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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

March 14, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

Congratulations on commencing your tenure as Chair of the newly-reconstituted United States Sentencing Commission as it embarks on its first amendment cycle. We write to express our views on some of the proposed amendments which the Commission has promulgated.

Proposed Amendment #1: First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)

We find it heartening and appropriate that the Commission's top two priorities for the current amendment cycle involve implementation of the First Step Act (FSA). We support the amendment of § 1B1.13 (policy statement) to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by Section 603(b) of the FSA, authorizes an incarcerated person to file a motion seeking a sentence reduction and is not limited to motions filed by the Bureau of Prisons.

We further support the Commission's decision to provide courts identical discretion to determine what constitutes "extraordinary and compelling reasons" for self-filed motions as exists for warden-filed motions. This approach appropriately recognizes that courts are in the best position to determine what constitutes an extraordinary and compelling reason within the specific circumstances of an individual § 3582(c)(1)(A) motion, regardless of whether it is filed by a warden or by an incarcerated person directly.

Victim of Assault

We agree that the Commission should include the proposed Victim of Assault enumerated circumstance:

> (4) VICTIM OF ASSAULT.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.

However, several modifications would better effectuate the Commission's purpose. First, the phrase "sexual assault or physical abuse" should be replaced with "sexual or physical assault or abuse," to ensure that sexual abuse of the type prohibited under 18 U.S.C. § 2243(b) is covered. As horrifically illustrated by recent events at Federal Correctional Institution (FCI) Dublin, sexual abuse of incarcerated people by correctional staff is frequently perpetrated by express or implied coercion, rather than physical force.[1]

Second, the requirement of "serious bodily injury" should be removed. The trauma of an assault, especially a sexual assault, does not necessarily depend on the degree of bodily injury that it causes. To the extent that degree of injury is relevant, courts are in the best position to evaluate its significance without a rigid limitation imposed by the Policy Statement.

Third, the phrase "correctional officer or other employee or contractor of the Bureau of Prisons" should be expanded to include "; the United States Marshals Service; of a state, local, or private corrections agency; or by another incarcerated person." Federal prisoners are no less traumatized by sexual or physical assault or abuse when it occurs in the custody of these additional agencies or at the hands of another incarcerated person.

Changes in Law

We strongly support inclusion of the proposed Changes in Law enumerated circumstance:

> (5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.

The statutory language of § 3582(c)(1)(A) is certainly broad enough to encompass legal changes which have occurred since the defendant's original sentencing.

For example, Section 401 of the FSA substantially reduced enhanced penalties for individuals with prior drug convictions. An individual serving a life sentence under these provisions might raise in her motion the fact that the same offense would garner a 25-year sentence today. Of course, this legal development alone would not entitle her to relief—the court would also have to consider the 18 U.S.C. § 3553(a) factors and the remainder of § 1B1.13. But clearly a court could find that the difference between the sentence the defendant received, and the one she would receive today for identical conduct, is an extraordinary and compelling reason for the court to reconsider whether this individual should continue to serve the rest of her life in prison.

Other Circumstances Options

In light of the broad statutory discretion given to district courts under § 3582(c)(1)(A), we view the Commission's Option 3 as the most appropriate approach to the "catchall" basis for relief:

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[1] See U.S. Senate Perm. Subcomm. on Investigations, *Sexual Abuse of Female Inmates in Fed. Prisons – Staff Rpt.* (Dec. 13, 2022).

"(6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)]"

Options 1 and 2 insert additional restrictions that are not supported by the statutory text. With one exception (rehabilitation alone[2]), Congress included no categorical limits on what may qualify as extraordinary and compelling reasons, which by their nature are varied, frequently unanticipated, and not reducible to an exhaustive list.

Indeed, the experience of compassionate release over the past several years, when courts have been operating without an applicable policy statement, shows that judges have appropriately used their discretion to determine whether extraordinary and compelling reasons exist, and have taken seriously the requirement to consider the § 3553(a) factors as well. The Commission's data show that of the 25,416 compassionate release motions filed between October 2019 and September 2022, only 16.2 percent were granted.[3] The Commission's policy statement should preserve and support federal courts' discretion and expertise in adjudicating compassionate release motions.

Proposed Amendments #6 & #7: Career Offender and Criminal History

We write about these two proposed amendments together because each fundamentally presents the same issue: to what degree should a person's criminal history affect their sentence in their current case? In a different context, Congress confronted this same issue in enacting Sections 401, 402, and 403 of the First Step Act, which, for Sections 401 and 403, tempered certain draconian prior-conviction enhancements, or, for Section 402, made individuals with more criminal history points eligible for safety valve relief. We urge the Commission, in each instance presented in Proposed Amendments #6 & #7, to move in the direction of assigning criminal history less weight as a factor in sentencing.

Among many problems, overreliance on criminal history in sentencing exacerbates the effect of racially disparate arrest and prosecution rates. A 2014 examination of 3,528 police departments found that Black Americans are more likely to be arrested in almost every city for almost every type of crime; at least 70 police departments arrested Black people at a rate ten times higher than non-Black people.[4] For this reason, criminal history can often be more of a proxy for race than for any factor that is valid and relevant to sentencing.

"Status points" present one example of criminal history-based sentencing without evidentiary justification. These are criminal history points assigned under § 4A1.1(d) to a defendant who was "under any criminal justice sentence" (most commonly on probation) at the time of the current offense. Status points often result in what amounts to "triple-counting" of a prior conviction in determining how much incarceration a person will serve as a consequence of

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[2] 28 U.S.C. § 994(t).

[3] United States Sentencing Commission, *Compassionate Release Data Report Fiscal Years 2020 to 2022*, tbl. 1 (Dec. 19, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf.

[4] Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA Today, Nov. 19, 2014, http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/.

his current offense. The prior conviction itself raises the criminal history score, the status points raise it further, and the prior sentencing court often imposes consecutive punishment for the probation violation.

Sentencing Commission data from 2022 reveals that in the five preceding fiscal years, 37.5 percent of federal offenders received status points, resulting in a higher criminal history category for 61.5 percent of those individuals. And yet for the cohort of individuals released from incarceration in 2010 and tracked for the following 12 years, the Commission concluded that: "[t]hose who received status points were rearrested at similar rates to those without status points who had the same criminal history score," and "[s]tatus points only minimally improve the criminal history score's successful prediction of rearrest—by 0.2 percent."[5] These data points suggest that lengthening sentences based on this aspect of criminal history is not empirically justified.

Career Offender sentencing under §4B1.1 presents an example where prior convictions can dramatically and arbitrarily escalate the guideline range, out of proportion to any other factor about the person or the offense. In its 2016 report to Congress on Career Offender sentencing, the Commission highlighted that most people designated as "career offenders" were sentenced for drug trafficking, and that those whose prior "qualifying" offenses were drug-only (i.e., not violent offenses), "are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive."[6]

Federal judges clearly recognize that the Career Offender guideline usually calls for sentences that are too high: in FY2021, judges imposed within-guideline sentences for only 19.7 percent of those sentenced as career offenders.[7] Yet each of the Commission's proposed modifications to the Career Offender guideline and definitions appears to *increase* the number of people who would be subject to sentencing as a Career Offender. We urge the Commission to avoid expanding the reach of this flawed guideline provision and, more broadly, to revise Proposed Amendments #6 & #7, to assign criminal history less weight as a factor in sentencing.

Proposed Amendment #8: Acquitted Conduct

We commend the Sentencing Commission on proposing amendments to the Guidelines Manual that would limit federal courts from considering acquitted conduct while applying the guidelines. We applaud the Commission for recognizing consideration of this issue as a priority during its 2022-2023 amendment cycle, and we ask the Commission to take the following issues into account during the amendment process.

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[5] United States Sentencing Commission, *Revisiting Status Points* 2-3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

[6] United States Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), https://www.ussc.gov/research/congressional-reports/2016-report-congresscareer-offender-enhancements.

[7] United States Sentencing Commission, *Quick Facts on Career Offender* (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf.

Fifth and Sixth Amendment Guarantees of Due Process and the Right to a Jury Trial

Federal courts have interpreted §§ 1B1.3 and 1B1.4 to permit the use of acquitted conduct during sentencing, as the latter section indicates that "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant." This language has been construed to include not only conduct for which a defendant has been convicted, but also conduct for which he or she has not been convicted, without distinguishing between uncharged conduct for which a defendant has not been convicted and conduct for which a defendant has actually been acquitted. The distinctions between uncharged and acquitted conduct justify treating acquitted conduct differently for the purposes of sentencing (though examination of the use of uncharged conduct at sentencing may be appropriate in future amendment cycles, for related reasons). An acquittal indicates that a finder of fact, usually a jury of one's peers, has determined that the government failed to prove a defendant guilty beyond a reasonable doubt of each element of an offense. While some have argued that an acquittal is not equivalent to a finding of actual innocence, failing to treat it as such in the sentencing context would result in an acquitted defendant essentially reaping no benefits from the jury's finding of not guilty and continuing to carry the stigma and consequences of being accused of a crime.

Further, when a judge considers relevant conduct during sentencing, the burden of proof is a preponderance of evidence, the lowest standard, compared to proof beyond a reasonable doubt, which applies to a jury's consideration during a criminal trial. When a judge is permitted to reevaluate a jury's verdict regarding alleged conduct at a lower standard during sentencing, and allow those factual findings to influence the defendant's sentencing on separate charges, he or she effectively sets aside the jury's verdict. Moreover, the judge may reconsider this conduct without affording a defendant the various other protections he or she enjoys during a trial, such as the right to confront witnesses or the exclusion of impermissible hearsay. Consideration of acquitted conduct during the sentencing process effectively strips the defendant of his or her constitutional rights to due process and a trial by jury as to those allegations, as it allows a judge to circumvent a jury's verdict without the same procedural safeguards, and impose his or her own factual conclusions.

The Statutory Purposes of Sentencing

The sentencing guidelines established by the Commission are designed in part to incorporate the statutory purposes of sentencing (including just punishment, deterrence, incapacitation, rehabilitation, and respect for the law) and to provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct. Permitting the consideration of acquitted conduct at sentencing disregards many of these goals.

First, defendants are frequently factually innocent of conduct for which they have been acquitted. A defendant cannot be rehabilitated from a crime he did not commit, nor deterred from committing future criminal activity related to conduct in which the defendant did not engage. Similarly, since most people are unaware that they can be punished for acquitted conduct, the availability of such punishment does not result in either specific or general deterrence. Just punishment implies principles of equity and reasonableness, which are not evoked in a sentencing process that allows punishment for conduct for which a jury has acquitted a

defendant. Further, consideration of acquitted conduct can exacerbate unwarranted disparities among similarly situated defendants, particularly where co-defendants are tried together for a myriad of offenses resulting in different convictions for each. In such a scenario, a judge may still consider charges of which some defendants were acquitted when contemplating their sentences. Because of its fundamental unfairness, punishing a defendant for acquitted conduct fails to promote respect for the law and in fact does the opposite.

Proposed Exceptions to the Limitation on Consideration of Acquitted Conduct

The Commission's proposed amendment to § 1B1.3 would provide that "acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction."

We urge the Commission to refrain from promulgating any exceptions to its limitation on the consideration of acquitted conduct, including excepting conduct admitted during a guilty plea colloquy in a subsequent prosecution. We recognize that defendants may plead guilty for reasons sometimes unrelated to actual guilt, and thus an acquittal by a trier of fact should supersede statements made during such plea colloquies. We also support the Commission's proposed definition of "acquitted conduct," which includes "conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction." A motion of acquittal granted on any grounds should carry the same weight and finality as an acquittal by a trier of fact, in order to promote principles of fairness and respect for the justice system and the law.

In addition, we urge the Commission to reconsider its proposed amendment to § 6A1.3 indicating that "acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." This language may have the effect of condoning the unjust practice of considering acquitted conduct, and its explicit inclusion is unnecessary, because the extent to which the Guidelines Manual permits consideration of "acquitted conduct" is clear based on the Commission's new definition of the term.

For all of the aforementioned reasons, the Commission should use the discretion Congress has granted it to amend the Guidelines Manual to promulgate amendments prohibiting the use of acquitted conduct in applying the guidelines. Legislation introduced before Congress to prohibit punishment for acquitted conduct has enjoyed broad bipartisan support,[8] and multiple Supreme Court Justices have challenged the constitutionality of this practice. We echo the late Justice Scalia, joined by Justice Thomas and the late Justice Ginsburg, in the sentiment that "this has gone on long enough."

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[8] We recognize that the Sentencing Commission's authority extends only to prohibiting the use of acquitted conduct for determination of an applicable guideline range, and thus does not encroach on Congress's lawmaking authority as expressed in S.601 (117th Cong.), which would prohibit *all* consideration of acquitted conduct at sentencing, except for mitigation. We nonetheless believe that this action by the Commission would be a substantial step toward fairness and constitutionality in federal sentencing.

Proposed Amendment #9: Sexual Abuse Offenses

We commend the Commission on proposing amendments to the Guidelines Manual in response to the passage of the Violence Against Women Act (VAWA) Reauthorization Act of 2022, which reauthorizes VAWA through 2027 and modernizes current law to better address the evolving needs of domestic violence and sexual assault survivors. Senators Feinstein, Ernst, Durbin, and Murkowski led this reauthorization on a bipartisan basis with the intent to renew our longstanding commitment to protecting the most vulnerable members of our communities.

The 2022 VAWA reauthorization created two new offenses that (1) prohibit any person from engaging in, or causing another to engage in, sexual misconduct while committing a civil rights offense; and (2) prohibit any individual, while acting in their capacity as a federal law enforcement officer, from knowingly engaging in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. Last year, several Senators sent multiple letters urging the Department of Justice and the Bureau of Prisons (BOP) to immediately act to enhance prevention, reporting, investigation, prosecution, and discipline of sexual misconduct perpetrated by staff against incarcerated people.[9] We were pleased to learn that the Department has convened a working group of senior officials dedicated to addressing this issue. The working group has proposed recommendations and reforms to better protect individuals in BOP's custody from sexual abuse, and we understand that some of these plans have already been implemented. We urge the Commission to join us in the effort to promote safe, secure, and effective correctional facilities by promulgating carefully deliberated amendments to the Guidelines that will implement the VAWA reauthorization provisions and appropriately hold offenders accountable.

Proposed Amendment #10: Alternatives-to-Incarceration Programs

We commend the Commission on identifying "a multiyear study of court-sponsored diversion and alternatives-to-incarceration programs" as one of its policy priorities this amendment cycle. The United States has one of the highest incarceration rates in the world, averaging approximately 505 prisoners per 100,000 people.[10] According to the Prison Policy Initiative, United States correctional systems, including federal, state, local, and tribal facilities, hold nearly two million people at any given time.[11]

While incarcerated, these individuals are unable to contribute to their households and communities, and they are subject to the many adverse physical, emotional, and psychological challenges associated with being confined. Additionally, once individuals are released from correctional facilities, they are likely to be disadvantaged by the collateral consequences of incarceration and convictions, which may include barriers to securing housing, employment,

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[9] Durbin, Grassley, Feinstein, Padilla Press DOJ for More Information on Sexual Misconduct at BOP, Press Release, (December 12, 2022), https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-feinstein-padilla-press-doj-for-more-information-on-sexual-misconduct-at-bop.

[10] *Countries with the Largest Number of Prisoners Per 100,000 of the National Population, as of January 2023*, STATISTA (Jan. 2023), https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants.

[11] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html.

education, and voting access. These social and economic barriers can contribute to less successful reintegration into society and thus an increased likelihood of recidivism.

Furthermore, not only is mass incarceration damaging to our communities and the families that reside in them, but it places a heavy burden on our economy. The Bureau of Justice Statistics has estimated that the United States spends near $81 billion on correctional facilities each year,[12] and factoring in other intertwined expenses associated with the criminal justice system, the total annual amount spent on incarceration is closer to $182 billion.[13] Recent data indicate that the average annual cost of incarceration for a Federal prisoner is about $39,158.[14]

We encourage the Commission to comprehensively explore the expansive array of diversion programs available to prevent low-risk individuals from ever entering correctional facilities, including community service, education, deferred prosecution or deferred sentencing agreements, and courts that specialize in mental health programs, veterans' services, and substance use disorder treatment. Studying the various models, their measures of success and rates of recidivism, and the demographic and offense characteristics of participants would likely be instructive as to when and how judges should be granted wide discretion to utilize such programs and how the programs can be implemented without unwarranted disparities. We also encourage the Commission to examine the same factors in its study of the variety of other alternatives to incarceration, including probation, home confinement, electronic monitoring, residential reentry centers, restorative justice practices, and other sentencing options designed to promote accountability, community safety, and productivity.

Thank you for considering our views.

Sincerely,

Richard J. Durbin
Chair

Cory A. Booker
United States Senator

Mazie K. Hirono
United States Senator

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[12] Peter J. Tomasek, *Annual Prison Costs Going into 2023*, INTERROGATING JUST. (Dec. 28, 2022), https://interrogatingjustice.org/ending-mass-incarceration/annual-prison-costs-going-into-2023.

[13] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[14] Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49060, 49060 (Sept. 1, 2021).