

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300; 917-591-3452

July 12, 2013

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United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

ATTN: Public Affairs – Priorities Comment

RE: Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014

Dear Commissioners:

On behalf of Human Rights Watch, we submit these comments on the Commission's proposed priorities for the 2014 amendment cycle. Human Rights Watch is a nonprofit, nonpartisan organization dedicated to promoting and protecting human rights around the globe. We prepare reports based on interviews, data, and policy analysis and work with government officials and other stakeholders to promote recommendations based on our findings.

In this letter, we specifically address proposed priority numbers (5) "Continuation of its multi-year study of the statutory guideline definitions of 'crime of violence', 'aggravated felony', 'violent felony', and 'drug trafficking offense'," and (6) "Continuation of its comprehensive, multi-year study of recidivism."

Overall, we believe that the Commission should research the extent to which its guidelines lead to unnecessarily harsh sentences not mandated by Congress and to consider revisions in the guidelines based on that research. Our comments in this letter are specifically limited to immigration-related offenses. We also have concerns regarding sentencing policy and practices related to drug offenses, which we will address in the future.

Our recommendations regarding priorities 5 and 6 are based on research conducted for our May 2013 report *Turning Migrants into Criminals*, which examines federal prosecutions of illegal entry and reentry under 8 USC §§ 1325 and 1326.

Human Rights Watch supports the Commission's fifth priority on the definition of crimes of violence and aggravated felonies.

We agree that the Commission should continue "its multi-year study of the statutory and guideline definitions of 'crime of violence', 'aggravated felony', 'violent felony', and 'drug trafficking offense', possibly including recommendations to Congress on any statutory changes that may be

appropriate and development of guideline amendments that may be appropriate.”

Human Rights Watch has long advocated for an amendment to the definition of “aggravated felony” as defined in the Immigration and Nationality Act section 101(a)(43), so that the term would be limited to serious, violent offenses. Although when first enacted, the term was limited to murder, federal drug trafficking, and illicit trafficking in firearms or destructive devices, the definition of “aggravated felony” is now so broad that it encompasses numerous offenses like shoplifting, bar fights, and working with false identification. Non-citizens convicted of aggravated felonies—even if they are in the United States with permanent resident status—are deported without the right to request that an immigration judge consider individualized circumstances, such as mitigating circumstances, evidence of rehabilitation, and strong family ties. Not surprisingly, such individuals who have been separated from their families and their communities, but who have no legal way to return to the US, often return illegally and then face significant prison time under 8 USC § 1326.

Human Rights Watch commends the extent to which the Commission has over the years sought to distinguish certain offenses—like “crime of violence” and “drug trafficking offense”—from other “aggravated felonies” under Sentencing Guideline 2L1.2. Human Rights Watch, however, remains concerned that these terms are still complex and difficult to apply, and result in guideline sentences that inadequately distinguish between defendants who represent a threat to public safety and those who do not, particularly those with convictions for minor or old offenses. For its recent report, Human Rights Watch interviewed many defendants whose sentences for illegal reentry were significantly longer than the sentences received for their prior convictions.

We therefore recommend that the Commission continue to study these definitions and explore possible ways to limit the longest sentences for illegal reentry to those who have recent prior convictions for serious, violent felonies.

Human Rights Watch supports the Commission’s sixth priority on studying recidivism.

We support the Commission’s continuation of “a comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.”

The Commission’s focus on recidivism is crucial to the effort to effectively reduce the federal prison population. The United States has the largest prison population in the world. Even as state prison populations have recently started to decrease, the federal prison population continues to grow.¹

¹ Pew Charitable Trusts, “US Prison Count Continues to Drop: More than Half of States Cut Imprisonment Rates from 2006 to 2011,” March 8, 2013, <http://www.pewstates.org/news-room/press-releases/us-prison-count-continues-to-drop-85899457496> (accessed July 10, 2013); Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, January 22, 2013, <http://www.fas.org/sgp/crs/misc/R42937.pdf> (accessed July 10, 2013).

A complete study of recidivism should take into account the effect of the growth of illegal entry and reentry prosecutions under 8 USC §§ 1325 and 1326, which are at an all-time high. In 2012, immigration cases constituted 40 percent of the federal caseload.² Although average sentences for immigration offenders have decreased over the past 10 years, in 2010, immigration offenders made up approximately 30 percent of all inmates entering the federal prison system, a close second to drug offenders.³ At any given time, immigration offenders make up about 12 percent of the federal prison population,⁴ and non-citizens are generally not eligible for alternative sentencing.

Even as these prosecutions have increased, there has been a stark shift in the criminal histories of defendants convicted of illegal entry offenses over the past decade. In 2002, 42 percent of defendants sentenced under Guideline 2L1.2 had prior convictions that resulted in an increase of 16 offense levels, while 17 percent had no prior conviction resulting in any increase in offense levels. By 2011, only 27 percent of defendants had a conviction that resulted in a 16-level increase, while 27 percent received no increase in offense levels.⁵

The number of cases in which the defendant had less serious criminal histories (felonies less serious than “aggravated felonies,” or three or more misdemeanors resulting in a 4-level increase) has increased by 725 percent. Although Commission data does not include information on what kind of felonies these defendants were convicted of, the expansion of the mass-prosecution program Operation Streamline across the southwest border suggests many of these defendants may have had only immigration-related prior convictions.

When Congress increased the maximum penalty for illegal reentry to 20 years’ imprisonment, lawmakers stated their intent was to target “alien drug traffickers who are considering illegal entry into the United States” and cited in particular the example of a drug kingpin who was wanted for about 50 murders.⁶ The significant increase in prosecution and incarceration of defendants with minor or no criminal histories for illegal entry offenses raises serious concerns about whether these prosecutions are meeting their original intended criminal justice goals.

The Commission, with the information it collects, is in a unique position to inform Congress about the impact of these prosecutions on the federal court and prison systems, as well as to provide analysis of who is being convicted of illegal entry offenses, what factors increase the likelihood of recidivism, and the extent to which there is a relationship, if any, between the length of a sentence and recidivism rates.

² Executive Office of US Attorneys, “Fiscal Year 2012: Annual Statistical Report,”

http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (accessed July 10, 2013). This figure differs from the Commission’s statistics, as the Commission’s data collection is limited to felonies and Class A misdemeanors.

³ James, *The Federal Prison Population Buildup*, 2013.

⁴ US Department of Justice, Federal Bureau of Prisons, “Quick Facts About the Bureau of Prisons,” last updated May 25, 2013, <http://www.bop.gov/news/quick.jsp> (accessed July 10, 2013).

⁵ According to the Commission’s 2012 “Report on the Continuing Impact of US v. Booker on Federal Sentencing,” 8,000 cases were excluded from analysis because they were missing the presentence reports. Defense attorneys interviewed by Human Rights Watch reported that presentence reports are generally only waived in cases where defendants have no or minor criminal histories. If these cases were to be included in our calculations in the no-prior-conviction category, the percentage of defendants with no increase in offense levels would rise to 46 percent.

⁶ See Doug Keller, “Rethinking Illegal Entry and Reentry,” *Loyola University Chicago Law Journal*, vol. 44, Fall 2012.

Conclusion

Thank you for the opportunity to comment on the Commission's proposed priorities for 2014. If you have any questions or comments, please feel free to contact Grace Meng, researcher in the US Program, at 212-377-9491 or mengg@hrw.org.

Sincerely,

A handwritten signature in cursive script that reads "Alison Parker". The signature is written in black ink and includes a long horizontal flourish at the end.

Alison Parker
Director, US Program
Human Rights Watch