October 17, 2022

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2022-2023 Amendment Cycle

Dear Judge Reeves,

FAMM (formerly known as Families Against Mandatory Minimums) welcomes this opportunity to comment on the proposed priorities announced by the Sentencing Commission. We wrote to the Commission on September 16, 2022, to recommend priorities for this amendment cycle. We write now to comment on several of the Commission's proposed priorities.

I. Proposed Priority (1): Compassionate Release, USSG §1B1.13

Compassionate release has been a lifeline for thousands of individuals during a historic pandemic and beyond. FAMM provides two recommendations on how to incorporate changes made by the First Step Act of 2018 (FSA) in USSG §1B1.13. In addition, the time period in which the Commission has been without a quorum has revealed additional bases that we would recommend be added to the enumerated list of extraordinary and compelling circumstances described in the policy statement.

By statute, judges evaluating compassionate release motions must consider "applicable" policy statements issued by the Commission. The policy statement addressing compassionate release, USSG §1B1.13, applies only to motions for compassionate release initiated by the Director of the Bureau of Prisons (BOP).[1] So as an initial matter, and to comport with the FSA, the policy statement should be updated to include compassionate release motions filed by people who are incarcerated. In addition, sentencing judges should be given the same latitude as BOP to "[d]etermine[] [whether] . . . there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)."[2]

[1] USSG §1B1.13.
[2] *Id.* at comment. (n.1(D)).

In our September 16 letter, FAMM presented the stories of people who were granted compassionate release because the sentencing judge used his or her discretion to consider grounds other than those described in Application Note 1.[3] Not every extraordinary and compelling reason *can* be anticipated by the Commission. The catchall provision in USSG §1B1.13, Application Note 1(D), recognizes the inherent unpredictability of circumstances that may warrant compassionate release.[4] Judges have proven their ability to carefully consider such unforeseen circumstances and determine whether they are truly extraordinary and compelling, potentially warranting a reduction in sentence. It is critical that judges retain this authority moving forward.

Amending §1B1.13 to allow for judicial agility is also called for in light of executive branch intransigence when it comes to compassionate release. BOP has *never* exercised the discretion afforded it in Application Note 1(D) to bring compassionate release motions on behalf of individuals for unforeseen circumstances. In fact, it almost never files for circumstances expressly described in §1B1.13 and replicated in its own program statement governing compassionate release at P.S. 5050.50. Between March 2019 and October 2022, BOP brought only 1 percent of the compassionate release motions that were granted.[5] And the government almost always opposes compassionate release motions filed by defendants. While Commission data do not report on the number of defendant-filed motions the government opposed, we do know that from March 2019 to October 2022 the government filed jointly with the defense only 2.5 percent of the time.[6] Now that defendants can file their motions directly in court, courts need the tools to be able to respond when confronted with extraordinary and compelling reasons not addressed in the policy statement.

In addition to recommending the Commission bring the compassionate release policy statement in line with the FSA, FAMM proposes two new grounds to include in the list of those considered extraordinary and compelling reasons for a reductions in sentence. As a prerequisite to expanding this list, we recommend amending the definition of "extraordinary and compelling reasons." One of the most important lessons learned during the years the Commission was without a quorum is that circumstances may transpire that drastically change the nature of incarceration, and so transform a sentence that it no longer fits the purposes of punishment. To account for such unforeseen circumstances we propose that the description of compassionate release make clear that the examples in Application Note (1) are not exhaustive. For example, the description could be updated to read:

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[3] Letter from Mary Price & Shanna Rifkin to Hon. Carlton W. Reeves (Sept. 16, 2022), https://famm.org/wp-content/uploads/PriorityLetter_FAMM_2022.pdf.
[4] *See* USSG §1B1.13, comment. (n.1(D)).
[5] *See* USSC, *United States Sentencing Commission Compassionate Release Data Report* tbl.5 (Sept. 2022).
[6] *Id.*

> 1. **Extraordinary and Compelling Reasons.**—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons ~~exist under~~ include, but are not limited to, any of the circumstances set forth below.

We also encourage the Commission to add two new bases for compassionate release to this non-exhaustive list. First, we believe that the examples for compassionate release should be amended to include public health emergencies in federal prisons. The pandemic taught us that Application Note 1(A)(ii) did not adequately capture the medical threat posed by COVID-19, a public health emergency that transformed chronic, but otherwise stable health conditions, into debilitating and life-ending conditions.[7] Early in the pandemic, precious months were lost during which the government fought compassionate release motions brought on behalf of people with underlying medical conditions who faced serious illness or death should they contract COVID-19 until Main Justice finally conceded the point.[8] With the advent of Monkeypox and the likelihood of additional viruses, and the problems BOP had protecting people in its care, we think including such a reason will help balance the need to protect the public and also keep prisons safe for incarcerated people and corrections staff.

Second, sexual abuse during incarceration should be added to the list of enumerated examples. The rampant sexual misconduct at FCI Dublin – which has earned the facility the nickname, "the rape club" – has led to the prosecution of a number of BOP officers.[9] And yet, survivors of the horrific sexual abuse remain in custody, stigmatized for what they have lived through, facing retaliation, and deprived of mental health counseling. None of the people who have been grossly abused in prison were sentenced to endure such violence. And this violence has made their incarceration degrading and terrifying. Moreover, given the carceral setting, these survivors cannot protect themselves or flee from abusers. The trauma of sexual violence is enduring in a setting in which survivors may be re-victimized at any time.

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[7] *See, e.g.*, *United States v. Douglas*, No. 10-171-4, 2021 Lexis 10755, at *13 (D.D.C. Jan. 21, 2021) (conceding that health circumstances exacerbating the impact of COVID-19 do not fit within Application Note 1(A) and relying instead on the catch-all provision in 1(D) to find an extraordinary and compelling circumstance).

[8] *See, e.g.*, *United States v. Wright*, 8:17-cr-00388-TDC, ECF 50, *Supplemental Response* (D. Md. May 19, 2020) ("The Government now supplements [its] response in light of intervening Department of Justice guidance. Based on that guidance, the Government concedes that the defendant's Type I diabetes, and perhaps other of her medical conditions, constitute 'extraordinary and compelling circumstance' during the current pandemic, even if these conditions in ordinary times would not allow compassionate release.").

[9] For detailed examples of the abuse that these survivors have suffered, *see* Lisa Fernandez, Fox KTVU, *Dozens of women detail rape and retaliation at Dublin prison, real reform is questioned*, (Sept. 25, 2022), https://www.ktvu.com/news/dozens-of-women-detail-rape-and-retaliation-at-dublin-prison-real-reform-is-questioned; *see also* Nate Gartrell, The Mercury News, *As systemic prison sex abuse scandal continues, ex-FCI Dublin guard hit with additional felony charges* (Sept. 30, 2022), https://www.mercurynews.com/2022/09/29/as-systemic-prison-sex-abuse-scandal-continues-ex-fci-dublin-guard-hit-with-additional-felony-charges/.

The Commission has the power to provide relief to certain individuals in this population whose sentences have become psychological torture, perpetrated by the very agency tasked with ensuring their safety.

We urge the Commission to amend the policy statement at §1B1.13 to align it with the FSA, as discussed above, and to expand the description of extraordinary and compelling circumstances, which should not be exhaustive.

II. Proposed Priority (2): Amendments To The Guidelines Manual To Implement The First Step Act Of 2018

We support the Commission in its aim to update the guidelines in a manner consistent with the FSA. In addition to the changes to compassionate release and punishments for certain firearm and drug offenses, the FSA also changed the statutory safety valve. The safety valve, codified at 18 U.S.C. § 3553(f), directs sentencing judges to depart from a mandatory minimum sentence for certain defendants convicted of drug crimes, and instead, impose a guideline sentence. To be eligible for the statutory safety valve, a defendant must meet five criteria.[10]

The FSA expanded eligibility criteria for the statutory safety valve.[11] Under the old criteria, an individual was ineligible for safety valve relief if they had more than one criminal history point. This excluded many low-level defendants who did not present a recidivism risk. Under the current eligibility criteria, an individual is safety valve eligible if, among other reasons, they have no more than four criminal history points. The current corresponding safety valve provision in the guidelines, however, reflects the now-outdated eligibility criteria.[12] The Commission has historically mirrored the statutory criteria and we hope that the Commission will update §5C1.2 to reflect the changes made under the FSA.

III. Proposed Priority (4) and (6): Career Offender Guideline, §4B1.1 & Categorical Approach, §4B1.2

FAMM supports amendments that would narrow the scope of USSG §4B1.2. The Career Offender guideline, in its current state, is over inclusive. While the Career Offender guideline is the result of a congressional directive, the manner in which predicates are identified is within the control of the Commission. For example, the

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[10] 18 U.S.C. § 3553(f). The five criteria are: (1) the defendant does not have more than 4 criminal history points, excluding criminal history points from a 1-point offense; a prior 3-point offense; and a prior 2-point violent offense; (2) the defendant did not use violence or credible threats of violence or possess a firearm or dangerous weapon; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense; and (5) the defendant has provided truthful information to the government about the offense.
[11] *Compare* Violent Crime Control and Law Enforcement Act § 80001 (requiring for eligibility that a defendant have not more than 1 criminal history point), *with* 18 U.S.C. § 3553(f) (2018) (requiring for eligibility that a defendant does not have "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense").
[12] USSG §5C1.2.

Commission has used its discretion to, among other things, credit acceptance of responsibility in the instant offense,[13] limit the counting of stale priors,[14] and exclude simple possession prior drug felonies as Career Offender predicates.[15]

The Commission should go further to limit the impact of prior offenses in ways that ensure that only those who have indeed made careers of crime are subject to the enhanced penalties. We are especially concerned about the steep punishment that the Career Offender designation has on those who have spent little or no time incarcerated for their prior offenses, despite the felony nature of their priors.

The Commission has an opportunity now to limit the reach of the career offender guideline. As discussed in the proposed priorities, the Career Offender guideline enhances the punishment for defendants using prior convictions for crimes not recognized in the federal code. We urge the Commission to use this amendment cycle to end that practice. Additionally, FAMM cautions the Commission against adopting any alternative to the categorical approach. For additional detail, FAMM incorporates the response submitted by the Federal Public Defenders as to these two proposed priorities.

IV. Proposed Priority (7): (A) the impact of "status" points under subsection (d) of §4A1.1 and (B) the treatment of defendants with zero criminal history points

In our priorities letter for the 2018/2019 amendment cycle, FAMM wrote of our disappointment that the Commission had decided against adopting an adjustment for "first offenders" it had considered.[16] We are delighted to see that the Commission is considering once again implementing a "first offender" adjustment. Doing so would assist the Commission in complying with two underutilized statutory directives. First, in the Sentencing Reform Act (SRA), Congress requires the Commission to craft guidelines that ensure punishment other than incarceration for "first offenders," and defines "first offenders" as defendants who have not been convicted of a crime of violence or serious drug offense.[17] Second, the SRA directs the Commission to craft guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . ."[18]

The current criminal history guideline misses the mark. It draws Criminal History Category I too broadly, equating defendants with no criminal history whatsoever with those with countable history. Providing an adjustment for "first

[13] USSG §4B1.
[14] USSG §4A1.2(e).
[15] USSG §4B1.2(b).
[16] Letter from Kevin A. Ring & Mary Price to Hon. William H. Pryor, Jr 8 (August 9, 2019), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20180628_fr_proposed_priorities.pdf.
[17] 28 U.S.C. § 994(j).
[18] 28 U.S.C. § 994(g).

offenders" would help the Commission comply with congressional intent. We also encourage the Commission to consider including defendants who have history that result in non-countable priors.

We suggest the Commissioners review FAMM's October 10, 2017 comment on the First Offender Adjustment proposed amendment for additional ideas about how to craft a first offender adjustment.[19]

Status points play an outsize role in increasing sentence length for affected defendants despite the fact that status points have scant predictive value. According to the Commission's recent report on the subject, status points nearly double criminal history scores for those assigned them as compared to those not assigned status points.[20] Status points thus lead to longer proposed punishment. The average prison sentence based on status points was 66 months, compared to 45 months for individuals without status points.[21] Meanwhile the report found that assessing status points improves "prediction of re-arrest by only 0.2 percent."[22]

Over 1/3 of federal defendants were subject to status points, and over 1/2 of those defendants saw increases to their criminal history scores.[23] The Commission's research reveals that status points had no significant impact on predicting recidivism or potential for re-arrest. This means that status points serve no useful purpose but exert an unintended punitive impact.

We applaud the Commission's proposal to include revisiting status points among its priorities.

V. Proposed Priority (9): Acquitted Conduct, §1B1.3

FAMM supports the Commission for including in its proposed priorities any initiative that would re-examine and put an end to the use of acquitted conduct at sentencing. Our September 16, 2022 recommended priorities letter details our position on the acquitted conduct guideline.[24] We incorporate, by reference, our views on that guideline into this response.

[19] Letter from Kevin A. Ring & Mary Price to Hon. William H. Pryor, Jr. (October 10, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171010/FAMM.pdf.
[20] USSC, *Revisiting Status Points* 18 (2022).
[21] Id. at 3.
[22] Id. at 18.
[23] Id. at 2, 17.
[24] *See supra* n.3.

VI. Proposed Priority (12): Multiyear Study Of Court-Sponsored Diversion And Alternatives-To-Incarceration Programs

FAMM supports the Commission's initiative to undertake a multi-year study on alternatives to incarceration.

VII. Conclusion

Thank you for considering our views. We are so pleased that the Commission will once again be able to serve its role as a vital agency and we look forward to working together in the coming years.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
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