



The National Council for Incarcerated and Formerly Incarcerated Women and Girls

**Comment on Proposed Priorities for Amendment Cycle (BAC2210-40)
National Council for Incarcerated and Formerly Incarcerated
Women and Girls
October 17, 2022**

The National Council for Incarcerated & Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. Organizing began in a federal prison yard with a group of women who were tired of policy makers instituting criminal justice reform without consulting any formerly incarcerated people – those who have the expertise to create an alternative system that recognizes each person’s humanity. Every incarcerated woman who reaches out to us automatically becomes a member, giving the organization unprecedented access to the reality of incarceration in federal and state prisons across the country.

In its short history, the National Council has already had a significant impact, including acting as the voice of the incarcerated women who helped draft the Dignity Act.¹ We’ve also passed Primary Caretaker legislation in several states, mandating that judges consider alternate sanctions for primary caretakers of children – generally women – and provide a written justification if they order incarceration.²

¹ <https://justiceroundtable.org/dignity-act-for-incarcerated-women/>

² Human Impact Partners, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in MA, TN, LA*, <https://humanimpact.org/hiprojects/primary-caretakers/> (last visited May 7, 2019).

The National Council welcomes the opportunity to comment on the Sentencing Commission’s proposed priorities. As a preliminary matter, we welcome Chairman Reeves’s statement that the Commission is eager to work in “a deliberative, empirically-based, and inclusive manner.”³ We are disappointed, however, that he failed to mention those directly impacted by the criminal legal system among the many voices that he welcomed to the discussion. The National Council believes in the adage “nothing about us, without us.” Those with the highest stake in the Commission’s priorities are the families and communities of those who are serving federal sentences. Especially if the Commission is going to include “victims,” among stakeholders, it must also include advocates for the incarcerated to make sure that the government does not impose sentences that are longer than necessary by adopting harsh sentencing policies. 18 U.S.C. § 3553(a).

Priority 1: Consideration of amendments to §1B1.13

The National Council has represented or assisted many incarcerated people seeking a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). Judges across the country correctly determined that the Policy Statement drafted before the First Step Act can no longer apply. Nevertheless, the default solution of giving judges the discretion to determine whether “extraordinary and compelling” circumstances have been met has led to unpredictable and haphazard results. Therefore, amendment of §1B1.13 is urgent and an appropriate top priority.

³ Press Release, U.S. Sentencing Commission, New Commission Proposes Policy Priorities for 2022-2023 Amendment Year (Sept. 29, 2022), <https://www.ussc.gov/about/news/press-releases/september-29-2022>.

In revising this Policy Statement, the Commission should significantly expand the type of family situation that meets the “extraordinary and compelling” standard. The Adoption and Safe Families Act requires the states to sever all parental ties if a parent leaves a child in the foster care system for 15 out of 22 months. 42 U.S.C.A. § 675(5)(E). Eighty percent of women in federal custody were the primary caretakers of their children; some do not have relatives who can take the children while their mother is incarcerated. That means that even women with relatively short sentences can lose their children permanently if they do not have a family member to care for them or if that person becomes incapacitated – as often happens if the children are left with grandparents. ASFA has destroyed many Black, brown, and poor families, especially those impacted by the criminal legal system.⁴ The revised Policy Statement must take this into consideration, allowing for reduction in sentences for parents who otherwise would lose the right to have any contact with their children during and after incarceration.

Priority #9: Prohibiting the Use of Acquitted Conduct

A bipartisan consensus exists to end the insidious practice of significantly enhancing sentences on the basis of acquitted conduct. Overruling the jury’s decision that a defendant is not guilty violates a fundamental principle of the Constitution and leads to unfair and unduly harsh sentences. A bill to end this practice has passed the House and is currently under consideration

⁴ Chloe Jones, *1 in 100 kids lost legal ties to their parents by the time they turn 18. This new bill aims to help*, PBS News Hour (Dec. 30, 2021), <https://www.pbs.org/newshour/nation/1-in-100-kids-lose-legal-ties-to-their-parents-by-the-time-they-turn-18-this-new-bill-aims-to-help>

in the Senate.⁵ The Commission should not wait on the political process but should make it a greater priority to revise the Guidelines to stop this unjust practice.

Priority #12: Study of Court Sponsored Diversion

Mass incarceration harms society as a whole. One in two Americans have either been involved in the criminal legal system or know someone who has. The numbers of people incarcerated each year are staggering. Prisons are not equipped to handle the health, mental illness, and social problems that land people in prison. The best way out of the huge – and expensive – problem of mass incarceration is to reduce the number of people entering prison through diversion programs. We must address the underlying causes that lead a person to a prison cell. Addressing the illness of addiction, lack of education, and physical and emotional trauma will not only slow mass incarceration but will put people in a position to help their communities rather than burden them. Therefore, study of diversion programs should not be an afterthought but a focal point. Designing effective diversion programs will reduce the number of people in custody – which should be a major priority for the Commission.

⁵ <https://www.billsponsor.com/bills/32723/house-bill-1621-congress-117>