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

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]

Background:

Prosecutions Tear Families Apart:

The Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) 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.

Prosecutions have untold costs and do not deter migration:

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

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[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.ussc.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/

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."[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.

Additional information deterrence which can be added:

- 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]

Recommendations

Overall

[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.

We therefore urge the Commission and other implicated government agencies to reexamine comprehensively – and reduce – the deleterious impacts of border-crossing prosecutions and sentences.

Specific Recommendations

- Support Commission's 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.

- 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 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

- 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.

CHIRLA commends the Commission for looking to sentencing judges' determinations regarding a past conviction's seriousness. We recommend that the proposed amendments be

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

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 systematically taken into account by the sentencing court. A far better proxy for seriousness is time served.

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

CHIRLA is deeply troubled that at a time of national attention to criminal-justice reform and re-incarceration the Commission's proposed amendments would increase sentences for most offenders.

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 status, would see their average guideline minimum *double* from 12 to 24 months.

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.[12]

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-re-entry 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."[13] 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

[12] 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.

[13] 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

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 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. Sentencing courts must look beyond the mere fact of a prior deportation to ensure that it comported with due process.

Case Example (optional): 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.