Comments of the American Immigration Lawyers Association
Submitted to the Federal Sentencing Commission
§ 2L1.2 "Unlawfully Entering or Remaining in the United States" and
§ 2L1.1 "Smuggling, Transporting, or Harboring an Unlawful Alien"

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Contact:
Greg Chen, Director of Advocacy
gchen@aila.org

Alyson Sincavage, Legislative Associate
asincavage@aila.org

The American Immigration Lawyers Association (AILA) is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA counts among its members over 14,000 attorneys and law professors across the nation who are involved in every aspect of our nation's immigration laws.

We appreciate this opportunity to provide comments regarding the United States Sentencing Commission's (USSC) proposed amendments to Guidelines § 2L1.2 "Unlawfully Entering or Remaining in the United States" and § 2L1.1 "Smuggling, Transporting, or Harboring an Unlawful Alien." In the first part of this document, AILA sets forth its overarching concerns with border-related prosecutions and enforcement policy, in particular with the lack of due process and protection of asylum seekers. In the second part, AILA provides specific recommendations to §§ 2L1.1 and 2L1.2.

Background: Border-related prosecutions and enforcement

Prosecutions and incarceration for immigration-related offenses are rising rapidly and are at odds with federal prosecutorial goals

In the past decade the federal government has dramatically increased the practice of prosecuting violations for illegal entry (8 U.S.C § 1325) and reentry (8 U.S.C § 1326). The USSC's April 2015 report, *Illegal Reentry Offenses*, indicates that the number of people sentenced for illegal reentry under Guideline § 2L1.2 grew significantly beginning in 2007, and constituted a major proportion of the overall federal district court caseload in 2013—at 26 percent. The increase in illegal reentry prosecutions under § 2L1.2 is especially pronounced in southwest-border districts with the use of Operation Streamline (Streamline).[1] With the increased prosecutions of these offenses, incarceration rates have also grown substantially. The annual cost of incarcerating

[1] TRAC, "Immigration Prosecutions for December 2015." (Feb. 19, 2016), http://trac.syr.edu/tracreports/bulletins/immigration/monthlydec15/fil/.

individuals charged with and convicted of illegal entry and reentry has been estimated at approximately $1 billion.[2]

As a result, the federal government is incarcerating thousands of individuals whose only criminal offenses are those related to their immigration status; who have family and significant community ties in the United States; and who pose no threat to public safety. The USSC's April 2015 report concludes that 49.5% of persons sentenced for illegal reentry had at least one child living in the United States, and that those sentenced had an average age of 17 at the time of initial entry.[3] Large portions of the federal government's finite resources are now dedicated to the prosecution and incarceration of individuals who do not meet any of the Department of Justice's stated prosecutorial interests: national security, violent crime, financial fraud, and protection of the most vulnerable members of society.[4]

In the same respect, the USSC's proposed increase in penalties for illegal reentry is inconsistent with federal prosecutorial priorities and will result in higher incarceration rates for many individuals who pose no danger to society and contribute to and have strong ties to the community.

Prosecutions for illegal reentry demand significant prosecutorial resources but have not been shown to deter illegal immigration

New findings published in May 2015 by the Inspector General (OIG) for the Department of Homeland Security (DHS) conclude that Streamline may not be an effective enforcement tool despite the enormous law enforcement resources dedicated to the program. The OIG report stated that "Border Patrol is not fully and accurately measuring [Streamline's] effect on deterring aliens from entering and reentering the country illegally…. [C]urrent metrics limit its ability to fully analyze illegal re-entry trends over time."[5] Significant taxpayer dollars are spent each year to continue prosecutions that have not been proven to deter border crossings or reduce recidivism.

Operation Streamline deprives individuals of due process

Operation Streamline employs speedy, mass prosecution methods that severely abrogate fundamental due process.[6] Streamline annually sweeps in tens of thousands of migrants with no criminal history, many of whom are rejoining their mixed-status families in the United States.

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[2] ALISTAIR GRAHAM ROBERTSON, ET AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (SEPT. 2012), *available at* http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf.

[3] U.S. Sentencing Commission, *Illegal Reentry Offenses*. (Apr. 2015), 25, 26, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf

[4] U.S. Department of Justice, SMART ON CRIME 2 (Aug. 2013), http://www.justice.gov/ag/smart-on-crime.pdf; *see generally* ACLU, Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing (Dec. 2015), https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf

[5] Department of Homeland Security, Office of the Inspector General, *Streamline: Measure Its Effect on Illegal Border Crossing* (May 15, 2015), *available at* https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf

[6] *See* Joanna Lydgate, "Assembly Line Justice: A Review of Operation Streamline", June 2010, https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.; Written Statement of Heather Williams, House Judiciary Subcommittee on Commercial and Administrative Law, Oversight Hearing on the Executive Office of U.S. Attorneys, June 2008, http://judiciary.house.gov/_files/hearings/pdf/Williams080625.pdf.

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Streamline has been implemented in jurisdictions in every border state except California, and has caused skyrocketing caseloads in those federal district courts. Under Streamline, instead of being processed for deportation, apprehended migrants are detained for 1 to 14 days before appearing in court.[7] These individuals frequently have no counsel until their hearings, allowing little time to consult with an attorney to understand the charges, consequences of conviction, and potential avenues for legal relief.[8] Because a single attorney often represents dozens of defendants at a time, he or she might not be able to speak confidentially with each client or might have a conflict of interest among clients.[9] Judges combine the initial appearance, arraignment, plea, and sentencing into one mass hearing for the 70-80 defendants processed daily.[10] Nearly everyone pleads guilty in light of lengthy maximum sentences.[11] This kind of spectacle is an affront to our judicial system and to the fundamental principles of fairness and due process.

<u>Asylum Seekers and Other Vulnerable Groups Will Likely Be Impacted Negatively by the Proposed Amendments to the Guidelines</u>

The proposed changes to the alien smuggling guidelines and to the base offense level for illegal re-entry occur amidst significant changes to migration patterns at the U.S. southern border, specifically the increase in bonafide asylum seekers. The vast majority of the unaccompanied minors and family units who have arrived in the United States since 2012 are fleeing violence in three Central American countries: El Salvador, Guatemala, and Honduras.[12] The rates of violence in these three countries are approaching unprecedented levels as the region grapples with growing instability. Honduras has endured a steadily growing homicide rate from 2006-12,[13] and in August 2015 El Salvador experienced its deadliest month on record for Salvadorans since the end of their civil war in 1992.[14] The murder rates in the Northern Triangle are currently among the highest in the world.

A significant majority of recently apprehended individuals from Northern Triangle countries have legitimate claims for asylum and other protection under U.S. law. Department of Homeland Security (DHS) data shows that nearly 88 percent of the mothers and children it detains are proving to the government they are likely to be found eligible for asylum and other forms of humanitarian relief by an immigration judge.[15] This is consistent with findings of the UN High Commissioner for Refugees: "Since 2008, UNHCR has recorded a nearly fivefold increase in

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[7] *See id.*
[8] Williams, *supra* note 6.
[9] "Dan Rather Reports/Operation Streamline," May 14, 2013, http://vimeo.com/67640573; s*ee also*, Williams, *supra* note 6.
[10] Lydgate, *supra* note 6.
[11] *Id.*
[12] Pressures from gang recruiters and rampant killings create a situation so hostile to minors that they are unable to even go to school.
[13] Since 2006, the total number of homicides in Honduras more than doubled.
[14] Three Myths about Central American Migration to the United States, Washington Office on Latin America (Jun. 17, 2014), *available at* http://www.wola.org/commentary/3_myths_about_central_american_migration_to_the_us.
[15] U.S. Citizenship and Immigration Services, Asylum Division (2015), *Family Facilities Reasonable Fear Statistics for FY2015 2nd Quarter*, *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-familiy-facilities-FY2015Q2.pdf.

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asylum-seekers arriving to the United States from the Northern Triangle region of El Salvador, Guatemala, and Honduras."[16]

Unfortunately, the rising rate of prosecution for illegal entry and reentry and the use of Streamline has resulted in the prosecution of many asylum seekers. The DHS Inspector General recently concluded that CBP is referring asylum seekers for prosecution under the Streamline program.[17] U.S. and international asylum law shields asylum seekers from prosecution for crossing our borders or otherwise entering the country in violation of U.S. law. AILA is concerned that increased penalties under § 2L1.2 will contribute further to the incarceration of this protected class of individuals.

AILA is also concerned that the proposed changes to sentences for smuggling under § 2L1.1 will be interpreted broadly and result in enhancements being applied to asylum seekers and other vulnerable individuals.

<u>Recommendations for §§ 2L1.2 and 2L1.2</u>

AILA recommends that the USSC reexamine and reduce the harmful impacts of prosecutions under 8 U.S.C. § 1326 and 8 U.S.C. § 1324, and the potential heightened penalties for these offenses that are being contemplated by the proposed new Guidelines for §§ 2L1.2 and 2L1.2.

AILA recommends the following:

I. <u>Do not increase the base-offense level in § 2L1.2 from 8 to 10 for persons with no prior illegal-reentry convictions. There is no justification for such change.</u>

The proposed amendment to Guideline § 2L1.2 provides no rationale for increasing the base offense level from 8 to 10. Nor does it provide an explanation for how levels were assigned to persons with prior reentry convictions, which start at levels 12 and 14. The USSC's data analysis states that persons with no applicable criminal-conviction enhancements or other upward departures would see their average guideline- minimum sentence increase from 1 month to 6 months: a 500% increase. The USSC's data from FY 2013 shows that 72.8% of individuals in that sample had no prior illegal-reentry convictions. The USSC has stressed throughout the Guideline review process that these proposed amendments are in response to specific concerns about how the Guideline's currently operate, *not* in response to any "general concern about penalty levels."[18] Increasing the penalty offense level is inconsistent with this approach, especially when there is no empirical evidence demonstrating the need for an increase..[19] For these reasons, the USSC should reject the proposed amendments' base-offense-level increases.

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[16] UNHCR, Women on the Run (October 2015), *available at*, *http://www.unhcr.org/5630f24c6.html*.
[17] Department of Homeland Security, Office of the Inspector General (May 15, 2015), *Streamline: Measure Its Effect on Illegal Border Crossing*, *available at* https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf
[18] *See, e.g.*, USSC, "*Data Briefing: Proposed Immigration Amendment*" (2016), http://www.ussc.gov/videos/immigration-data-briefing.
[19] The USSC should also leave intact its 2014 amendment allowing for departures based on time served in state custody. The rationale accepted so recently for taking into account state-custody terms would continue to be important, and eliminating the departure would not further any of the USSC's purposes for considering these reentry-Guideline amendments.

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II. Sentence served—not sentence imposed—should be used to evaluate the seriousness of a conviction.

AILA supports the USSC's philosophy of considering sentencing judges' determinations regarding a past conviction's seriousness. We recommend, however, that the proposed amendments to § 2L1.2(b)(1) and (b)(2) be modified to allow sentencing judges to consider time actually served rather than the undifferentiated imposed-sentence lengths. This would bring § 2L1.2(b)(1) and (b)(2) in line with U.S. Sentencing Guidelines § 4A1.2(b)(2) which explains, if part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.[20] Therefore, a far better proxy for seriousness is the time served.

III. The USSC should not create an upward departure for prior deportations not reflected in prior convictions

The USSC should reject the amendment allowing for a possible upward departure based on multiple prior deportations (voluntarily or involuntarily) that are not reflected in prior convictions under 8 U.S.C. §§ 1253, 1325(a), or 1326. By adopting this amendment, sentencing courts would be able to make an upward departure based on deportations executed using "expedited removal" or "reinstatement of removal," procedures that severely abridge due process. Both practices allow for the summary removal of certain noncitizens without a hearing or judicial review. Typically individuals ordered removed using expedited removal or reinstatement of removal are detained during the procedures, which take place so quickly that the individual does not have time to obtain counsel.[21] The process is designed to allow DHS to remove individuals immediately; the entire process (including the removal) may occur within 24 hours.

At times, CBP officers fail to properly screen individuals for asylum at the border and points of entry and, as a result, issue expedited removal orders when they should instead refer individuals for credible fear interviews with the Asylum Office. The number of expedited removal orders issued by the Department of Homeland Security (DHS) has more than doubled from 72,911 in 2005 to 193,092 in 2013.[22] Many individuals who are deported under expedited removal orders have valid claims to asylum and include women or young adults with domestic violence claims or individuals with sexual-orientation- based claims. AILA has complained to the DHS Office of Civil Rights and Civil Liberties regarding DHS's failure to properly screen these individuals. Improper screening has resulted in the return of individuals back into environments where they are once again targeted for persecution and violence.[23] Many return to the United States despite having been previously deported. These individuals, who often willingly present themselves to U.S. authorities at ports of entry, may have higher numbers of administrative deportations than

[20] U.S. Sentencing Guidelines Manuel § 4A1.2(b)(2) (2015).

[21] American Immigration Council, *Removals Without Recourse: The Growth of Summary Deportations From the United States*, April 28, 2014, [hereinafter AIC Removals Without Recourse], *available at* http://bit.ly/1wJO8Fk.

[22] 8 C.F.R. § 1240.16; Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208 (Sept. 30, 1996) (establishing expedited removals); *see also* AIC Removals Without Recourse, *supra* note 22..

[23] *See e.g.*, Complaint filed with the DHS Office of Civil Rights and Civil Liberties (CRCL) (Nov. 13, 2014), *available at* http://www.aila.org/infonet/aila-nijc-and-others-file-crcl-complaint.

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criminals who operate in the shadows and avoid border officials, but they should not be treated as more criminally culpable for merely seeking protection under U.S. law.

While Courts *may* already consider prior deportations during sentencing, those prior deportations that do not result in convictions should be considered in context, such as whether a deportation followed an asylum claim or some other mitigating circumstance. The USSC's proposed upward departure would prevent courts from considering such circumstances, leading to unfair and disproportionate enhanced sentences.

Accordingly, AILA recommends that the USSC reject this proposed change as it would allow for an upward departure based merely on number of deportations, which does not accurately reflect criminal culpability. Such an upward departure would disproportionately affect individuals fleeing persecution, and would arbitrarily inflate criminal sentences for individuals with no criminal history or intent.

Furthermore, the USSC currently excludes voluntary returns from a possible upward departure based on immigration history. It is unclear whether the proposed addition of "Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions," would continue the current practice. AILA recommends that the USSC continue to exclude voluntary returns and that it clarify this intent in the Guidelines.

IV. AILA recommends the USSC reject the proposed increases to the base level offense for §2L1.1

AILA opposes the two proposed options for increasing the base offense level for §2L1.1. The proposed increases in sentences for low-level "foot guides" are unlikely to advance the government's interest in deterring smuggling and will likely result in stiffer punishments for minors and individuals traveling as families who are not leaders in a criminal smuggling operation—or even involved in a criminal operation.

Both Option 1 and Option 2 are premised on the assumption that increasing the sentencing guidelines would help deter participation in alien smuggling operations, but neither option would advance the Department of Justice's goal of deterrence. We are not aware of any empirical evidence indicating that increasing the base offense level for the lowest-level offenders would achieve this goal. The mothers and children fleeing persecution and life-threatening circumstances are often desperate and have little choice but to turn to smuggling organizations to make the 1400-mile journey to the United States. In the absence of evidence indicating that an increased penalty will deter participation in smuggling, the USSC should not consider these options.

Option 1 represents a "one size fits all" approach to the wide variety of conduct that can lead to a conviction under 8 U.S.C. § 1324(a). Raising the "otherwise" default base offense level from 12 to 16 will increase guideline sentences for foot guides by the same amount that it does for the leaders of smuggling operations–even though the latter are much less likely to be caught,

convicted, and sentenced.[24] Option 2 suffers from the same flaw. Although Option 2 limits the base offense level increase to offenses committed as part of an "ongoing commercial operation", Option 2 also does not distinguish between conduct by individuals who run these criminal organizations and those who play a minor role in the operation.

The requirement in Option 2 that a defendant "participated" in an organization of five or more raises concerns that this definition may cover low level offenders, families who hire smugglers to bring relatives across the border, or other participants. The definition as written may increase the sentences directly imposed on young male "foot guides," some of whom were forcibly recruited, or may increase the sentences of adult foot guides, thereby encouraging human smugglers to use more minors as "foot guides" to circumvent the sentencing guidelines. We recommend the USSC consider using a narrower verb here, such as "directed," "managed," or "organized," to ensure that this definition would apply to mid- and senior-level offenders and not to "foot-guides," especially those who were forcibly recruited or family members.[25]

In addition, there is good reason to think that the creation of an "ongoing commercial organization" base offense level under Option 2 would become the default, given the breadth of conduct that falls under the definition of "part of an ongoing commercial organization." The phrase "part of an ongoing commercial organization" may be interpreted by courts as meaning to include families in the definition. AILA urges the USSC to avoid the possibility that individuals traveling in family units would be treated severely in the sentencing process when the goal is to target leaders in the criminal enterprise.

V. AILA Opposes the Upward Departure Provision Proposed for Guideline 2L1.1 Because It May Apply Disproportionately to Families Transporting Minors with Legitimate Claims of Asylum and Low-Level Offenders.

AILA opposes the addition of an upward departure provision for offenses involving six or more minors, as such a provision would most directly harm children and families fleeing violence. As we have seen with the increasing numbers of Central Americans arriving at our Southern border, the data strongly suggests that the vast majority of these individuals, both adults and children, have bona fide claims for protection under U.S. law. Asylum seekers frequently have no choice but to turn to smuggling organizations to flee horrific violence and make the journey to the United States. The USSC's contemplated upward departure would expose many parents and caretakers who qualify for protection under U.S. law to harsh and unfair sentences based on the number of children in their care when they cross the border.

VI. AILA Supports Extending the Definition of "Minor" to Children under 18. AILA also recommends that the USSC also Define "Unaccompanied Minor" to be Consistent with Federal Law.

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[24] Smuggling to Migrants: A Global Review and Annotated Bibliography of Recent Publications, United Nations Office on Drugs and Crime 69 (2011).

[25] An offender's eligibility for a minor role reduction under §3B1.2 does not undermine this point because the mitigating role analysis is independent. In other words, an offender who was already eligible for a minor role reduction will see a longer sentence if his or her base offense level starts at 16 rather than 12.

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AILA supports amending the definition of "minor" to include 16- and 17-year-olds, which would make § 2L1.1 consistent with other provisions in the Guidelines.

Guideline § 2L1.1 also employs the term "unaccompanied minor," which is not currently defined in the Application Notes. Paragraph (b)(4) refers to unaccompanied minors as children "unaccompanied by their parents or grandparents," but that phrasing is inconsistent with federal immigration law which defines an "unaccompanied alien child" as a child who "has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States is available to provide care and physical custody."[26] We encourage the USSC to consider adopting a definition of "unaccompanied minor" that is consistent with this definition of "unaccompanied alien child", as defined by federal law, for the sake of clarity and consistency.

Similarly, special offense characteristic (b)(1) provides for a downward departure of three levels if the offense involved the defendant's spouse or child. The use of the term "child" leaves unspecified whether the downward departure is also available to legal guardians of children or only to parents. If the USSC decides to define the term "unaccompanied minor" in the Guideline so that it is consistent with the definition of "unaccompanied alien child" under federal immigration law, legal guardians would clearly be eligible for the downward departure in (b)(1). AILA recommends the USSC adopt this approach.

[26] 6 U.S.C. § 279(g)(2) (2008).

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