

UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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WEDNESDAY
APRIL 5, 2023

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The United States Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 2:10 p.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT

CARLTON W. REEVES, Chair
LAURA E. MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
LUIS FELIPE RESTREPO, Vice Chair
CLARIA HORN BOOM, Commissioner
JOHN GLEESON, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio Commissioner

ALSO PRESENT

KATHLEEN GRILLI, General Counsel
KENNETH P. COHEN, Staff Director

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C-O-N-T-E-N-T-S

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P-R-O-C-E-E-D-I-N-G-S

(2:10 p.m.)

CHAIR REEVES: We now call this meeting to order. Good afternoon. I welcome you all to this public meeting of the United States Sentencing Commission. I'm the Chair of the Commission, Carlton W. Reeves, and I thank each of you for joining us whether you're in this room with us or attending via livestream.

I have the honor of opening this meeting with my fellow commissioners. To my right, we have Vice Chair Claire Murray, Commissioner John Gleeson, and Commissioner Candace Wong. To my left, we have Vice Chair Luis Felipe Restrepo, Vice Chair Laura Mate, Commissioner Claria Horn Boom, and our Ex-Officio Commissioner Jonathan Wroblewski.

The first order of business is to vote to adopt the January 12th, 2023, public meeting minutes. Is there a motion to do so?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

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COMMISSIONER GLEESON: Second.

CHAIR REEVES: Is there any discussion on this motion? All right. I hear no discussion. We'll vote on the motion by saying aye or nay.

(Chorus of ayes.)

CHAIR REEVES: Okay, thank you. The motion is adopted by a voice vote. The next item of business is the Report of the Chair. Today's meeting marks the end of our first policy making cycle as commissioners. The policies we're voting on today are the product of an enormous amount of deliberation and care. I'm humbled to be serving with colleagues who are willing to put so much time and effort into this work. Every single one of us has done all they can to make sure we do the right thing and do the just thing.

When I say us, let me be clear. I'm talking about all of us at the Commission, not just the commissioners. We are an agency of over 100 people, some of whom are in this room, but many of whom are not because this room is too

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small. No matter where they are working right now, each member of our team played an essential role in crafting the policies we're about to vote on. Whatever we do today, our staff should be proud, knowing that our work is truly their work.

The policies we are voting on today are informed by a tremendous amount of input from individuals and communities across the country. We held three days of public hearings that were supplemented by extensive written testimony. We also received thousands of public comments. Much of this input is available to watch or read on our website, www.ussc.gov.

Some comments came from the halls of Congress. I thank Leader McConnell, Chairman Durbin, Senators Grassley, Feinstein, Booker, Hirono, and Murphy for providing their views on our work. Some comments came from the chambers of federal courts. I so appreciate the dozens of current and former federal judges, magistrate judges, and district and appeals courts judges who took the time to give us their perspectives.

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There were comments from prosecutors, public defenders, and probation officers.

Most comments, however, came from people who do not sit in the halls of Congress or on the federal bench. They came from people who do not have titles or power or even status. People who may be sitting at their desk in a home or a workplace or even a prison watching and hearing, hoping that this Commission will have listened to their pleas for change, for mercy, for justice. We've heard those voices in part because of our new online comment portal. That is just one of the many tools the Commission is using to make it easier for people to submit their views to us. As one commenter told us, "Thank you for making it easy for incarcerated people like me to tell you what we think."

But our new tools aren't the only reason we've heard from so many people. The policies we are considering are so important that many took extraordinary steps to make sure their views were heard in sending us a detailed legal

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analysis. Written from the penitentiary in West Virginia, one person wrote, "most inmates don't have access to your proposed amendments, so they don't even know what to comment on. My family sent me most of the 290 pages."

Given the effort, time, and thoughtfulness that so many placed into their comments, I am compelled to repeat what I've said so many times: When you speak to the Commission, you will be heard. Let me explain why.

Our democracy is founded on the idea that "We the People" were united "to form a more perfect union." The story of our great country is a story of perfecting that union, making her more perfect by ensuring that "We the People" includes all the people, men and women, White and Black, rich and poor, natives and immigrants. The choices our government makes, questions of "life, liberty, and the pursuit of happiness" are too important to be decided by position, power, or tradition.

In my role as Chair of the Commission,

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my job is to make sure the policies we issue reflect the value and wisdom of all the people in "We the People," especially the people most directly affected by our policies. So, when we receive thousands of comments, including those from victims of crime; judges, doctors, correctional employees, public health professionals, academics, scientists, and even ordinary citizens, the Commission has an obligation to not just receive these views, but to listen to them.

This duty also applies to the views of currently and formerly incarcerated people. Our policies influence how much time of a person's life is spent in prison. As my former colleague, Judge George J. Hazel, so aptly put it, "The difference between ten and 15 years may determine whether a parent sees his young child graduate from high school. The difference between ten and 15 months may determine whether a son sees his sick parent before their parent passes away. The difference between probation and 15 days may

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determine whether the defendant is able to maintain his employment and support his family."

If the Commission is to select the correct policy, the fair policy, the just policy, we must listen to those who have lived out the consequences of our choices. Again, when we speak -- when you speak to the Commission, you will be heard because you must be heard. If there is one thing the policies voted on today will prove, it is this: If you have spoken to the Commission, whether from the halls of Congress or the desk of a prison library, you have been heard.

The policy we heard most about has often been described as "compassionate release."

As many judges have said and as we were reminded at our hearings, this term is a misnomer in explaining the nature and origin of this policy.

I hope to make clear how important it is that this Commission adopt what I believe to be a commonsense proposal. At a congressman's urging, take a first step toward a second chance for so

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many deserving people.

Before the 1980s, people in federal prisons regularly had their sentences reduced if they proved that they had reformed themselves. When the Sentencing Commission was created in 1984, Congress ended this system of federal parole. At the same time, Congress created a tool that judges could invoke if there were "extraordinary and compelling reasons" to reduce or end an incarcerated person's term of imprisonment. Congress tasked this Commission with describing what reasons counted as "extraordinary and compelling."

For decades, the sentencing reducing tool went almost entirely unused. Originally by statute, the provision could only be wielded upon the request of the Bureau of Prisons (BOP). And the BOP limited such requests to cases where a prisoner faced death mirroring compassionate release statutes passed in states during the 1990s. In this way, the BOP transformed the "extraordinary and compelling" sentence reduction

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prevention into a narrow -- into a narrow "compassionate release" provision. Even when the Sentencing Commission marginally expanded this provision over 15 years when it added a catch-all category that went beyond medical condition and age, BOP's practices did not change.

After three decades of seeing this sentence reduction tool ignored, even with the catch-all provision created by the Commission, Congress acted. In 2018, it explicitly increased its use by passing the bipartisan First Step Act.

To achieve this goal, Congress gave incarcerated people, rather than the Bureau of Prisons, final say in requesting a sentence reduction. In doing so, Congress again tasked the Commission with the important role of describing when a judge should consider -- when a judge should consider in deciding whether to use this provision. Unfortunately, this agency lacked enough commissioners to immediately meet the moment in our policy on the provision, which continued to reference the Bureau of Prisons went unchanged.

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As the Commission sat dormant, incarcerated people facing the COVID-19 pandemic turned to the courts. And they were able to directly ask a judge to spare them from dying of this unimagined virus in crowded prisons, they persuaded judges to implement Congress's wishes as expressed through the First Step Act and expand the flow of sentence reduction beyond a few drips. In doing so, judges not only may have saved thousands of lives during the pandemic, but found a broad range of circumstances that alone or together amount to an extraordinary and compelling justification for a reduction in sentence.

When given the discretion the Commission had long urged to be exercised, judges did not unleash a flood of crime into our communities. Research instead suggests that those who received those sentence reductions had an astonishingly tiny recidivism rate of one seventh of one percent. Research also suggests that granting release of these kinds of

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incarcerated people strengthens, rather than undermines public safety all while reuniting families and restoring communities.

In exercising their newfound discretion during the pandemic, judges often refused to interpret the sentence reduction prevention as a mere compassionate release statute. Instead, they embraced the original intent of Congress using the tool to ensure federal sentences when given a second look to continue to be sufficient, but not greater than necessary.

In some cases, however, the Commission's inability to describe extraordinary and compelling reasons led to injustices. I think of the letter we received from Markwann Gordon, a person serving over 1,600 months in federal prison on robbery and firearm charges who wrote to us to increase opportunities for second chances. When Mr. Gordon applied for a reduction in sentence, District Judge Harvey Bartle said he had "rarely seen a case as compelling as this for

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a defendant's release from prison," noting that Mr. Gordon had been "totally rehabilitated" and was a "role model for those who are incarcerated." Despite all of this, Judge Bartle denied Mr. Gordon's motion stating that neither a "draconian length in sentence" nor any of the other reasons Mr. Gordon presented were "an extraordinary and compelling reason to warrant a reduction in sentence." Mr. Gordon asked us, as so many incarcerated people have, to give judges "the discretion to give relief to prisons to whom they feel" - "give relief to prisoners to whom they feel has earned and deserves it."

When "We the People" spoke, the Commission listened. In revising our guidance to judges on how to use the sentence reduction prevention, we will take two simple steps. First, we endorse some of the most common reasons judges have found to be extraordinary and compelling facing a dire threat from a public health emergency like COVID, being seriously assaulted or sexually abused by prison employees

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and having served at least ten years of an unusually long sentence. These may all justify reducing a sentence.

Second, we will reaffirm the policy adopted by the Commission in 2006 granting broad discretion to those using the reduction provision. In doing so, we recognize a key lesson of the pandemic in our courts. To do justice, judges must be able to modify sentences whenever new and extraordinary and compelling reasons arise. When seen in the context of history, in Congress' expressly stated intent, the changes we're proposing to be made are common sense.

But to those who may wish to ignore this context, let me be clear. In enacting this policy, we are not releasing a single person from prison, nor are we forcing judges to do so. Our policy cannot be used to release anyone from prison until a judge also determines that doing so adequately protects the public, provides just punishment, and reflects the seriousness of their

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offense.

If we trust judges as we must do in our democracy, then we have faith that this provision will be used appropriately. But this policy is about much more than judicial discretion. This policy is about taking a first step toward a second chance for incarcerated people who need it most. For the last 40 years, the light of redemption has almost been extinguished from our federal prisons. This policy helps rekindle that flame while enhancing public safety.

It is impossible to underestimate the impact the possibility of a second chance will have on the lives of incarcerated people and their families. As a formerly incarcerated father told us, this policy is about "the ability to answer prayers of little girls and boys who want their parents released." And as a mother of a young person in federal custody told us, today's action will give families like hers "a glimmer of hope" after having "lost . . . faith

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in our national justice system." These benefits are the reasons why a bipartisan coalition of policy makers, advocates, and nonprofits have urged us to adopt this policy. We cannot promise release, but we can promise hope. I urge my fellow commissioners to vote in favor of this policy.

Other policies we've heard a great deal about implicating longstanding feature of the federal sentencing guidelines and state sentencing guidelines across the country, the idea that having prior convictions justifies additional punishment. While we have often heard serious criticism of this idea in general, we have proposed addressing two discrete ways in which the sentencing guidelines punish people for having a "criminal history."

The first proposal aimed to reduce or eliminate the use of "status points," which are sentencing enhancements given to people who committed a crime while on parole or probation. As we heard from many commenters, status points

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often amount to a form of "double penalty." As one incarcerated person told us, "I should not be subject to more time because of my status at the time of the incident offense[,] especially since I would be subject to a violation, as well as time for a new offense."

Moreover, Commission research strongly suggests that status points' ability to predict recidivism, a core justification for their use, may be extremely weak. In light of all of this, the Commission's final policy will eliminate status points in advancement of criminal cases for a limited category of defendants with extensive criminal histories. We are cutting the effect of status points in half, I believe, reflecting the idea that this too may sometimes achieve other goals beyond predicting recidivism.

The second criminal history proposal we issued was to fulfil a core directive Congress gave the Commission at its inception. That directive says that, in general, "a first offender who has not been convicted of a crime of

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violence or an otherwise serious offense" may not be -- should not be incarcerated. The Commission's proposal sought to define who met this standard and what the consequences for meeting the standards should be. Ultimately, we decided to answer, we think, both questions broadly.

Our final policy provides for a larger reduction in sentences for a larger category of people than merely the status quo. While we agree to limit this reduction to a limited set of circumstances, we also agree to give judges discretion to expand non-carceral options to more people. We hope that this policy will as one commenter put it, achieve Congress's goal of not subjecting largely productive and benign citizens to lengthy periods of incarceration, which impact not only their lives, but those of their families, businesses, and communities.

Another policy attempts to address the horrors we've heard about in some of our federal prisons, including and especially FCI Dublin. No

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incarcerated person, we think, should suffer physical or sexual abuse at the hands of those tasked with safeguarding them. I think about the mother who wrote to us about her son who when she wrote -- she wrote he was a "victim of an assault" by correctional officers. "My son did not commit a violent crime," she said. "My son did not murder anyone," she said. "My world is definitely not the same without him in it and he has a long enough sentence to where I think about if I will even be alive when he gets out. But now, most days, all I can think about is if he will make it out alive."

For this reason, we're proposing to increase penalties on those who sexually abuse their wards. At the same time, we're also modifying the extraordinary and compelling sentence reduction provision to expressly allow reduction in sentences in certain cases where incarcerated people suffer these heinous kinds of harms.

Another of the policies before us

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reflects an obvious truth: Fentanyl is a deadly and serious problem in our country. Every Commissioner recognizes this and the importance of the federal government acting on this issue. A number of us expressed concerns about doing so by continuing the longstanding practice of increasing penalties for drug crimes. Nevertheless, we agree that it may be appropriate to adjust -- to adjust how penalties are assessed where fentanyl has been trafficked. I will here go the many, many commentators who urged us and other federal policy makers to focus on interventions based in science to address the harms in drug use. We will continue to ensure that policies do just that.

Similarly, our commissioners recognize that Congress has spoken directly to us through the bipartisan Safer Communities Act to increase penalties for certain firearm offenses. Every Commissioner recognizes the seriousness of gun violence. Nevertheless, there will be concerns about the possible events of increased penalties,

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especially on communities of color. Accordingly, we've tried to promptly respond to a congressional directive while addressing areas where disparities or injustices may arise, including notably by adding, we hope, a downward adjustment to ensure that straw purchases without significant criminal histories receive sentences that reflect their personal role, their culpability, and the actual danger to the public.

Our hope is, in the words of one expert who spoke to us, that these changes end a mismatch between the drivers of gun violence and the people targeted for federal prosecution that exacerbates structural racism. Yet I recognize that the abbreviated nature of this year's policy making cycle left many of us wishing we had more time to refine this policy. I promise, my fellow commissioners, as well as the public that the Commission schedule moving forward will include all the time necessary to consider and if necessary, to revisit this policy.

We received an immense amount of

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comment on our proposals regarding acquitted conduct -- acquitted conduct sentencing. Some asked us to preserve judges' ability to consider acquitted conduct. Some asked us to move forward with the proposal to significantly limit how judges can use such conduct. But many others wanted us to go bolder, either by banning any consideration of acquitted conduct when using the guidelines or addressing other forms of conduct judges can currently consider.

These comments affirmed to all commissioners that the question of "What conduct judges can consider when using the guidelines" is, as Professor Doug Berman has said, "of foundational and of fundamental importance to the operation of the entire federal justice system."

We all agree that the Commission needs a little more time, we think, before coming to a final decision on such an important matter. We intend to resolve these questions involving acquitted conduct next year.

We reached a similar conclusion about

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our proposals regarding how the guidelines define "crime of violence" and "controlled substance" in the context of penalty enhancements in our career offender guideline. Currently the guidelines embrace what is known as a "categorical approach" to defining these terms, while we propose using a different method, we received a great deal of feedback urging us to either preserve the categorical approach or use other alternatives given the possibility that our choices on this issue may as one commenter put it, "increase incarceration, exacerbate racial disparities, and further entrench a disproportionate treatment of people charged with drug-related offenses."

Again, the importance of this issue justifies our taking more time with it. While we will further debate this issue over the next year, today we're voting on a few changes to how this career offender guideline implicates offenses like Hobbs Act robbery.

The Commission also took a cautious approach to the implementation of other changes

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mandated by the First Step Act. Most notable among those changes are those to how some incarcerated people can qualify for a "safety valve" under 18 USC § 3553(f). For a number of reasons, including the Supreme Court's recent decision -- recent choice to consider open questions about the "safety valve," the Commission, we believe, has taken a narrow approach - a neutral approach to implement in Congress's directives on this matter.

Turning to another policy, I will recall that, in 2021, Justices Sotomayor and Gorsuch identified an "important and longstanding split" among federal circuit courts that "need[s] clarification from the Commission." The issue was whether the guidelines reduction for acceptance of responsibility could be withheld or denied because the defendant filed a motion to suppress. In resolving this issue today, we're ensuring that more people have access to reductions in sentence for accepting responsibility for their actions.

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There are additional amendments regarding a host of other congressional directives, technical changes to the guidelines, and miscellaneous matters that we will be considering today. It should be obvious by now, the Commission has done an extraordinary amount of work over the last six months. While I'm proud of how this work reflects the commissioners' willingness to hear members of the public, I'm even prouder of how our work shows that the commissioners have heard each other.

As I've said many times, our strength is defined by our diversity. We see the world differently. And that is a good thing. And if we ultimately disagree, we remain united in our support for one another and the work of this commission. And indeed, ladies and gentlemen, that is the best thing.

With that, the next item of business is a possible vote to promulgate proposed amendments. The General Counsel, Kathleen Grilli, will advise the Commission on the first

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possible vote concerning a proposed technical amendment.

MS. GRILLI: Thank you, Judge Reeves.

The technical amendment before you are a multi-part amendment that would make technical changes in various places throughout the Guidelines Manual to provide updated references to certain sections of the United States Code or reclassification of sentences in the United States Code, to reorganize the commentary to make it more readable and user friendly, and to correct typographical errors in the Guidelines Manual.

A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER BOOM: I so move.

CHAIR REEVES: Is there a second?

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COMMISSIONER GLEESON: Second.

CHAIR REEVES: Is there any discussion on this motion? Vote on the motion by saying aye or any nays.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

MS. GRILLI: The next amendment before you is a miscellaneous amendment, which contains two parts. Part A responds to a guideline application issue concerning the interaction of §2G1.3 and §3D1.2 and would amend §3D1.2(d) by providing that those offenses covered by §2G1.3, like those offenses covered by §2G1.1, are not grouped under subsection (d) of §3D1.2. Part B would revise the guidelines to address the fact that the Bureau of Prisons no longer operates a shock incarceration program as described in §5F1.7 and would amend the commentary to reflect that.

A motion to promulgate the proposed

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amendment with an effective date of November 1st, 2023 and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER WONG: Second.

CHAIR REEVES: Is there any discussion on this motion? I'll ask you to vote on the motion by saying aye or any nays.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli will advise the Commission on a possible vote concerning a proposed amendment on fake pills.

MS. GRILLI: The Fake Pills Amendment responds to concerns expressed by the Drug Enforcement Administration about the

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proliferation of fake pills, that is illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills that contain fentanyl or fentanyl analogues. The proposed amendment would amend the existing §2D1.1(b)(13) specific offense characteristic to add a new subparagraph with an alternative two-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug, another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that the mixture or substance was not the legitimately manufactured drug.

The new provision would refer to 21 United States Code section 321(g)(1) for purposes of defining the term "drug."

A motion to promulgate the amendment with an effective date of November 1st, 2023 and with technical and conforming amendment authority to staff is appropriate at this time.

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CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by General Counsel?

VICE CHAIR MURRAY: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER GLEESON: Second.

CHAIR REEVES: Is there any discussion on this motion?

VICE CHAIR MURRAY: I'd like to say just one thing to supplement your very eloquent remarks.

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: I'm so pleased that we were able to promulgate this amendment today. The CDC's numbers that have been submitted to us say that overdose deaths in the last year have gone up to 15 percent. That 80 percent of that is driven by fentanyl and that 60 percent of that is driven by mismarketing of pills. This is an attempt to get a very narrow, tailored set of particularly reckless and dangerous conduct, which is people who knew or in

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this case had willful blindness about the fact that the pills that they were selling, which look like legitimately manufactured pills such as Oxy -- you know, Oxy 30s -- are actually laced with something like fentanyl, which can cause immediate death and has throughout our communities.

It's an attempt to get at people who, you know, have willfully been blind to the fact that, that fentanyl may be in those pills and have continued to sell. So they have seen perhaps an adverse reaction in one victim and then have continued to sell going forward. This is in my view particularly and vile and dangerous behavior. And I'm so pleased that we were able to get to a very narrowly tailored enhancement that would target that important issue. Thank you.

CHAIR REEVES: Thank you, Vice Chair Murray. Anyone else? Any further discussion on this motion? I now request a vote on the motion by saying or any nays. Do I hear any ayes?

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(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed amendment on sexual abuse offenses.

MS. GRILLI: Thank you, Judge. The sexual abuse offenses amendment contains two parts. Part A responds to recently enacted legislation and would amend Appendix A in the manual to reference the new offenses under 18 USC § 250 to §2H1.1 and offenses under 18 USC § 2243(c) to §2A3.3.

Part B responds to concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody care and supervision. Part B of the proposed amendment would amend §2A3.3 to address these concerns. First, it would increase the

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base offense level from 14 to 18. Second, it would address the presence of aggravating factors in sexual abuse offenses in the same way that §2A3.2 does by providing a cross reference to §2A3.1.

A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: Second.

CHAIR REEVES: Is there any discussion on this motion? Vote on the motion, please by saying aye or if you want to say nay.

(Chorus of ayes.)

CHAIR REEVES: Okay. The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

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The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed amendment on criminal history.

MS. GRILLI: The Criminal History Amendment contains three parts, A through C. Part A of the proposed amendment addresses the impact of status points under the guidelines. It amends §4A1.1 by redesignating the current subsection (d) as subsection (e) and the current subsection (e) as subsection (d). It would reduce the impact of status points by revising the redesignated subsection (e) to provide that one criminal history point is added if the defendant receives seven or more points under the other subsections of §4A1.1 and committed the instant offense while under any criminal justice sentence. Third, Part A of the proposed amendment would also make conforming changes to the commentary in §4A1.1, §2P1.1, and §4A1.2.

Part B of the proposed amendment sets forth a new Chapter Four guideline at §4C1.1

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called "Adjustment for Certain Zero-Point Offenders." The new §4C1.1 would provide a decrease of two levels from the offense level determined under Chapters Two and Three if the defendant meets all of the ten listed criteria.

The new §4C1.1 would also include a subsection (c) that provides definitions and additional considerations for purposes of applying the guidelines.

Part B of the proposed amendment would also amend the Commentary to §5C1.1 as part of the Commission's implementation of 28 USC § 994(j).

In addition, Part B of the proposed amendment would amend §4A1.3 to provide that a departure below the lower limit of the applicable guideline range is prohibited unless otherwise specified. And would amend Chapter One, Part A, Subpart 1(4)(d), to provide an explanatory note addressing these amendments.

Part C of the proposed amendment would amend the Commentary to §4A1.3 to include sentences resulting from possession of marijuana

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offenses as an example of when a downward departure from the defendant's criminal history may be warranted.

A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff is in order at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER GLEESON: Second.

CHAIR REEVES: Is there any discussion on this motion? Let's vote on the motion by saying aye or any nays.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote

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concerning a proposed amendment on a career offender.

MS. GRILLI: The Career Offender Amendment is a three-part amendment. Part A would address concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under §4B1.2 as amended in 2016. It would amend §4B1.2 to add a definition of "robbery" that mirrors the Hobbs Act robbery definition in 18 U.S.C. § 1951(b)(1).

Part A would also add a provision defining the phrase "actual or threatened force" for purposes of the new "robbery" definition as force sufficient to overcome a victim's resistance informed by the Supreme Court's holding in Stokeling v. United States, 139 S. Ct. 544, 550 (2019). Finally, Part A of the proposed amendment would make conforming changes to the definition of "crime of violence" in the Commentary to §2L1.2, which includes robbery as an enumerated offense.

Part B would amend §4B1.2 to address a

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circuit conflict regarding the commentary provision stating that the terms "crime of violence" and "controlled substance offense" include inchoate offenses. Part B of the proposed amendment would address this circuit conflict by moving the inchoate offenses provision from the Commentary of §4B1.2 to the guideline itself as a new subsection (c).

Finally, Part C of the proposed amendment would amend the definition of "controlled substance offense" in §4B1.2(b) to include offenses described in 46 U.S.C. §§ 70503A and 70506B to be in compliance with the Commission's directive at 28 U.S.C. § 994(h).

A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff would be in order at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

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COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Second.

CHAIR REEVES: Thank you. Is there any discussion on this motion? Well, let's vote on the motion. For those in favor, please say aye or any nays.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed amendment on crime legislation.

MS. GRILLI: The Crime Legislation Amendment before you has eleven parts, A through K.

Part A responds to the FDA Reauthorization Act of 2017 by amending Appendix A and the Commentary to §2N2.1.

Part B responds to the Allow States

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and Victims to Fight Online Sex Trafficking Act of 2017 by amending Appendix A, §2G1.1 and §2G1.3.

Part C responds to the FAA Reauthorization Act of 2018 by amending Appendix A and §2A5.2, as well as the Commentary to §2A2.4 and 2X5.2.

Part D responds to the SUPPORT for Patients and Communities Act by amending Appendix A and the Commentary to §§2B1.1 and 2B4.1.

Part E responds to the Amy Vicky and Andy Child Pornography Victim Assistance Act of 2018 by amending Appendix A and the Commentary to §2X5.2.

Part F responds to the Foundations for Evidence-Based Policy Making Act of 2018 by amending Appendix A and the Commentary to §2H3.1.

Part G responds to the National Defense Authorization Act for Fiscal Year 2020 by amending Appendix A and the Commentary to §2X5.2.

Part H responds to the Representative Payee Fraud Prevention Act of 2019 by amending

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Appendix A and the Commentary to §2B1.1.

Part I responds to the Student Debt Relief Scams Act of 2019 by amending Appendix A and the Commentary to §2B1.1.

Part J responds to the Protect Lawful Streaming Act of 2020, which was part of the Consolidation Appropriations Act 2021, by amending Appendix A.

And finally, Part K responds to the William M. Thornberry National Defense Authorization Act for Fiscal Year 2021 by amending Appendix A and §2S1.3.

A motion to promulgate the Crime Legislation Amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff would be in order at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER WONG: So moved.

CHAIR REEVES: Is there a second?

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VICE CHAIR RESTREPO: Second.

CHAIR REEVES: Is there any discussion on this motion? Let's vote. For those in favor of the motion, please say aye.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed amendment on circuit conflicts.

MS. GRILLI: The Circuit Conflicts Amendment addresses circuit conflicts involving §3E1.1, the "Acceptance of Responsibility" guideline. Two circuit conflicts have arisen relating to §3E1.1(b). The first concerns whether a §3E1.1(b) reduction may be withheld or denied because a defendant moved to suppress evidence. The second conflict concerns whether the Government may withhold a §3E1.1(b) motion where the defendant has raised sentencing

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challenges.

The proposed amendment responds to these circuit conflicts by amending §3E1.1(b) to provide a definition of the term "preparing for trial" that provides more clarity on what actions would ordinarily constitute preparing for trial for purposes of this guideline. It would also delete a sentence in Application Note 6 of the Commentary to §3E1.1.

A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff would be appropriate at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: Second.

CHAIR REEVES: I think we have discussion on this motion.

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VICE CHAIR MURRAY: I just have a very small question if you don't mind. My very small point, which is maybe too in the weeds for this setting is my sort of understanding of our amendment is that it does provide guidance as to what "preparing for trial" means. And resolves a certain amount of conflict on the circuits on that point. But there's, as I understand, an additional split with, for example, United States v. Adair, 38 F.4th 341, 361 (3d Cir. 2022), on the question of whether or not the Commission has the authority to add conditions to the Government's kind of discretionary authority to file for that third point that we did not intend to and maybe can't legally touch. That was my very small, and I apologize, very in the weeds point.

CHAIR REEVES: No need to apologize, Vice Chair Murray. Any further discussion on this motion? Well, are we ready to vote on the motion? The General Counsel has this perfect (laughter). The Chair does not. Let's have a

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vote on the motion. For those in favor of this motion, please say aye.

(Chorus of aye.)

CHAIR REEVES: All right. The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed amendment on our firearm offenses.

MS. GRILLI: Thank you, Judge. Part A of the proposed amendment would amend §2K2.1 to respond to the bipartisan Safer Communities Act.

The Act created two new offenses and Part A of the proposed amendment would amend Appendix A to reference those new offenses to §2K2.1. Part A also makes additional amendments to §2K2.1 to address these new offenses and increase penalties for offenses applicable to straw purchasers and trafficking of firearms as required by the directive to the Commission.

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Part A addresses these new offenses in part by revising the firearms trafficking enhancement in §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses and revises into the existing four-level enhancement for firearms trafficking to make it a tiered enhanced with the greater of a two-level or five-level increases triggered by specific criteria. In addition, Part A of the proposed amendment would amend Application Note 13 to conform its content with a revised version of §2K2.1(b)(5) and revise the departure provision in Application Note 13.

Part A of the proposed amendment also addresses the part of the directive that requires the Commission to consider in particular an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal history receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability and any coercion, domestic

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violence, survivor history, or other mitigating factors. We respond to the directive by adding a new two-level reduction to the guideline based on those certain mitigating factors. In relation to this part of the directive, Part A would delete the departure provision in Application Note 15.

Part A also addresses the part of the directive that requires the Commission to review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under sections 932 or 933 of title 12, United States Code, who was affiliated with a gang, cartel, organized crime ring, or other such enterprise, should be subject to higher penalties than an otherwise unaffiliated individual. It would provide a new two-level enhancement in response to this part of the directive.

Part B of the proposed amendment addresses concerns addressed by some commentators about guns that are not marked with a serial number, also known as ghost guns. Part B revises

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§2K2.1(b)(4)(B) to add that the four-level enhancement applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number or was willfully blind to or consciously avoided knowledge of such fact.

A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff would be in order at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Second.

CHAIR REEVES: Is there any discussion on this motion? Let's vote on the motion. For those in favor of the motion, please say aye.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted

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and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed amendment on First Step Act drug offenses.

MS. GRILLI: The First Step Act Drug Offense Amendment contains two parts. Part A of the proposed amendment would implement the provisions of the First Step Act by expanding the applicability of the safety valve provision by amending §5C1.2 and its corresponding Commentary to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A of the proposed amendment would also revise §5C1.2(b) in relation to the minimum offense level required for certain offenders.

In addition, Part A makes conforming changes to the Commentary at §5C1.2 and to §4A1.3 (Departures Based on Inadequacy of Criminal History Category), which makes a specific reference to the number of criminal history

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points allowed by §5C1.2(a)(1).

Finally, Part A of the proposed amendment would also make non-substantive changes to §§2D11 and 2D1.11, the two-level reductions in both guidelines that are tethered to the eligibility criteria in Paragraphs 1 through 5 of §5C1.2(a), and changes the Commentary of those guidelines that correspond to the applicable provisions of the revised commentary of those guidelines that correspond to the applicable provisions of the revised Commentary to §5C1.2.

Part B of the proposed amendment would revise subsection (a) of §2D1.1 to make the guideline base offense levels consistent with the First Step Act changes to the type of prior offenses that trigger enhanced mandatory minimum penalties. Specifically, the proposed amendment would revise subsections (a)(1) and (a)(3) to replace the term "similar offense" used in these guideline provisions with those terms set forth in the relevant statutory provisions as amended by the First Step Act.

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A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff would be in order at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER GLEESON: Second.

CHAIR REEVES: Let's have a vote. Those in favor of this -- oh, I'm sorry. You're right. I skipped -- no. Is there any discussion on this motion?

VICE CHAIR MURRAY: At the risk of exhausting everyone's patience, I have one more -

(Simultaneous speaking.)

CHAIR REEVES: You are not exhausting our patience.

VICE CHAIR MURRAY: Thank you, Chair.

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So I wanted to echo what you had said in your statement earlier about -- and I don't want to put words in your mouth -- but about this amendment today being a matter of deference to the Supreme Court and a stop-gap measure while Pulsifer v. United States, 39 F.4th 1018, 1022 (8th Cir. 2022), cert. granted, 2023 WL 2227657 (U.S. Feb. 27, 2023) (No. 22-340) is being decided, rather than an affirmative policy choice made by the Commission. From my point of view -- to me, and here I'm speaking very much for myself, it seems very clear that what Congress intended to do when it expanded the safety valve was to expand the safety valve in the way reflected by the new safety valve factors as read disjunctive -- gosh, I always get this one -- as read disjunctively.

And for me, part of that reason is that if you read them conjunctively, then of the 17,000 offenders last year who could have been eligible for a safety valve, only 320 are not eligible. So really it is a reduction, rather

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than a safety valve. Now whether that's what Congress actually did in the language they passed is a question before the Court. It's not a question for us. It's a question for the Court.

But if the Court ends up deciding that those factors should be read conjunctively, then in my view, the safety valve will have been turned into a reduction, rather than a safety valve.

I see value in a real safety valve. We have no control over §5C1.2. That is a statutory matter. But we do have policy control over §2D1.1, which has always been linked to §5C1.2, but does not have to be as a matter of law or policy. And so I wanted only to say that if Pulsifer comes down in a conjunctive way, I will strongly encourage the Commission to think hard about what a safety valve that is a safety valve is intended to, you know, separate folks who merit a reduction because of reduced criminal history or lack of violence of their offense, or whatever other relevant factors there are from folks who are less meritorious at that, rather

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than just being a reduction. A reduction, I think should be considered on other terms. So that's my only point. Thank you for your indulgence here.

CHAIR REEVES: Thank you. Anyone else wish to speak on this particular motion? Any further discussion? No further discussion? Well, let's have a vote. For those in favor of this motion, please say aye.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion.

The General Counsel, Kathleen Grilli, will advise the Commission on a possible vote concerning a proposed First Step Act reduction in term of imprisonment 18 U.S.C. § 3582(c)(1)(A) amendment.

MS. GRILLI: Thank you, Judge. The First Step Act Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A) Amendment would implement the First Step Act's relevant

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provisions by amending §1B1.13 and its accompanying Commentary. Specifically, the proposed amendment would revise the policy statement to reflect that 18 U.S.C. § 3582(c)(1)(A) as amended by the First Step Act now authorizes a defendant to file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of "extraordinary and compelling reasons" in §1B1.13 in several ways.

First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C), with revisions, add two new categories, and revise the "Other Reasons" category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under

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any of the circumstances or a combination thereof, described in the categories.

The proposed amendment would move current Application Note 3 regarding rehabilitation into the guideline as a new subsection. It would also add new language providing rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

The proposed amendment would also move Application Note 2 concerning the foreseeability of extraordinary and compelling reasons into the guideline as a new subsection (e).

Finally, as conforming changes, the proposed amendment would delete existing Application Notes 4 and 5, make a minor technical change to the Background Commentary, and add two new Application Notes to the Commentary in §1B1.13.

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A motion to promulgate the proposed amendment with an effective date of November 1st, 2023, and technical and conforming amendment authority to staff would be appropriate at this time.

CHAIR REEVES: Is there a motion to promulgate the proposed amendment as suggested by the General Counsel?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MATE: Second.

CHAIR REEVES: All right. It's been moved and properly seconded. Is there a discussion on this motion? I understand that there is discussion. Who wishes to go first?

COMMISSIONER WONG: Thank you, Chair Reeves. Vice Chair Murray, Commissioner Boom, and myself have prepared a joint statement to explain why the three of us will not be able to join this amendment to promulgate the revised policy statement on compassionate release. I will deliver the first portion of our joint

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statement before turning things over to my two colleagues.

The policy statement the Commission is about to promulgate dramatically expands the grounds that justify compassionate release for federal criminal defendants. The three of us have enormous respect for our friends and colleagues on the Commission and for their good faith efforts to enact improvements to our criminal justice system. During our public hearings, we heard testimony from stakeholders, including formerly incarcerated recipients of compassionate release, and victims of crime and their families. To say we were moved by the import and magnitude of these issues we have grappled with would be an understatement.

All three of us were supportive throughout the amendment process of proposals that would have allowed courts to grant relief in exceptional circumstances based on legally permissible factors subject to careful guardrails.

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Unfortunately, however, in our view, today's policy statement goes further than the Commission's legal authority extends. In effectively promulgating a form of second local legislation through the vehicle of compassionate release, we are concerned that the Commission is about to make a seismic structural change to our criminal justice system without congressional authorization or directive. We cannot be party to that effort.

First, we fear that subsection (b) (6) of the new policy statement at §1B1.13, which makes nonretroactive changes in law a basis for compassionate release in some cases, supplants Congress's legislative role. In layman's terms, a nonretroactive law is as relevant here, a change Congress has made to the sentence for a given crime. It is a change that Congress has explicitly stated should be applied only prospectively, not to defendants who have already been sentenced.

Today's amendment allows compassionate

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release to be the vehicle for retroactively applying the very reductions that Congress has said by statute should not apply retroactively. To be sure, it doesn't do so automatically, but it makes any nonretroactive change in law potential grounds for re-sentencing once the defendant has served ten years. In practical effect, it provides a second look to revisit duly imposed criminal sentences at the ten-year mark based on intervening legal developments that Congress did not wish to make retroactive.

The separation of powers problem should be apparent. In the American system, it is the political branches, Congress and the President who are accountable to the people who make the criminal laws. It is not the Commission's role to countermand Congress's legislative judgments. For that reason, it should come as no surprise that the weight of legal authority is against the Commission on this issue.

Of the ten Courts of Appeals to have

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considered the issue, six made clear by their holdings that the Commission's actions today are unlawful. Likewise, the Department of Justice testified before us that sentence reductions based on nonretroactive changes in sentencing law are unlawful under the statute governing compassionate release.

As the Supreme Court has held, the strong presumption against statutory retroactivity is deeply rooted in our jurisprudence and embodies a legal doctrine older than the republic. In the Supreme Court's words, "in federal sentencing, the ordinary practice is to apply new penalties" -- in context, no lower penalties - "to defendants not yet sentenced while withholding that change from defendants already sentenced."

Respectfully, the three of us commissioners share the view, to quote the 6th Circuit, that "what the Supreme Court views as the ordinary practice cannot also be an extraordinary reason to deviate from that

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practice." But extraordinary and compelling reasons is precisely what the compassionate release statute requires.

CHAIR REEVES: Thank you, Commissioner Wong.

VICE CHAIR MURRAY: I'm part two.

CHAIR REEVES: You're part two. Thank you. Vice Chair Murray, please.

VICE CHAIR MURRAY: Thank you, Commissioner Wong and thank you, Chair Reeves for the opportunity to speak. I'd like to start by echoing what Commissioner Wong said about the deep respect we all have for our colleagues and who we also count as friends and for their efforts to improve the legal system. It is an honor to serve with all of you. I am so proud that we were able to come to consensus on ten of our eleven amendments today.

I'd also like to reiterate what Commissioner Wong said about the gravity of our undertaking regarding compassionate release. Everyone at this time understands the enormous

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impact that any amendment to the policy statement will have on the lives of the incarcerated and their families, on victims and their families, and on the public. We are so grateful for the testimony and public comment we received throughout the amendment process. All seven of us took seriously the importance of crafting a policy statement that was data driven, compassionate, and legal.

As you've heard, however, we do differ in good faith in our views of what the law requires in this case. My portion of the joint statement addresses the First Step Act, the legislation that was the impetus for today's amendment. In our view, nothing in the First Step Act authorizes or even encourages the Commission's inclusion of nonretroactive changes in law in the policy statement.

By way of background, for decades, the Commission's policy statements have set forth the extraordinary and compelling reasons justifying compassionate release. For decades, those

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enumerated reasons have been limited to rare cases of advanced age, serious, often terminal illness, and extraordinary family circumstances, the death or incapacitation of the caretaker of a defendant's minor child. That was the backdrop at which Congress legislated when it passed the First Step Act. And in the First Step Act, the only change Congress made to compassionate release statute was a narrow procedural one. It allowed prisoners to file compassionate release missions on their own, rather than being forced to rely on the Bureau of Prisons to file on their behalf. Congress made that procedural expansion as a direct response to a discrete problem, the Bureau of Prisons longstanding, scandalous dereliction in failing to move for compassionate release on behalf of prisoners who clearly qualified for it, including those with advanced terminal illnesses, often with tragic results.

But nothing in the First Step Act, literally nothing, not text, not legislative history, indicates any intention on Congress's

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part to expand the substantive criteria for granting compassionate release. Much less to fundamentally change the nature of compassionate release to encompass for the first time, factors other than the defendant's personal or family circumstances.

The Supreme Court tells us that Congress does not hide elephants in mouse holes, and it did not do so here. That point is underlined by the only change the First Step Act made to any of the legal provisions related in even an ancillary way to the compassionate release statute.

In Section 603(b)3 of the First Step Act, Congress established a notification requirement that for the first time required the Bureau of Prisons to notify a defendant's attorney, partner, and family if that defendant was diagnosed with a terminal illness. It also required BOP as necessary to assist that terminally ill defendant with the preparation and filing of a compassionate release motion. It is

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very clear that Congress felt strongly about removing obstacles that prevented defendants who qualified for compassionate release under the existing criteria, most notably terminal illness needs to be a focus of theirs from filing for compassionate release.

The legislative history does say that compassionate release should be expanded. It doesn't specify substantively or procedurally, but it does say it should be expanded. And it's clear that they wanted at least this expansion. By contrast, Congress's silence with regards to expanding the substantive criteria for granting compassionate release, let alone expanding those substantive criteria to encompass much broader and categorically different kinds of factors is deafening.

Senator Chuck Grassley, the Chair of the Senate Judiciary Committee during the passage of the First Step Act, provided public comment on the Commission's proposal. I'm going to read from Senator Grassley's letter because we found

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it -- the three of us found it very illuminating. He said, "as lead author of the First Step Act, I can tell that Congress didn't intend to make the entire Act retroactive. Instead, Congress may careful retroactive determinations with regard to specific provisions within the First Step Act itself." He continued, "Congress determined that some provisions are retroactive, while others are not. Yet, this proposal would, contrary to well established law, set aside Congress's specific determinations."

We also received public comment from Senator Mitch McConnell who was the majority leader of the Senate during passage of the First Step Act. And he told us that our proposal was, "nothing short of an extra-legislative attempt to apply new sentences retroactively." Both Senators warned us that taking it upon ourselves to apply nonretroactive laws retroactively would show the future -- the prospect of future bipartisan legislation on criminal justice reform.

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We also very much appreciated the public comment provided by the current Chairman of the Senate Judiciary, Senator Dick Durbin, as well as by Senator Mazie Hirono and Corey Booker, which address compassionate release and several other issues. While the three of us ultimately found the legal arguments put forth by President Biden's Justice Department and by Senator Grassley and Leader McConnell to be more persuasive on this point, their letter was very helpful to all member of the Commission on both this and a number of other issues.

And with that, I'll turn things over to Commissioner Boom for the dramatic conclusion.

(Chorus of laughter.)

CHAIR REEVES: She set the bar high.

COMMISSIONER BOOM: In this case, they do not save the best for last, rather the worst.

CHAIR REEVES: Oh, no.

COMMISSIONER BOOM: Thank you for the opportunity to speak. So good afternoon. I echo

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Vice Chair Murray's and Commissioner's Wong's sentiments about our talented and earnest colleagues. I likewise echo my support for proposals to allow courts to grant -- in truly exceptional cases, grant relief when consistent with the law and subject to clear, careful guardrails. Indeed, I have granted such important motions where the law permitted, and the facts were truly extraordinary and warranted compassionate release.

As part of our collective statement, I will address the expansive catch-on provision, of §1B1.13(b)(5) of the new amendment, that we respectfully submit fails to fulfil the Commission's statutory mandate. The Sentencing Reform Act, our governing statute, sets forth specific directives to our agency. Three provisions of the SRA, 28 U.S.C. §§ 994(a), 994(t), and 18 U.S.C. § 3582(c)(1)(A) operate together to delegate to the Commission the responsibility for establishing criteria and specific examples of what factors warrant

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consideration under the compassionate release statute.

We heard during our public comment period from the Criminal Law Committee (CLC) of the Judicial Conference of the United States, the body charged with speaking on behalf of the Judiciary. On the issue of clear standards, I will quote from the CLC's letter.

The Criminal Law Committee urges the Commission to adopt clear standards and where possible, to avoid open-ended standards that will invite excessive litigation, inconsistent application, circuit splits, and uncertainty. Indeed, when proposing these changes, Judge Reeves, Chair of the Commission, indicated his hope that they would bring, greater clarity to the federal courts and more uniform application of compassionate release across the country.

I'm still quoting the CLC when they said,

The Committee joins in that hope and notes

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for the Commission's consideration some instances in which the proposed changes may instead result in confusion or inconsistent application of the guidelines.

That's the end of their quote.

The amendment the Commission is about to adopt contains a sweeping catch-all that in our view, abdicates the Commission's responsibility to articulate clear criteria by effectively delegating the Commission's authority to the courts and it realizes the CLC's concerns.

Subsection (b)(5) of the new policy statement at §1B1.13 defines extraordinary and compelling grounds for compassionate release to include situations where, "the defendant presents any other circumstance or combination of circumstances that when considered by themselves are similar in gravity to those described in Paragraphs 1 through 4."

This unbounded provision provides no criteria to applying other, than it must be "similar in gravity" in the view of the court to

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other enumerated reasons. This new standard effectively offers no substantive guidance and risks swallowing the whole. The Sentencing Reform Act abolished parole. The Act's goal was for defendants to be sentenced in accordance with clear, rationale rules that reduce disparities and for sentences to be final, subject only to potential reduction by good time credit or a reduction in sentence in what the Act's legislative history termed a "relatively small number of cases that the apparatus of the Parole Commission could safely be abolished as unneeded."

The policy statement the Commission is about to promulgate threatens to unwind those efforts. It provides a second look system but lacking the procedural protections and infrastructure of the old parole system. Under the new policy statement, once a sentence has been imposed, there is no finality and judges have virtually unfettered discretion to reduce a sentence for any reason or combination of reasons

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that they view as sufficiently grave. This lack of finality is also visited on crime victims. We heard compelling testimony from a panel of victims of the trauma they experience each and every time a defendant moves for compassionate release.

Finally, as a practical matter, we fear that today's amendment will inundate the federal courts and other stakeholders. The CLC warned that an expansive catch-all provision will "provide courts will little guidance and could invite a deluge of compassionate release motions." They urged us to consider the "complexity of the kind of litigation" we are imposing on the courts in light of "scarce judicial resources." The seismic expansion of compassionate release promulgated today, not only saddles judges with the task of interpreting a free willing catch-all that also ensures a flood of motions. A flood that will then repeat any time there is a nonretroactive change in the law.

For the past several years while the

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Commission lacked a quorum to implement the First Step Act, the country has experienced a natural experiment in what happens when judges have no operative guidance as to the criteria they should apply in deciding compassionate release motions.

The result has been widespread disparities. In fiscal year 2022 for example, the most generous circuit -- I'm sorry -- the most generous circuit granted 35 percent of compassionate release motions. The most cautious granted only 2.5 percent. The disparities within circuits and even within courthouses were often just as stark.

We fear that today's dramatic, vague, and ultimately unlawful expansion of compassionate release, that with it, we will expect far more of the same.

We appreciate the Commission's work today and are proud that the seven of us were able to come to so much consensus on so many important proposals. We have the utmost respect for our colleagues. I really cannot stress enough how much we like and esteem our

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colleagues. But we cannot join them in promulgating this amendment. Thank you, Chairman.

CHAIR REEVES: Thank you, Commissioner Boom. Any further discussion on this?

VICE CHAIR MURRAY: Can I add one sentence --

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: -- before the rebuttal. The only thing I want to say that I forgot to put in my statement is just that we did not discuss all the provisions of the -- you know, in our statement, we did not discuss all the provisions of the policy statement. No one should take an inference either way on our views on any of the other provisions we didn't discuss. It's not that we disagree with all of the provisions. We focused on the two that we thought had legal infirmities that stopped us from joining. Thanks.

CHAIR REEVES: Certainly. Your colleagues know what your concerns are, and we

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respect your concerns on that issue. So, if anybody ever asks me, yes, we do understand. Commissioner Gleeson.

COMMISSIONER GLEESON: Thank you, Chair Reeves. As a preliminary matter, let you say that I too, like my friend and colleague, Commissioner Judge Boom, am proud of the work that this brand new group of Commissioners has done in the eight short months since we were confirmed all at once but the U.S. Senate. And with the amendments that we announced today, both individually and collectively, these amendments amount to important steps to a more equitable sentencing system and safer communities as well.

Especially in light of the fact that our First Amendment cycle together was truncated by the timing of our confirmations. We did a lot, and I could hardly be more grateful to my six colleagues on this Commission and to the staff of the Commission, which has done excellent work under very difficult circumstances.

I do want to say a few words, not in

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rebuttal, but by way of observation about this amendment to policy statement §1B1.13, which provides the necessary guidance to district judges exercising the limited authority to reduce sentences granted in 18 U.S.C. § 3582(c)(1)(A).

As you've heard already, we've received enormous and valuable feedback across the entire range of issues on which we sought feedback. And this one was no exception.

We heard from judges who had exercised that authority in the 4+ years since the enactment of the First Step Act in which Congress, for the express purpose of increasing the use of such sentence reductions, first allowed defendants to make such motions under the law. We heard from people who received those reductions and who were returned to their families and communities. We heard from the Department of Justice, members of the legal academy, and many other groups and individuals who are genuinely concerned, as we all are, without a doubt, with interest, such as finality,

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administrability, families to victims, as well as to sentenced defendants, and of course the safety of our communities.

As Chair Reeves is fond of saying -- and I love hearing him say it -- when people speak to this Commission, they are heard. We have done our level best to revise §1B1.13 in a way that reconciles as best we can all the relevant considerations, some of which are admittedly in tension with others. The result is a policy statement that modifies -- that provides needed modification rather -- to the specified extraordinary and compelling reasons, particularly medical and family circumstances. And adds a much needed one for inmates subjected to certain forms of abuse by those responsible for their custody.

The amendment also maintains the so-called other reasons catch-all that's been in the current policy statement for years reflecting the fact that by their nature as the past few years have demonstrated, reasons judges find

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extraordinary and compelling and worthy of consideration in deciding whether to reduce the sentence are by their nature difficult to specify and enumerate in advance.

And finally, and most controversially, the amendment allows for consideration of changes in the law as extraordinary and compelling reasons warranting a reduction in sentence, but only in narrow circumstances. Only when a defendant is serving an unusually long sentence and only when he or she is at least ten years into that sentence may a change in the law be considered for this purpose. And even then, under the amendment, it can only be considered in the rare circumstance where that change in law would result in a "gross disparity" between the sentence the moving defendant is serving and the sentence likely to be imposed at the time the motion is made. That commonsense guidance is fully consistent with separation of powers principles, our authority as the Sentencing Commission, and with the First Step Act.

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Most importantly, it will ensure that Section 3582(c)(1)(A) of Title 18, of the United States Code, serves one of the purposes Congress explicitly intended it to serve, and that law was enacted almost 40 years ago, to provide a needed, transparent, and judicial second look at unusually long sentences that in fairness should be reduced. Thank you, Chair Reeves.

CHAIR REEVES: Is there any further discussion on this motion? Thank you all for the discussion. I'm sorry I did not say that. We will vote on this matter by roll call. When the Staff Director calls your name, vote on the motion by saying aye or nay -- aye or nay. Mr. Cohen, please call the roll.

MR. COHEN: Commissioner Wong.

COMMISSIONER WONG: Nay.

MR. COHEN: Judge Boom.

COMMISSIONER BOOM: Nay.

MR. COHEN: Judge Gleeson.

COMMISSIONER GLEESON: Aye.

MR. COHEN: Vice Chair Mate.

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VICE CHAIR MATE: Aye.

MR. COHEN: Vice Chair Murray.

VICE CHAIR MURRAY: Nay.

MR. COHEN: Judge Restrepo.

VICE CHAIR RESTREPO: Yes.

MR. COHEN: Chair Reeves.

CHAIR REEVES: Aye.

MR. COHEN: I heard four ayes.

COMMISSIONER GLEESON: There were actually three ayes and one yes.

(Chorus of laughter.)

MR. COHEN: Four in support.

CHAIR REEVES: All right. The motion is adopted. And let the record reflect that at least four commissioners voted in favor of the motion.

Our General Counsel will now advise us on the next matter of business.

MS. GRILLI: Thank you, Chair Reeves.

Parts A and B of the just promulgated Criminal History Amendment may have the effect of lowering the term of imprisonment recommended in the

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guidelines applicable to particular offenses or category of offenses. In light of that, I ask whether there is a motion pursuant to Rule 2.2 and 4.1(A) of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis of the Criminal History Amendment.

CHAIR REEVES: Is there a motion to instruct staff to prepare a retroactivity impact analysis as suggested by the General Counsel?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MATE: Second.

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: Is there any discussion on this motion? No discussion. Could you please vote on this motion by saying aye or any nays?

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted. And let the record reflect that at least three commissioners voted in favor of the motion.

MS. GRILLI: Judge, may I -- I'm

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sorry.

CHAIR REEVES: Oh, I'm sorry.

MS. GRILLI: May I interrupt --

CHAIR REEVES: Yes.

MS. GRILLI: -- because I think that I steered you wrong on the three. And so I noted four votes in favor, meaning a majority of the members serving voted in favor. Thank you. Sorry, Judge.

CHAIR REEVES: No problem. There were at least four commissioners voted in favor of the motion.

The next item of business is a possible vote to publish in the Federal Register for an issue for comment on whether to make retroactive any part of the Criminal History Amendment that may have the effect of reducing the guideline range for a category of offenses or offenders.

MS. GRILLI: Yes. Thank you, Judge. As I noted, the Criminal History Amendment may have the effect of lowering guideline ranges for

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certain offenses or category of offenses. In light of that, under your Rules of Practices and Procedures, if you are going to consider retroactivity, you are required to put out a Notice for Comment seeking public comment on the issue of whether to apply this guideline retroactively by amending §1B1.10 of the guideline range.

So, there is an issue for comment before you asking whether to list Parts A and B of the amendment addressing the impact of status points at §4A1.1 and offenders with zero criminal history points at the new §4C1.1 in subsection (d) of §1B1.10 as changes that may be applied retroactively to previously sentenced defendants.

You have this authority under 28 U.S.C. § 994(u).

So, a motion to publish the issue for comment with a public comment period closing on June 23rd, 2023, and technical conforming amendment authority to staff would be in order at this time.

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CHAIR REEVES: Is there a motion to publish the issue for comment as suggested by the General Counsel?

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: It's been moved and properly seconded. Vote by saying -- Any discussion on the motion? Excuse me. Let's vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted and let the record reflect that at least four commissioners voted in favor of the motion. If we needed three, we got three.

MS. GRILLI: Three is fine.

(Simultaneous speaking.)

MS. GRILLI: In this one, it's okay.

CHAIR REEVES: You got three. Is there any further business before the Commission? I assume there is. Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you so

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much, Mr. Chairman, for recognizing me. I want to first express our sincere gratitude to the Commission for taking up several of the priorities of the Department of Justice during this amendment year. As you know, the fentanyl crisis across the country, firearms violence plaguing our cities and rural areas alike, and sexual abuse in our federal prisons, are all critical public safety issues. The amendments enacted today will help address each of them. They will not solve these problems on their own, but they are necessary and appropriate. On these and the other amendments, there are provisions -- specific provisions that we agree with and others that we don't. And we appreciate the Commission considering our views on all of them.

I want to thank the Commission staff for its work and its patience with us over the course of the last six months. The issues we have faced together over that time are complex and controversial. You are genuinely the true experts on the Sentencing Reform Act, the

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Guidelines Manual, and federal sentencing data. And your search for sensible sentencing policy has been remarkable to see.

I also want to recognize the men and women who work in our federal courts around the country every day. A special shout-out to my Justice Department colleagues, but to all who work in the courts; public defenders, private counsel, probation officers, appellate district and magistrate judges, clerks, marshals, and any others. You are the front lines of our criminal justice process. Thank you for your service and for all you do to try to make justice a reality every day. We know each of you care deeply about justice and about the work of the Commission.

Mr. Chairman, I worry -- I worry about many of the amendments that we promulgated today and how they will impact our colleagues in the courts for those amendments are indeed quite complex. There are new aggravating factors, new mitigating factors, all new sentencing concepts, fine gradations, a whole new criminal history

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category, lists of limitations, exceptions, provisos, and much more. If there is one theme that runs through most of our amendments, it is the burden and uncertainty of litigation that is sure to be a byproduct of our work.

If I believed all of this litigation and complexity would lead to more safety for the public and more justice for victims and those convicted of crime, that would be one thing. But I'm not so sure. I hope we can find time in the coming year to examine the guideline system as a whole and how that system, I believe, has led to a tangle of litigation and sometimes policy making, too. To the sentencing ranges, some sensible and some not so sensible in the guidelines, and to the ever-growing complexity of federal sentencing and corrections law and the implications it has for the many dimensions of justice.

This year marks the 50th anniversary of the publication of Judge Marvin Frankel's book, Criminal Sentences: Law Without Order, from

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which the guidelines movement began. And next year will mark the 40th anniversary of the Sentencing Reform Act of 1984. The basic architecture of the federal guidelines has not changed since the guidelines were first promulgated despite major and structural Supreme Court decisions, a bipartisan national movement for reform of federal sentencing, dramatic changes to federal corrections law and policy, including the introduction of a new earn time credit system, unprecedented technological change that opens up great possibilities for sentencing and corrections, calls for systemic review from the American Law Institute, the Counsel on Criminal Justice, and many, many others. And even some advancement in knowledge of human behavior. The first Commission made some good choices and some not so good when it built the framework that we have for federal sentencing. We think some engagement on that framework is way past due.

Thank you, Mr. Chairman, for your

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leadership over the last eight months. Thank you to my colleagues. It's a genuine privilege to work with all of you. And thank you, Mr. Chairman, for giving me the opportunity to say a few words.

CHAIR REEVES: Thank you, Commissioner Wroblewski. Your input is valuable to all of us during all of our deliberations and we certainly appreciate it. Any other statements? Yes? Thank you. You're such a gentleman, Vice Chair Restrepo. Vice Chair Mate?

VICE CHAIR MATE: Thank you. Thank you for the opportunity. I just have a very quick few words. I primarily want to say how grateful I am for the opportunity to serve on this Commission and what an honor it is to work with this group of commissioners and with truly dedicated staff.

I just want to say that as the Supreme Court has recognized, this Commission fills an important institutional role. It has the capacity to base its determinations on empirical

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data and national experience. Many of the amendments we announced today reflect that role.

In formulating the guidance on modification of sentences where individuals in prison face critical, medical, or family situations, unusually long sentences, and other extraordinary and compelling circumstances, we look to the decisions and experiences of the courts charged with making these modifications.

In addition, our considered decision to not further penalize someone for being under a criminal justice sentence and to adjust sentences for people facing their first conviction is based on empirical evidence. On these amendments, I have little add to the Chair's remarks. This evidence-based guidance will improve the lives of thousands of people each year, strengthen communities, and serve public safety.

Going forward, I look forward to working with my wonderful colleagues to ensure our decisions are based on the best possible empirical data and a wide range of national

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experiences. Thank you.

CHAIR REEVES: Thank you, Vice Chair Mate. Vice Chair Restrepo.

VICE CHAIR RESTREPO: Thank you, Mr. Chairman. As Chairman Reeves noted -- has made clear, the amendments we are advancing or proposing today are the product of extensive deliberations on behalf of myself and my colleagues. And I want to underscore how hard all eight of us have worked on these proposed amendments in a collaborative spirit understanding that we would all have to compromise.

In several instances, I found myself persuaded by my colleagues to change my position on a given issue. I'm grateful to all of my colleagues for fostering an environment of collegiality and an open robust exchange of ideas. I'd like to echo my thanks to the staff of the United States Sentencing Commission for their support and expertise. None of this would be possible without their support.

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And lastly, a very special thanks to our Chairman for his leadership, patience, willingness to listen, and consider everybody's views, his wonderful sense of humor, and his inherent good nature. Mr. Chairman, President Biden choose wisely appointing you to be the Chair of this Commission. I look forward to working with my colleagues and the staff over the next many months and years to come. Thank you.

CHAIR REEVES: Thank you, Vice Chair Restrepo. We're nearing the end of our meeting.

And I'll again reiterate, thank you to the staff. Thank you to the public. Thank you to my fellow commissioners. We have more work to do, but we're going to get it done. And I just appreciate each of us as we get down that road.

Is there any further business? Then I call for a motion to adjourn.

VICE CHAIR MURRAY: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: There's a third,

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fourth. Let's vote on the motion to adjourn.
You may do so by saying aye.

(Chorus of ayes.)

CHAIR REEVES: The motion is adopted
by voice vote, and the meeting is now adjourned.

Thank you all so very much, and have a happy
Easter to those who will be celebrating it.
Thank you.

(Whereupon, the above-entitled matter
went off the record at 3:49 p.m.)