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Nora V. Demleitner

Washington and Lee University School of Law, demleitner@wlu.edu

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Offenses Involving Immigration, Naturalization, and Passports:

Model Sentencing Guidelines §§211, 212, 213, and 214



NORA V. DEMLEITNER

Vice Dean for Academic Affairs and Professor, Hofstra University School of Law;

Co-Managing Editor, *Federal Sentencing Reporter*

The immigration guidelines are among the most frequently used crime-specific sentencing guidelines. In Fiscal Year 2004, 15,717 immigration offenses were sentenced under the guidelines, which amounts to almost a quarter of all cases sentenced under the guidelines.¹ By far the most frequently used guideline has been U.S.S.G. §2L1.2, which addresses reentry offenses, followed by U.S.S.G. §2L1.1, which covers smuggling, transporting, or harboring of unlawful aliens.² Not surprisingly, immigration offenses are unevenly distributed throughout the country. In many districts along the Southern border, immigration cases make up more than 50 percent of the caseload. This has led to the introduction of fast-track programs in many border districts that allow for the fast processing of certain immigration cases, in exchange for lesser sentences.³ Until recently, only a few districts have had fast-track programs.⁴ In early August, however, the Department of Justice authorized a nationwide fast-track program for illegal entry cases, subject to approval by the local U.S. Attorney. This change may lead to greater sentence equality across the country for reentry cases.

Not only the frequency of their use but also their political saliency make immigration sentencing provisions crucial to the sentencing simplification project. The proposed guidelines consider the data available on immigration offenses and factor the reality of fast-track sentences into the determination of sentence levels, sentence increases, and sentence decreases. They also assume continued monitoring of sentencing data and rely on the ongoing creation of immigration sentencing data, especially data whose generation is not based on or driven by the existing guideline structure.

Finally, while the proposed guidelines build on the existing structure, they do not generally consider current legislative proposals pending in the House or the Senate, many of which would lead to substantial sentence enhancements or even require mandatory minimum sentences.

Model Sentencing Guidelines §211 Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level: 3.

(b) Factors Decreasing the Offense Level by 1:

If the offense was not committed for profit, and/or the offense involved the smuggling, transporting, or harboring of the defendant's spouse, child(ren), parent(s), or sibling(s).

(c) Factors Increasing the Offense Level by 1:

- (1) If a firearm was discharged.
- (2) If the offender inflicted permanent or life-threatening injury or death, or if his/her intentional or extreme reckless actions led to permanent or life-threatening injury or death.
- (3) If an alien was involuntarily detained through coercion or threat or in connection with a demand for payment, (A) after the alien was smuggled into the United States or (B) while the alien was transported or harbored in the United States.
- (4) If the defendant smuggled more than [25] noncitizens.
- (5) If the defendant knew that the alien smuggled, transported, or harbored was previously deported after a conviction for an aggravated felony or was inadmissible for reasons of health or under 8 U.S.C. §1182(a)(3) security-related grounds.
- (6) If the defendant knew that the smuggled, transported, or harbored alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

[OPTION ONE]

(d) Mandatory Factors to Be Considered in Setting a Sentence within the Applicable Range:

If the offense involved one or more of the following circumstances, the court should ordinarily impose a sentence above the midpoint of the applicable sentencing range:

- (1) If a firearm was brandished or otherwise used.
- (2) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.

(e) Advisory Factors to Be Considered in Setting a Sentence within the Applicable Range:

- (1) The infliction of bodily injury, if not already considered under subsection (c)(2).
- (2) The number of noncitizens smuggled, transported, or harbored, if the number substantially exceeds 100.

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- (3) If the conduct is part of an ongoing commercial organization or enterprise.
- (4) If the aliens were smuggled, transported, or harbored in a negligent manner so as to endanger their lives.

[OR]

[OPTION TWO]

(d) Advisory Factors to Be Considered in Setting a Sentence within the Applicable Range:

- (1) Aggravating factors: In determining the sentence within the applicable sentencing range, the court should consider whether any of the following aggravating factors exist:
 - (A) If a firearm was brandished or otherwise used.
 - (B) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.
 - (C) The infliction of bodily injury, if not already considered under subsection (c)(2).
 - (D) The number of noncitizens smuggled, transported, or harbored, if the number substantially exceeds 100.
 - (E) If the conduct is part of an ongoing commercial organization or enterprise.
 - (F) If aliens were smuggled, transported, or harbored in a negligent manner so as to endanger their lives.
- (2) Mitigating Factors: In determining the sentence within the applicable sentencing range, the court should consider whether any of the following mitigating factors exist:
 - (A) The number of aliens smuggled, transported, or harbored, if the number is [five] or fewer.
 - (B) The persons smuggled, transported, or harbored are close family members of the defendant other than a spouse, child, parent, or sibling.

Application Notes:

1. For purposes of this guideline—

“The offense was committed other than for profit,” as used in subsection (b), means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

“Aggravated felony” used in subsection (c)(5), has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), with regard to the date of conviction for the aggravated felony.
2. For the purposes of the Aggravating Role adjustment of Model Sentencing Guidelines §3.1(a)(1), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others.
3. Reckless conduct to which the adjustment from subsection (d)(2) [Option 1] or subsection (2)(1)(3) [Option 2] applies includes a wide variety of conduct (e.g., transporting persons

in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition).

4. *Extreme reckless conduct, referenced in subsection (c)(2), applies to activity that shows an extreme indifference to the value of human life and must be more egregious than mere reckless activity.*

Drafter's Commentary

1. Model Sentencing Guidelines §2I1 consolidates various reasons for considering a smuggling, harboring, or trafficking operation as more dangerous. It mandates the courts to enhance a sentence based on a jury finding of such aggravating factors.
2. Model Sentencing Guidelines §2I1(b) prescribes a one-offense-level decrease either if the operation was not conducted for profit or if a family member was being smuggled. This provision is analogous to Section 2L1.1(b)(1) of the existing Federal Sentencing Guidelines, which mandates a three-level decrease in base offense severity as long as the defendant did not assist in the smuggling of an alien who had previously been deported as an aggravated felon and “the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child).” Virtually all smuggling operations include family members and non-family members.⁵ Even if these operations include payment, they constitute less culpable activity than other for-profit smuggling operations.

In subsection (b) this proposed guideline slightly expands the definition of the group of related persons a defendant may smuggle into the country, which had been limited to spouse and child, and still receive a one-level sentence decrease. Since the immigration system itself treats parents, and to a lesser extent siblings, preferentially, and therefore recognizes the closeness of such relationships, a defendant should receive a downward adjustment if s/he smuggles, harbors, or transports such a close family member. Since the immigration system does not treat other close relatives—grandparents, grandchildren, cousins, aunts, uncles—preferentially, for sentencing purposes, such close familial ties will not lead to a mandatory sentence decrease. However, because of different family structures around the world, courts may consider other close family relationships in setting the sentence within the applicable range. To determine whether a “close family relationship” exists, courts should consider not only the degree of blood relationship but also the extent of personal relationships between the defendant and the individual(s) smuggled.

3. The sentence enhancements in this model guideline apply to situations in which the defendant constitutes a substantially larger risk either to the aliens or the

United States than is the case in the average situation. This may be because of the way in which the illegal activity is being conducted, because of its scale, or because the defendant was aware of the dangerous character of the alien(s) brought into the United States.

Subsection (c)(2) relies on knowledge on the part of the defendant, including constructive knowledge, but does not hold the defendant strictly liable. Because of the limited deterrent effect such a provision would have if a rational weighing of additional sentence against anticipated benefit occurred, a strict liability provision would merely unnecessarily punish a very small number of defendants who had the bad luck of bringing certain aliens into the country. Strict liability, which should be limited to certain high-risk situations in which the defendant was either on notice of the high risk of the strict liability element (such as the likelihood of a federal officer being involved in a drug transaction⁶) or could have taken precautions to prevent the strict liability event from occurring (such as the introduction of adulterated drugs into the stream of commerce⁷), is inappropriate in this situation. After all, the likelihood of the application of the enhancement is minuscule, and the opportunity to prevent it is virtually nonexistent as the defendant is not in a position to screen the aliens. The enhancement is not designed to deter all alien smuggling, which the overall sanction should do, but the knowledge-based provision makes an additional retributive punishment defensible.

4. In Model Sentencing Guidelines §211(c)(4) the number of noncitizens smuggled that leads to a sentence increase should be empirically verifiable as a threshold for larger, more organized, and therefore more dangerous smuggling operations. As most smugglers currently appear to bring fewer than twenty-five aliens, these appear to be average operations.⁸ With increasing border enforcement, however, such operations may increase—or decrease—in size. Empirical monitoring of the average size of smuggling operations will be required to ensure that only greater than average operations receive the increase. For future data collection, the Commission's staff should collect the individual number of aliens smuggled or harbored who are involved rather than collect data within the preexisting numbering scheme. Because of the empirical basis for the determination of the threshold number of aliens in this subsection, the number 25 is bracketed and may be changed based on an improved data set.
5. Option I requires the judge, upon a finding of certain aggravating factors, to sentence above the midpoint of the applicable sentencing range. Option II suggests that a sentence at the upper end of the proposed guideline range be considered upon such a fact-finding. The pros and cons of these differing approaches are discussed at length in the Editor's Observations at the beginning of this Issue.⁹

6. The aggravating factors listed in subsections (d) and (e) allow the court to calibrate a sentence within the proposed range to the level of risk creation and injury inflicted. Subsections (d)(2) and (e)(4), or, in the alternative, (d)(1)(B) and (F), also calibrate the sentence based on the defendant's culpable mental state.
7. The proposed Model Guidelines do not address specifically the issue of unaccompanied minors as vulnerable victims. The proposed Amendment to U.S.S.G. § 2L1.1 allows for a sentence enhancement for unaccompanied minors. The proposed Model Guideline, however, does not address this issue, as a complete version of the Model Sentencing Guidelines would likely include a vulnerable victim enhancement. Admittedly, such a general provision is missing from the current draft.

One may also consider that while the law generally protects unusually vulnerable victims, policy reasons may counsel against a mandatory sentence elevation in cases sentenced under this Model Guideline. Many times parents will ask smugglers to bring their children into the United States. A mandatory sentence increase may merely increase the cost of such smuggling, usually to the detriment of the children, rather than deter the activity. For that reason, the alternative of leaving the decision of a sentence increase within the court's discretion may be desirable.

8. Since a high number of aliens smuggled can lead to a sentence increase, an unusually small number should do so as well. That number should be based on empirical data but at this point is likely to be (substantially) smaller than five. Currently, almost half of all cases involve five or fewer aliens.¹⁰ However, no data is available as to how many defendants have smuggled one or two aliens. Should a breaking point exist below five, an unusually small number of aliens smuggled should lead to a sentence decrease, as it presumably indicates lack of sophistication, personal interest, or other mitigating factors.

Model Sentencing Guidelines §212 Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 1

(b) Specific Offense Characteristic:

Unlawfully entering the United States after a previous deportation or unlawfully remaining in the United States after a conviction for certain offenses merits a sentence increase:

(1) Increase the offense level by one level:

- (A) if the defendant has a conviction for three or more convictions for misdemeanors that are crimes of violence or drug-trafficking offenses;
- (B) if the defendant has a conviction for a felony drug-trafficking offense for which the sentence served was twenty-four months or less;
- (C) if the defendant has a conviction for an aggravated felony.

- (2) Increase the offense level by two levels if the defendant has a conviction for a felony that is
- (A) a drug-trafficking offense for which the sentence served exceeded twenty-four months;
 - [(B) a crime of violence;]
 - (C) a firearms offense;
 - (D) a child pornography offense;
 - (E) a national security or terrorism offense;
 - [(F) a human-trafficking offense; or
 - (G) an alien-smuggling offense.]
- (c) Mitigating Factors:
- In decreasing the sentence level or selecting a sentence within the appropriate sentence range, a court should consider the following factors:
- (1) circumstances of the defendant's initial entry into the United States, including his age;
 - (2) length of time the defendant has lived in the United States, and length of time under the age of eighteen he has lived in the United States;
 - (3) education and employment in the United States;
 - (4) fluency in English and in his native language;
 - (5) family ties in the United States, including parents, siblings, spouse, and children, and the immigration status of these family members;
 - (6) family and/or community ties in the defendant's native country;
 - (7) defendant's criminal record, before and after reentry;
 - (8) circumstances of the defendant's discovery in the United States, i.e., in connection with otherwise lawful activity or serious unlawful activity;
 - (9) the category into which the prior conviction falls substantially overstates its seriousness, which may be indicated by the sentence imposed, the sentence served, or the facts of the case as detailed in the plea agreement or the trial record.

Application Notes:

1. *Application of Subsection (b)*—
 - (A) *In General.*—For purposes of subsection (b):
 - (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
 - (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
 - (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
 - (iv) Subsection (b) does not apply to a conviction for an offense committed before the defendant was

eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

- (v) All convictions should be treated as if they were counted as part of the Criminal History Chapter. Therefore, stale convictions will not be counted, although a judge may consider them in selecting a point along the sentence range.

(B) Definitions.

For purposes of subsection (b)(1) & (2):

- (i) "Sentence served" includes any term of imprisonment given upon revocation of probation, parole, or supervised release.
- (ii) "Crime of violence" is defined in Model Sentencing Guidelines §4.1(d), Criminal History Score.
- (iii) "Drug-trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

For purposes of subsection (b)(2):

- (i) "Alien-smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).
- (ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
- (iii) "Firearms offense" means any of the following:
 - (I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).
 - (II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).
 - (III) A violation of 18 U.S.C. § 844(h).
 - (IV) A violation of 18 U.S.C. § 924(c).
 - (V) A violation of 18 U.S.C. § 929(a).
 - (VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
- (iv) "Human-trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582,

§ 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(v) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism," as that term is defined in 18 U.S.C. § 2332b(g)(5).

3. Application of Subsection (b)(1)(c).—

(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), with regard to the date of conviction for the aggravated felony.

4. Application of Subsection (a).—For purposes of subsection (a):

(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases," as that term is defined in Definitions and Instructions for Computing Criminal History.

Drafter's Commentary

1. While these sentences may appear relatively low, in light of the statutory maximum, they are in line with the fast-track programs. For cases sentenced under the current U.S.S.G. § 2L1.2, the mean sentence in 2005, post-*Booker*, was twenty-seven months, with the median sentence at twenty-four months.¹¹ As fast-track programs dominate in the parts of the country with the highest number of reentry cases, these sentences reflect the judgments of the prosecutors and courts in these jurisdictions as to the relative culpability of the offenders. In some border districts without fast-track programs, courts have resorted to substantial downward departures in reentry cases which have been accepted by the prosecution and the defense.

Prosecutors offer fast-track sentences for reentry offenses because of the overwhelming caseload. As fast-track sentences become guideline sentences, prosecutors may fear that they will be forced into a large number of trials as defendants will no longer agree to a plea bargain. This is unlikely to occur on a large scale since defendants will not likely fare better at trial, as most reentry cases are relatively easy to prove. A judicial determination of criminal history, as discussed under Commentary 2 below, may also make it less likely that defendants seek jury trials. A plea will move the case faster through the system and ultimately lead to faster release and deportation.

2. Even though Criminal History already considers an offender's prior offense, this proposed guideline focuses

on individuals who have reentered the United States despite their prior criminal history and an order of removal. The different degrees of underlying offenses that have led to a deportation allow for their consideration in calculating sentences under this proposed guideline, as the offenders may be assumed to represent a different threat to the United States upon their reentry based on their prior conviction.

The proposed Model Guideline on Criminal History adopts the position that a judge, post-conviction, should determine a defendant's criminal record. For the sake of internal coherence and consistency and not to introduce additional procedural mechanisms, this proposed guideline follows the same model. If there were a guideline that merits an exception, however, it would be this one. The elements of the offense—reentry and prior deportation—are generally easy to prove. Prior criminal history, which is often the most difficult component, however, drives the sentence. Because of the difficulties and often uncertainties in a defendant's prior criminal record and its importance to the ultimate sentence, further refinement of this provision should include continued exploration of the question whether the judge is the appropriate fact finder with respect to criminal history.

3. The Crime of Violence definition in subsections (b)(1)(A) & (2)(B) tracks the definition in Model Sentencing Guidelines §4.1, the revised criminal history guideline. This makes the proposed guidelines internally coherent by defining the same term identically throughout the proposed guidelines.

The proposed guidelines suggest omitting crimes of violence entirely from the two-level enhancement under subsection (b)(2)(B). Many crimes of violence are already classified as aggravated felonies and will therefore receive a substantial enhancement. The same holds true for human-trafficking and human-smuggling offenses under subsections (b)(2)(F) and (G), some of which may not be so serious as to merit a two-level increase.

4. Even though the Commission has rejected using "time served" as a measure of the gravity of a prior conviction under §2L1.2(b)(1)(A), (B),¹² the proposed guidelines adopt this structure.¹³ In a federal system that draws state sentences from guideline and non-guideline states, a time-served measure is more appropriate than a time-imposed measure. This is the case even though the Commission's analysis found no meaningful correlation when it considered enhancements based on time served.¹⁴ This conclusion, however, appeared to be driven in part by the way in which the enhancement factors were set up and by surprise over the low sentence levels even for crimes traditionally considered very dangerous.

The proposed guidelines will likely create some administrative problems for probation officers and prosecutors, who will have to document the time the defendant actually served for the prior offense.¹⁵ With

increased automated record keeping, this problem should subside over time.

5. The Federal Public and Community Defenders recently proposed an amendment to the existing Federal Sentencing Guidelines that would add a downward adjustment based on grounds of cultural assimilation.¹⁶ This particular departure ground is fraught with serious problems because of the contentious nature of the term “assimilation” in the immigration literature.¹⁷ To avoid a loaded concept, more appropriate is a mitigating factor that allows the court to consider a host of individual factors in determining where the defendant’s center of life has been. In many ways, such an assessment acknowledges the irrationality of the existing deportation regime, which allows for the deportation of individuals whose lives have been primarily in the United States. Implicit in the mitigators is an assessment of the motivating factor for a return. The proposed guideline acknowledges that if the defendant returned because the center of his life has been in the United States and his past criminal record has been relatively minor, or he appears to have been rehabilitated, his sentence should be reduced, as his culpability is lesser than that of an individual whose background does not reflect the same mitigating factors.¹⁸

Model Sentencing Guidelines §213 Immigration Fraud

(a) Base Offense Level: 2

(b) Factors Decreasing the Offense Level by 1:

If the offense was not committed for profit, and/or the offense involved the smuggling, transporting, or harboring of the defendant’s spouse, child(ren), parent(s), or sibling(s).

(c) Factors Increasing the Offense Level by 1 Level:

- (1) If the offense involved more than [x] documents or passports.
- (2) If the defendant knew that a U.S. or foreign passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration and naturalization laws.

(d) Mandatory Factors to Be Considered in Setting a Sentence within the Applicable Range:

If the offense involved one or more of the following circumstances,

[Option One] the court should ordinarily impose a sentence above the midpoint of the applicable sentencing range:

[or]

[Option Two] the court should consider the existence of the circumstance(s) in setting the sentence within the applicable range:

- (1) If the offense involved [100] or more documents or passports.
- (2) If the offense was part of an ongoing commercial organization or enterprise.

Application Notes:

1. *This proposed guideline applies to the following statutory provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546.*
2. *For purposes of this guideline—*
“The offense was committed other than for profit” means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.
“Immigration and naturalization offense” means any offense covered under the Model Guidelines for Offenses Involving Immigration, Naturalization, and Passports.
3. *Where it is established that multiple documents are part of a set of documents intended for use by a single person, treat the set as one document.*
4. *Subsection (c)(2) provides an enhancement if the defendant knew that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. Knowledge includes constructive knowledge.*

Drafter’s Commentary:

1. This proposed guideline mandates a decrease in the sentencing range when the defendant either engaged in the criminal activity to benefit certain immediate family members or did not derive any financial profit from the offense. Subsection (b) slightly expands the definition of the group of related persons a defendant may smuggle into the country, which had been limited to spouse and child, and still receive a one-level sentence decrease. Since the immigration system itself treats parents, and to a lesser extent siblings, preferentially, and therefore recognizes the closeness of such a relationship, a defendant should receive a downward adjustment if s/he smuggles, harbors, or transports such a close family member. Since the immigration system does not treat other close relatives—grandparents, grandchildren, cousins, aunts, uncles—preferentially, for sentencing purposes, such close familial ties will not lead to a mandatory sentence decrease. However, because of different family structures around the world, courts may consider other close family relationships in setting the sentence within the applicable range. To determine whether a “close family relationship” exists, courts should consider not only the degree of blood relationship but also the extent of personal relationships between the defendant and the individual(s) smuggled.
2. A one-level increase is indicated in situations where the offense involved a particularly large number of documents. The number should be set based on empirical data indicating the average number of documents involved in these types of cases. An enhancement should apply only if the number of documents is substantially larger than in the average case.
3. A one-level increase will also be mandatory if the offender knew that the document would be used for the commission of a serious, non-immigration-related

offense. Knowledge or constructive knowledge is required so as to accord with the earlier guidelines, which also require knowledge for a sentence increase in smuggling, harboring, and transportation cases.

4. Judges should be able to consider the extent of the organization and the number of documents in choosing the specific sentence within the applicable range. The number of documents should not be subject to the one-level increase *and* be used to set the sentence within the specific range but should be used solely for one or the other purpose.

Model Sentencing Guidelines §214 Immigration Fraud Directly Benefiting the Defendant

(a) Base Offense Level: 1

(b) Aggravating Factors:

The court shall increase the offense level by one:

(1) If the defendant is an unlawful alien who has been deported based on a prior criminal conviction on one or more occasions prior to the instant offense.

[(2) If the defendant fraudulently obtained or used a U.S. passport or a foreign passport.]

(c) Aggravating Factors to Be Considered in Setting a Sentence within the Applicable Range:

The court may consider the following factors at sentencing:

(1) motive for the commission of the offense, such as to illegally obtain welfare services or to commit a non-immigration-related offense,

(2) circumstances of the discovery of the offense, for example, while the defendant committed another serious offense,

(3) If the defendant is an unlawful alien who has been deported on one or more occasions prior to the instant offense, but not based on a criminal conviction.

(d) Mitigating Factors to Be Considered in Setting a Sentence within the Applicable Range:

The court may consider, among others, the following factors at sentencing:

(1) motive for the commission of the offense, such as to gain employment,

(2) education and employment,

(3) family ties in the United States.

Application Notes:

1. *This proposed guideline applies to the following statutory provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1428, 1542-1544, 1546.*

2. *Application of Subsection (b)(2):*

The term "used" is to be construed broadly and includes the attempted renewal of previously issued passports.

3. *Multiple Counts: For the purposes of Multiple Counts, a count of conviction for unlawfully entering or remaining in the United States covered by Unlawfully Entering or Remaining in the United States arising from the same*

course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline and therefore is to be grouped with the count of conviction covered by this guideline.

Drafter's Commentary

1. This section also applies to Failure to Surrender Canceled Naturalization Certificate, 18 U.S.C. § 1428. This allows for the consolidation of the immigration fraud guidelines into two parts, immigration fraud that the defendant commits to benefit him/herself directly through an immigration benefit under Model Sentencing Guidelines §214 and immigration fraud that would allow a third party to gain an unlawful benefit and may, or may not, provide the defendant with a financial gain under Model Sentencing Guidelines §213.

2. Subsection (b) sets out two aggravating factors that require an increase in sentence level. Subsection (b)(1) focuses on the offender him/herself, i.e., whether s/he had previously been deported based on a criminal conviction. The basis for the deportation is necessary to distinguish the defendant from the defendant in subsection (c) whose prior removal (not for a criminal conviction) the court may consider in setting the specific sentence within the applicable sentence level.

Subsection (b)(2) focuses on the type of document the defendant obtained. Since a U.S. passport allows entrance into the United States, and a foreign passport facilitates international travel, and passports are more difficult to forge, a sentence increase appears warranted for this offense. Passports, however, are relatively infrequently the object of immigration fraud.¹⁹ While some have argued for sentence increases for other types of documents, presumably to decrease mobility within the United States and make employment by those without legal documentation more difficult, the vast number of cases includes documents that facilitate employment or mobility.²⁰ Therefore, such a specific increase appears unwarranted and should come through an increase in the base sentence level. However, such a change would require a reevaluation of the dangers these offenses pose to the United States.

- 3) The proposed guideline sets out a set of mitigating factors a court may consider. They are nonexclusive and focus on the purpose for which the defendant engaged in immigration fraud.

Notes

¹ U.S. Sentencing Commission, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines 2* (Jan. 20, 2006) [hereinafter *Interim Staff Report*] (for FY 2004, the number of immigration offenses constituted 22.5 percent of all cases; from January 12, 2005, to November 1, 2005, the percentage rose to 23.1).

² Post-Booker 2005 data indicate that 16.1 percent of all cases were sentenced under U.S.S.G. §2L1.2 (Unlawfully Entering or

- Remaining in the United States) while only 4.9 percent were sentenced under U.S.S.G. §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The immigration fraud guidelines were used even less frequently—U.S.S.G. §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) in 1.5 percent of all cases and U.S.S.G. §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) in 0.6 percent. *Interim Staff Report*, *supra* note 1, at 2.
- ³ *Id.* at 30 (detailing which districts, as of October 29, 2004, had authorized fast-track programs, and for what types of offenses).
- ⁴ See Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZONA STATE L.J. 517 (2006).
- ⁵ *Interim Staff Report*, *supra* note 1, at 9.
- ⁶ See, e.g., *United States v. Feola*, 420 U.S. 671 (1974).
- ⁷ See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943).
- ⁸ *Interim Staff Report*, *supra* note 1, at 7.
- ⁹ Frank O. Bowman, III, *Editor's Observations: 'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT. REP. 301, 305-306 (2006).
- ¹⁰ *Interim Staff Report*, *supra* note 1, at 7.
- ¹¹ *Id.* at 21.
- ¹² Linda Drazga Maxfield, *Aggravated Felonies and 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527 (2003).
- ¹³ See Beverly Dyer, *Revising Criminal History*, 18 FED. SENT. REP. 373, 375 (2006).
- ¹⁴ See Maxfield, *supra* note 12, at 535, Exhibit 5 at 545.
- ¹⁵ *Cf. id.* at 536, n. 41. For a discussion of the challenges probation officers in border districts face, see Magdeline E. Jensen, *Reflections of a Southwest Border Probation Chief*, 14 FED. SENT. REP. 255 (2002).
- ¹⁶ See also Jason F. Carr & Rene L. Valladares, *A Renewed Call to the Sentencing Commission to Address Whether Cultural Factors Can Serve as a Basis for Downward Departures*, 14 FED. SENT. REP. 279 (2002).
- ¹⁷ See, e.g., Nora V. Demleitner & Jon M. Sands, *Non-Citizen Offenders and Immigration Crimes: New Challenges in the Federal System*, 14 FED. SENT. REP. 247, 250-51 (2002).
- ¹⁸ For a comparative discussion of such factors in the immigration context, see Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273 (2003).
- ¹⁹ *Interim Staff Report*, *supra* note 1, at 18 (based on data collected by the Sentencing Commission's staff during the 2005 Immigration Coding Project, no sentences were imposed under §2L2.1 that involved U.S. or foreign passports; under §2L2.2 17.3 percent of all cases involved U.S. Passports and 19.2 percent involved foreign passports).
- ²⁰ *Id.*