



Human Rights Watch comments to the US Sentencing Commission in response to
the Commission's January 16, 2016 notice of proposed amendments

March 21, 2016

Human Rights Watch submits the following comments to the United States Sentencing Commission in response to the Commission's January 16, 2016 notice of proposed amendments.¹ Our comments are limited to two proposed amendments:

- Proposed amendment #2 on changes 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); and
- Proposed amendment #6 on changes to the guidelines for immigration offenses (including revisions to § 2L1.2: Unlawfully Entering or Remaining in the United States).

Human Rights Watch is an independent, international organization that works in more than 90 countries around the world as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all. We scrupulously investigate abuses, expose the facts widely, and press those with power to respect rights and secure justice. Within the United States, we have long worked on domestic human rights concerns, including in the areas of immigration, criminal justice, and their intersect.

I. Proposed amendment #2: compassionate release

Imprisonment and changed circumstances

Imprisonment is the most drastic punishment, short of the death penalty, that a government can legitimately impose on an individual. Human Rights Watch believes that it should be imposed only as a last resort, and only when no lesser sanction is appropriate given the nature of the crime. Even then, a term of imprisonment should never be disproportionately severe relative to the crime, nor longer than necessary to further the legitimate purposes of punishment.

A prison sentence that may have constituted a just and proportionate punishment when it was imposed may become disproportionately severe in light of changed circumstances. To be consistent with human rights norms, a decision regarding whether a prisoner should remain confined should include careful consideration of whether continued imprisonment would be inhumane, cruel, degrading, or otherwise inconsistent with human dignity.

US federal law acknowledges that changing circumstances during imprisonment may merit a reduction in sentence, allowing for sentence modifications for “extraordinary and compelling” reasons. This acknowledgment takes the form of the federal compassionate release program.²

The duty to define the “extraordinary and compelling” criteria for purposes of sentence modification falls to the US Sentencing Commission. The only restriction placed on the Commission by Congress on that

¹ 81 Federal Register 2295

² 18 USC 3582(c)(1)(A)

duty is that rehabilitation alone is insufficient to qualify as an extraordinary and compelling reason for a sentence modification.³

In 2012, Human Rights Watch and Families Against Mandatory Minimums jointly published *The Answer is No*, a report on the federal compassionate release program.⁴ We found an essentially dysfunctional program run by a Bureau of Prisons that was consistently reluctant to grant motions for compassionate release, with only a handful of people qualifying for sentence modifications each year. As we stated in the report, “Compassionate release is conspicuous in its absence.”

Statistics from the Department of Justice bear out that absence: From August 2013 to December 2015, the Bureau of Prison received 3,142 requests for compassionate release, and approved only 261.⁵ Of those approvals, 178 (68%) were for cases where the applicant had a terminal medical condition. The Bureau approved zero requests for sentence modifications based on non-medical circumstances, like the death or incapacitation of the caregiver of the applicant's child.

In cases involving prisoners with terminal illnesses, the Bureau’s review of these petitions can also be slow, with devastating consequences. The Department of Justice’s Inspector General found in 2013 that 13% of prisoners whose compassionate release requests were approved by both a warden and a regional director died before the director of the Bureau could make a final decision whether to file a motion for release.⁶ In 2015, 11 prisoners died while their request for compassionate release was pending.⁷

The Department of Justice position on compassionate release

The Department of Justice appears to find little to be concerned about in how the Bureau of Prisons administers its compassionate release program. In written comments to the Commission, the Department recommends that the Commission simply sign over its power to define “extraordinary and compelling” by adopting by reference the Bureau of Prisons’ own compassionate release policy.⁸ The Department further suggests that since the Bureau of Prisons is the agency that makes the motion for a sentence modification, the Commission should hesitate to set criteria to authorize reductions in sentences under circumstances in which the Bureau of Prisons would not. To make this point, the

³ 28 USC 994(t)

⁴ Human Rights Watch and Families Against Mandatory Minimums, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*, November 2012, <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons>.

⁵ Letter from Michelle Morales, Acting Director, Office of Policy and Legislation, Department of Justice to US Sentencing Commission (DOJ comments), February 12, 2016, <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/DOJ.pdf>, (accessed March 9, 2016), Appendix, p. 32. For more information on the procedures for applying for compassionate release that that result in such low approval rates, see *The Answer is No*, pp. 28-34.

⁶ US Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program*, April 2013, <https://oig.justice.gov/reports/2013/e1306.pdf>, (accessed March 16, 2015), p. iii. The Inspector General found that the Bureau of Prisons had no timeliness standard on reviewing compassionate release requests and does not track the length of time to process all compassionate release requests.

⁷ Testimony of Kathleen M. Kenney, Assistant Director/General Counsel, Bureau of Prisons, US Sentencing Commission public hearing on compassionate release and conditions of supervision, February 17, 2016, transcript at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/Transcript.pdf>, (accessed March 16, 2016), p. 37.

⁸ DOJ comments, p. 8.

Department refers to “horrible consequences” if the Commission were to set its own definition of “extraordinary and compelling” circumstances:

For example, the Bureau could be required to seek the release of such inmates as Robert Hanssen, Aldrich Ames, and Bernard Madoff if they developed the medical or familial conditions described in the proposed policy statement commentary as “extraordinary and compelling.”⁹

In this warning, the Department fails to acknowledge the statutory role of the judiciary in making public safety determinations prior to the release of a person seeking compassionate release. Additionally, it draws attention to the Bureau’s hesitancy to grant family-based compassionate release petitions. At one point in its testimony the Justice Department states that, without qualification, the Commission’s proposal that the death or incapacitation of a family member caregiver of the defendant’s child be considered extraordinary and compelling is “nonsensical.”¹⁰ It points instead to a better model: the Bureau of Prisons’ own program statement on compassionate release which “contemplates a searching inquiry” to ensure that any release is “in the best interests of the child.”¹¹ Yet under that policy the Bureau did not approve a single nonmedical request for six years under review by the Inspector General (2006-2011), nor from August 2013 to December 2015.¹² Whether this is primarily due to the Bureau of Prison’s policy, to a flawed implementation of that policy or both, it underscores the Bureau’s need for greater direction.

The Department closes its comments by noting the severity of crimes committed by federal prisoners, noting the high sentence base offense level (BOL) of federal prisoners age 50 or over:

As the Commission is well aware, cases with such high BOLs often represent very serious drug trafficking offenses. These considerations, in many instances, weigh heavily against a reduction in sentence due to the seriousness of the inmate's offense and public safety concerns.¹³

The Justice Department comments are revelatory in that they consistently point to the original crime of conviction as the reason to deny compassionate release requests. In *The Answer is No* we reviewed dozens of memoranda to prisoners from Bureau of Prisons' wardens, regional directors, and the Bureau's central office denying, on public safety grounds, prisoner requests for compassionate release or appeals of the wardens’ denials. In those memoranda the BOP usually does not explain which specific aspects of the prisoner’s history or circumstances lead officials to conclude that they *remain* dangerous.

One example of this flawed, static analysis is the case of Caspar McDonald.¹⁴ As we documented in the report, McDonald, 73, has served 10 years of a 20-year federal sentence for sex offenses. He has no prior

⁹ DOJ comments, p. 12.

¹⁰ DOJ comments, p. 13.

¹¹ DOJ comments, p. 13.

¹² Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program*, p. ii, and DOJ comments, p. 32.

¹³ DOJ comments, p. 19.

¹⁴ *The Answer is No*, p. 60. “Caspar McDonald” is a pseudonym.

criminal history. Because of severe spinal stenosis, McDonald is permanently paralyzed below his upper chest and is unable to use his arms or legs. He also has hypertension, anemia, diabetes, and hypothyroidism. He cannot bathe, dress, go to the toilet, or move himself without assistance, and because of pain, he cannot sit up or be out of bed for more than brief periods of time. He will remain bedridden and require skilled nursing care for the rest of his life. To call a nurse, he blows into a special tube.

The BOP acknowledged that his medical condition was “serious” and made him “an appropriate candidate for reduction in sentence consideration.” Nevertheless, in October 2011, Warden Sara Revell concurred with the recommendation of the Reduction in Sentence Committee that his request should be denied “due to the nature of [his] offense and the length of sentence imposed.” When McDonald appealed the denial, Warden Revell denied the appeal, stating, “[a]n objective of the reduction in sentence program is each request will be carefully reviewed to protect the public from undue risk. Due to the seriousness of your instant offense, you are still considered a threat to society.”¹⁵

Human Rights Watch met with Warden Revell and asked her why she felt McDonald could be considered a threat to public safety were he released, given his physical condition. Warden Revell acknowledged McDonald was physically incapable of re-offending. Yet she said that it was her responsibility to “put myself in the victim’s role” and to think “how the victim or her family would feel” were McDonald released home before the end of his sentence. She also said that as a warden, she has discretion to consider whether the prisoner’s release would lessen the seriousness of his offense.

Recommendations

We suggest that the Commission reject the Justice Department’s argument that its current practices in applying compassionate release are adequate, and that the Commission instead exercise its full statutory power to define the scope of “extraordinary and compelling” circumstances that could support a motion for a sentence reduction. In our research we have documented several cases beyond the McDonald case where we believe that an inmate clearly falls within even the narrowest of readings of “extraordinary and compelling” circumstances, but the Bureau declined to file the motion without advancing any convincing rationale. By opposing any expansion by the Commission of the definition of “extraordinary and compelling,” the Justice Department is resisting guidance that it sorely needs.

Furthermore, Human Rights Watch does not believe that the Bureau of Prisons should be making public safety determinations in its decisions whether to make a motion that extraordinary and compelling circumstances are met in a particular case; rather, such a determination should be left to the judiciary.

The seriousness of a prisoner’s crime of conviction alone is not adequate reason to refuse to file a motion for compassionate relief. The International Criminal Court provides a compelling contrast to the Bureau’s current practice in this regard. The Court has jurisdiction over gravely serious crimes under

¹⁵ *The Answer is No*, p. 61.

international law, including genocide. Yet that Court establishes by right an automatic sentence review—even for genocide—after 25 years in the case of life imprisonment.¹⁶ The Court then decides whether a sentence modification is appropriate, taking into account public safety considerations.¹⁷ This is the responsibility of the judiciary, not the jailer. The same should apply with federal compassionate release.

Therefore we recommend that:

1. *The Commission should explicitly state in its policy statement that the Bureau of Prisons should not withhold a motion if the defendant meets any of the circumstances listed as “extraordinary and compelling” as defined by the Commission.*

We further suggest that the Commission's proposed amendment could and should go further, as follows:

2. *The proposed amendment should embrace more non-medical “extraordinary and compelling” circumstances.*

We note that there is very little legislative restriction on what “extraordinary and compelling” circumstances entail. The only restriction is that rehabilitation alone is not sufficient.¹⁸ Congress gave the Commission the authority to define these circumstances. We strongly urge the Commission use that authority to elaborate a thoughtful and comprehensive list of relevant factors. We note the American Law Institute’s Model Penal Code draft, which suggests sentence modifications for “the circumstances of the prisoner’s advanced age, physical or mental infirmity, exigent family circumstances, *or other compelling reasons.*”¹⁹ The American Bar Association has proposed “extraordinary and compelling” circumstances not only limited to age and disability but also including “changes in the law, exigent circumstances, heroic acts, or extraordinary suffering.”²⁰ We urge the Commission to add more non-medical “extraordinary and compelling” circumstances to its proposed amendment.

3. *The Commission should reconsider the proposed amendment's age thresholds.*

The proposed amendment lists one set of “extraordinary and compelling” criteria as including a person who is 65 or older suffering from a chronic medical condition, is deteriorating and cannot benefit from

¹⁶ UN General Assembly, Rome Statute of the International Criminal Court, adopted July 17, 1998, article 110(4).

¹⁷ Rule 223, Rules of Procedure and Evidence, International Criminal Court, <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> (accessed March 21, 2016).

¹⁸ 28 USC 994(t). The proposed amendment language that rehabilitation “by itself” is not sufficient appears to clarify that rehabilitation still may be a one factor considered among others to determine whether a motion for sentence modification is appropriate.

¹⁹ Testimony of Kate Stith, United States Sentencing Commission, February 17, 2016, <http://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/stith.pdf> (accessed March 21, 2016), p. 5 [italics added].

²⁰ Denise A. Cardman, American Bar Association, letter to the Honorable Ricardo H. Hinojosa, chair, United States Sentencing Commission, March 12, 2007, http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007mar12_sentencededuc_lauthcheckdam.pdf, (accessed March 10, 2017).

conventional treatment. It lists another set of criteria as including a person who is 65 and had served at least 10 years or 75% of their sentence, whichever is greater.

As we documented in our 2012 report, *Old Behind Bars*, while age 50 or 55 may not be considered “older” outside of prison, people in prison have “physiological and mental health conditions that are associated with people at least a decade older in the community.”²¹ These factors are exacerbated by imprisonment: the violence, anxiety, and stress of prison life, isolation from family and friends, substandard medical care, and lifestyles prior to and during incarceration. We suggest that the age limits in the current proposed amendment may be too high.

II. Proposed amendment #6: immigration offenses

The crime of trying to reunite with family

The Human Rights Watch 2013 report on the criminalization of unauthorized entry, *Turning Migrants into Criminals*, documented the exponential growth in federal prosecutions of immigration offenses over the previous ten years, as well as the stories of people prosecuted for those offenses, many of whom were trying to reunite with US-based family.²²

The stories we heard often shared two traits: a desire to rejoin family as a reason for trying to enter the United States, and multiple attempts to do so. One person we interviewed had tried to return to the United States at least four times, attempting to reunite with his wife and two US citizen children.²³ Another was prosecuted for illegal reentry trying to return to his 16-year-old US citizen daughter and lawful permanent resident wife—he had no other offenses on his record other than traffic violations and an illegal entry conviction.²⁴ Another had tried to return to the United States several times, and had not been able to see her two teenage, US citizen daughters for over two years—she served 13 days for illegal entry and faces felony reentry prosecution if she tries to return to the United States. Yet still, she told us, “I have not lost the desire to try again.”²⁵

The Commission is well aware of these two common traits in illegal reentry convictions. The Commission's 2015 report on illegal reentry offenses noted the high percentage of offenders with US family ties in its dataset, with half (49.5%) of offenders having at least one child living in the United States and over two-thirds (67.1%) of offenders having relatives other than children living in the United States.²⁶ The Commission has also noted that the average illegal reentry offender was deported 3.2 times before their instant illegal reentry prosecution, and that over one-third (38.1%) were previously deported

²¹ Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, January 2012, p. 17.

²² Human Rights Watch, *Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions*, May 2013.

²³ *Turning Migrants into Criminals*, p. 71.

²⁴ *Turning Migrants into Criminals*, p. 54.

²⁵ *Turning Migrants into Criminals*, p. 1.

²⁶ United States Sentencing Commission, *Illegal Reentry Offenses*, April 2015 (http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf, accessed March 7, 2016), p. 25.

after a prior illegal entry or illegal reentry conviction.²⁷

In its proposed amendment, the Commission appears to attempt to address these realities by creating a base offense level that changes depending on prior illegal reentry offense levels: a base of offense level of 10 for people without prior illegal reentry offenses, 12 for one prior illegal reentry offense, and 14 for two or more.²⁸ The Commission also proposes the possibility of an upward departure from the base offense level based on prior multiple deportations.²⁹

We strongly oppose these parts of the proposed amendment. First, the proposed amendment unnecessarily raises the base offense level for all illegal reentry crimes from 8 to 10. It is not at all clear what reason there is to do so, and the proposed amendments offer no explanation. Nothing in the Commission's 2015 report suggests that persons who are convicted of illegal reentry without prior convictions of any kind should be facing a higher base offense level.

Secondly, the Commission should reconsider whether it should play a role at all in trying to deter multiple re-entrants by increasing their base offense level or by allowing for an upward departure on the basis of prior deportations. A recent report by the Department of Homeland Security Inspector General raised serious questions about whether immigration prosecutions have a deterrent effect on unauthorized migration.³⁰ As we documented time and again in our research, people's desires to be with their family are fundamental to their existence. The International Covenant for Civil and Political Rights, a human rights treaty to which the United States is a party, notes that "The family unit is the natural and fundamental group unit of society and is entitled to protection by society and the State."³¹

Consider that in the criminal justice context strong family ties are generally considered to help prevent recidivism, but for illegal reentry crimes, strong family ties are a key *driver* to recidivate. As Roberto Lopez, serving a 4 1/2 year sentence for illegal reentry, told us: "My oldest daughter, she asks me, 'Did you commit a crime?' And I say, 'I came back for you.'"³² As Jorge Luis Lopez-Duran wrote from prison, where he was serving a 100-day sentence for illegal entry:

In school [my children] are being taught that criminals belong in prison for not obeying the laws. In some sense they see me as a criminal but in another sense, they see me as their father ... whose crime is wanting to be with his children.³³

Whatever the Commission makes of the policy rationale for criminalizing illegal entry under these

²⁷ USSC, *Illegal Reentry Offenses*, p. 2.

²⁸ 81 FR 2309.

²⁹ 81 FR 2310.

³⁰ DHS OIG, *Streamline: Measuring Its Effect on Illegal Border Crossing*. (May 15, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf, introduction and p. 2,

³¹ ICCPR, article 23(1).

³² *Turning Migrants into Criminals*, p. 58.

³³ *Turning Migrants into Criminals*, p. 59.

circumstances, it is hard to see how increased base offense levels or upward departures are warranted.

The Commission should also be aware that some individuals who have been previously deported may have been deported erroneously, in violation of their due process rights as well as their rights to seek asylum. For example, two Human Rights Watch investigations found numerous cases in which individuals reported they expressed fear of return to their home countries to Border Patrol agents, but were improperly denied the opportunity to seek protection under the Refugee Convention and were instead summarily deported.³⁴ Several federal public defenders told Human Rights Watch they had had clients who had been wrongly denied relief for removal and were restored to lawful permanent resident status, or who turned out to be US citizens—in one case after multiple deportations.³⁵

Few “cultural assimilation” sentencing departures

In 2010, the Commission amended its sentencing guidelines for illegal entry and reentry offenses by recognizing “cultural assimilation” as a valid reason for a downward departure from the sentencing guidelines. Some of the factors that go into determining whether a judge should sentence under the guideline include:

- the age at which the defendant began residing continuously in the United States;
- the nature and extent of the defendant’s familial and cultural ties inside the United States (and the nature and extent of such ties outside the United States);
- the seriousness of the defendant’s criminal history; and
- whether the defendant engaged in additional criminal activity after illegally reentering the United States.

The cultural assimilation provision, however, has not necessarily led to more downward departures from the guidelines. Nearly all of the defense attorneys we interviewed for our 2013 report stated they had rarely seen judges cite this provision in granting lower sentences.

Because there are so many defendants in this situation (e.g. with long residence in the United States and family residing in the US), reducing sentences every time someone has strong family ties arguably might be seen as defeating the purpose of the guideline, which aims to set the sentence for the majority of defendants. For example, in ruling on a case in which the defendant had grown up in El Paso since the age of 10 and had parents, siblings, and children in the US, the judge noted, “Unfortunately, the Court sees a number of illegal aliens who come into the United States around age 10, and the Court has trouble distinguishing [the defendant] from the many others before the Court.”³⁶ Angela Viramontes, an assistant federal defender in Riverside, California, said she had heard a judge tell her colleague, “If I apply it in this case, I’d have to apply it to all cases.”³⁷ Some defense attorneys also noted that “cultural assimilation

³⁴ *Turning Migrants into Criminals*, p.64-67. Human Rights Watch, “*You Don’t Have Rights Here*,”: *US Border Screening and Returns of Central Americans to Risk of Serious Harm*, October 2014.

³⁵ *Turning Migrants into Criminals*, p. 78-80.

³⁶ *Turning Migrants into Criminals*, p. 51.

³⁷ *The Answer is No*, p. 51.

can be a double-edged sword”, as judges sometimes see these very ties as evidence that the defendant is likely to come back and should be more harshly sentenced in order to provide a stronger deterrent.

Ultimately, the 2010 cultural assimilation departure may not be as an effective tool as originally conceived to address the very common reality of persons convicted of multiple reentry convictions due to a desire to reunite with family.

Recommendations

The US immigration system is in disarray. More than 11 million unauthorized immigrants live in the United States, with a median length of residence of 13 years. Four million live with US citizen children.³⁸ Congress has attempted to regularize this population for over a decade, without success. President Obama has attempted to offer temporary relief from deportation to unauthorized parents of US citizen and lawful permanent resident children—a set of actions that faces review by the US Supreme Court in April.

In our 2013 report, we urged the United States to end the criminalization of migration and impose civil, not criminal penalties, for illegal entry and reentry. Yet today immigration crimes account for almost 40 percent of all federal prosecutions.

The Commission cannot, by itself, hope to ease the utter dysfunction of current US immigration law. Consider that this proposed amendment, in part, is in effect attempting to progressively and more severely punish the act of trying to reunite with family. The Commission should decline to do so.

We therefore recommend that the Commission:

- 1. keep the base offense level for illegal reentry at its current level;*
- 2. not increase the base level for prior illegal reentry convictions, nor offer sentence enhancements for prior entry or reentry convictions;*
- 3. not allow for upward departures based on prior deportations; and*
- 4. review application of its cultural assimilation departure to determine: 1) whether it should be strengthened by clarifying that its use is appropriate even in cases of prior convictions for illegal entry or reentry; or 2) eliminated and instead moving to a lower base offense level for persons with prior convictions for reentry and with significant family equities in the United States.*

³⁸ Firdaus Dordi, an assistant federal defender in Los Angeles, estimated that in 12 years of practice, among his clients alone, about 6,000 US citizen children have likely been directly affected by illegal reentry prosecutions of their parents. *Turning Migrants into Criminals*, p. 54.