CAIR
Capital Area Immigrants' Rights
COALITION

Working to ensure all immigrants are treated with fairness, dignity and respect for their human and civil rights.

www.caircoalition.org

1612 K Street, NW Suite 204
Washington, DC 20006

T 202 / 331.3320
F 202 / 331.3341

Comments on the United States Sentencing Commission's Proposed Amendments to Federal Sentencing Guideline §2L1.2 Unlawfully Entering or Remaining in the United States

March 21, 2016

The Capital Area Immigrants' Rights (CAIR) Coalition respectfully submits this comment regarding the Sentencing Commission's proposed amendments to Guideline §2L1.2, "Unlawfully Entering or Remaining in the United States."

While we commend the Commission's attention to excessive punishment based on inflexible escalator enhancements and its sensitivity to certain aspects of immigration law, we believe several of the Commission's proposed amendments represent a move in the wrong direction. Specifically, we emphatically disagree with:

(1) The use of imposed rather than served sentences to gauge the seriousness of a conviction;
(2) The increase in base-offense level from 8 to 10 for persons with no prior illegal-reentry convictions;
(3) The imposition of enhancements based on all post-*first*-entry conduct; and
(4) The allowance of an upward departure in cases involving multiple prior deportations.

Instead, we strongly urge the Commission to:

(1) Use time served rather than time imposed to gauge the seriousness of a conviction;
(2) Decline to increase the base level offense for persons with no prior illegal reentry convictions, and adjust all other gradations downwards accordingly;
(3) Eliminate or limit imposition of enhancements exclusively to post-*last*-entry conduct; and
(4) Eliminate upward departures in cases involving multiple prior deportations.

As discussed below, these recommendations arise out of our firm belief that the harsh penalizing of illegal border-crossing imposes staggering economic and human costs, including on U.S. citizen families, without having a demonstrable deterrent effect. Accordingly, we believe that the criminal prosecution and punishment of persons who oftentimes are fleeing violence or seeking to reunite with their families should sharply be reduced.

Background

Since 2007, the number of people sentenced under §2L1.2 of the Federal Sentencing Guidelines has increased exponentially. Illegal entry and reentry cases now constitute a major portion of the overall federal district-court caseload – about 26 percent in fiscal year 2013, and even greater in

southwest-border districts.[1] This is a direct result of policies that prioritize the mass prosecution and incarceration of border-crossers who do not meet any of the Department of Justice's stated prosecutorial interests.[2]

These prosecutions come with staggering costs to the criminal justice system, including the diversion of limited prosecutorial and court resources away from serious offenses, as well as prison overcrowding in substandard private facilities.[3] They also come with staggering human costs, including to U.S. citizen families. As the Commission's report finds, almost 50 percent of persons sentenced for illegal reentry had at least one child living in the United States, and those sentenced were very young – an average and median age of 17 at the time of initial entry.[4]

These costs are incurred even though there is no evidence that they actually have a deterrent effect on future border-crossing attempts. A University of Arizona study tracking 1,200 people deported after prosecution for border-crossing found no statistically significant difference when it comes to re-entry between those who went through mass prosecution and incarceration under Operation Streamline and those who did not.[5] Other reports have found that for persons with strong family or economic ties to the United States, even criminal prosecutions and enhanced penalties may not outweigh the need to reunite with family or find a job.[6]

Because of these considerations, the United Nations Special Rapporteur on the Human Rights of Migrants has emphasized that "irregular entry or stay should never be considered criminal offenses; they are not per se crimes against persons, property, or national security."[7] By harshly criminalizing irregular entry, the United States has at times run afoul of its international commitments, and the Department of Homeland Security's Inspector General has concluded that "Border Patrol's practice of referring [individuals who express fear of persecution or return to their home countries] to prosecution . . . may violate U.S. treaty obligations."[8]

---

[1] United States Sentencing Commission Report, *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; 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] Seth Freed Wessler, "'This Man Will Almost Certainly Die.'" The Nation (Jan. 28, 2016), http://www.thenation.com/article/privatized-immigrant-prison-deaths/; 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.

[4] U.S. Sentencing Commission, *Illegal Reentry Offenses* at 25, 26.

[5] 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

[6] 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; 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.

[7] *Turning Migrants*, supra, at 4.

[8] DHS OIG, supra, at 2.

Recommendations

In light of the foregoing, we urge the following four changes to the Commission's proposed amendments:

(1) Use time served to gauge the seriousness of a conviction:

Based on our frequent interactions and intimate familiarity with at least two state criminal court systems, it is our strong belief that actual time served is a far better proxy for the seriousness of a conviction than total imposed sentence.

The Virginia Justice Program of the CAIR Coalition trains and advises criminal defense attorneys in Virginia on the immigration consequences of criminal dispositions. In this capacity, we frequently review sentences and proposed pleas and engage with the different penalty levels judges tend to impose based on their assessment of the seriousness of an offense. We similarly engage issues arising out of sentencing practices in Maryland in our organization's immigration representation work. Based on our experiences with both the Virginia and the Maryland criminal justice systems, we have come to a general understanding that judges systematically take into account suspension of sentences, as well as day-for-day credits and other factors affecting the length of time actually spent in detention, in arriving at a determination regarding the appropriate length of an imposed sentence.

Thus, the total imposed sentence is not usually reflective of the judge's assessment of the seriousness of the offense; rather, the actual time served is a far more accurate indicator of that judgment. For example, judges in Maryland will not infrequently impose a sentence suspended in its entirety when in their judgment the person's offense is minor and does not deserve an actual term of incarceration. Similarly, judges in Virginia will use a stock total length and then vary the actual jail time depending on their assessment of the severity of an offense.

It is our understanding that these practices are common in many states and are not exclusive to the two jurisdictions we most frequently serve. We understand, too, however, that in other states judges are less reliant on the use of suspended time, or the average amount of time suspended is less, with total sentences more reflective of the nature of the offense. Using the total time imposed to determine the severity of a defendant's prior criminal conviction will, therefore, undermine uniformity in federal sentencing and unfairly punish defendants with convictions in states like Maryland or Virginia where judges frequently use suspended time in their sentencing. In keeping with these practices, we therefore oppose the use of total imposed sentences in making determinations about the seriousness of an offense, and we strongly urge the Commission to instead consider only time served in making these determinations.

(2) Do not increase base-offense level, and adjust all other gradations downwards:

As the sole legal services provider for detained immigrants in Maryland and Virginia, we conduct intakes with several thousand immigrants each year and provide legal orientation or services to a

significant proportion of that population. In almost every case where we have encountered a person with illegal entry or reentry convictions, the reasons for the repeated border-crossing relate either to fear of harm in the individual's country of origin or a desire to reunify with family in the United States. Harsh punishments for persons seeking to reunite with their families or to flee persecution are fundamentally inconsistent with our values and waste valuable resources while not having any measurable deterrent effects.

The Commission's data analysis states that persons with no applicable enhancements or other upward departures would see their average guideline-minimum sentence increase from 1 to 6 months – a 500% increase that has absolutely no justifiable basis. 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 person's immigration status, would see their average guideline minimum fully *double* from 12 to 24 months. There is no sound rationale for such draconian increases in the minimum sentences imposed for these offenses. [9]

We therefore urge the Commission to reject these base-offense level increases and to adjust all other gradations downwards accordingly.

(3) Eliminate enhancements or apply them only for post-last-entry convictions.

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."[10] 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 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.

(4) Do not allow upward departures for prior deportations.

---

[9] 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.

[10] 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

In the course of our work, we frequently see orders of deportation entered without due process – either because a person was unrepresented, or because an expedited process was used that did not allow the person to mount possible legal defenses to charges of deportation, or even simply – and in a very large number of cases – because of lack of access to counsel. We find these due process deficiencies to be rampant across the immigration court system, and based on our experience working with thousands of immigrants in detention each year, are convinced that the entry of a deportation order should in most cases not be taken as an indication that a person has received proper process or that the person would not have been able to prevail had he or she had access to competent counsel and other due process.

Indeed, these due process deficiencies in the immigration court system are quite pervasive and well-documented, beyond our own experiences in Virginia and Maryland. They include: inaccurate interpretation of testimony by interpreters;[11] a pervasive reliance on videoconferencing for detained immigrants so that they do not have the opportunity to appear in court in person to defend against removal, undermining the most basic of due process confrontation rights;[12] immigrants and their attorneys lacking access to critical records in immigrants' files;[13] and "hair-raising stories of injustice" when detainees do not have access to counsel and attempt to fight their cases pro se, without access to basic documents and services or the ability to gather crucial information about their cases and learn about available legal defenses in their cases.[14]

We therefore emphatically oppose upward departures because of prior deportations.

Submitted on behalf of the CAIR Coalition by:

Sirine Shebaya, Esq.
Director, Virginia Justice Program
sirine@caircoalition.org
(202) 331-3320 x15

Heidi Altman, Esq.
Legal Director
haltman@caircoalition.org
(202) 331-3320 x20

[11] Cavendish & Shulman, *Reimagining the Immigration Court Assembly Line* (2012) at 49, http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.
[12] *Id.* at 56.
[13] *Id.* at 63.
[14] *Id.* at 67.