

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION**

**THE UNITED STATES OF AMERICA**

**v.**

**Criminal No. RWT-05-XXXX**

**FPD Client**

\* \* \* \* \*

**SENTENCING MEMORANDUM RE: APPLICABLE ADJUSTMENT  
UNDER U.S.S.G. § 2L1.2(b)(1)**

The defendant herein, FPD Client, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, hereby submits the following legal memoranda as to why the court should include a 4-level upward adjustment to his offense level in its calculation under the advisory Federal Sentencing Guidelines pursuant to U.S.S.G. §2L1.2 (b)(1)(E), and not an 8-level increase pursuant to §2L1.2(b)(1)(C).

**I. INTRODUCTION**

\_\_\_\_\_ In this case, FPD Client pled guilty to a charge of unlawful reentry by an alien without authorization, in violation of 8 U.S.C. §1326(a). In light of the Supreme Court’s holding in United States v. Booker, 125 S.Ct. 738 (2005), the discretion of a sentencing court is no longer bound by the range prescribed by the guidelines. “Nevertheless, a sentencing court is still required to “consult [the] Guidelines and take them into account when sentencing.” United States v. Hughes, 401 F.3d 540, 546 (4<sup>th</sup> Cir. 2005) (quoting Booker, 125 S.Ct. at 767). A district court is to first calculate the applicable guideline range, and then consider that guideline range as well as other relevant factors set forth in the guidelines and in 18 U.S.C. §3553(a) before imposing the sentence. Id.

The United States Sentencing Guidelines provide a base offense level of 8 for a conviction of illegal re-entry after deportation pursuant to U.S.S.G. §2L1.2(a). Because Mr. Client's deportation was subsequent to convictions in the District of Columbia for possession with intent to distribute marijuana and distribution of marijuana, there is an upward adjustment pursuant to subs. (b)(1). The government asserts that an 8-level increase is warranted under §2L1.2(b)(1)(C). While it is undisputed that Mr. Brooke's earlier convictions were for D.C. misdemeanor offenses, the government asserts that these charges qualify as "aggravated felonies" for purposes of §2L1.2(b)(1)(C). For the reasons expressed below, the government's assertion is incorrect and the correct adjustment is a 4-level increase pursuant to U.S.S.G. §2L1.2 (b)(1)(E), which expressly applies to prior convictions for misdemeanor drug trafficking offenses.

## II. ARGUMENT

Because Mr. Client's earlier convictions were for D.C. misdemeanor drug offenses, they do not qualify as "aggravated felonies." As such, the 8-level increase does not apply. Mr. Client does not challenge the fact that the 4-level increase set forth at U.S.S.G. §2L1.2(b)(1)(E), expressly covering "three or more convictions for misdemeanors that are . . . drug trafficking offenses," applies.

### A. The Plain Language of U.S.S.G. § 2L1.2(b)(1)(E) Supports the 4-Level Increase.

\_\_\_\_\_ In assessing a statute's scope, the court must first examine its plain language. United States v. Sheek, 990 F.2d 150, 152-53 (4<sup>th</sup> Cir. 1993). Normal rules of statutory construction apply in interpreting guideline provisions. United States v. Brock, 211 F.3d 88, 92 (4<sup>th</sup> Cir. 2000) (citation omitted); see United States v. Turchen, 187 F.3d 735, 739 (7<sup>th</sup> Cir. 1999) ("When interpreting a provision of the sentencing guidelines, a court must begin with the text of the provision and the plain

meaning of the words in the text.”) (citation omitted).

United States Sentencing Guideline §2L1.2(b)(1)(E) expressly provides a 4-level enhancement “[i]f the defendant was previously deported, or unlawfully remained in the United States, after . . . three or more convictions for misdemeanors that are . . . drug trafficking offenses.” For purposes of that section, comments to the guideline define the term “misdemeanor” as “any federal, state, or local offense, punishable by a term of imprisonment of one year or less.” Cmt. 4(A), U.S.S.G. §2L1.2. “Drug trafficking offense” is defined as “any offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or any possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense.” Cmt. 1(B)(iv), U.S.S.G. §2L1.2.

On three occasions between 1990 and 1991, Mr. Client was found guilty of several counts of marijuana possession with intent to distribute or marijuana distribution in violation of D.C. Code 1981 §33-541 (current version set forth at D.C. Code §48-904.01). Section 33-541 made it unlawful for any person “knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance.” Under that statute, possession with intent to distribute marijuana was punishable by a term of imprisonment not to exceed one year. See D.C. Code 1981 §33-541 (“Any person who violates this subsection with respect to: . . . (D) A substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than 1 year, fined not more than \$10,000 or both;”); See D.C. Code 1981 § 33-522 (setting forth substances listed in Schedule V and including “Cannabis” at paragraph 2) (current schedule set forth

at D.C. Code § 48-902.12).<sup>1</sup> Mr. Client's prior convictions fall squarely within the provision's definition of "misdemeanor" for purposes of §2L1.2(b)(1)(E).

United States Sentencing Guideline §2L1.2(b)(1) requires the court to apply the greatest adjustment under that provision. U.S.S.G. §2L1.2(b)(1). However, if Mr. Client's prior misdemeanors qualify as "aggravated felonies" as the government suggests, §2L1.2(b)(1)(E) is rendered meaningless. Any one misdemeanor drug trafficking offense alone would qualify as grounds for a 8-level enhancement. If that were the case, there would be no reason to even look to whether a defendant had three prior misdemeanor drug trafficking offenses warranting a 4-level increase.

It is a classic canon of statutory construction that "[w]here possible, [courts] must 'give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous.'" United States v. J.H. Scott, 328 F.3d 132, 139 (4<sup>th</sup> Cir. 2003) (citing Freytag v. Comm'r Internal Revenue, 501 U.S. 868, 877 (1991)); see United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992) (noting the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect."). Moreover, courts should avoid statutory constructions that render another part of the same provision superfluous. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

Mr. Client's prior convictions for "misdemeanors that are . . . drug trafficking offenses" fit squarely within U.S.S.G. §2L1.2 (b)(1)(E) and the application definitions provided in the comments

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D.C. Law 13-300 (2000) repealed Paragraph 2 of § 48.902.12 (Schedule V), amended § 48-902.08 (Schedule III) to include "Cannabis," and amended 48-904.01 to set forth when marijuana is a misdemeanor offense.

to that subsection. If a misdemeanor drug trafficking offense is to also be considered to be an “aggravated felony,” subs. (b)(1)(E) and the definitions provided would be unnecessary and rendered superfluous. Such a result is to be avoided.

**B. The Legislative History of §2L1.2 Demonstrates the Sentencing Commission’s Intent to Provide a 4-Level Increase for Prior Misdemeanor Drug Trafficking Offenses.**

While statutory construction must begin with the language of the statute, the court may look beyond the language where “there is ambiguity or the statute as literally read would contravene the unambiguously expressed legislative intent gleaned from the statute’s legislative history.” Sheek, 990 F.2d at 152-153. For reasons set forth below, Mr. Client asserts that his prior misdemeanor drug trafficking offenses do not fall within the definition of “aggravated felony” for purposes of §2L1.2(b)(1)(C). However, even if one of Mr. Client’s prior offenses did qualify as an “aggravated felony” under subs. (b)(1)(C), as well as a misdemeanor drug trafficking offense under subs. (b)(1)(E), such a reading of the guideline would be in direct conflict with the Sentencing Commission’s clear intent.

Legislative history demonstrates that while the Sentencing Commission intended to include some prior drug trafficking offenses in the definition of “aggravated felony,” it did not intend to include all drug trafficking offenses within that definition. The Commission’s amendments and stated motivations for the amendments demonstrate that it intended to provide a reduced enhancement where a defendant’s prior drug trafficking offenses were not felonies. In 2001, the Sentencing Commission issued a replacement guideline at §2L1.2 that contains the current versions of the sections of §2L1.2 at issue here. See Appendix C, amendment 632, effective November 1, 2001. In amending the guideline, the Commission acknowledged that “disproportionate penalties

had resulted because of the breadth of the definition of ‘aggravated felony’ provided in 8 U.S.C. §1101(a)(43).” Id. Specifically, one of the Commissions’ stated reasons for the 2001 amendment was “to provide guidance regarding the application of the enhancement for the commission of three or more prior misdemeanors.” See Appendix C, amendment 632, “Reason for Amendment.” With that amendment, the Commission added the present language in §2L1.2(1)(b)(E) that a 4-level enhancement is to applied where a defendant has “three or more convictions for misdemeanors that are . . . drug trafficking offenses.” U.S.S.G. §2L1.2(1)(b) (E). In the prior version, the Commission provided a 4-level enhancement where a defendant had a misdemeanor “controlled substance offense.” See Appendix C, amendment 562, effective November 1, 1997.

By amending the language of subs. (b)(1)(E), the Commission effectively removed all non-trafficking drug offenses from inclusion within this subsection. The current version of the subsection, with its applicable definitions, does not cover offenses that involve the mere use or possession of drugs without an intent to distribute or otherwise traffic.

The case before the court involves only misdemeanor drug trafficking offenses for small amounts of marijuana. If §2L1.2(1)(b)(E) does not apply to Mr. Client’s prior misdemeanors, it is difficult to imagine a case where this adjustment would apply. Why would the Commission carve out a lesser penalty category for misdemeanor drug trafficking offenses, if it never intended for it to be used? Moreover, why would the Commission allow one prior misdemeanor drug trafficking offense to require an 8-level increase and three misdemeanor drug trafficking offenses to require a 4-level increase? It is quite clear from the 2001 amendments that the Commission envisioned that the term “aggravated felony” would define a subset of the broader category of felony drug trafficking offenses, and that prior misdemeanor drug trafficking offenses would be addressed under

subs. (b)(1)(E).

The Commission's inclusion of a separate adjustment category for three or more misdemeanor drug trafficking offenses indicates a clear legislative intent to provide a lesser adjustment where a defendant's prior drug trafficking offenses are not felonies. If §2L1.2(b)(1)(E) is to conform to the Commission's apparent motivation for the amendment and not render that provision superfluous, the court must apply that provision to prior convictions for misdemeanor drug trafficking offenses. The policy choices of Congress and the Sentencing Commission must guide this court's interpretation of this enhancement. United States v. Martinez-Garcia, 268 F.3d 460 (7<sup>th</sup> Cir. 2001) ("We shall not 'second guess the conscious policy choices of Congress and the Sentencing Commission, an activity in which we are not at liberty to engage.'") (quoting United States v. Marquez-Gallegos, 217 F.3d 1267, 1271 (10<sup>th</sup> Cir. 2000)). If §2L1.2(b)(1)(E) is to be given any effect, it must be applied in Mr. Client's case.

Moreover, if the court finds that one of Mr. Client's prior misdemeanors qualifies as both an "aggravated felony" warranting an 8-level increase under subs. (b)(1)(C), and as one of three or more of his prior misdemeanor drug trafficking offenses warranting a 4-level increase under subs. (b)(1)(E), U.S.S.G. § 2L1.2(1)(b) is ambiguous. The rule of lenity would therefore apply. See United States v. Lambley, 974 F.2d 1389, 1398 (4<sup>th</sup> Cir. 1992) (stating that rule of lenity is used to resolve ambiguities in the Sentencing Guidelines). The rule of lenity is reserved for situations in which a "grievous ambiguity or uncertainty in the language and structure" of a statute remains after using other standard tools of statutory construction. Id. (citing Chapman v. United States, 111 S.Ct. 1919, 1926 (1991)). If two readings of a criminal statute are "rational" or "plausible," the Supreme Court has stated that it is appropriate to require "clear and definite" language before choosing the

harsher alternative. Id.(citing Williams v. United States, 458 U.S. 279, 290 (1982)).

Under the rule of lenity, any ambiguity in §2L1.2(b)(1) must be resolved in favor of the criminal defendant. Therefore, Mr. Client's prior misdemeanor drug trafficking offenses must qualify for the lesser 4-level adjustment for "three or more convictions for misdemeanors that are . . . drug trafficking offenses" under U.S.S.G. §2L1.2(b)(1)(E).

**C. Recent Fourth Circuit Case Law Supports Only a 4-Level Increase.**

In United States v. Amaya-Portillo, 423 F.3d 427 (4<sup>th</sup> Cir. 2005), the Court addressed the issue of whether a state drug possession conviction could ultimately qualify as an "aggravated felony" under § 2L1.2 if it was a misdemeanor under applicable state and federal law. The Court held that an offense that was not classified by applicable state and federal law as a felony did not qualify as an "aggravated felony" under section §2L1.2(b)(1)(C) of the Sentencing Guidelines.

In Amaya-Portillo, the Fourth Circuit set forth an analysis for determining whether the defendant's prior offense qualified as an "aggravated felony." The court's analysis began with the guideline itself:

The term "aggravated felony" is not defined in the text of subsection 2L1.2. However, the application note for the subsection states that an "aggravated felony" has the meaning given that term in 8 U.S.C. 1101(a)(43). U.S. Sentencing Guidelines Manual 2L1.2, cmt. n.3. Section 1101(a)(43) of Title 8 provides that "[t]he term 'aggravated felony' means -(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18) . . ." 8 U.S.C. 1101(a)(43)(b). Section 924(c) of Title 18 states that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), . . . [or two other enumerated statutes]." 18 U.S.C. 924(c)(2). The two elements of section 924(c)(2) are (1) any felony, that is (2) punishable under the Controlled Substance Act (or one of the two enumerated statutes). [United States v. Wilson, 316 F.3d 506, 512 (4<sup>th</sup> Cir. 2003).]

Amaya-Portillo, 423 F.3d at 431.

It is clear that marijuana distribution or possession with intent to distribute marijuana is punishable under the Controlled Substance Act. See 21 U.S.C. §§ 841(b)(1)(D), 844(a). Therefore, element two of § 924(c)(2) is satisfied. However, as in Amaya-Portillo, Mr. Client's prior misdemeanor drug convictions do not qualify as "felonies."

"To determine whether the state crime is a 'felony,' the Court must consider whether the defendant's state conviction . . . amounts to a felony within the meaning of §924(c)(2)." Id. Section 2L1.2(b)(1)(C) directs the Court, to the definition of a "felony" in 21 U.S.C. §802(13). See Amaya-Portillo, 423 F.3d at 433. Section 802(13) of Title 21 defines "felony" as those offenses "classified" as such by the jurisdiction in which the crime occurred. See 21 U.S.C. §802(13) ("The term 'felony' means any Federal or State offense classified by the applicable state or Federal law as a felony."). (Emphasis added).

In Amaya-Portillo, the Court gave deference to the applicable state's (there, Maryland's) classification of the defendant's prior offense as a misdemeanor. See Amaya-Portillo, 423 F.3d at 435 ("Finally our interpretation gives deference to a state's judgment, not as to the appropriate punishment, but as to whether the offense is a felony."); id. at 432 (finding the defense's argument persuasive that the application of §2L1.2(b)(1)(C) should turn upon a state's classification of an offense as a felony or misdemeanor, rather than possible penalty); United States v. Wilson, 316 F.3d 506, 512 (4<sup>th</sup> Cir. 2003) (finding that the definition of "aggravated felony" encompassed the defendant's Virginia conviction because the offense was a felony under Virginia law). Several other courts have focused on whether a state court classifies a defendant's prior offense as a misdemeanor or a felony. See Amaya-Portillo, 423 F.3d at 432 (citing other Circuit decisions which conducted the "aggravated felony" inquiry by focusing on the "classification" of an offense under state law);

Ibarra-Galindo, 206 F.3d 1337, 1341 (9<sup>th</sup> Cir. 2000) (holding “a crime that is punishable under the Controlled Substances Act amounts to an ‘aggravated felony’ . . . so long as it was denominated a “felony” by the jurisdiction in which the perpetrator was convicted.”).

It is undisputed that Mr. Client’s prior offenses qualified as a misdemeanors under District of Columbia law. See D.C. Code 1981 § 33-541 (“Any person who violates this subsection with respect to: . . . (D) A substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than 1 year, fined not more than \$10,000 or both;”); see D.C. Code 1981 § 33-522 (setting forth substances listed in Schedule V and including “Cannabis” at paragraph 2). Such offenses are also classified by the District of Columbia courts as misdemeanors. See Henson v. United States, 399 A.2d 16, 20 (D.C. App. 1979) (stating that D.C. courts define all crimes that are punishable for no more than one year as misdemeanors).

Certainly, the state’s classification of Mr. Client’s prior offense as a misdemeanor should be given deference. E.g. United States v. Gomez-Ortiz, 62 F.Supp.2d 508, 509 (D. R.I. 1999) (finding that state misdemeanor drug trafficking offense did not constitute “felony” for purposes of U.S.S.G. §2L1.2(b)(1)(C), even though the defendant’s offense would have been classified as a felony if prosecuted under federal law.).

In determining whether a misdemeanor drug trafficking offense qualifies as an “aggravated felony,” the government will no doubt ask the court to look to whether the conduct underlying one or more of Mr. Client’s prior state misdemeanor offenses would be punishable by the Controlled Substance Act as a felony. To the defense’s knowledge, the Fourth Circuit has not yet addressed the specific issue of whether a drug trafficking offense that is classified by the convicting state as a misdemeanor but hypothetically punishable as a felony under the Controlled Substance Act can be

classified as an “aggravated felony” under 8 U.S.C. §1101(a)(43). However, in Wilson, the Fourth Circuit held that 18 U.S.C. §924(c)(2) “does not say that the offense must be punishable as a felony by the CSA. Rather, the statute merely says that the offense must be a felony, punishable thereunder.” Wilson, 316 F.3d at 513. In doing so, the court rejected the defendant’s argument that “when 18 U.S.C. §924(c)(2) defines ‘drug trafficking crime’ as ‘any felony punishable under the’ CSA, it means the offense must be punishable as a felony by the CSA, and not simply punishable under the CSA.” Id. (emphasis in original).

In light of the Court’s rationales in Amaya-Portillo and Wilson, Mr. Client asserts that an offense that is classified by a state as a misdemeanor cannot qualify as an “aggravated felony,” since it is the state’s classification that determines whether a prior drug trafficking offense meets the guideline definition of “felony.” Because Mr. Client’s prior misdemeanor offenses do not meet the definition of “aggravated felony” for purposes of §2L1.2(b)(1)(C), the 8-level upward adjustment does not apply.

### **III. CONCLUSION**

For the reasons stated above, Mr. Client requests that in its calculation of the appropriate advisory guideline range, the court provide a 4-level upward adjustment for his prior misdemeanor drug traffic offenses under U.S.S.G. §2L1.2(b)(1)(E), and not an 8-level upward adjustment for “aggravated felony” pursuant to U.S.S.G. §2L1.2(b)(1)(C).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

\_\_\_\_\_ I HEREBY CERTIFY that on this 3<sup>rd</sup> day of February 2006, a copy of the foregoing sentencing memorandum was delivered via courthouse courier to the office of Daphene R. McFerren, Assistant United States Attorneys, 6500 Cherrywood Lane, Suite 400, Greenbelt, Maryland 20770; and Mary Brewster, United States Probation Officer, 9200 Edmonston Road, Suite 200, Greenbelt, Maryland 20770.

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