

Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
Remarks for Public Meeting
April 15, 2016

Thank you for attending the United States Sentencing Commission's second public meeting of the year.

The Commission appreciates the attendance of those joining us here today as well as those watching through our livestream broadcast on the Commission's website. Once again, I appreciate the strong public interest in sentencing issues and the work of the Commission.

As those of you following our work already know, the Commission unanimously voted to adopt an amendment relating to the definition of "crime of violence" in the Career Offender and other federal sentencing guidelines in January. The effective date for this amendment is August 1st and the Commission will publish a supplement to the Guidelines Manual that incorporates the new amendment at that time.

The January amendment is not our final work related to this area of "crimes of violence." We are busily working on a report to Congress on career offenders and other recidivist provisions later this year, which may include recommended statutory changes.

Also, the Commission is currently accepting written public comment on proposed revisions to the Commission's Rules of Practice and Procedure. Please note—if you are interested, written public comment on these changes should be submitted by June 1, 2016. The proposed changes can be found at the Commission's website at www.usc.gov. Instructions on the submission of public comment are on the website as well as a link to sign up for the Commission's Twitter and e-mail alerts.

Briefly, I'd like to highlight a few of the Commission's recent research projects and publications. A few weeks ago, the Commission released its first in a series of publications on its multi-year recidivism study. The study is groundbreaking in both its breadth and in its duration, analyzing recidivism in multiple ways, including rearrest, reconviction, and/or reincarceration.

Let me mention a few key findings:

- Nearly one-half (49.3%) of the federal offenders studied were rearrested within 8 years of release for either a new crime or for some other violation of the conditions of their probation or release. Almost one-third (31.7%) were reconvicted, and one-quarter were reincarcerated.
- The Guideline's criminal history score remains a very good predictor of future recidivism. Age, offense type and educational level were also associated with future recidivism.

- In addition, with the exception of very short sentences (less than 6 months), the rate of recidivism varies very little by length of prison sentence imposed.
- Again, these are just a few findings of the recidivism report, and there will be more to come in the coming months.

Recently, the Commission also published its Fiscal Year 2015 Annual Report and Sourcebook, and perhaps the most interesting trend is that the federal criminal caseload continues to shrink. In past years, the decreased caseload was largely driven by declining immigration cases, but this year the decreases were more evenly distributed across the major offense types.

Regarding sentencing training, last September we had approximately 1,000 judges, probation officers, and practitioners attend our National Training Seminar in New Orleans. This year, the seminar will be held in Minneapolis on September 7th to the 9th. Please look for registration information on our website in the weeks ahead.

So, as always, there is a great deal of work going on here at the Commission and I wanted to provide this short summary of a few activities before we turn to the business before us today. As we ordinarily do in April, the Commission will now vote on whether to adopt the pending amendments to the federal sentencing guidelines.

As the Commission votes on changes to its policy statement on compassionate release, I want to thank everyone who testified at our hearing in February or submitted public comment, including representatives from the Criminal Law Committee, the Department of Justice, the Bureau of Prisons, the Inspector General, the Federal Public Defenders, the Practitioners Advisory Group, Dr. Brie Williams, ACLU, FAMM, and NACDL, among others. Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentence reduction. With the vote on this proposed amendment, the Commission is exercising its authority in this area by broadening the criteria beyond that in the Commission's current policy statement and the Bureau of Prisons' program statement.

The revised policy statement also encourages the Director of the Bureau of Prisons to file a motion for a sentence reduction if the defendant meets any of the circumstances set forth in the Commission's policy statement. While the BOP testified that the agency is trying to expedite consideration of compassionate release requests, we are concerned that so few have been granted.

We hope that these revisions prove to be a constructive step in addressing some of the concerns we heard both in public comment and at the public hearing regarding eligibility for compassionate release for the elderly, the terminally ill, and prisoners with other extraordinary and compelling circumstances.

I also want to briefly discuss the proposed amendment to Chapter Five of the Guidelines Manual, which concerns conditions of probation and supervised release. Based on a series of circuit court decisions criticizing several "standard" and "special" conditions of supervision over the past two years, both the Commission and the Criminal Law Committee reviewed the conditions of

supervision that appear both in the Guidelines Manual and also in the judgment form used by the Administrative Office of the U.S. Courts. Over the past year, our staff worked closely with the Criminal Law Committee's staff to obtain helpful input from all of the stakeholders in the federal criminal justice system. From this process, the pending amendment seeks to revise many of the "standard" and commonly-imposed "special" conditions. One goal is to make sure that the conditions are not imposed woodenly and, instead, are designed to reflect the individual characteristics of each offender.

I want to thank Congressmen Blumenauer, Fitzpatrick, Marino, and McGovern and Senators Feinstein and Vitter for their public comment on our animal fighting amendment, as well as the many other stakeholders who also wrote to us, including the ASPCA and its members, the Humane Society, and various other animal welfare organizations. In fact, we received more pieces of public comment on this amendment than any in the history of the Commission!

The Commission has heard your concerns and today we vote to significantly increase the penalty for these offenses by increasing the base offense level for this crime from a level 10 to a level 16. This change will result in a 250 percent increase in the bottom of the applicable guideline range for the typical offender prosecuted for these offenses.

This change reflects the recent increase in the statutory maximum penalty from three to five years and better accounts for the cruelty and violence inherent in animal fighting crimes. We heard testimony about dogs who were being beaten, tortured, and killed. We found further support for this increase from Commission data evidencing a high percentage of above-range sentences in these cases. With today's amendment, average sentences are more likely to be within or near the new sentencing range.

The Commission has also revised and expanded the existing departure language to address issues of extreme cruelty and neglect and animal fighting on an exceptional scale.

As the Supreme Court recognized in *Braxton v. United States*, it is the Commission's responsibility to resolve conflicting interpretation of the guidelines by circuit courts, and today we vote to resolve several long-standing circuit conflicts in the area of child pornography. In doing so, we do not intend to either increase or decrease the guideline ranges or sentences for this class of offenses. Rather, the Commission merely intends to simplify several unnecessarily confusing issues that have arisen with great frequency in the context of the child pornography guidelines. In doing so, we are acting to make sure that these guidelines relating to distribution of child pornography will apply if any defendant knowingly distributed, conspired or willfully caused another person to distribute any sexually explicit material involving a minor.

While we believe these specific improvements to the child pornography guidelines are helpful, we recognize that they are limited in scope. We continue to urge Congress to act on the recommendations outlined in the Commission's 2012 Report to Congress on federal child pornography offenses so that the Commission can make more comprehensive changes to the guidelines to better reflect the current spectrum of offender culpability and technological changes.

Today, the Commission will also vote on whether to promulgate a set of amendments to the guidelines for the two most common immigration offenses, alien smuggling (section 2L1.1) and illegal reentry (section 2L1.2). In recent years, immigration offenses have been either the most common federal offense type or a close second to drug offenses. Approximately 18,000 federal offenders were sentenced under just these two immigration guidelines in Fiscal Year 2015.

I want to address the amendments to the two immigration guidelines separately. I'll start with the alien smuggling guideline. Back in the fall of 2014, former Deputy Attorney General James Cole wrote to the Commission, stating that the Department of Justice considered guideline penalties to be inadequate for alien smuggling offenders, particularly those offenders who smuggle unaccompanied minors. He observed that unaccompanied minors are the most vulnerable of all persons being smuggled and that they are sometimes subject to "unspeakable abuses," including sexual abuse.

In recent years, our country has experienced an unprecedented migration of children from Central America. More than 100,000 children have come alone in the last two years, far outpacing previous years and seriously straining the U.S. system designed to provide care and custody for these particularly vulnerable refugees. Beginning in the fall of 2011 and every year forward, the numbers of children arriving at the border doubled until the height of the crisis in 2014 when more than 68,000 unaccompanied children were apprehended. This represented a nearly tenfold increase from the historical norm of 7,000-8,000 children from 2004-2011. Unaccompanied minors are being smuggled into the United States in record numbers, particular minors from Central American countries. At the Commission's public hearing in March, we also received testimony from expert witnesses that these vulnerable minors are often subject to abuse – sexual and otherwise – during the course of smuggling offenses.

The amendment addresses the smuggling of unaccompanied minors in two important ways. First, it will increase the enhancement for smuggling unaccompanied minors from a 2-level increase to a 4-level increase. Second, the amendment will clarify that any sexual abuse, not just limited to minors, results in a 4-level increase in smuggling cases. These two changes better reflect the increased culpability of offenders who engage in some of the most serious types of alien smuggling offenses.

Next, I want to address the proposed amendment to the illegal reentry guideline, section 2L1.2. Based on the Commission's most current data, this amendment is particularly important because illegal reentry comprises approximately 22 percent of the federal caseload, concentrated along the southwest border. In April of 2015, the Commission issued a report on illegal reentry offenses which can be found on our website.

There are two main points about that proposed amendment that I want to highlight: first, the amendment greatly simplifies the operation of the guideline, which has been the source of a great deal of litigation, uncertainty, and criticism. The proposed amendment does so by abandoning the so-called "categorical approach" to determine whether illegal reentry offenders' prior felony convictions warrant an enhancement.

Courts and stakeholders for many years have complained that the categorical approach is too complex and resource-intensive. For example, because every state defines its crimes differently and state records are hard to obtain, it is often difficult to determine if a crime falls within the definition of a “crime of violence.”

Currently, courts, probation officers, and practitioners devote enormous resources to applying the “categorical approach” to determine whether prior convictions should receive an enhancement as a “crime of violence,” a “drug trafficking” offense, or an “aggravated felony.” The categorical approach also has proven to be an ineffective way of identifying the most severe offense types for enhancement.

Instead of the categorical approach, the proposed amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. In other words, the level of the sentencing enhancement will be determined by the length of the sentence imposed by the sentencing judge.

We think this change is appropriate because the length of sentence imposed by a sentencing judge is a good indicator of how serious the court viewed the offense at the time. This significant change also avoids all the complications of the categorical approach.

The vast majority of the witnesses at our March hearing favored the sentence-imposed model. We received support for this approach from four of the five districts with the highest illegal reentry caseload. In addition, the Department of Justice and two of the Commission’s advisory groups – the Probation Officers Advisory Group (POAG) and the Practitioners Advisory Group (PAG) – support the proposed amendment. Witnesses for both advisory groups testified that the sentence-imposed model would be much easier to apply than the categorical approach and would result in savings of judicial resources, at both the trial court and appellate levels. Some witnesses suggested that the sentence-imposed model can be problematic because different counties punish crimes differently, particularly if a judge thinks that a defendant is about to be deported. The Commission has addressed those concerns by clarifying that a departure is available in cases where the sentence imposed either overstates or understates the seriousness of the prior offense.

I would like to recognize that the Commission also did receive a great deal of public comment in favor of a “sentence served” model. While we reviewed and considered these views carefully and seriously, ultimately, this approach is not feasible given the limits of state recordkeeping. The sentence-imposed approach is also consistent with how the guidelines score criminal history generally.

The second point I would make is that the proposed amendment accounts for the past criminal conduct of these offenders in a broader – and more proportionate – manner. Specifically, the amendment addresses concerns raised about the severity of the current 16-level enhancement for prior felonies based solely on a defendant’s single most serious conviction prior to his or her first deportation. Depending on the nature of that conviction, an enhancement of as much as 16 levels can occur.

Even if an offender's predicate conviction is so old that it does not receive criminal history points under the guidelines, a defendant still can receive as much as a 12-level enhancement. For this reason alone, the Commission has heard repeated complaints about this guideline, particularly these 16 and 12 level enhancements, which apply to nearly one-third of all illegal reentry cases. The Commission's sentencing data is consistent with these concerns. Indeed, only 27.4 percent of defendants who currently receive the enhancement are sentenced within the recommended guideline range. Accordingly, the pending amendment reduces the level of enhancement for a single pre-deportation conviction to a maximum of 10 levels.

But at the same time, it addresses a concern that the existing guideline only captures criminal conduct that occurs prior to the offender's first deportation. In its recent report, the Commission concluded that 48 percent of illegal reentry offenders in the study sample were convicted of at least one offense after their first deportation other than a prior illegal reentry conviction.

In addition, immigrants convicted of illegal reentry have reentered the country an average of 3.2 times. Yet, the current guideline does not account for any criminal conduct that may be committed after the offender illegally reenters the United States. The proposed amendment adds a new tiered enhancement specifically aimed at criminal conduct occurring after the defendant has reentered the country illegally. It also adds an enhancement to account for the number of times an offender has been convicted of illegal reentry.

I would also point out that the amendment differs from the proposal published in January in that it does not increase the base offense level in the illegal reentry guideline. The Commission received a great deal of public comment on this particular issue citing statistics in the Commission's 2015 report. The report found that:

- one-half of these offenders had at least one child living in the United States;
- these offenders had an average age of 17 at the time of their initial entry into the United States; and
- nearly three-quarters had worked in the United States for more than one year at some point prior to their arrest for the instant offense.

Many unlawful immigrants keep returning to work and/or to be with their family, or out of fear of drug traffickers, not to commit crimes. The Commission was persuaded by the majority of public comment and its own sentencing data that the current base offense level of 8 should remain unchanged.

I would note that the Commission is unable to conduct its typical impact analysis for this proposed change because it is impossible to predict how the various fast-track programs, which expedite deportation, may be revised after its implementation, and fast-track programs play such a large role in illegal reentry cases, particularly along the southwest border. I can say, however, that the Commission estimates that the average guideline minimum would decrease from 21 months to 18 months as a result of the new amendment. This does not mean that the average sentence will decrease and, yet, for the reasons that I already mentioned, there may even be some sentences that will increase.

In sum, we believe that the proposed amendment will be easier to apply, reduce litigation and uncertainty, mitigate areas of over-severity, and properly account for criminal conduct that currently is not reflected in the illegal reentry guideline.

Next, I want to briefly discuss the topic of retroactivity. The Commission has statutory authority to make any amendment retroactive if it will have the effect of lowering penalties for a category of offenses or offenders. In deciding whether to make an amendment retroactive, the Commission considers several factors, including the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.

First, with respect to the immigration amendment, as I mentioned earlier, the purpose of that amendment in great part was to simplify its operation, reduce litigation and uncertainty, and to more broadly and proportionately account for criminal conduct. The amendment is expected to decrease guideline ranges for some offenders but increase them for others. Furthermore, it would be extremely difficult to identify offenders who might benefit from retroactivity because the Commission does not routinely collect data about deportation dates or about which prior conviction or the type of prior offense that resulted in an enhancement under the current illegal reentry guideline.

Similarly, the purpose of the amendment to the child pornography guidelines was not to effectuate an overall reduction in guideline penalties, although it may have the effect of reducing the guideline range for some offenders. The amendment is intended to simplify guideline application and resolve the litigation surrounding certain aspects of its operation. Like the immigration amendment, the Commission does not routinely collect the information concerning the intent of the distributor necessary to identify and characterize the offenders who might benefit from retroactivity. Ascertaining the overall effect of the amendment would be difficult because that determination depends on data that the Commission does not routinely collect.

For these reasons the Commission has decided against retroactivity.

Finally, I would like to take a few minutes to address the Bipartisan Budget Act of 2015. The Act passed in November 2015, after the Commission's amendment cycle had commenced. When new legislation is enacted in the waning days of the calendar year, it is not uncommon for the Commission to delay action and to defer to the following amendment cycle because of the abbreviated time frame in which to work on the issue.

In this particular instance, the Commission voted in January to publish a proposed amendment that would provide a guideline reference for the new conspiracy offenses created by that Act but did not publish any specific offense characteristics or other guideline changes to specifically address the increased statutory maximum for certain types of offenders, such as third-party facilitators. The Commission received written comment from Members of Congress, the Justice Department and the Inspector General of the Social Security Administration suggesting that the change, as initially proposed, does not adequately address the type of cases and offenders covered by the new 10-year statutory maximum penalty. I would like to acknowledge the important years of work, as well as the continued oversight, led by the Senate Committee on Finance and the House Ways and Means Committee, as well as the Senate and House Judiciary

Committees, to ensure aggressive implementation of these new penalties relating to Social Security fraud.

Specifically, I would like to acknowledge the thoughtful letter from Chairmen Goodlatte, Brady and Hatch expressing their views on the proposed amendment. The Commission continues to take into consideration this feedback as well as the public comment in support of specific sentencing enhancements.

At this juncture, the Commission is persuaded that this issue merits additional study before making a final policy decision. Accordingly, the Commission has decided to defer action on the Act until the next amendment cycle. This issue will remain a priority for us next year and we look forward to working with the Congress, the relevant agencies and the stakeholders as we move forward into the next amendment cycle.