

## REVISED PROPOSED AMENDMENT: IMMIGRATION

**Synopsis of Amendment:** *In November 2001 the Commission amended this guideline by adopting graduated sentencing enhancements of between 8 levels and 16 levels, depending on the seriousness of the prior felony offense and the dangerousness of the defendant. The proposed amendment primarily adds definitions and clarifies the operation of the guideline based upon a review of relevant case law and issues raised by judges, lawyers, and probation officers who use the guidelines.*

*First, two options are provided to address felony drug trafficking offenses that receive a sentence other than imprisonment. Currently, there is some confusion regarding whether such offenses should receive a 16-, 12-, or 8-level enhancement. (See, e.g. United States v. Estrada-Tufino, No. 02-10039, 2002 U.S. App. Lexis 26322 (9<sup>th</sup> Cir. Dec. 6, 2002) Under the current guideline (as well as both proposed options), drug trafficking offenses for which the term of imprisonment imposed exceeded 13 months receive a 16-level enhancement. Under Option One, all other felony drug trafficking offenses will receive a 12-level enhancement. Under Option Two, felony drug trafficking offenses that receive a term of imprisonment of at least [one day] [sixty days], but not more than 13 months will receive a 12-level enhancement, and felony drug trafficking offenses that receive any other sentence (e.g., [probation or a fine] or [less than sixty days]) will receive an 8-level enhancement. Under either option, prior aggravated felony simple possession drug offenses, in which there is no intent to distribute, will receive a 4-level enhancement. However, if the Commission determines that such offenses should receive an 8-level enhancement, either option could be redrafted to eliminate the 4-level breakout for these offenses in subsections (b)(1)(C) and (D).*

*This amendment also makes the following commentary changes: adds definitions of "alien smuggling", "child pornography", and "human trafficking" offenses; clarifies the meaning of "crime of violence (See e.g. United States v. Rayo-Valdez, 302 F.3d 314 (5<sup>th</sup> Cir. 2002), United States v. Gomez-Hernandez, 300 F.3d 974 (8<sup>th</sup> Cir. 2002); adds commentary to clarify how revocations of probation, parole, or supervised release (See, e.g. United States v. Moreno-Cisneros, 2003 WL 203130 (9<sup>th</sup> Cir. 2003), United States v. Compian-Torres, 2003 WL 164156 (5<sup>th</sup> Cir. 2003) and indeterminate sentences (See, e.g. United States v. Rodriguez-Arreola, No. 02-1838, 2002 U.S. App. Lexis 26471 (8<sup>th</sup> Cir. Dec. 23, 2002) should be treated for purposes of determining the term of imprisonment imposed; and adds language prohibiting the use of juvenile adjudications under this guideline.*

### Proposed Amendment:

#### §2L1.2. Unlawfully Entering or Remaining in the United States

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(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which ~~the~~ a sentence of imprisonment of more than imposed exceeded 13 months was imposed; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels;

[Option One:

~~(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;~~

(B) a conviction for a felony drug trafficking offense other than a felony drug trafficking offense covered under subdivision (A), increase by 12 levels;]

[Option Two:

~~(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;~~

(B) a conviction for a felony drug trafficking offense for which a sentence of imprisonment of at least [one day][60days], but not more than 13 months, was imposed, increase by 12 levels;

(C) a conviction for (i) an aggravated felony other than an aggravated felony that is a simple possession drug offense; or (ii) a felony drug trafficking offense other than a felony drug trafficking offense covered under subdivision (A) or (B), increase by 8 levels;]

[(D) a conviction for (i) any other felony; or (ii) an aggravated felony that is a simple possession drug offense, increase by 4 levels; or]

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Commentary

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Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

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~~(iv) — If all or any part of a sentence of imprisonment was probated, suspended, deferred, or stayed, "sentence imposed" refers only to the portion that was not probated, suspended, deferred, or stayed.~~

*(iv) — Offenses Committed Prior to 18 Years of Age.—Subsection (b)(1) 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.*

~~(B) — Definitions.—For purposes of subsection (b)(1):~~

~~(i) — "Committed for profit" means committed for payment or expectation of payment.~~

~~(ii) — "Crime of violence" —~~

~~(I) — means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and~~

~~(II) — includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.~~

~~(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.~~

~~(iv) — "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.~~

~~(v) — "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) — "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).~~

(B) Definitions.—For purposes of subsection (b)(1):

- (i) *"Aggravated felony that is a simple possession drug offense" means an offense of simple possession of a controlled substance (or a counterfeit substance) without the intent to manufacture, import, export, distribute, or dispense for which the sentence of imprisonment imposed was less than 13 months.*
- (i) *"Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 § 1101(a)(43)(N)).*
- (ii) *"Child pornography offense" means (I) an offense described in 18 §§ 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) *"Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.*
- (iv) *"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.*
- (v) *"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.*

(vi) *"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.*

(vii) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

(ix) *"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).*

[(C) *Departure Provision.—In a case in which (i) the conviction covered under subsection (b)(1) is an alien smuggling offense; (ii) the defendant committed that alien smuggling offense for a purpose other than assisting, abetting, or aiding only the alien's spouse, child, or parent, and (iii) the defendant can affirmatively show that the offense was not committed for profit, a downward departure may be appropriate. "Committed for profit" means the offense was committed for payment or expectation of payment.*]

~~2. *Application of Subsection (b)(1)(C).—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in 8 U.S.C. § 1101(a)(43), without regard to the date of conviction of the aggravated felony.*~~

2. *Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*

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 8 U.S.C. § 1101(a)(43).*

(B) *In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B), (e.g., a felony drug trafficking offense for which the sentence of imprisonment imposed was a sentence of less than 60 days).*]

34. *Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):*

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(B) *"Three or more convictions" means at least three convictions for offenses that (i) were separated by an intervening arrest; (ii) did not occur on the same occasion; (iii) were not part of a single common scheme or plan; or (iv) were not consolidated for trial or sentencing. are not considered "related cases" as defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

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