Comments by the End Streamline Coalition on Proposed Amendments to the U.S. Sentencing Guidelines

The End Streamline Coalition is a group that includes citizens, immigrants, attorneys, pastors, faith community leaders, humanitarian aid groups, human rights organizations, and ordinary border residents in Southern Arizona. We have been regularly observing and documenting Operation Streamline proceedings since the program was brought to the U.S. District Court in Tucson in 2008, and members of our coalition have traveled to Del Rio and to Yuma to observe Operation Streamline at different sites on the border. Our members have decades of experience addressing the ongoing humanitarian crises occasioned by increased border enforcement in the region where we live and work. We appreciate this opportunity to give our testimony regarding the Sentencing Commission's proposed amendments to Guideline §2L1.2, "Unlawfully Entering or Remaining in the United States."

Overall Position

The End Streamline Coalition strongly disagrees with policy choices that have led to the mass prosecution and incarceration of border crossers. Our long-held position has been that that the criminal prosecution and incarceration of human beings simply for crossing the border must be halted, and that 8 U.S.C. § 1325 and § 1326 must be repealed. Accordingly, we strongly oppose any proposed amendments to the U.S. Sentencing Guidelines that would increase the criminal penalties and length of sentences for individuals convicted under 8 U.S.C § 1325 and 8 U.S.C § 1326. We discuss in more detail below several aspects of the Commission's proposed amendments that go in the wrong direction.

Background: The Current State of Sentencing under Guideline §2L1.2

The Commission's April 2015 report, *Illegal Reentry Offenses*, and other data make clear that the number of people sentenced under Guideline §2L1.2 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] The vast majority of these prosecutions do not meet any of the Department of Justice's stated prosecutorial interests—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

[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

average (and median) age of 17 at the time of initial entry.[3] U.S. incarceration and deportation policies tear families apart and provide little in the way of individualized discretion, even when the needs of U.S.-citizen children are at stake.

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 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. 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]

U.S. policy of mass prosecution of border crossers also currently results in violations of international law. The United Nations special rapporteur on the human rights of migrants has

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[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/

[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

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

We oppose the prosecution and incarceration of border crossers for simple migration offenses under 8 U.S.C. § 1325 and 8 U.S.C. § 1326 and support the repeal of those statutes. Toward that end, we strongly oppose any amendments to the Sentencing Guidelines that would increase sentences imposed for illegal entry and reentry after deportation, and we ask that the Commission reexamine comprehensively and reduce the deleterious impact of these unwarranted prosecutions and sentences on the human beings incarcerated and on their families in the United States.

Specific Recommendations

- We 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.

- We ask that the Commission reject the proposed amendment allowing for an upward departure based on multiple prior deportations. It is particularly critical that the Guideline not permit sentencing courts to consider prior deportations that occurred without due process.

- 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.

[9] *Turning Migrants*, supra, at 4.
[10] DHS OIG, supra, at 2.
[11] See, e.g., USSC, "Data Briefing: Proposed Immigration Amendment." (2016), http://www.ussc.gov/videos/immigration-data-briefing

- We support the 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, which fail to take into account the views of sentencing judges in jurisdictions where sentences are routinely suspended.

- We ask that the Commission carefully consider the effects on the overall U.S. prison population and on U.S. domestic and foreign policy goals that the amendments to Guideline §2L1.2 would have.

I. There is no justification for raising the base-offense level for all individuals convicted of illegal entry and reentry after deportation.

The End Streamline Coalition is deeply troubled that the Commission's proposed amendments would increase sentences for most border crossers.

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.

II. Sentencing courts should not consider prior deportations that occurred without due process.

Individuals who accumulate multiple prior deportations frequently do so because they are attempting to reunite with U.S. family members and have strong ties to the United States. Because of this, prior deportations should never be considered as a basis for an upward departure.

It is abundantly clear from our collective experience that many apprehended border crossers navigate immigration proceedings without counsel, do not understand the procedures or waivers that led to orders of removal, are asked or forced to sign documents they do not

[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.

understand, and end up deported without any meaningful opportunity to present claims for relief from deportation for which they may be eligible. For these reasons, multiple prior deportations should not be used as bases for upward departures.

It is particularly important that deportations that occur as a result of flawed process should never be used as a basis for an upward departure. 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. 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 behind the mere fact of a prior deportation to ensure that it comported with due process.

III. In gauging the seriousness of a conviction, the sentence served – not imposed – should be used.

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

IV. 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-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."[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 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

[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

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.

V. The overall effect of the proposed amendment to the Sentencing Guidelines on U.S. domestic and foreign policy goals must be considered.

At this time, the Administration has begun to take first steps toward amelioration of the effects of mass incarceration on U.S. citizens whose lives were sacrificed to the prison system, particularly the many who served long periods of time for low-level, nonviolent drug offenses and the elderly who grew old in prison and now suffer from health conditions that the Bureau of Prisons cannot adequately treat. Nevertheless, the Administration appears to have developed a blind spot with respect to the fact that prosecuting large numbers of immigrants for illegal entry and reentry, at the same time as adopting drug-offense-related reforms, has simply been substituting border crossers for drug offenders as the main source of new admits to the U.S. prison population. Increasing the Guidelines for individuals convicted of 8 U.S.C. § 1325 and § 1326 will result in longer sentences for a large segment of these newly minted prisoners, further increasing mass incarceration at great taxpayer cost with little public benefit.

The current U.S. system of mass incarceration is a matter of deep and growing concern, both to the American people and the international community. We ask that the Commission consider the effect on the overall U.S. prison system that the implementation of the amendments to Guideline §2L1.2 would have. Ensuring the lengthy incarceration of large numbers of foreign nationals, simply for crossing the border, with little defensible justification and in violation of international treaties and standards, will result in great cost and expense to the U.S. government while neither furthering U.S. standing in the world nor advancing our own domestic policy goals.