

**United States Sentencing Commission Public Meeting Minutes
October 28, 2022**

Chair Carlton W. Reeves called the meeting to order at 9:00 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Carlton W. Reeves, Chair
- Luis Felipe Restrepo, Vice Chair
- Laura E. Mate, Vice Chair
- Claire Murray, Vice Chair
- Candice C. Wong, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioners were present via telephone:

- Claria Horn Boom, Commissioner
- John Gleeson, Commissioner

The following Commissioner was not present:

- Patricia K. Cushwa, Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen Grilli, General Counsel

Chair Reeves stated that the first order of business was a motion to adopt the December 13, 2018, public meeting minutes. Vice Chair Mate moved to adopt the minutes, with Vice Chair Murray seconding. Chair Reeves called for discussion on the motion. Hearing no discussion, Chair Reeves called for a vote, and the motion was adopted by voice vote.

Chair Reeves welcomed the public attending the Commission's meeting, whether they were in-person or watching via the Commission's livestream broadcast. He stated that he was honored to Chair his first public meeting, which also marked the first time in four years that the Commission has held a public meeting with a full slate of commissioners.

Chair Reeves noted that he was confirmed by the Senate on August 4, 2022, along with his six highly qualified and respected fellow commissioners and he was pleased have them alongside him. He further noted that the commissioners' confirmations were the first time since 1999 that a full slate of voting commissioners were appointed at once. And, as commissioners are appointed to staggered six-year terms, the fact that all seven are new to the Commission is highly

unusual and exciting.

Chair Reeves acknowledged the passing of former Commissioner Sterling Johnson. Commissioner Johnson joined the Commission in 1999 and served until 2002. Commissioner Johnson was a United States District Judge in the Eastern District of New York, where he served with distinction alongside one of the new commissioners. Chair Reeves expressed the Commission's appreciation for all Commissioner Johnson did for the Commission, the State of New York, and the United States.

Chair Reeves introduced his fellow commissioners.

Vice Chair Laura E. Mate served for many years as the Sentencing Resource Counsel for the Federal Public and Community Defenders.

Vice Chair Luis Felipe Restrepo serves on the Court of Appeals for the Third Circuit, and previously served as a United States District Judge, a Federal Public Defender, and as a private practitioner accepting cases through his court's Criminal Justice Act (CJA) panel.

Vice Chair Claire Murray most recently served as the Principal Deputy Associate Attorney General at the Department of Justice.

Commissioner John Gleeson previously served as a United States District Judge in the Eastern District of New York along with Judge Sterling Johnson.

Commissioner Candice C. Wong is an Assistant United States Attorney at the Department of Justice and Chief of the Violence Reduction and Trafficking Offenses Section in the U.S. Attorney's Office in Washington, DC. Commissioner Wong previously served as the Commission's ex-officio member.

Commissioner Jonathan J. Wroblewski represents the Department of Justice as the designated ex officio member of the Commission.

Judge Claria Horn Boom is a United States District Judge who serves in both the Eastern and Western Districts of Kentucky.

Commissioner Patricia K. Cushwa represents the United States Parole Commission as the designated ex officio member of the Commission but was unable to attend the meeting.

Chair Reeves expressed his gratitude for his colleagues, noting each brings a wide breadth and robust experience and a unique and very important perspective to the Commission's sentencing policy work.

Chair Reeves stated that after four years without a Commission quorum there was a backlog of policy work. Upon confirmation, the Commissioners quickly began the important mission entrusted to it. The 2022-2023 amendment cycle is abbreviated because, by statute, the

Commission must submit amendments to Congress for review no later than May 1, 2023. As a result, the unusual year-long amendment cycle is down to just six months. Nevertheless, Chair Reeves asserted, the Commission was committed to meeting its deadlines and will focus in this initial amendment cycle on the most urgent policy concerns. On September 29, 2022, the Commission issued its tentative list of policy priorities and notice for public comment, with its top focus on implementation of the First Step Act of 2018. The proposed priorities were posted on the Commission's website and the volume of feedback received was indicative of the important work the Commission has ahead of it.

Chair Reeves reported that the Commission received over eight thousand public comments on the proposed priorities. The Commission heard from District Courts, members of Congress, federal public defenders, criminal defense lawyers, probation officers, the Departments of Justice (DOJ), Homeland Security, and other executive branch agencies. Advocacy organizations, universities, and individuals currently incarcerated and their families also submitted comments.

Chair Reeves expressed the Commission's gratitude for the public's comments as they are important and valuable to the Commission as it moves forward during the amendment process.

Chair Reeves recognized the work done under the leadership of his immediate predecessor, Judge Charles Breyer, Senior United States District Judge for the Northern District of California. He stated that the Commission owed Judge Breyer a great deal of gratitude for the two years he served as Acting Chair and lone voting member on the Commission. Chair Reeves commended Judge Breyer's stewardship of the Commission, acknowledging its impressive productivity.

Chair Reeves recounted how, in 2022 alone, the Commission released 14 reports on many timely and important topics in the federal criminal justice system, including: recidivism; the impact of Bureau of Prisons programming; robbery offenses; illegal reentry offenses; and two areas on which legislation awaits implementation by the Commission, compassionate release and firearms offenses. The release of these reports, Chair Reeves observed, was a testament to the dedication of Judge Breyer and the remarkable staff of the Commission.

Chair Reeves recalled the many calls, text messages, and emails he received upon his nomination and subsequent confirmation as Chair. He recalled how many people offered their support and encouragement. He also recounted how many others also reacted with a gasp and asked how he would undertake the position.

Chair Reeves conceded that he did yet know the answer to that question. But, he continued, the Commission will not be able to do anything without the staff or without the commissioners listening to one another and keeping an open mind. He observed that the criminal justice system has many moving and interrelated parts, emphasizing the word justice. Justice, he asserted, will be front and center in all Commission's work.

Chair Reeves expressed his understanding that much was expected of the new Commission beyond the immediate priorities, and that it was eager to do the important work entrusted to it. He asserted that the Commission would operate in a deliberative, empirically based, and

inclusive manner as it was committed to a shared common goal: building on the work of the past Commissions and leave an improved federal sentencing guideline system for the next commissioners.

Chair Reeves stated that he was the first to acknowledge that the Commission's work was not easy, recognizing that the work was challenging, sometimes tedious, but always vitally important. As a Commission, he continued, the commissioners will deliberate, discuss, debate, and at times, disagree, but they would not be disagreeable. Ultimately, Chair Reeves believes the commissioners will have the satisfaction of knowing they did what they thought best for the nation's criminal justice system.

Chair Reeves stated that the Commission's first proposed priority was implementation of the First Step Act of 2018. The First Step Act amended 18 U.S.C. § 3582 to allow defendants for the first time to move for compassionate release on their own, without having the Director of the Bureau of Prisons make such a motion.

In the absence of a Commission policy statement recognizing this new avenue, courts of appeals generally have held the Commission's policy statement governing compassionate release, §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), does not apply to motions filed by defendants. Without guidance from the Commission, during the COVID-19 pandemic the debate about what constituted extraordinary and compelling reasons for compassionate release took front and center stage across the nation and produced different results.

The Commission's report on compassionate release, Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic (March 2022), found that the likelihood of compassionate release motions succeeding varied significantly depending upon the circuit or district in which they were filed. This suggested that courts could benefit from clearer guidance from the Commission, which makes this issue important for the Commission's agenda this year.

Additionally, the First Step Act expanded eligibility for the safety valve to certain offenders with more than one criminal history point. The Commission will need to amend §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to recognize this change, but it will also need to consider changes to the two-level reduction in the drug trafficking guideline, §2D1.1 (Drug Trafficking), to meet the safety valve criteria. Consideration of any potential amendments may be complicated by differing caselaw among the circuits regarding the scope of the new statutory safety valve criteria.

Chair Reeves stated that the Commission also intended to implement the Bipartisan Safer Communities Act, firearms legislation passed after the Uvalde, Texas, shootings, signed into law in July. This Act directs the Commission to increase penalties for certain firearms offenders, particularly straw purchasers. The Commission also will work to implement other legislation that warrants action.

The Commission's proposed priorities also include examining and resolving the most critical

circuit conflicts regarding guideline interpretation, as suggested in some of the United States Supreme Court's denials of writs of certiorari.

The policy priorities also include work starting in this amendment cycle but may not be completed given their complexity and the abbreviated, six-month timeframe the Commission must work under. These priorities include continuation of the Commission's examination of the categorical approach in determining, for example, whether an offense is a crime of violence or a controlled substance offense. Another multi-year priority is examination of possible amendments to the criminal history guidelines to account for recent recidivism research regarding zero point offenders and the impact of status points.

Multi-year priorities also include possible amendments to prohibit the use of acquitted conduct in applying the guidelines; simplification of the guidelines; an examination of case law concerning the validity and enforceability of guideline commentary; and a study of court-sponsored diversion and alternatives-to-incarceration programs.

Chair Reeves concluded his report by again thanking his fellow commissioners and staff for their hard work in preparing for the public meeting. He also thanked everyone that submitted comments on the proposed priorities. He acknowledged that work would not be easy, but that the Commission will be up to the task.

Chair Reeves called on the General Counsel, Kathleen Grilli, to advise the Commission on a possible vote to adopt and publish the final notice of policy priorities for the 2022-2023 amendment cycle.

Ms. Grilli stated that a notice of possible priorities was published by the Commission on its website on September 29, 2022, and in the Federal Register on October 5, 2022, with the comment period concluding on October 17th, 2022. The Commission received and reviewed public comment pursuant to that notice.

Ms. Grilli advised that at this time a motion to adopt and publish in the Federal Register the final notice of priorities for the Commission's 2022-2023 amendment cycle would be in order.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Mate moved to adopt and publish the final notice of priorities, with Vice Chair Murray seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted, with at least four commissioners voting in favor of the motion.

Chair Reeves asked if there was any further business before the Commission.

Commissioner Wroblewski expressed his pleasure that the Commission once again had a voting quorum, that the President nominated and the Senate confirmed the commissioners, and that the new Commission was off to a very productive start.

Commissioner Wroblewski noted that the range of issues covered in the final priorities was substantial and reflected the range of the Commission's statutory responsibilities. He thanked the Commission on behalf of the DOJ for considering all the public comment along with the DOJ's letters sent to the Commission in September and October identifying the issues that it believed were especially important for the Commission's review.

Commissioner Wroblewski noted that the Commission was approaching the 40th Anniversary of the Sentencing Reform Act and the DOJ believes it was important for the Commission to review the federal sentencing system as a whole and not just its various individual parts. The DOJ hoped that the Commission would consider holding regional hearings or otherwise taking on a systemic review of the sentencing guidelines in 2023.

Commissioner Wroblewski also joined Chair Reeves in thanking former Commissioner Danny Reeves, Commission staff, and especially Commissioner Breyer, for their stewardship of the Commission over the last four years.

Commissioner Wroblewski noted that the Commission does much more than just amend the sentencing guidelines. The Commission's research and data functions were invaluable in giving an accurate assessment of what was happening in the federal criminal justice system and how, during the COVID-19 pandemic, this was especially important. Additionally, the Commission's training function continued to ensure that criminal justice system practitioners accurately applied the law as the Sentencing Reform Act and the Supreme Court require. Commissioner Wroblewski expressed the DOJ's appreciation for the Commission's work and its work products published during the last several years.

Commissioner Wroblewski thanked Chair Reeves for the opportunity to speak and thanked the Chair for his leadership of the Commission. He stated that it was an honor to serve with the Chair and the commissioners, and that the DOJ looked forward to working with the Commission over the coming months and years.

Chair Reeves thanked Commissioner Wroblewski for his comments.

Chair Reeves asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Mate moved to adjourn, with Vice Chair Restrepo seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 9:21 a.m.

UNITED STATES SENTENCING COMMISSION

Final Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In October 2022, the Commission published a notice of proposed policy priorities for the amendment cycle ending May 1, 2023. See 87 FR 60438 (October 5, 2022). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant

to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2023. Other factors, such as legislation requiring Commission action, may affect the Commission's ability to complete work on any or all identified priorities by May 1, 2023. Accordingly, the Commission may continue work on any or all identified priorities after that date or may decide not to pursue one or more identified priorities.

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

The Commission has identified the following priorities for the amendment cycle ending May 1, 2023:

(1) Consideration of possible amendments to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) to (A) implement the First Step Act of 2018 (Pub. L. 115–391); and (B) further describe what should be considered

extraordinary and compelling reasons for sentence reductions under 18 U.S.C. § 3582(c)(1)(A).

(2) Consideration of possible amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), and related provisions in the Guidelines Manual, to implement the First Step Act of 2018 (Pub. L. 115–391).

(3) Consideration of possible amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses.

(4) Resolution of circuit conflicts as warranted, pursuant to the Commission’s authority under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to subsection (b) of §3E1.1 (Acceptance of Responsibility) because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. § 801 et seq.) to qualify as a “controlled substance offense” under subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

(5) Implementation of any legislation warranting Commission action.

(6) Continuation of its multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the “categorical approach” in determining whether an offense is a “crime of violence” or a “controlled substance offense”; and (B) address various application issues, including the meaning of “robbery” and “extortion,” and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.

(7) In light of Commission studies, consideration of possible amendments to the Guidelines Manual relating to criminal history to address (A) the impact of “status” points under subsection (d) of §4A1.1 (Criminal History Category); (B) the treatment of defendants with zero criminal history points; and (C) the impact of simple possession of marijuana offenses.

(8) Consideration of possible amendments to the Guidelines Manual addressing 28 U.S.C. § 994(j).

(9) Consideration of possible amendments to the Guidelines Manual to prohibit the use of acquitted conduct in applying the guidelines.

(10) Consideration of possible amendments to the Guidelines Manual to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed

by law enforcement or correctional personnel.

(11) Multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary.

(12) Continuation of its multiyear examination of the structure of the guidelines post-Booker to simplify the guidelines while promoting the statutory purposes of sentencing.

(13) Multiyear study of court-sponsored diversion and alternatives-to-incarceration programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the Guidelines Manual that might be appropriate.

(14) Consideration of other miscellaneous issues, including possible amendments to (A) §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) to address offenses involving misrepresentation or marketing of a controlled substance as another substance; (B) §3D1.2 (Grouping of Closely Related Counts) to address the interaction between §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and §3D1.2(d); and

(C) §5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Carlton W. Reeves,

Chair