

## **No More Deaths/No Más Muertes' Comments For a Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines**

We appreciate this opportunity to provide testimony regarding the Sentencing Commission's proposed amendments to Guideline §2L1.2, "Unlawfully Entering or Remaining in the United States." The Commission's April 2015 report, *Illegal Reentry Offenses*, and other data make clear that the number of people sentenced under this Guideline 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.<sup>1</sup>

### Background:

#### Prosecutions Tear Families Apart:

No More Deaths/No Más Muertes strongly disagrees with policy choices that have led to mass prosecutions and incarceration of border-crossers who do not meet any of the Department of Justice's stated prosecutorial interests, namely national security, violent crime, financial fraud, and protection of the most vulnerable members of society.<sup>2</sup> 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 average (and median) age of 17 at the time of initial entry.<sup>3</sup> Given a U.S. deportation regime that tears families apart and provides little in the way of individualized discretion even for U.S. citizen children's needs, criminal prosecutions and punishments for people seeking to reunite with their families should be sharply reduced. Disappointingly, as discussed below, some aspects of the Commission's proposed amendments go in the wrong direction.

Prosecutions have untold costs and do not deter migration:

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.<sup>4</sup> 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

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<sup>1</sup> TRAC, "Immigration Prosecutions for December 2015." (Feb. 19, 2016), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlydec15/fil/>

<sup>2</sup> 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](https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf)

<sup>3</sup> 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](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf)

<sup>4</sup> 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/>

aliens from entering and reentering the country illegally....[C]urrent metrics limit its ability to fully analyze illegal re-entry trends over time.”<sup>5</sup> 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.<sup>6</sup> Massive expenditures are therefore resting on speculation, not facts, about deterrence and recidivism.

Additional information deterrence which can be added:

- Indeed, 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.<sup>7</sup>
- 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.”<sup>8</sup>
- The United Nations special rapporteur on the human rights of migrants has 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.”<sup>9</sup>
- 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.”<sup>10</sup>

## Recommendations

### Overall

We therefore urge the Commission and other implicated government agencies to reexamine comprehensively – and reduce – the deleterious impacts of border-crossing prosecutions and sentences.

### Specific Recommendations

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<sup>5</sup> 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](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf)

<sup>6</sup> 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>

<sup>7</sup> 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](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf)

<sup>8</sup> 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>

<sup>9</sup> *Turning Migrants*, supra, at 4.

<sup>10</sup> DHS OIG, supra, at 2.

- Support 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.
- We also 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.”<sup>11</sup> Increasing offense levels is entirely inconsistent with this approach.
- In addition, 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
- Finally, we suggest that the Commission change its proposed amendment allowing for an upward departure based on multiple prior deportations so sentencing courts do not consider prior deportations that occurred without due process.

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

No More Deaths/No Más Muertes 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 systemically taken into account by the sentencing court. A far better proxy for seriousness is time served.

II. There is no justification for raising the base-offense level for all convicted persons.

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<sup>11</sup> See, e.g., USSC, “Data Briefing: Proposed Immigration Amendment.” (2016), <http://www.ussc.gov/videos/immigration-data-briefing>

No More Deaths/No Más Muertes is deeply troubled that at a time of national attention to criminal-justice reform and deincarceration the Commission's proposed amendments would increase sentences for most offenders.

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.<sup>12</sup>

For these reasons, the Commission should reject the proposed amendments' base-offense-level increases.

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

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.

Case Example: For example, 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.

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<sup>12</sup> 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.