



March 21, 2016

Honorable Patti B. Saris, Chair
United States Sentencing Commission
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Re: ACLU Comments in response to Notice for Proposed U. S. Sentencing Commission (USSC) Amendments to the Sentencing Guidelines, policy statements and commentary for the Cycle Ending in May 2016 (cite 81 FR 2295-02).

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Dear Judge Saris:

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With this letter the American Civil Liberties Union (“ACLU”) provides public comments to the U.S. Sentencing Commission on its notice of proposed amendments to the sentencing Guidelines, policy statements and commentary for the amendment cycle ending May 1, 2016. For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law.

These comments address several of the issues outlined in the proposed amendments where the Commission could take substantial steps toward improving the fairness and proportionality of the Guidelines and reduce the number of individuals in the federal Bureau of Prisons system. Our comments are focused on two areas of specific interest: the proposed amendment that would revise the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States) and the policy statement pertaining to compassionate release, §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

I. Proposed Amendment that would revise the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States).

We strongly urge the Commission not to feel bound by a zero-sum approach in reducing the injustice of excessive enhancements by increasing base-offense levels, and also to revise the proposal to more accurately reflect its animating principles of focusing on judicial officers' sentences to gauge the seriousness of a criminal conviction, and emphasizing serious *recent* convictions after reentry, not outdated criminal and immigration history.

The Commission's April 2015 report, *Illegal Reentry Offenses*, and other data make clear that the number of people sentenced under guideline §2L1.2 has increased significantly since 2007, constitutes a major proportion of the overall federal district-court caseload (26% in fiscal year 2013), and is especially pronounced in southwest-border districts.¹

There has been a massive increase in total criminal immigration prosecutions, growing from under 10,000 in 1997 to 40,000 in 2007 and almost 100,000 in 2013.² This includes a doubling of the proportion of cases involving individuals with no felony convictions. Keeping average sentences steady would fail to address the devastating impact these convictions have had on individuals who do meet no national-security or public-safety priorities. Judge Robert Brack in Las Cruces, New Mexico, told the *Wall Street Journal* in 2013: "Every day I see people who would never have been considered as criminal defendants two years ago. It's just a completely different profile."³

We disagree with policy choices that have led to mass prosecutions and incarceration of border-crossers who meet none of the Department of Justice's stated prosecutorial interests, namely national security, violent crime, financial fraud, and protection of the most vulnerable members of society.⁴ The Commission's report demonstrates that 49.5% of persons sentenced for illegal reentry had at least one child living in the United States, and that those sentenced were an average (and median) age of 17 at the time of initial entry.⁵ Given a U.S. deportation regime that tears families apart and provides little in the way of individualized discretion even for U.S. citizen children's needs, criminal prosecutions and punishments for people seeking to reunite with their families should be sharply reduced. Disappointingly, as discussed below, some aspects of the Commission's proposed amendments are trending in the wrong direction.

The current number of individuals prosecuted and sentenced for illegal reentry comes with staggering costs to the criminal justice system, including a diversion of limited prosecutorial and court resources away from serious offenses, as well as prison overcrowding in substandard

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

² TRAC, "Changes in Criminal Enforcement of Immigration Laws." (May 13, 2014), <http://trac.syr.edu/immigration/reports/354/>

³ Joe Palazzolo & Miriam Jordan, *Border Laws Put Judge on Map*, WALL.ST. J., May 31, 2013, <http://www.wsj.com/articles/SB10001424127887323336104578499480108652610>.

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" (2015), https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf

⁵ 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

private facilities.⁶ Moreover, these costs are incurred without any assurance that prosecutions for border crossing actually have a deterrent effect. The Department of Homeland Security's Office of Inspector General issued a critical report last year concluding that "Border Patrol is not fully and accurately measuring [the Streamline border-prosecution initiative'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."⁷ A University of Arizona study tracking 1,200 people deported after prosecution for border-crossing found that when it comes to re-entry there is no statistically significant difference between those who went through Streamline and those who did not.⁸ Massive expenditures are therefore resting on speculation, not facts, about deterrence and recidivism.

Indeed, it is virtually impossible to measure the multiple factors that inform a migrant's decision to cross, and the desire to reunite with family or find a job often outweighs any fear of prosecution.⁹ The Migration Policy Institute has noted that for border crossers with strong family and/or economic ties to the United States "even . . . high-consequence enforcement strategies [i.e., criminal prosecutions] may not deter them from making future attempts."¹⁰ The United Nations special rapporteur on the human rights of migrants has therefore emphasized that "irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security."¹¹ By acting otherwise, the United States has at times run afoul of its international commitments; DHS's Inspector General concluded that "Border Patrol's practice of referring [aliens who express fear of persecution or return to their home countries] to prosecution . . . may violate U.S. treaty obligations."¹²

We therefore urge the Commission and other implicated government agencies to re-examine comprehensively – and reduce – the deleterious impacts of border-crossing prosecutions and sentences. With respect to the Commission's specific amendment proposals, we support the attention given to the imposition of excessive punishment based on currently inflexible escalator enhancements. We also endorse the philosophy of gauging the seriousness of pertinent past convictions by looking at judicial officers' punishment decisions, rather than through the mechanical application of a categorical approach.

⁶ ACLU and ACLU of Texas, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*. (June 2014), <https://www.aclu.org/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system>; Seth Freed Wessler, "This Man Will Almost Certainly Die." *The Nation* (Jan. 28, 2016), <http://www.thenation.com/article/privatized-immigrant-prison-deaths/>

⁷ DHS OIG, *Streamline: Measuring Its Effect on Illegal Border Crossing*. (May 15, 2015), cover page & 2, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf

⁸ Ted Robbins, "Is Operation Streamline Worth Its Budget Being Tripled?" NATIONAL PUBLIC RADIO (Sept. 5, 2013), <http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled>; see also Jeremy Slack et al., "In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border." 3 *Journal on Migration and Human Security* 2 (2015), <http://jmhs.cmsny.org/index.php/jmhs/article/view/46>

⁹ Human Rights Watch, *Turning Migrants Into Criminals: The Harmful Impact of U.S. Border Prosecutions*. (May 2013), 24 n.40, http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf

¹⁰ Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*. (Apr. 2014), 43, <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>

¹¹ *Turning Migrants*, supra, at 4.

¹² DHS OIG, supra, at 2.

We disagree, however, with the proposed amendments' reliance on imposed rather than served sentences, a distinction that would lead to treating equally severely persons sentenced by judicial officers who perceived the gravity of each person's offense very differently. Records of time served are steadily improving with technology and this calculation is too important for the imprecise measure of imposed sentences.

We also emphatically urge the Commission not to increase the base-offense level from 8 to 10 for those with no prior illegal re-entry convictions (and to adjust other gradations down accordingly). The Commission has stressed continually that these proposed amendments respond to specific concerns about the Guidelines' current operation, *not* any "general concern about penalty levels."¹³ Increasing offense levels is entirely inconsistent with this assertion.

In addition, we fundamentally disagree with the inclusion of enhancements based on all post-first-entry conduct. Convictions that precede the most-recent entry are already accounted for in Criminal History calculations and enhancements should focus exclusively on post-last-entry conduct. This would capture the Commission's evident concern with punishing more severely people who return and then commit a crime, without sweeping in a much-larger universe of past offenses than are currently punished (including expunged matters, as well as three misdemeanors that may have arisen out of a single event, been tried in the absence of counsel, resulted in no prison time at all, and/or punished activity such as personal drug possession which may no longer be a criminal act in the relevant jurisdiction).

Finally, we suggest that the Commission change its proposed amendment allowing for an upward departure based on multiple prior deportations so sentencing courts do not consider prior deportations that occurred without due process.

A. ***In gauging the seriousness of a conviction, the sentence served – not imposed – should be used.***

The Commission should look to sentencing judges' determinations regarding a past conviction's seriousness. We recommend that the proposed amendments be modified, however, because they use undifferentiated imposed-sentence lengths rather than time actually served. Adopting such a proposal would have a particularly severe and unintended impact on individuals with state convictions in jurisdictions where automatic parole is systemically taken into account by the sentencing court. A far better proxy for seriousness is time served.

B. ***There is no justification for raising the base-offense level for all convicted persons.***

At a time of national attention to criminal-justice reform and reducing mass incarceration, the Commission's proposed amendments would run counter to the national trend and increase sentences for most offenders. While the amendments are presented as neutral with respect to *average* sentences, the least-serious and most-numerous offenders would see a drastic increase in incarceration length. The Commission'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 to 6 months: an unconscionable 500% increase. Persons with

¹³ See, e.g., USSC, "Data Briefing: Proposed Immigration Amendment." (2016), <http://www.ussc.gov/videos/immigration-data-briefing>

a 4-level enhancement for any felony conviction with a sentence under a year, which could have resulted in no jail time and/or had as an element or motivation the individual's immigration status, would see their average guideline minimum *double* from 12 to 24 months. (We note that the proposed amendment would be much improved by revising upward the enhancement thresholds, rather than making a 12-month sentence fall into a more severe category than a 12-month-less-a-day sentence.)

The Commission's study states that "[e]ach additional increase of 2 offense levels will increase the sentencing range by approximately 25 percent."¹⁴ No rationale is given for increasing the base offense level to 10 rather than 8, nor for the levels assigned to persons with prior reentry convictions, which start at levels 12 and 14. Prior reentry convictions are insignificant part a matter of chance, depending more on where an individual was apprehended rather than a useful barometer of someone's serious criminal past. The Commission's data from FY 2013 show that 72.8% of individuals in that sample had no prior illegal-reentry convictions, so almost 3/4 of persons would under the new Guideline have a significantly higher average guideline minimum. This harsh change in no way responds to the specific concerns the Commission's proposal is attempting to address.¹⁵

The proposed amendment would also have a starkly disparate impact on districts, like New Mexico, that have a supermajority of cases without enhancements (as the Commission study's Figure 7 shows.¹⁶) The proposed amendment offers no justification for a massive increase in individual and aggregate sentences for migrants prosecuted in New Mexico.

For these reasons, the Commission should reject the proposed amendments' base-offense-level increases.

C. *Enhancements should be applied only for convictions subsequent to the most recent entry.*

The Commission's purpose of refocusing the extra penalty of an offense-level increase on post-reentry conduct should be reflected in the amendment's actual operation. The current proposal fails to fulfill the amendment's stated purpose, which is "to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, *post-reentry* convictions and a corresponding reduction in the enhancements for past, *pre-deportation* convictions."¹⁷ If the amendment is adopted, § 2L1.2 would result in enhancements for more offenses than can be used for enhancements now. While there are time limitations on offenses generally through the Criminal History recency restrictions, the number of older offenses that would lead to enhancements increases dramatically – and retroactively – under this proposal.

¹⁴ *Illegal Reentry Offenses*, supra, at 6.

¹⁵ The Commission 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 Commission's purposes for considering these reentry-Guideline amendments.

¹⁶ *Id.* at 13.

¹⁷ USSC, "Proposed Amendments to the Sentencing Guidelines." (Jan. 15, 2016), 61 (emphasis added), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160113_RFP_Combined.pdf

The proposal would provide for two opportunities to increase the offense level (ranging from 2 to 8 levels), based on pre-deportation order and post-deportation order convictions, rather than the one potential increase under the current Guideline. Depending on particular convictions, a defendant might receive a higher or a lower offense level. But in either case, by making the pre- and post-reentry enhancements equal in weight the proposal does not sufficiently shift the focus to post-reentry conduct as the prefatory language suggests. To effectuate that purpose and to make notice of these changes more fair, the Guideline amendment should include enhancements only for post-reentry conduct.

D. Sentencing courts should not consider prior deportations that occurred without due process.

The Commission demonstrates sensitivity to immigration law by excluding voluntary returns and voluntary departures (two distinct consequences in immigration law) from a possible upward departure based on immigration history, but does not take into account prior deportations that violated due process in an individual case, or as a category. For example, in *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit concluded that an immigrant’s stipulated-removal proceedings violated due process. In the Commission’s possible “Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions,” however, there is no provision for such a deportation to be discounted for purposes of an upward departure. As stated above, we oppose including this departure based on outdated immigration history that is unreliable given the inconsistent message U.S. immigration policy has sent over the decades to persons reentering and the differential treatment accorded to persons depending on where they are apprehended. If the Commission does include such a departure, however, Sentencing courts must look behind the mere fact of a prior deportation to ensure that it comported with due process.

II. The Proposed Amendment to the Commission’s Policy Statement on Compassionate release, §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

A. Should the United States Sentencing Commission (“Commission”) amend the current policy statement describing what constitutes “extraordinary and compelling reasons” and, if so, how? Should the list of extraordinary and compelling reasons in the Guidelines Manual closely track the criteria set forth by the Bureau of Prisons (“BOP”) in its program statement?

The United States Sentencing Commission (“Commission”) should amend the current policy statement describing what constitutes “extraordinary and compelling;” and promulgate its own definition of “extraordinary and compelling” that specifies the circumstances for which a person’s sentence may be reduced. On August 12, 2013, the Bureau of Prisons issued an updated compassionate release program statement. According to this policy, a sentence reduction may be based on the defendant’s medical circumstances or certain non-medical

circumstances. The non-medical and elderly provision of the BOP program statement determine the age of eligibility is 65.¹⁸

However, the Commission is given authority to make amendments to the sentencing guidelines pursuant to 28 U.S.C. § 994(o).¹⁹ The Commission also has a statutory obligation to define what circumstances qualify for a reduction in sentence.²⁰ More importantly, there is no statutory authority requiring the Commission's policies to align with BOP program statements.²¹ For this reason, the USSC should provide an independent definition of "extraordinary and compelling" circumstances required for a compassionate release sentence reduction.

The Commission's compassionate release proposed amendment states that a person is eligible for non-medical, elderly prisoner compassionate release if "*the defendant (I) is at least 65 years old; and (II) has served at least 10 years or 75 percent of his or her sentence, whichever is greater.*"²² By limiting the age of those eligible for compassionate release to 65 years, the Commission does not account for the following: (1) accelerated aging, a health condition associated with being incarcerated, (2) the decreasing recidivism rates of people over 50, (3) the heightened expenditures associated with elderly inmates, or (4) compassionate release being a component of a broader strategy to address the overcrowding of BOP facilities.

In addition, aging inmates are less likely to have disciplinary problems while incarcerated and have a lower rate of recidivism. Thus, lowering the age requirement for compassionate release would not adversely affect public safety. Based on BOP data, the Department of Justice (DOJ) Office of Inspector General (OIG) determined that people in BOP facilities over 50 years of age engage in fewer disciplinary infractions during their incarceration.²³ Furthermore, the Director of the BOP's Office of Research and Evaluation stated that age is one of the biggest predictors of misconduct, and that inmates tend to "age out" of misconduct as they get older.²⁴

¹⁸ The Bureau of Prisons issued an updated compassionate release program statement, 5050.49. Under this program statement, a sentence reduction may be based on the defendant's medical circumstances (e.g., a terminal or debilitating medical condition; see 5050.49(3)(a)-(b)) or on certain non-medical circumstances (e.g., an elderly defendant, the death or incapacitation of the family member caregiver, or the incapacitation of the defendant's spouse or registered partner; see 5050.49(4),(5),(6)). Sentencing Guidelines for United States Courts, 81 FR 2295-02; and the non-medical, elderly provision of the BOP statement sets the age of eligibility at 65; see generally U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5050.49, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (12 August 2013).

¹⁹ Brian Crowell, *Amendment 706 to the U.S. Sentencing Guidelines: Not All It Was Cracked Up to Be*, 55 Vill. L. Rev. 959, 961 (2010).

²⁰ *United States v. Ragland*, 568 F. Supp. 2d 19, 25 (D.D.C. 2008) (citing 28 U.S.C. § 994(u), which directs the Commission to "specify in what circumstances and by what amount the sentence of prisoners serving terms of imprisonment ... may be reduced.").

²¹ *supra*.fn.19.

²² United States Sentencing Commission, Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 81 Fed. Reg. 2295, at 27 (proposed Jan. 15, 2016) (to be codified in policy statement § 1B1.13) [hereinafter *Proposed Amendments*], http://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20160115_FR_Proposed_Amendment.pdf.

²³ THE DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 37 (Revised Feb. 2016) [hereinafter IMPACT OF AN AGING INMATE], <https://oig.justice.gov/reports/2015/e1505.pdf>.

²⁴ *Id.* at 38.

OIG also reported that the recidivism rate for inmates released through the compassionate release program was 3.5 percent, compared to the general recidivism rate for federal prisoners which has been reported as high as 41 percent.²⁵ Thus, public safety would not be adversely impacted by lowering the age of eligibility to 55 because incarcerated persons over 50 have a much lower rate of re-arrest in comparison to younger inmates and the rate of re-arrest continually decreases with age.²⁶

Another reason to consider lowering the eligibility age for compassionate release is the exorbitant healthcare cost associated with aging inmates. People over the age of 50 have considerable healthcare cost associated with their incarceration.²⁷ The cost of providing healthcare to older prisoners substantially outweighs the public safety benefits of keeping them incarcerated. For example, BOP spent approximately \$881 million, or nearly one fifth of its total budget incarcerating older inmates.²⁸ Elderly inmates represent one-third of the population at BOP's six medical centers, and it costs BOP approximately \$59,000 per inmate per year to incarcerate this population as opposed to slightly over \$30,000 at other BOP facilities.²⁹ According to the OIG, lowering the compassionate release threshold age from 65 to 50, coupled with a modest 5 percent release rate for aging inmates in minimum and low security institutions or medical centers, could reduce federal incarceration costs by approximately \$28 million per year.³⁰

Finally, reducing the age of eligibility for compassionate release could help to reduce overcrowding in BOP prisons. Generally, BOP facilities lack the physical infrastructure and appropriate staffing levels to adequately house older inmates.³¹ Additionally, BOP's implementation of its current compassionate release policy results in very few people actually being released prior to the completion of their sentence.³² Lowering the age of eligibility from "65 and older" to "50 and older," which is consistent with the National Institute of Corrections (NIC) categorization of aging, would assist with overcrowding issues in BOP institutions, especially in its minimum- and low-security institutions where more elderly inmates are incarcerated.³³ If BOP maintains the age of eligibility at 65 and older, its compassionate release policy will continue to do very little to address federal prison overcrowding.³⁴

²⁵ *Id.* at 6.

²⁶ *Id.* at 37.

²⁷ *Id.* at *i.* (stating that "aging inmates on average cost 8 percent more per inmate to incarcerate than inmates age 49 and younger").

²⁸ *Id.* at 48.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 3.

³² *Id.* at 48.

³³ *Id.* (inmates age 65 and older represented only 4 percent (2,755 inmates) of the BOP's minimum- and low-security population, whereas inmates age 50 and older represent 24 percent (17,482 inmates) of the BOP's total minimum- and low-security population. If a modest 5 percent (874 of 17,482 inmates) of criteria-meeting inmates 50 and older were released from BOP custody, the BOP could reduce overcrowding in its minimum- and low-security institutions by 2 percent.).

³⁴ *Id.* at 47 (based on BOP population data FY2013, there were 4,384 inmates age 65 and older and 30,962 inmates age 50 and older; the population of prisoners 65 and older is a growing age group but still only constitutes 3 percent of the BOP's total inmate population.).

In addition to lowering the age of eligibility, the Commission should consider reducing the requirement that a person serve 10 years. If the time served requirement was reduced, more people that meet the age requirement and have served 75% of their sentence would be eligible for compassionate release. The OIG found that the 10 year minimum excludes almost half of the BOP's aging inmate population because many sentences are too short to meet compassionate release eligibility requirements.³⁵ Furthermore, compassionate release was designed to address prison overcrowding by providing early release for aging inmates who posed no threat to public safety.³⁶ Yet the currently policy prohibits early release of inmates who did not serve at least a ten year prison sentence, this group of inmates would be good candidates for compassionate release because they are less of a public safety risk.³⁷

For all these reasons, the Commission should lower the age of eligibility to at least 55 and consider reducing the requirement that a person serve 10 years, which could substantially increase the number of prisoners eligible for compassionate release.³⁸

B. Should the Commission develop further criteria and examples of what circumstances constitute “extraordinary and compelling reasons”? If so, what specific criteria and examples should the Commission provide? Should the Commission further define and expand the medical and non-medical criteria provided in the Bureau’s program statement? In addition, the Commission seeks comment on how, if at all, the policy statement at §1B1.13 should be revised to address the recommendations in the OIG report.

The USSC should revise or expand the medical compassionate release circumstances so that they comply with scientifically proven medical theories. The proposed amendment states that any inmate is eligible for medical compassionate release if “(i) The defendant (I) has been diagnosed with a terminal, incurable disease. and (II) has a life expectancy of 18 months or less. (ii) The defendant has an incurable, progressive illness. [or] (iii) The defendant has suffered a debilitating injury from which he or she will not recover.”³⁹

The provision requiring the prisoner to have a life expectancy of 18 months does not adequately account for the scientific limitations inherent to all prognoses. Date-specific prognoses are often uncertain and only provide a probability for death over a certain time.⁴⁰ In addition, studies have also shown that physicians’ prognoses often overestimate patients’ life

³⁵ *United States Sentencing Commission: Public Hearing on Compassionate Release and Conditions of Supervision* (Feb. 17, 2016) [hereinafter *Compassionate Release Hearing*] (statement of Michael Horowitz, Inspector General, United States Department of Justice, at 5), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf>.

³⁶ *Id.* (“...Department [of Justice] leadership has stated that the compassionate release policy was designed to address prison overcrowding by providing for early release of aging inmates who did not commit violent crimes and who posed no threat to public safety.”)

³⁷ *Id.*

³⁸ See Michael Horowitz IG, testimony, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (February 17, 2016) p 5 (increasing the eligible population from 4,384 inmates age 65 and older to 30,962 inmates age 50 and older, based on FY 2013 population data).

³⁹ *Proposed Amendments*, *supra* note 22, at 26-27.

⁴⁰ Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, *J Am Geriatr. Soc.*, June 2012, at 7, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/>.

expectancy.⁴¹ Also, many conditions that are ultimately terminal are not predictable.⁴² For these types of conditions, a date-specific death prognosis is more difficult to establish than requiring the physician to outline the patient’s functional and cognitive trajectory for the next 18 months.⁴³ The Commission should elicit the advice and recommendations of the medical community to provide a more precise definition of “incurable, progressive illness” and “debilitating injury” so that the amendment’s language accurately represents scientifically confirmed medical theories.

Furthermore, the proposed amendment states that a person is eligible for elderly, medical compassionate release if he or she experiences chronic, serious conditions or deteriorating mental and physical health with little chance for recovery.⁴⁴ The Commission should consult with medical professionals to provide the BOP with more guidance on which chronic and serious conditions should result in older inmates being released from prison as well as the signs and symptoms of deteriorating mental and physical health.

Finally, this provision may not capture all the medical circumstances intended to trigger a reduction in sentence for aging prisoners.⁴⁵ People over the age of 50 experience geriatric health related conditions that include both cognitive impairment and functional impairments that are difficult to detect.⁴⁶ Medical professionals would be best suited to determine if people who suffer from these conditions should be eligible for compassionate release.

C. *Should the Commission adopt the recommendations in the OIG report as part of its revision of the policy statement at §1B1.13?*

The Commission should adopt all the recommendations in the OIG report titled, “Impact of an Aging Inmate Population on the Federal Bureau of Prison,”⁴⁷ particularly, recommendation #8, which advises lowering the age requirement.⁴⁸ It is important to note that the BOP agreed with all the OIG report’s recommendations, but have only been partially responsive to the issue of lower the age of eligibility. Given that BOP has accepted the OIG recommendations, implementation of the recommendations should not be difficult.⁴⁹

D. *Should the Commission expand upon these recommendations to revise the Bureau’s requirements that limit the availability of compassionate release for aging inmates?*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ “(I) the defendant is at least 65 years old; (II) the defendant has served at least 50 percent of his or her sentence; (III) the defendant suffers from a chronic or serious medical condition related to the aging process; (IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and (V) conventional treatment promises no substantial improvement to the defendant’s mental health or physical condition.” *Proposed Amendments, supra* note 22, at 27.

⁴⁵ Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, *J Am Geriatr. Soc.*, June 2012, at 8, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/>.

⁴⁶ *Id.* at 4.

⁴⁷ IMPACT OF AN AGING INMATE, *supra* note 19.

⁴⁸ As explained in this Comment’s responses to question 1 on pages 1-3.

⁴⁹ IMPACT OF AN AGING INMATE, *supra* note 19, at 60-67

The Commission should recommend Congress amend 18 U.S.C. § 3582(c)(1)(A) in order for inmates to file motions for a reduction of sentence based on “extraordinary and compelling” reasons. Currently BOP acts as a gatekeeper to inmates in federal prison who want to seek a reduction of their sentence based on 18 U.S.C. § 3582(c)(1)(A). Between 2013 and 2014, the OIG notes 2,612 people requested BOP to file motions for reductions,⁵⁰ however, BOP only approved 111 motions on behalf of inmates and only 85 were granted by federal courts.⁵¹ BOP files so few motions to reduce sentences, if inmates were able to file their own motions it would potentially increase the number of people who could benefit.

E. Alternatively, should the Commission defer action on this issue during this amendment cycle to consider any possible changes that the Bureau of Prisons might promulgate to its compassionate release program statement in response to the OIG report?

The Commission should not defer action on this issue to wait for possible changes by BOP to its compassionate release program statement. While BOP has agreed with all the OIG’s recommendations, it has not made the changes suggested in Recommendation #8, regarding lowering the age requirement and eliminating the requirement that a person serve 10 years before becoming eligible.⁵² Given that BOP has not implemented this OIG recommendation, the Commission should not defer action until BOP revises its compassionate release program statement.

F. The Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”

The story of Phyllis Hardy serves as a concrete example of a person who was a viable candidate for compassionate release and eventually was released in 2015 after several delays in the consideration of her motion. Phyllis Hardy was sentenced to 366 months (or 30.5 years) in federal prison for conspiracy to import and distribute cocaine and money laundering; she entered prison in November 1991.⁵³ While in Danbury prison, Hardy was helpful to her peers and model inmate.⁵⁴ She was known as “Grandma” and helped many women who were incarcerated at Danbury adjust to life in prison.⁵⁵ After 22 years in prison and at the age of 70, Ms. Hardy was

⁵⁰ *Id.* at 45.

⁵¹ *Id.*

⁵² U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5050.49, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (12 August 2013) (limiting elderly compassionate release to persons that are 65 or older and have served the greater of 10 years or 75% of the term of imprisonment to which the inmate was sentenced).

⁵³ Victoria Law, *Phyllis "Grandma" Hardy Is Home! But Over 98,000 People Remain Prisoners of the Drug War*, TRUTHOUT (Apr. 7, 2015), <http://www.truth-out.org/news/item/29973-phyllis-grandma-hardy-is-home-but-over-98-000-people-remain-prisoners-of-the-drug-war>.

⁵⁴ *Id.*

⁵⁵ *Id.*

confined to a wheel chair, needed a knee replacement, experienced heart problems, and struggled with respiratory issues.⁵⁶ She filed a request with BOP for compassionate release, but when her health began to fail she was transferred to the Carswell Federal Medical Center. When she inquired about the status of her request upon arrival at Carswell, she was told the paper work had been lost. Fortunately after several delays before and after her motion for release was granted by the court, Ms. Hardy was granted compassionate release under the current guidelines.⁵⁷ This is just one example, but there are many people in federal prisons across the country who are over the age of 50 and experiencing similar health problems, who should also be eligible for compassionate release.

G. Under this general authority, should the Commission further develop the policy statement at §1B1.13 to provide additional guidance or limitations regarding the circumstance in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons? If so, what should the specific guidance or limitations be? For example, should the Commission provide that the Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons” in §1B1.13?

The Commission should revise §1B1.13 to require the BOP Director to file a motion pursuant to 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons” in §1B1.13. Given how infrequently the BOP Director files these motions when an incarcerated person meets a circumstance listed as an “extraordinary and compelling reasons” in §1B1.13,⁵⁸ the Commission should recommend that Congress change the language of 18 U.S.C.A. § 3582(c)(1)(A) so that it allows inmates to file their own motions.⁵⁹

⁵⁶ Letter from Natasha Chart, Campaign Director, RHRealityCheck.org, to Bride of Petitions, Alerts, Letters Facebook Page (Feb. 21, 2014), https://www.facebook.com/permalink.php?id=393438370719766&story_fbid=10202423602662924.

⁵⁷ Victoria Law, *supra* note 48.

⁵⁸ See Michael Horowitz IG, testimony, Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (February 17, 2016) p 3 (stating that as of 2013 only an average of 24 inmates were released each year through the BOP’s then-existing compassionate release program).

⁵⁹ Congress should amend the language in 18 U.S.C 3582(c)(1)(A) so that sentence reductions are available “upon motion of the defendant or the Director of the Bureau of Prisons, or on [the court’s] own motion,” (emphasis added) rather than the current language which gives BOP Director the primary responsibility to file a motion to reduce a sentence for “extraordinary and compelling” reasons.

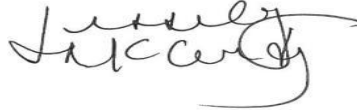
Conclusion

We appreciate the opportunity to comment on the Commission's proposed amendments for 2016. If there are any comments or questions, please feel free to contact to Senior Legislative Counsel Jesselyn McCurdy at (202) 675-2307 or jmccurdy@aclu.org or Chris Rickerd, Policy Counsel at (202)675-2339 or crickerd@aclu.org .

Respectfully submitted,



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WRITTEN TESTIMONY OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines

March 16, 2016

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For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law.

We appreciate this opportunity to provide testimony regarding the Sentencing Commission's proposed amendments to Guideline §2L1.2, "Unlawfully Entering or Remaining in the United States." The Commission's April 2015 report, *Illegal Reentry Offenses*, and other data make clear that the number of people sentenced under this Guideline has increased significantly since 2007, constitutes a major proportion of the overall federal district-court caseload (26% in fiscal year 2013), and is especially pronounced in southwest-border districts.¹

The ACLU strongly disagrees with policy choices that have led to mass prosecutions and incarceration of border-crossers who do not meet any of the Department of Justice's stated prosecutorial interests, namely national security, violent crime, financial fraud, and protection of the most vulnerable members of society.² The Commission's report demonstrates that 49.5% of persons sentenced for illegal reentry had at least one child living in the United States, and that those sentenced were an average (and median) age of 17 at the time of initial entry.³ Given a U.S. deportation regime that tears families apart and provides little in the way of individualized discretion even for U.S. citizen children's needs, criminal prosecutions and punishments for people seeking to reunite with their families should be sharply reduced. Disappointingly, as discussed below, some aspects of the Commission's proposed amendments go in the wrong direction.

The current number of individuals prosecuted and sentenced for illegal reentry comes with staggering costs to the criminal justice system, including a diversion of limited prosecutorial and court resources away from serious offenses, as well as prison overcrowding in substandard private facilities.⁴ Moreover, these costs are incurred without any assurance that prosecutions for border crossing actually have a deterrent effect. The Department of Homeland Security's Office of Inspector General issued a critical report last year concluding that "Border Patrol is not fully and accurately measuring [the Streamline border-prosecution initiative's] effect on deterring

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

² 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" (2015), https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf

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

⁴ ACLU and ACLU of Texas, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*. (June 2014), <https://www.aclu.org/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system>; Seth Freed Wessler, "'This Man Will Almost Certainly Die.'" *The Nation* (Jan. 28, 2016), <http://www.thenation.com/article/privatized-immigrant-prison-deaths/>

aliens from entering and reentering the country illegally . . . [C]urrent metrics limit its ability to fully analyze illegal re-entry trends over time.”⁵ A University of Arizona study tracking 1,200 people deported after prosecution for border-crossing found that when it comes to re-entry there is no statistically significant difference between those who went through Streamline and those who did not.⁶ Massive expenditures are therefore resting on speculation, not facts, about deterrence and recidivism.

Indeed, it is virtually impossible to measure the multiple factors that inform a migrant’s decision to cross, and the desire to reunite with family or find a job often outweighs any fear of prosecution.⁷ The Migration Policy Institute has noted that for border crossers with strong family and/or economic ties to the United States “even . . . high-consequence enforcement strategies [i.e., criminal prosecutions] may not deter them from making future attempts.”⁸ The United Nations special rapporteur on the human rights of migrants has therefore emphasized that “irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security.”⁹ By acting otherwise, the United States has at times run afoul of its international commitments; DHS’s Inspector General concluded that “Border Patrol’s practice of referring [aliens who express fear of persecution or return to their home countries] to prosecution . . . may violate U.S. treaty obligations.”¹⁰

We therefore urge the Commission and other implicated government agencies to reexamine comprehensively – and reduce – the deleterious impacts of border-crossing prosecutions and sentences. With respect to the Commission’s specific amendment proposals, we support their attention to excessive punishment imposed based on currently inflexible escalator enhancements. We also endorse the philosophy of gauging how serious any pertinent past convictions are by looking at judicial officers’ punishment decisions, rather than through the mechanical application of a categorical approach.

We disagree, however, with the proposed amendments’ reliance on imposed rather than served sentences, a distinction that would lead, for example, to a suspended sentence being treated the same way as a served sentence.

We also emphatically urge the Commission not to increase the base-offense level from 8 to 10 for persons with no prior illegal-reentry convictions (and to adjust other gradations down

⁵ DHS OIG, *Streamline: Measuring Its Effect on Illegal Border Crossing*. (May 15, 2015), cover page & 2, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf

⁶ Ted Robbins, “Is Operation Streamline Worth Its Budget Being Tripled?” NATIONAL PUBLIC RADIO (Sept. 5, 2013), <http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled>; see also Jeremy Slack et al., “In Harm’s Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border.” 3 *Journal on Migration and Human Security* 2 (2015), <http://jmhs.cmsny.org/index.php/jmhs/article/view/46>

⁷ Human Rights Watch, *Turning Migrants Into Criminals: The Harmful Impact of U.S. Border Prosecutions*. (May 2013), 24 n.40, http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf

⁸ Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*. (Apr. 2014), 43, <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>

⁹ *Turning Migrants*, supra, at 4.

¹⁰ DHS OIG, supra, at 2.

accordingly). The Commission has stressed throughout that these proposed amendments respond to specific concerns about the Guideline's current operation, *not* any "general concern about penalty levels."¹¹ Increasing offense levels is entirely inconsistent with this approach.

In addition, we fundamentally disagree with the proposed amendments' inclusion of enhancements based on all post-first-entry conduct. Convictions that precede the most-recent entry are already accounted for in Criminal History calculations and enhancements should focus exclusively on post-last-entry conduct. This would capture the Commission's evident concern with punishing more severely people who return and then commit a crime, without sweeping in a much-larger universe of past offenses than are currently punished (including expunged matters, as well as three misdemeanors that may have arisen out of a single event, been tried in the absence of counsel, resulted in no prison time at all, and/or punished activity such as personal drug possession which is no longer a criminal act in the relevant jurisdiction).

Finally, we suggest that the Commission change its proposed amendment allowing for an upward departure based on multiple prior deportations so sentencing courts do not consider prior deportations that occurred without due process.

I. In gauging the seriousness of a conviction, the sentence served – not imposed – should be used.

The ACLU commends the Commission for looking to sentencing judges' determinations regarding a past conviction's seriousness. We recommend that the proposed amendments be modified, however, because they use undifferentiated imposed-sentence lengths rather than time actually served. This would have a particularly severe and unintended impact on individuals with state convictions in jurisdictions where suspended sentences or automatic parole are systemically taken into account by the sentencing court. A far better proxy for seriousness is time served, either based on an initial sentence or in circumstances where a suspended sentence is revoked.

II. There is no justification for raising the base-offense level for all convicted persons.

The ACLU is deeply troubled that at a time of national attention to criminal-justice reform and deincarceration the Commission's proposed amendments would increase sentences for most offenders. While the amendments are presented as neutral with respect to *average* sentences, the least-serious and most-numerous offenders would see a drastic increase in incarceration length.

The Commission'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 to 6 months: an unconscionable 500% increase. Persons with a 4-level enhancement for any felony conviction with a sentence under a year, which could have resulted in no jail time and/or had as an element or motivation the individual's immigration

¹¹ See, e.g., USSC, "Data Briefing: Proposed Immigration Amendment." (2016), <http://www.ussc.gov/videos/immigration-data-briefing>

status, would see their average guideline minimum *double* from 12 to 24 months. (We note that the proposed amendment would be improved by matching the enhancement thresholds to its definition of a felony as “punishable by imprisonment for a term *exceeding* one year,” rather than making a 12-month sentence fall into a more severe category than a 12-month-less-a-day sentence.)

The Commission’s study records that “[e]ach additional increase of 2 offense levels will increase the sentencing range by approximately 25 percent.”¹² No rationale is given for increasing the base offense level to 10 rather than 8, nor for the levels assigned to persons with prior reentry convictions, which start at levels 12 and 14. The Commission’s data from FY 2013 show that 72.8% of individuals in that sample had no prior illegal-reentry convictions. This harsh change in no way responds to the specific concerns animating the Commission’s proposal.¹³

The proposed amendment would also have a starkly disparate impact on districts, like New Mexico, that have a supermajority of cases without enhancements (as the Commission study’s Figure 7 shows.¹⁴) The proposed amendment offers no justification for a massive increase in individual and aggregate sentences for migrants prosecuted in New Mexico.

For these reasons, the Commission should reject the proposed amendments’ base-offense-level increases.

III. Enhancements should be applied only for convictions subsequent to the most recent entry.

The Commission’s purpose of refocusing the extra penalty of an offense-level increase on post-reentry conduct should be reflected in the amendment’s actual operation. The current proposal fails fully to fulfill the amendment’s stated purpose, which is “to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, *post-reentry* convictions and a corresponding reduction in the enhancements for past, *pre-deportation* convictions.”¹⁵ If the amendment is adopted, § 2L1.2 would result in enhancements for more offenses than can be used for enhancements now. While there are age limitations on offenses generally through the Criminal History recency restrictions, the number of older offenses that would lead to enhancements increases dramatically – and retroactively – under this proposal.

The proposal would provide for two opportunities to increase the offense level (ranging from 2 to 8 levels), based on pre-deportation order and post-deportation order convictions, rather than the one potential increase under the current Guideline. Depending on particular convictions, a defendant might receive a higher or a lower offense level. But in either case, by

¹² *Illegal Reentry Offenses*, supra, at 6.

¹³ The Commission 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 Commission’s purposes for considering these reentry-Guideline amendments.

¹⁴ *Id.* at 13.

¹⁵ USSC, “Proposed Amendments to the Sentencing Guidelines.” (Jan. 15, 2016), 61 (emphasis added), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160113_RFP_Combined.pdf

making the pre- and post-reentry enhancements equal in weight the proposal does not sufficiently shift the focus to post-reentry conduct as the prefatory language suggests. To effectuate that purpose and to make notice of these changes more fair, the Guideline amendment should include enhancements only for post-reentry conduct.

IV. Sentencing courts should not consider prior deportations that occurred without due process.

The Commission demonstrates sensitivity to immigration law by excluding voluntary returns from a possible upward departure based on immigration history, but does not take into account prior deportations that violated due process in an individual case, or as a category. For example, in *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit concluded that an immigrant’s stipulated-removal proceedings violated due process. In the Commission’s possible “Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions,” however, there is no provision for such a deportation to be discounted for purposes of an upward departure. Sentencing courts must look behind the mere fact of a prior deportation to ensure that it comported with due process.


We thank the Commission for this opportunity to testify. Please contact Policy Counsel Chris Rickerd (crickerd@aclu.org) for more information.



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