

Testimony to the United States Sentencing Commission Regarding Proposed Amendments to §2L1.2 of the Federal Sentencing Guidelines

Presented jointly by
Justice Strategies and Grassroots Leadership

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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 percent in fiscal year 2013), and is especially pronounced in southwest-border districts.¹

Grassroots Leadership is an Austin, Texas-based national organization that works to end prison profiteering and reduce reliance on criminalization and detention through direct action, organizing, research, and public education.

Justice Strategies is a small nonpartisan, nonprofit public policy research organization that strives to promote humane, effective approaches to criminal justice and immigration reform through rigorous analysis and high-quality research, offering practical policy solutions.

In the past six months, Justice Strategies and Grassroots Leadership have conducted in-depth interviews with Magistrate and District Judges, Federal Public Defenders, private defense attorneys, and individuals directly impacted by these prosecutions in southern border districts in Arizona, Texas, and California to gain insight into 8 USC 1325 and 8 USC 1326 prosecutions for a report we will be releasing this spring on migrant prosecutions. This field research has provided us with insights from a broad array of individuals who deal with reentry prosecutions within the federal court system, as well as from people who have been directly impacted by these prosecutions.

We found that there is a broad consensus that most 1326 cases involve heartbreaking circumstance. Those sentenced are often people who have lived in the United States since they were children, have family here, and consider the U.S. their home. The Commission's own report demonstrates that 49.5 percent of persons sentenced for illegal reentry had at least one child living in the United States.² We also heard from many judges and defense attorneys that long sentences for reentry do not deter people from crossing the border again due to the strong pull of family ties or economic obligations.

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

² U.S. Sentencing Commission, *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

Our comments on the proposed amendments:

The Department of Justice 2013 publication *Smart on Crime* states that given the scarcity of resources, federal prosecutors should focus on the most serious cases that meet the Department's "clear, substantial federal interests:" national security threats; violent crime; financial fraud; and protection of the most vulnerable members of society.³ Yet in 2015, 8 USC 1326 – reentry – was the second most prosecuted federal crime.

The proposed amendments to §2L1.2 of the current guidelines manual would boost the base offense level from 8 to 10, or even higher if there are prior reentry convictions. In light of the nature of the actual conduct involved, as well as the priorities stated above, level 8 is *already* too severe. The mere reentry of migrants across the border we share with Mexico does not threaten public safety, much less national security. One federal public defender in Tucson told us that compared to the circumstances that motivate most of her clients to cross the border, she considers the reentry offense to be relatively trivial:

Most of the people we represent do not come from the middle class in Mexico. They're people who are already living on the edge, having a very hard time making it. And locking them up can't be good for the children they've left in Mexico. If the kids have no guidance and don't go to school it contributes to the social breakdown back in these communities. But you've got this whole big industry that's feeding off of these prosecutions. That's the status quo at the moment, but in reality these people are only trespassing on US soil.

What possible rationale could there be for increasing the base offense level? In comparison with many other federal offenses that involve a distinct threat to public safety or entail conduct that portends serious harm to life, to property, or to the integrity of our financial and commercial institutions, level 8 is disproportionately high. Far more alarming forms of criminal conduct are scaled at that same level. These include mishandling of hazardous or toxic substances; insider trading; commercial bribery; and trespass on the grounds of the White House.

Moreover, many types of criminal conduct that pose danger to the wellbeing of the public are scaled as though they are *less serious* than migrant reentry. An assault that threatens use of a firearm is scaled at base offense level 7. At base offence level 6, we find unlawful possession of a gun in a federal facility or a school zone; violation of food and drug laws and regulations; and possession of hazardous or injurious devices on federal land. Even *discharge* of a firearm in a school zone is scaled at level 6.

³ U.S. Department of Justice, SMART ON CRIME 2 (August 2013), <http://www.justice.gov/ag/smart-on-crime.pdf>

The proposed amendment would multiply the minimum sentence recommendation available to a migrant with no more than one criminal history point by a factor of *six*. We urge you *not* to adopt this amendment.

On the other hand, we support and *urge further efforts* to reduce the severe impact of the escalating sentencing enhancements contained in §2L1.2. For many migrants, the disproportionate base offense level is only the foundation upon which extraordinarily harsh enhancements may be stacked. These enhancements can raise the level of punishment to unconscionable heights, as is reflected by the high level of judicial departures in recent years.

When we first reviewed the §2L1.2 guideline specifications we were shocked to find that a single prior felony drug trafficking conviction could boost the base offense level from 8 to level 24. A federal defender in San Diego told us that this is an unusually harsh enhancement within a sentencing structure that is already severe:

The possible 16 level enhancement in the sentencing guidelines for 1326 cases has no parallel in *any other criminal offense*. It is a super-crazy enhancement for reentry and has a massive effect on sentencing. It is why we fight all these cases based on the categorical approach. Still, some judges hesitate to give lower sentences even if the prior sentence was wrong.

In Texas, one federal defender pointed out to us that the provisions for “specific offense” enhancements require that the judge count many prior history convictions twice:

The sentencing guidelines punish you two times: there is a 16 offense level bump for certain kinds of prior convictions (or 12, 8, or 4 level bumps for others). And then the prior counts again as part of the criminal history. This creates a huge sentencing enhancement, and, depending on the defendant’s criminal history, can produce sentences as high as ten years.

Another Texas defender observed that since the sentencing enhancements could push the punishment far beyond what is otherwise warranted for the simple offense of reentry, it’s as though the defendant is being retried for old convictions as if they were new crimes:

The most troubling aspect of sentencing in an illegal reentry case is the huge role a past conviction plays in driving the guideline range. Simply being here illegally should be treated differently than committing new crimes upon returning. But that’s not what happens in court. The guidelines make defendants proxies for their past crimes and call for them to be punished again for those offenses. Instead of a human being at sentencing, you represent a prior conviction – an ounce of cocaine, a domestic assault, a drunk driving incident. When clients and their families complain about the unfairness of this I can only say that it’s the law.

There is no convincing evidence that the excessively harsh impact of the §2L1.2 guideline specifications – both the disproportionate base offense level and the unprecedented structure of the “specific offense” enhancements – are serving as a deterrent to reentry. In the opinion of one judge in Tucson who has many years of experience on the bench, most migrants are compelled by economic need or family ties to re-cross the border:

When you go home and your kids are hungry you’re going to have to forget your promise and come right back. And how about the guy who has a criminal record and was deported, but who has absolutely no family or access to a job across the border?

Another experienced Tucson judge agreed, adding that despite the growing risks and difficulties, migrants have very sincere and strong motivations:

People are coming to the US to send money back to their families, or because they already have children here. A lot of really unfortunate things are going on in Mexico that force people into crossing the border. They face an impossible employment situation in Mexico; they face increased violence, what with even well-educated Mexicans now running drugs. I don’t give many lectures to them about why they should not be coming back, because I just don’t think that what I have to say has much impact compared to, “But my wife and my children are up in Kansas,” or, “I was about to be killed back in Michoacán.”

A federal defender based in Phoenix spoke very movingly about how the themes of economic woes and family ties are intertwined. She added that the harsh enforcement efforts themselves causes many migrants to return:

People with 1326 charges are mostly coming back because they have family here. You are not going to deter people who have to be with their families; anyone would cross the border again given those circumstances. And for many of them this is the only place they have known through their whole lives. It’s really heartbreaking to see such cases. It’s tragic!

The border patrol takes away their documents and their phones, which contain all their contacts’ phone numbers. Their belongings get lost, and even if not, once they are deported it’s hard – and very expensive – to get their document sent to them. Documents are a huge issue. Without documents, they are “nobody,” and so many routine activities require proof of identity. In such a predicament, it’s easier for them to come back into the US than to try to live in Mexico.

A private immigration attorney in Tucson observed that family ties and obligations are what drive *all* of his clients to migrate:

A primary motivation for crossing and re-crossing is to help their families. In my experience, it seems about 80 percent cross to find work so they can send money home to their family in Mexico, while 20 percent come to be reunited with their family in the US.

Another private attorney in Tucson charged that the immigration enforcement process itself wears down people's fear of the consequences, even when they are aware of the harsh prosecution policies, because larger economic forces have made their lives in Mexico untenable:

It seems that people will just tolerate whatever comes at them – including mistreatment – because the whole process is so dehumanizing and they feel that they don't have any rights anyway. These prosecutions along the border are just propaganda to justify policy. They don't do anything to dissuade people from crossing.

People don't want to leave home permanently. If they had the opportunity to come to the U.S. to work and then go back home, they would. But as it is, people will do whatever they need to do to survive. These migrants are all campesinos; they used to work their fields, growing corn to eat. But NAFTA is a big economic push-out, creating a whole new industry of misery.

Perhaps the most convincing case against using federal prison sentences as a deterrent to reentry comes from those we spoke with who had been directly impacted by 1325 and 1326 prosecutions. We spoke with a Mexican man who has lived in the U.S. for 14 years and has three children. He was picked up in a traffic stop in McAllen and prosecuted while his wife was pregnant with their third child. He missed the birth of his child and was unable to support his wife economically during her pregnancy. Nonetheless, he returned almost immediately and spoke to us about the impossibility of heeding the judge's admonition not to return to the United States:

You say OK, but you have to come back. When the attorney was translating I told the judge that I have children here and everything and it's impossible to stay there [in Mexico] and leave my children here... After they deported me, I returned after two months. My family is here. I can't stay there. My family needs me.

Another Mexican man with two young adult daughters had lived in the U.S. for 37 years before being charged for reentry and deported. He told us how much he longs to cross the border again to see his daughters despite being a successful business owner in Mexico.

I love my daughters. They are a joy, and not only because they are my daughters. They're everything for me in my life. For me it would be a pleasure to be able to visit them. I was thinking if I could pay money as a deposit, like a bond, and go and visit my daughters for just a week, or get a visa to go and visit them for three days even if they would charge me \$50,000 or whatever amount, I would do it.

We also spoke to one of his daughters, who shared that her father often talks about coming back despite having already served two years in a federal prison for reentry, and that this takes a toll on their relationship.

I don't tell him if I'm struggling to make a payment because I know he beats himself up over it, and I don't want him to be tempted to come over again.

Reentry sentences also further criminalize migrants who have already been impacted throughout their lives by the harsh U.S. deportation regime. One woman we spoke with grew up watching her mom suffer physical abuse by multiple partners who would threaten to have her deported if she reported the abuse. As an asylum seeker and survivor of two traumatic instances of sexual abuse, she came to rely on drugs to cope and struggles with addiction. She was deported twice but quickly returned before she was picked up on charges related to her addiction and pled to a two-year sentence for reentry. She describes her fear after being deported and separated from her family in the U.S.

I was so scared because I have nobody in Mexico. So as soon as I got there I called my mom and my family. My brother had someone he knew in Nogales Sonora and he told me to call them and go stay with them. I did that and they let me stay with them for a couple of nights, but I was so scared. I had no family, no one in Mexico. I just wanted to go home.

Grassroots Leadership and Justice Strategies strongly disagree 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. According to the Pew Research Center, the increase in illegal re-entry convictions over the past two decades accounts for 48 percent of the growth in total convictions in federal courts over the period.

Furthermore, the prosecutions almost exclusively target Latinos, leading directly to the disproportionate representation of Latinos in the federal prison system.⁴ This is

⁴ Latinos represent 34 percent of all BOP prisoners but just 17 percent of the total U.S. population. Federal Bureau of Prisons, Statistics: Inmate Ethnicity, http://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (last visited March 18, 2016); Pew Research Center, Statistical Portrait of Hispanics in the United States, 1980-2013, <http://www.pewhispanic.org/2015/05/12/statistical-portrait-of-hispanics-in-the-united-states-2013-key-charts/> (May 12, 2015). Indeed, the United Nations Committee on the Elimination of Racial Discrimination has called for an end to Operation Streamline. United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America (Sept. 25, 2014), *available at* <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhspzO19YwTXeABruAM8pBAKIQ%2fdZ6XAqlyobgts1zwlHPkQhsSqMrVxuS6brQbHYpDYGXBUCX1bgRtTg3HaweAr5PBs9soaesD5KdByeki9OS>.

antithetical to the Sentencing Commission's goals of reducing the population serving time in federal prison for nonviolent offenses.

Moreover, the Department of Justice expends more than \$1 billion per year in incarceration costs for these convictions, most of which flows into the pockets of the for-profit prison industry.⁵

As evidenced by the stories above from those directly impacted, reentry convictions come at an enormous human cost to the migrants sentenced, their families, and communities. They further criminalize a population that is already marginalized by economic and immigration policy, giving a criminal record to people trying to reunite with family, sustain them economically, and flee violence. There is an enormous cost to families, including U.S. citizen children, who suffer emotional and economic hardship from the incarceration and deportation of their loved ones. The impacts of these charges extend to entire immigrant communities. They exacerbate fear of law enforcement, contribute to internalization of guilt for traumatic experiences, and drain economic resources that could be used for innovation or education.

Our joint recommendation:

The staffs at both Justice Strategies and Grassroots Leadership realize that the United States Sentencing Commission does not create the federal statutes that govern the enforcement of immigration laws, nor do you set policies and priorities for the Department of Justice. Nevertheless, the Commission plays a vital – often a leading role – in broad federal efforts to review criminal justice policies and practices, and in bringing about constructive amendments and adjustments that lessen the harm of ill-advised, wasteful laws and policies.

We are tremendously grateful for your unstinting efforts to reduce the impact of the harsh drug laws that were enacted during the moral panic that drove federal drug legislation during the 1980s. For more than a decade a moral panic over migration has seized the nation that is parallel in every way to the pervasive fear – stoked by politicians and the media – of illicit drug use and abuse that helped to spawn the drug laws and drug enforcement policies that we have finally recognized are counterproductive.

The human costs of the “drug war” have not been justified by any rational measure. The illegal supply and illicit use of drugs has not abated; the degree of racial disparity in our jails and prisons is intolerable; and the lives of millions of people have been severely damaged by the ill-conceived notion that drugs are a criminal justice problem. We now see that widespread misuse of drugs is a *public health* problem, requiring public health solutions.

⁵ Operation Streamline: Costs and Consequences. Grassroots Leadership, 2012.
http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report%20final.pdf

Especially in light of the heightened politicization of immigration issues that is poisoning the current electoral season, we urge you to use your leadership position to tamp down the moral panic about migration. Please consider that the problem of illicit migration is a *transnational economic* problem rooted in historical and ongoing political, racial and ethnic exploitation. People migrate to survive, whether they are fleeing abject poverty, domestic violence or gang warfare. These problems cannot be effectively addressed by raising the sentencing tariff for those that are compelled to cross the border.

Substantial guideline modifications are sorely needed to ameliorate the grave harm that results from current prosecution and sentencing practices in the federal courts. We hope that you will take this opportunity to move toward reducing, *across the board*, the harmful impact of the prosecution and sentencing policies that are currently sending tens of thousands of migrants to federal jails and prisons each year. If this is not currently possible, please consider abstaining now from any action regarding §2L1.2, allowing more time for further study and reflection.