

UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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THURSDAY
JANUARY 12, 2023

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The United States Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 1:00 p.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT

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

* Present via Teleconference

ALSO PRESENT

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

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

(1:03 p.m.)

CHAIR REEVES: The meeting is now called to order. Good afternoon. Whether you're joining us in person or via livestream on our website, I welcome you all to this public meeting of the United States Sentencing Commission, the first meeting of 2023.

Now, I have the pleasure of introducing my colleagues. First, I'd like to introduce the Commission vice chairs. Claire Murray, to my right, who most recently served as Principal Deputy Associate Attorney General. And Laura Mate, who served as a Sentencing Resource Counsel to the Federal Public and Community Defenders for many years.

Also with us today, District Judge Claria Horn Boom, who serves in both the Eastern and Western Districts of Kentucky. Candice Wong, who is an Assistant United States Attorney and the Chief of the Violence Reduction and Trafficking Offenses Section in the United States

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Attorney's Office in Washington, D.C. And the Commission's ex officio member representing the Attorney General, Jonathan Wroblewski.

Joining us by phone today is Judge Luis Felipe Restrepo, who serves on the United States Court of Appeals for the Third Circuit. And Commissioner John Gleeson, who previously served in the Eastern District of New York. Patricia Cushwa, the ex officio member representing the United States Parole Commission, was unable to join us today.

The first order of business is to vote to adopt the October 28th, 2022, public meeting minutes. Is there a motion to do so?

Vice Chair Murray: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MATE: Second.

CHAIR REEVES: I got a timid group.

(Laughter.)

CHAIR REEVES: Is there any discussion on this motion?

(Pause.)

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CHAIR REEVES: There is no discussion.

Please vote on the motion by saying aye. And if you don't agree with the motion, you can say nay.

(Chorus of aye.)

CHAIR REEVES: Thank you. The motion is adopted by voice vote.

The next item of business is the Report of the Chair. This is my opportunity to talk to you all. Happy New Year, again. There are no shortage of practices and traditions throughout the world that are believed to bring success and good things in the new year.

Some like myself from the south, we eat black eyed peas. But if you're from Mississippi, you eat black eye peas, you got to have the cabbage greens and you also have to have cornbread. And note, I said cabbage greens and not simply just cabbage. That's my Yazoo City tradition.

I've learned, though, that others eat fish for luck and prosperity while some smash dishes. And there are those, I've learned, who

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jump seven times in ocean waves. I even heard of others eating 12 grapes at the stroke of midnight on January 1st. Each grape representing a month of the year.

Regardless of how we all brought in the new year and the traditions we practice, I have no doubt that 2023 will be a very busy but good and successful year for this Commission. We worked hard, and we will continue to do so.

When my esteemed colleagues and I were confirmed by the Senate back on August 4th, not even six months ago, we knew we had a lot of hard work ahead. After four years without a voting quorum, the Commission was faced with quite a backlog of policy work.

By statute, we must submit our amendments to Congress for review no later than May 1st, 2023. That's less than four months away. We know that we're working under an abbreviated amendment cycle, but we are committed to meeting our deadlines with the focus on this initial amendment cycle on the most urgent policy

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concerns.

The Commission and its staff, we worked, as the saying goes, we work full steam ahead. Quite frankly, I'm constantly amazed with the amount of work and with the efficiency that the staff works. We, the Commission and the staff, have worked hard. We've worked thoroughly, and we've worked diligently and thoughtfully.

This work has led us to today's deliberations on our proposed guideline amendments. Before I turn to those amendments, however, I would like to provide an update on the initial work the Commission has been doing over the past few weeks as well as a look ahead. Last month, the Commission released an updated Compassionate Release Data Report, examining motions filed with the courts during fiscal years 2020, 2021, and 2022.

This report follows the significant work the Commission has done over the past few years. Consistent with previous reports on

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compassionate release, the Commission found that the likelihood of compassionate release motions succeeding varied significantly depending on the circuit or district in which they were filed.

The First Step Act amended Title 18, United States Code, section 3582, to allow defendants for the first time to move for compassionate release on their own, without having the Director of the Bureau of Prisons to make a motion.

In the absence of a Commission policy statement recognizing this avenue, Courts of Appeals generally have held the Commission's policy statement governing compassionate release does not apply to motions filed by defendants.

Without guidance from the Commission during the COVID-19 pandemic, the debate about what constitutes extraordinary and compelling reasons for compassionate release motions became a debate within the federal courts throughout the nation and with differing results.

It is the Commission's obligation to

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provide clearer guidance to the courts. We will do so. In fact, implementation of the First Step Act is among our top priorities, and one that we will discuss today.

In light of the patchwork of state laws regarding simple possession of marijuana as well as recent administration policy developments on the federal level, this week the Commission released a report titled, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System*.

The report looks at the number of offenders, sentence for federal offense of simple possession in the last five fiscal years, as well as the demographics and sentence lengths of these offenders. The Commission stakeholders asked, and again, we listened.

I'm pleased to announce that the Commission will soon launch yet another valuable online resource. In the next day or so, the Commission will add an interactive data tool to the website that provides information on programs

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that offer alternatives to incarceration throughout the nation.

Speaking of the website, please remember there is so much information just at your fingertips, just fingertips away, at www.ussc.gov. I implore you to visit and spend time at our website, at our site. It is easy to navigate, and it's packed with information for everyone, judges, law clerks, practitioners, stakeholders, the general public, and those who are simply curious about our federal criminal justice system.

During the recent proposed amendment comment period, we received many requests for this information, and I have no doubt this new tool will add to the wealth of resources already offered by the Commission.

This, of course, follows last year's launch of the Judiciary Sentencing Information Tool, a tool that we call JSIN. As of late-2022, JSIN, which provides its users with comparative sentencing data, was accessed more than 1,300

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times each month, and its data was cited in more than 1,700 pre-sentence reports.

In addition, I'm happy to announce a new public comment portal on our website that will go live after this week's Commission meeting has concluded. By providing access to the list of proposed amendments and allowing letters and comments to be submitted through a fillable online form, this portal will make it even easier for those who want to offer comment on the Commission's proposed amendments.

Of course, the Interactive Data Analyzer continues to be a regular resource for the federal sentencing community.

Now, turning to an overview of today's agenda. It's a busy one. Today, we will discuss the Commission's proposed guideline amendments and issues for comment.

In addition to implementation of the First Step Act that I discussed earlier, we will discuss the safety valve for which eligibility was expanded in the 2018 law. The Commission

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needs to amend §5C1.2 to recognize this change. But we also need to consider changing this to the two-level reduction in the drug trafficking guideline at §2D1.1 for meeting the safety valve criteria.

The Commission also intends to implement the Bipartisan Safer Communities Act, firearms legislation that was passed after the Uvalde shootings and signed into law in July. The Act directs the Commission to increase penalties for certain firearm offenders, particularly straw purchasers.

I've heard consistently from judges throughout the nation that the categorical approach should be reconsidered. Judges are far too often flummoxed by how to apply the categorical approach. This is certainly a matter that the Commission will continue to discuss, and one that may warrant a public hearing.

In addition, we will examine status points and the treatment of offenders with zero criminal history points. Many judges and

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stakeholders have also told me that acquitted conduct is important to them. The Commission may consider the possible amendments to limit the use of acquitted conduct in sentencing.

The Commission's possible guideline amendments also include examining and resolving the most critical circuit conflicts regarding guideline interpretations as suggested in some denials of writs of certiorari. Yes, we have been busy, and I've outlined only a few of our priorities.

But I know I join my colleagues in continuing to be grateful for this opportunity to serve our nation, this great nation, in this important capacity. I appreciate the feedback and the public comment we've received thus far, and I look forward to comments on the Commission's proposed guideline amendments.

I'm now turning to Ken Cohen, the Commission's Staff Director, as we move forward with today's agenda for the Staff Director's Report.

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MR. COHEN: Thank you, Judge.

I just have one announcement. Raquel Wilson could not be with us today, but Raquel is retiring at the end of January for bluer pastures. She's going to become a law professor at the University of Kentucky Law School teaching criminal law and criminal procedure, not far from Judge Boom, so you all will be neighbors.

Raquel has had a long and incredibly successful and productive federal career. She clerked for Judge Robert Hinkle in the Northern District of Florida. She served as an Assistant Federal Public Defender in Asheville, North Carolina, and Houston, Texas. And as an Assistant Public Defender in Tallahassee, Florida.

She joined the Commission in 2015 as my Deputy General Counsel when I was General Counsel, and she has served as the Director of our training unit, Education and Sentencing Practice, since 2009.

Raquel has been just a remarkable

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contributor to the Commission and to our training mission.

She has trained thousands of judges, probation officers, lawyers, and the collective. We are going to miss her, and I'm going to miss her deeply. In her stead, Alan Dorhoffer, will be Acting Director of training as of February 1st, and I am sure, Alan, who's sitting to my left, will do an excellent job in Raquel's stead. That's all I have.

CHAIR REEVES: Thank you, Mr. Cohen. I'd like to echo your sentiments. I was one of the ones that Raquel had a tough time training, I'm sure.

(Laughter.)

CHAIR REEVES: I was one of the ones - at "baby judges school," at the national conference and all that, so we do appreciate all the work that she, and her group of trainers did then, and continually do for our Judiciary.

The next item of business is a possible vote to publish in the Federal Register

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proposed guideline amendments and issues for comment. The General Counsel, Kathleen Grilli, will advise us, will advise the Commission, on the first possible vote concerning a proposed amendment on the Commission's compassionate release policy statement.

General Counsel.

MS. GRILLI: Thank you, Judge Reeves.

You have before you a proposed amendment responding to the First Step Act of 2018, specifically which, among other things, amended the sentencing modification procedure set forth in 18 USC § 3582(c)(1)(A).

Your proposed amendment will implement the First Step Act's relevant provisions by amending what is colloquially referred to as a compassionate release policy statement found in §1B1.13 of the Guideline Manual and its accompanying commentary to authorize a defendant to acknowledge that a defendant is also authorized to file a motion seeking a sentence reduction.

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The proposed amendment would also revise the list of extraordinary and compelling reasons in §1B1.13 in several ways, including revising the provision currently found in Application Note 1(D) of §1B1.13, also referred to sometimes as the "catch-all."

Three options for that revision are provided. All three options would redesignate this category as other circumstances and would expand it to motions filed by either the Director of Bureau Prisons or the defendant. Issues for comment are also included with this proposed amendment.

A motion to publish the proposed amendment as I've just described it with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Thank you.

Is there a motion to publish the proposed amendment as suggested by the General Counsel?

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VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there any discussion on the motion?

(Pause.)

CHAIR REEVES: No discussion. Did I hear any comment from my colleagues on the phone?

(Pause.)

CHAIR REEVES: Okay, all right. Now, we're ready for a vote on the motion. Please vote on that motion by saying aye.

(Chorus of aye.)

CHAIR REEVES: Any nays?

(Pause.)

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

The General Counsel will now advise the Commission on a possible vote concerning a proposed safety valve amendment.

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MS. GRILLI: The proposed amendment before you also responds to the First Step Act of 2018, which among other things, changed the eligibility criteria of the safety valve provision in 18 USC § 3553(f) and the recidivist penalties for drug offenders at 21 USC §§ 841(b) and 960(b).

The proposed amendment contains two parts, A and B, which are not mutually exclusive.

Part A of the proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending §5C1.2 and its accompanying commentary to reflect the broader class of defendants that are eligible for safety valve relief under the Act.

Part A would also make conforming changes to §4A1.3 and changes to §§2D1.1 and 2D1.11 as the two-level reductions in both guidelines are tethered to the eligibility criteria of paragraphs 1 through 5 of §5C1.2(a).

It provides two options for amending §§2D1.1 and

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2D1.11. Part A also includes issues for comment.

Part B of the proposed amendment would revise subsection (a) of §2D1.1 to make the guideline-based offense levels consistent with the First Step Act changes to the types of prior offenses that trigger enhanced mandatory minimum penalties.

A motion to publish the proposed amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Thank you.

Is there a motion to publish the proposed amendment as suggested by the General Counsel?

COMMISSIONER WONG: So moved.

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Second.

CHAIR REEVES: Is there any discussion

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on the motion?

(Pause.)

CHAIR REEVES: I hear no discussion. Let's vote on this motion by saying aye. Let me hear any ayes.

(Chorus of aye.)

CHAIR REEVES: Any nays?

(Pause.)

CHAIR REEVES: No nays, good. The motion is adopted. And let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel now will advise the Commission on a possible vote concerning a proposed firearm amendment.

MS. GRILLI: Before you, you have a proposed firearm offense amendment, which is a result of your consideration of possible amendments to §2K2.1. It's a three-part amendment. Each of the parts are not mutually exclusive.

Part A of the proposed amendment would amend §2K2.1 to respond to the Bipartisan Safer

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Communities Act. Two options are presented as well as issues for comment.

Part B of the proposed amendment addresses concerns expressed by some commenters about firearms that are not marked by a serial number, also referred to as "ghost guns." An issue for comment is provided in that part as well. And Part C provides issues for comment on possible further revisions to §2K2.1.

A motion to publish the proposed amendment as I just described it with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Thank you.

Is there a motion to publish the proposed amendment as suggested by the General Counsel?

COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Second.

CHAIR REEVES: Is there any discussion

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now on this motion?

(Pause.)

CHAIR REEVES: Well, let's vote on the motion. For those in favor of this motion please vote in the affirmative by saying aye.

(Chorus of aye.)

CHAIR REEVES: All right. Are there any nays?

(Pause.)

CHAIR REEVES: No nays, all right. The motion is adopted. And let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed circuit conflict amendment.

MS. GRILLI: Before you, you have the circuit conflict amendment. This proposed amendment contains two parts, A and B. Again, they are not mutually exclusive.

Part A of the proposed amendment would amend §3E1.1 and its accompanying commentary to

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address circuit conflicts regarding the permissible bases for withholding a reduction under §3E1.1(b).

Part B of the proposed amendment would amend §4B1.2 by adding the definition of the term "controlled substance" to address a circuit conflict concerning whether the definition of "controlled substance" in §4B1.2(b) covers only offenses covering -- involving substances controlled by federal law. An issue for comment is also included in each part.

The motion to publish the proposed amendment as I just described it with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff will be appropriate at this time.

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

VICE CHAIR WONG: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER MATE: Second.

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CHAIR REEVES: Is there any discussion?

(Pause.)

CHAIR REEVES: No discussion, so let us vote. For those who vote in favor of this, vote by saying aye.

(Chorus of aye.)

CHAIR REEVES: All right. The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed crime legislation amendment.

MS. GRILLI: The proposed amendment on crime legislation responds to recently enacted legislation. There are 11 parts, each of which are not mutually exclusive.

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 and Victims to Fight Online Sex Trafficking Act

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of 2017 by amending Appendix A and §2G1.1.

Part C responds to the FAA Reauthorization Act of 2018 by amending Appendix A and §2A5.2 §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 by amending Appendix A and the commentary to §2X5.2.

Part F responds to the Foundations for Evidence-Based Policymaking Act by amending Appendix A and the commentary to §2H3.1.

Part G respond to the National Defense Reuthorization 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 Appendix A and the commentary to §2B1.1.

Part I responds to the Stop Student Debt Relief Scam Act of 2019 by amending Appendix

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A and the commentary to §2B1.1.

Part J responds to the Protecting Lawful Streaming Act of 2020 by amending Appendix A.

Part K responds to the William M. Thornberry National Defense Authorization Act of fiscal year 2021 by amending Appendix A and the commentary to §2S1.3.

Each of the parts also include issues for comment.

A motion to publish the proposed crime legislation amendment currently before you with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

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

(Pause.)

VICE CHAIR RESTREPO: So moved.

(Laughter.)

CHAIR REEVES: She said a lot of

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words, so it took us a while to --

(Simultaneous speaking)

CHAIR REEVES: It has been moved, and I think I did hear a second.

VICE CHAIR MATE: Second.

CHAIR REEVES: Is there any discussion on this motion?

(Pause.)

CHAIR REEVES: Now, let's have a vote, then. All in favor say aye.

(Chorus of aye.)

CHAIR REEVES: Any nays?

(Pause.)

CHAIR REEVES: All right, thank you. The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment addressing the categorical approach and other career offender issues.

MS. GRILLI: You have before you a

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four-part proposed amendment titled, Career Offender, in which you're considering whether to promulgate any or all of these parts that are not mutually exclusive.

Part A would amend §4B1.2 to address recurrent criticism of the categorical approach.

It eliminates the categorical approach from the guidelines by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines rather than offenses or elements of an offense. It would also make conforming changes to other guidelines that use those terms.

Part B of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a crime of violence under §4B1.2 as amended in 2016.

Part C of the proposed amendment would amend §4B1.2 to address two circuit conflicts regarding the commentary provision stating that the terms "crimes of violence" and "controlled substance offense" include the offenses of aiding

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and abetting, conspiring to commit, and attempting to commit crimes of violence or a controlled substance offense. Two options are provided.

And Part D of the proposed amendment would amend the definition of "controlled substance" in 4B1.2(b) to include offenses involving an offer to sell a controlled substances and offenses described in 46 USC §§ 70503(a) and 70506(b). Issues for comment are included with each of the four parts.

A motion to publish the proposed career offender amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff would be in order.

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

VICE CHAIR MATE: So moved.

COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there a second?

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(Pause.)

CHAIR REEVES: Jump right in.

(Laughter.)

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: All right. Is there any discussion on this motion?

(Pause.)

CHAIR REEVES: Well, let's take a vote, then. All in favor of following the advice of our General Counsel and this motion, actually, say so by voting aye.

(Chorus of aye.)

CHAIR REEVES: Are there any nays? Thank you. The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed criminal history amendment.

MS. GRILLI: The proposed amendment before you contains three parts, Parts A through C. As with your other amendments, these parts

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are not mutually exclusive.

Part A relates to status points under subsection (d) of §4A1.1(), which adds two criminal history points if the defendant committed the instant offense while under any criminal justice system. Recent Commission recidivism research on publications found that status points add little to the overall predictive value associated with the Commission's criminal history score.

The proposed amendment addresses the impact of status points under the guidelines. Three options are provided.

Part B relates to zero-point offenders. The sentencing table in Chapter Five is divided into six criminal history categories.

Category I includes offenders with zero criminal history points and those with one criminal history point.

Recidivism data analyzed by the Commission suggests that offenders with zero criminal history points have considerably lower

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recidivism rates than other offenders. Part B of the proposed amendment sets forth a new Chapter Four guideline at §4C1.1 that addresses zero-point offenders.

It would provide a decrease of one or two levels from the offense levels determined under Chapter Two for offenders who meet certain criteria and provides two options for establishing the criteria. Part B would also amend the Commentary to §5C1.1 as part of the Commission's implementation of 28 USC § 994(j).

It would address the alternatives to incarceration available to zeropoint offenders by revising the Application Note in §5C1.1 and would make corresponding changes to subsection (b) (2) (A) of §4A1.3 and would amend Chapter One, Part A, Subpart 1.

Part C of the proposed amendment would amend the Commentary to 4A1.3 to include sentences resulting from possession of marijuana offenses as an example of when a downward departure from the defendant's criminal history

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may be warranted. Issues for comment are provided with each part.

A motion to publish the criminal history amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

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

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

(Pause.)

COMMISSIONER WONG: So moved.

CHAIR REEVES: Is there any discussion on this motion?

(Pause.)

CHAIR REEVES: Let's vote on the motion by saying aye. All in favor of this motion, please say aye.

(Chorus of aye.)

CHAIR REEVES: All right. Any nays?

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(Pause.)

CHAIR REEVES: Thank you. The motion is adopted, and please let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will advise the Commission on a possible vote concerning a proposed acquitted conduct amendment.

MS. GRILLI: This proposed amendment is a result of the Commission's consideration of possible amendments to the Guideline Manual to prohibit the use of acquitted conduct in applying the guidelines. Currently, consideration of acquitted conduct is permitted under §1B1.3 in conjunction with §§1B1.4 and 6A1.3.

The proposed amendment would amend §1B1.3, the relevant conduct guideline to add a new subsection (c) that provides that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted by the defendant during the guilty plea colloquy or was found by

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the trier of fact beyond a reasonable doubt to establish part of the instant offense of conviction.

The guideline would also include a definition of "acquitted conduct" and make corresponding changes to the Commentary at §6A1.3. Two issues for comment are also included. A motion to publish the acquitted conduct amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate.

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

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: Second.

CHAIR REEVES: Is there any discussion on the motion?

(Pause.)

CHAIR REEVES: Hearing no request for

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discussion, all in favor say aye.

(Chorus of aye.)

CHAIR REEVES: All right, thank you. The motion is adopted, and let the record reflect that at least three commissioners voted in favor of the motion to publish.

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

MS. GRILLI: The sexual abuse offenses amendment contains two parts that are not mutually exclusive.

Part A responds to recently enacted legislation, specifically the Violence Against Women Reauthorization Act of 2022, which created two new offenses. One at 18 USC § 250 titled, Penalties for Civil Right Offenses Involving Sexual Misconduct, and the other at 18 USC § 2243(c).

The proposed amendment would amend Appendix A, the Statutory Index to reference the new offenses under 18 USC § 250 to §2H1.1, the

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civil rights guideline. And offenses under 18 USC § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward). Issues for comment are provided.

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, or supervision. Part B of the proposed amendment would amend §2A3.3 in several ways to address these concerns.

First, it would increase the base offense level of 14 to a bracketed [22]. 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. Issues for comment are also provided.

A motion to publish the sexual abuse offenses amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

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

VICE CHAIR MURRAY: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: Second.

CHAIR REEVES: Is there any discussion on this motion?

(Pause.)

CHAIR REEVES: Well, let's then vote. All in favor of this motion, please say aye.

(Chorus of aye.)

CHAIR REEVES: Any nays?

(Pause.)

CHAIR REEVES: All right. The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed issue for comment addressing alternative to incarceration programs.

MS. GRILLI: The Commission identified

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as one of its policy priorities for the current amendment cycle a multi-year study of court-sponsored diversion and alternative to incarceration programs.

As part of its work on this priority, the Commission has drafted issues for comment on alternative to incarceration programs to inform the Commission's consideration of this priority.

There are two issues for comment provided.

A motion to publish the issue for comment on alternative to incarceration programs with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff would be in order at this time.

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

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER WONG: Second.

VICE CHAIR RESTREPO: Second.

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CHAIR REEVES: I'll receive Commissioner Wong's second to your motion, Judge Restrepo.

(Laughter.)

CHAIR REEVES: I don't think anybody wants you seconding your own motion, but that's great. Oh, that was John, I'm sorry. I don't see you. I'm sorry. That's good, okay.

(Laughter.)

CHAIR REEVES: I'm sorry.

MS. GRILLI: Helpful to know for record purposes, anyway.

CHAIR REEVES: Thank you all. We're just trying to liven it up.

(Laughter.)

CHAIR REEVES: Well, since we've had the vote and all ayes. Let me hear that again. Did I hear everybody say aye?

(Chorus of aye.)

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

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to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment addressing fake pills.

MS. GRILLI: The proposed fake pills amendment responds to concerns expressed by the Drug Enforcement Agency about the proliferation of fake pills that is illicitly manufactured pills that represented or marketed as legitimate pharmaceutical pills containing fentanyl or fentanyl analogue.

The proposed amendment would respond to these concerns by amending §2D1.1(b)(13) 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 fentanyl analogue, while having reason to believe that such mixture or substance was not the legitimately manufactured drug.

The new provision would also refer to 21 USC § 321(g)(1) for purposes of defining the

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term "drug." Issues for comment are also included. A motion to publish the fake pills amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff would be appropriate at this time.

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

COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Second.

CHAIR REEVES: Is there any discussion on this motion?

(Pause.)

CHAIR REEVES: Well, let's take a vote.

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

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least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed miscellaneous amendment.

MS. GRILLI: The miscellaneous amendment contains two parts, each of which is not mutually exclusive.

Part A responds to a guideline application issue concerning the interaction of §2G1.3 and §3D1.2, and would amend §3D1.2(d) to provide that offenses covered by §2G1.3, like offenses covered by §2G1.1, are not grouped under subsection (d).

Part B revises 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 publish the proposed miscellaneous amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff would

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be in order.

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

COMMISSIONER WONG: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MATE: Second.

CHAIR REEVES: Is there any discussion on the motion?

(Pause.)

CHAIR REEVES: Well, let's take a vote.

For those in favor of this motion, please say so by saying aye.

(Chorus of aye.)

CHAIR REEVES: The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish. The General Counsel will now advise the Commission on a possible vote concerning a proposed technical amendment.

MS. GRILLI: The technical amendment

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is also a multi-part amendment, but for your purposes, I will tell you that it simply makes technical changes in various places throughout the Manual to provide updated references to certain sections in the United States Code or reclassification of sentences in the United States Code or to reorganize Commentary to make it more readable and user-friendly and/or to correct typographical errors in the Guidelines Manual.

A motion to publish the proposed technical amendment with a public comment period closing on March 14th, 2023, and technical and conforming amendment authority to staff is appropriate at this time.

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

VICE CHAIR MURRAY: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER BOOM: Second.

CHAIR REEVES: Is there any discussion

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on this motion?

(Pause.)

CHAIR REEVES: Let's take a vote. For those who are in favor of proceeding with that proposal, please vote by saying aye.

(Chorus of aye.)

CHAIR REEVES: Any opposed?

(Paused.)

CHAIR REEVES: The motion is adopted.

And let the record reflect that at least three commissioners voted in favor of the motion to publish.

Ladies and gentlemen, I'm talking to you out there in the audience and you out there on the website. As I said, the staff has really been working. The Commission has been working. You heard all of these motions, and you know what's ahead of us that we're doing for you and for our system of justice. We got a lot of work to do, and we're still doing it. We appreciate all of your support.

At this time, I don't think there's

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any further business before the Commission, except for I'm pretty sure Jonathan Wroblewski representing the Attorney General has some comments.

MR. WROBLEWSKI: Thank you very much, Mr. Chairman. Thank you so much for your leadership of the Commission over the last five or six months or so.

As you pointed out, and I think as everyone in the public now knows, it has been a very busy few months since you became the Chair. Together, we developed a very expansive agenda. We sought and received extensive public comment on that agenda from over 8,000 individuals and groups, and we are now publishing thoughtfully crafted guideline amendment proposals and again seeking public comment.

You have guided the Commission deftly, and we appreciate you bringing us to this day and to this stage in the process. At the Department of Justice, we care very deeply about the Commission's work from the Attorney General to

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line prosecutors in districts across the country to our law enforcement colleagues and to our victim and witness advocates.

Guidelines and federal sentencing policy represent an important element in our collective mission to improve public safety and to deliver justice to victims, defendants and the general public.

We think the guideline amendment proposals and issues for comment we are publishing today address very critical public safety and justice concerns and also important guideline operational issues.

From the opioid crisis to violent crime, from sexual assaults of federal prisoners to the availability of probation for non-violent first offenders, from the study of drug and other alternative courts to the dreaded categorical approach, to determining what is and isn't a crime of violence.

These issues all implicate fundamental fairness in sentencing. While we commend the

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Commission for what is being published, I think it's fair to say that some of the proposals go in a direction we find problematic, while others don't go quite as far as we might want.

During the comment period, we will voice our agreement with some of the proposals and disagreement with others. Of course, this is how it should be, and we pledge to you our commitment to making the published proposals even better so that justice can be served and so that the American people can be safer in their communities.

We think the deliberative process the Commission is following is a model, and we are looking forward to the more public engagements that will take place over the coming months where we will hear in a public setting from lawyers, judges, individuals who have been directly subject to our sentencing process, victim advocates, law enforcement and others.

We encourage these stakeholders to speak loudly, and we look forward to their input.

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Before I close, I want to thank the Commission staff for its work. The issues we have faced together so far are complex and controversial. You are the true experts in this subject matter, and your search for sensible sentencing policy has been remarkable to see.

On the amendment process, you have gone from 0 to 60 in no time, and you have made the publication of all of these amendments possible. It has been very, very impressive. Again, thank you, Mr. Chairman, for your leadership and for giving me this opportunity to say a few words. We look forward to the coming months and to the public hearings to come. Thank you.

CHAIR REEVES: Thank you, Mr. Wroblewski.

Www.USSC.gov. I encourage you all to keep up with the work that we're doing. Attend these hearings with us through the website if you can't be here because this is important work that we're doing. And we have such a dedicated staff

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who's doing it.

We have advocates on all sides who are participating, but there is no greater advocate than the public. So please, ladies and gentlemen, do participate with us by attending our hearings and offering your comments.

Is there any further business before this Commission?

(Pause.)

CHAIR REEVES: Hearing none, then, is there a motion to adjourn?

VICE CHAIR MURRAY: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MATE: Second.

CHAIR REEVES: All right. We'll vote on that motion to adjourn by saying aye.

(Chorus of aye.)

CHAIR REEVES: It's unanimous.

(Laughter.)

CHAIR REEVES: Everyone has voted in favor. The motion is adopted by voice vote, and this meeting is now adjourned. Thank you.

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(Whereupon, the above-entitled matter
went off the record at 1:52 p.m.)