

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.

(viii) '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)."

Section 2L1.2 captioned "Application Notes" is amended by striking Note 2 and inserting the following:

"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."

Section 2L1.2 captioned "Application Notes" is amended by striking Notes 4 and 5; by redesignating Note 3 as Note 4; and by inserting after Note 2 the following:

"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), without regard to the date of conviction for the aggravated felony.

(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)."

Section 2L1.2 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by striking subdivision (B) and inserting the following:

"(B) 'Three or more convictions' means at least three convictions for offenses that are not considered 'related cases', as that term is defined in Application Note 3 of § 4A1.2

(Definitions and Instructions for Computing Criminal History)."

Reason for Amendment: In 2001 the Commission comprehensively revised § 2L1.2 (Unlawfully Entering or Remaining in the United States) to provide more graduated enhancements at subsection (b)(1) for illegal re-entrants previously deported after criminal convictions. In response to application issues raised by a number of judges, probation officers, defense attorneys, and prosecutors, particularly along the southwest border between the United States and Mexico, this amendment builds upon the 2001 amendment by clarifying the meaning of some of the terms used in § 2L1.2(b)(1).

First, the amendment adds commentary to define the following offenses: "alien smuggling", "child pornography", and "human trafficking." Prior to the amendment, these offenses received a 16 level increase but were not defined. The lack of definitions led to litigation regarding the meaning and scope of some of these terms. The Commission has determined that these offenses warrant application of the 16 level enhancement even though some of these offenses, as defined by the amendment, may not meet the statutory definition of an aggravated felony in 8 U.S.C. 1101(a)(43).

The amendment provides a definition of "alien smuggling offense" in a manner consistent with the "aggravated felony" definition in 8 U.S.C. 1101(a)(43)(N). This statutory definition excludes "a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person)". This definition generally is consistent with the guideline's previous terminology of "alien smuggling offense committed for profit," and results in a 16 level increase only for the most serious of such offenses. The new definition also responds to concerns about whether an alien smuggling offense includes the offenses of harboring or transporting aliens. By explicitly incorporating the statutory definition of alien smuggling within the guideline definition, the amendment, in effect, adopts the Fifth Circuit's interpretation of "alien smuggling". See *United States v. Solis-Campoazano*, 312 F.3d 164 (5th Cir. 2002) (holding that "alien smuggling offense" was not limited to the "offense of alien smuggling" but includes transporting aliens brought into the country as well).

Second, the amendment adds commentary that clarifies the meaning of the term "crime of violence" by

providing that the term "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." The previous definition often led to confusion over whether the specified offenses listed in that definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense "the use, attempted use, or threatened use of physical force against the person of another." The amended definition makes clear that the enumerated offenses are always classified as "crimes of violence," regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another.

Third, the amendment adds commentary at Application Note 1(B)(vii) explaining that the term "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. The Commission's approach in clarifying this definition is consistent with the case law interpreting the term and the use of the term in Chapter Four of the guidelines. See, e.g., *United States v. Moreno-Cisneros*, 319 F.3d 456 (9th Cir. 2003) (holding that the length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release); *United States v. Compian-Torres*, 320 F.3d 514 (5th Cir. 2003) (same). Compare *United States v. Hidalgo-Macias*, 300 F.3d 281 (2d Cir. 2002) (holding that the imposition of a sentence of imprisonment following revocation of probation is a modification of the original sentence and must be considered part of the sentence imposed for the original offense), with *United States v. Rodriguez-Arreola*, 313 F.3d 1064 (8th Cir. 2002) (holding that the term "sentence imposed" when applied to an indeterminate sentence is the maximum term that a defendant may serve).

Fourth, the amendment adds commentary providing that the enhancements in subsection (b)(1) do