Three years ago, drawing on my experience as a Magistrate Judge in the Southern District of California, I published an op-ed expressing concern about mass prosecutions of migrants who crossed the border illegally (Vicki B. Gaubeca and James Stiven, "'Operation Streamline' at Odds with Our Values." The Hill (March 25, 2013), http://thehill.com/blogs/congress-blog/homeland-security/290191-operation-streamline-at-odds-with-our-values). While I am encouraged that the Sentencing Commission is examining the reentry Guideline for disproportionately harsh sentences, I submit this comment to express concern about aspects of the proposed amendment that would increase base-offense levels for persons who are not public-safety or national-security risks, as well as use outdated immigration history to increase penalties.

In the San Diego sector where I processed thousands of 1326 defendants, reentries were scrutinized and prioritized for prosecution based on the severity of factors presented in an individual case, thereby preserving resources throughout the federal criminal-justice system rather than squandering them on unproven "zero-tolerance" approaches. To quote my article, undifferentated prosecutions have produced "a mass assembly-line justice system in which individuals are apprehended, handed over to U.S. marshals, placed in county jails to await trial at a federal courthouse, sentenced in a matter of hours or days, sent to a federal prison—a majority of which are private for-profit facilities — and then handed over to ICE for removal proceedings which could instead have been used much more cheaply in the first place."

I urge the Commission to play a leadership role in curbing the burdensome and distorting effects that excessive reentry prosecutions and sentences have on our federal courts, Marshals' facilities, and prisons. "Streamline overloads federal courthouses – the district of Arizona even had to declare a judicial emergency – and diverts resources away from prosecuting more serious crimes that present true threats to public safety, such as arms or drug smuggling or human trafficking. Five border districts now handle 41 percent of all federal cases, while nationwide entry and reentry prosecutions are up 130 percent from 2007 despite migrant apprehensions being at a 40-year low. All this comes at an incredible cost to U.S. taxpayers, mostly on costs for incarceration, and contributes greatly to federal prison overcrowding."

I noted in 2013 what remains true today, that these prosecutions "intensif[y] racial inequality in our criminal justice system. Latino and Hispanic people now constitute almost 35 percent of the entire currently imprisoned federal prison population, despite constituting only 16 percent of the U.S. population. The percentage of resources allocated to prosecution and incarceration of persons for immigration crimes is highly disproportionate to any reasonable assessment of the needs of public safety."

Within this context, I take issue with the proposed amendment's emphasis on maintaining the same average Guideline-minimum sentence. Reducing the injustice of disproportionate sentences at the high end of the current Guideline's spectrum does not require or justify increased penalties at the low end. The inequities I highlighted three years ago persist and I respectfully recommend that the Commission ensure that its revision of the reentry Guideline ameliorates these systemic problems. It would be counterproductive to the proposal's commendable attention to what is wrong with the reentry Guideline to improve one important aspect at the expense of compounding harsh results for persons posing no threat to the very American communities in which many have deep, longstanding family ties.

Respectfully,

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U.S. District Court Southern District of California