



TESTIMONY OF

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Appearing on Behalf of the
MAJOR CITIES CHIEFS ASSOCIATION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

**“PUBLIC HEARING ON PROPOSED
AMENDMENTS TO THE FEDERAL
SENTENCING GUIDELINES”**

February 23, 2023

Introduction

Judge Reeves and distinguished members of the Commission:

Thank you for the opportunity to participate in today's hearing. I currently serve as the Chief of Police in Sacramento, California. It is also my privilege to appear before you on behalf of the Major Cities Chiefs Association (MCCA). The MCCA is a professional organization of law enforcement executives representing the largest cities in the United States and Canada.

My testimony will provide a local law enforcement perspective on the Commission's proposed compassionate release amendment. The MCCA is well-positioned to weigh in on this issue. While every MCCA member is responsible for providing law enforcement services, several of our members are also responsible for corrections. Furthermore, MCCA member agencies have been on the front lines throughout the COVID-19 crisis, where compassionate release was used to justify the release of thousands of inmates from federal, state, and local correctional facilities. The MCCA is not opposed to compassionate release, but is concerned that the Commission's proposed amendment is too broad and does not contain sufficient guardrails to ensure only non-violent offenders are released.

Compassionate Release Position

The MCCA is a leader in discussions related to criminal justice reform. Through our advocacy with Congress, the Administration, and other stakeholders, we have fought for many reforms to address historical shortcomings, increase fairness, and make the criminal justice system in the United States more equitable for all. This work has included efforts related to compassionate release.

The MCCA supports compassionate release as long as it focuses on providing relief to non-violent offenders who do not represent a threat to public safety. To help ensure it is being applied appropriately, an individualized risk assessment for each individual being considered for compassionate release should be conducted. The specific criteria for such an assessment should be developed and informed by a combination of social scientists, mental health professionals, legal and criminal justice experts, and law enforcement practitioners. At a minimum, the risk assessment should take into account the crime(s) committed, criminal history, and proclivity to re-offend. Judges are already required to consider the factors laid out in 18 U.S. Code § 3553(a) before granting an individual compassionate release. The MCCA believes a risk assessment like the one described above aligns with and strengthens that requirement. Therefore, the MCCA strongly recommends it be a part of any effort to implement the Commission's updated compassionate release guidance.

Medical Circumstances

The proposed amendment would make a few changes to the criteria under which an individual can be granted compassionate release due to medical circumstances. More specifically, someone would be eligible if they are located in a facility affected or at risk of being affected by an ongoing outbreak of infectious disease or another public health emergency, are at increased risk of severe medical complications or death as a result, and this risk cannot be sufficiently mitigated.

The new subcategory in the proposed amendment is very similar to what was used to grant thousands of offenders compassionate release during the first few years of the COVID-19 pandemic. In many instances, these factors were applied in a manner that resulted in offenders who represented a threat to public safety being released early. Here are a few illustrative examples from MCCA members:

- During the first few weeks of the pandemic, an MCCA member was given a list of 1,760 inmates and asked to recommend individuals for early release. Based on its analysis, this agency determined that only 5% of these inmates did not represent threats to public safety. Despite the agency's recommendation, approximately 1,400 of the 1,760 inmates were released due to medical concerns. 135 (roughly 10%) of these individuals were rearrested a total of 236 times within a month of being released. A few months later, this agency was given another list of 1,125 individuals who had been granted early release on medical grounds. Within a month of being released, more than 200 (approximately 18%) were arrested again.
- An individual in a major city admitted to setting fire to his girlfriend's door and pled guilty to criminal mischief, avoiding the felony arson charge. He was granted an early release a few months into the pandemic, despite being imprisoned on a domestic violence offense. Days after his release, he returned to his girlfriend's apartment and threatened to kill her family. Shortly after, he was arrested following an attack on a mass transit rider.
- An individual with multiple felony convictions was arrested just before the start of the pandemic for rape. While this case did not move forward due to an uncooperative complainant, he was held for a parole violation before being granted early release during the pandemic. He was arrested within ten days of being released for robbing a nurse coming home from her shift and raping an older woman.

These examples clearly show the challenges that can arise when compassionate release is based on sweeping medical circumstances. The MCCA is concerned that the proposed amendment is making the same mistakes that were made during the pandemic by overexpanding eligibility for relief via broad and subjective criteria. COVID-19 demonstrated how quickly infectious diseases can spread and how difficult it is to address associated risks quickly and comprehensively. The Sentencing Commission needs to further specify what constitutes the "extraordinary and compelling reasons" required for compassionate release under this new subcategory to address this issue. Lessons learned from the past few years also demonstrate why an individualized risk assessment, like the one described earlier in this testimony, must be part of any compassionate release determination.

Changes in Law

Another part of the proposed amendment would permit compassionate release due to "changes in the law." Offenders "serving a sentence that is inequitable in light of changes in the law" would be eligible for relief under this provision. The MCCA believes this policy likely runs contrary to Congressional intent. Furthermore, compassionate release is not the appropriate method to address

potential sentence reductions due to a change in the law. For these reasons, the MCCA recommends that the Sentencing Commission remove the “changes in law” provision from the final compassionate release amendment.

An act of Congress is the only way to change criminal penalties established in statute. For example, the *Fair Sentencing Act of 2010* reduced the sentencing disparity between crack and powder cocaine. However, it’s important to note that Congress does not always make these changes retroactive. Individuals convicted of 924(c) offenses are a good example. The *First Step Act* prohibited the practice of stacking 924(c) offenses. This provision, however, only applies to future cases and does not impact individuals who were already sentenced, even if those charges were stacked. Therefore, if one of these individuals were to receive compassionate release under the proposed “changes in law” section, with the justification being that their stacked sentence is inequitable due to the changes made by the *First Step Act*, it would be a clear violation of Congressional intent.

While the MCCA understands that 28 U.S. Code § 994 grants the Sentencing Commission the authority to determine what constitutes “extraordinary and compelling” circumstances that warrant a sentence reduction, Congress has historically addressed retroactivity as part of sentencing reform legislation. For example, the *First Step Act* allowed crack cocaine offenders sentenced before the *Fair Sentencing Act* was enacted to be resentenced under the updated guidelines. Considering the precedent Congress has set related to this issue, a change in the law, unless there is an explicit retroactivity provision, should not be considered “extraordinary and compelling” circumstances.

There are also other avenues to address sentencing reductions following a change in the law. For example, 18 U.S. Code § 3582 (c)(1)(B) allows the court to modify a sentence as permitted by statute, such as when Congress authorizes individuals convicted of certain crimes to be resentenced under new, reduced penalties. In addition, 18 U.S. Code § 3582 (c)(2) allows individuals to petition the court for a sentencing reduction if the penalty range they were initially sentenced under is subsequently reduced. In the MCCA’s opinion, both of these provisions are a more appropriate manner than compassionate release to address potentially inequitable sentences following a change in the law.

Finally, there are legitimate questions about how this portion of the proposed amendment would be implemented and its broader impact. The criminal justice system needs some degree of finality to operate properly. There’s a reason why, except in limited circumstances, the law prohibits sentences from being modified once implemented. The MCCA is concerned this could be undermined by the “changes in law” provision in the proposed amendment. It’s not unreasonable to think that if the proposed amendment were implemented as currently drafted, there would be a flood of compassionate release petitions any time Congress or the Sentencing Commission makes a change that impacts criminal penalties. This will undoubtedly burden judicial and other resources and could even delay relief for individuals who genuinely are experiencing “extraordinary and compelling circumstances.”

Victim of Assault

The proposed amendment would allow individuals who were victims of sexual assault or physical abuse by Bureau of Prisons (BOP) personnel to petition for early release. The Sentencing

Commission also requested feedback on whether this provision should be extended to individuals whom other inmates victimize. The MCCA strongly believes that no person, regardless of why they are incarcerated, should live in fear of or be subjected to sexual assault, physical abuse, or any other kind of violence or trauma while in the custody of BOP.

The basis of this provision in the proposed amendment is misguided. The *Prison Rape Elimination Act of 2003* (PREA) required the Department of Justice to develop regulations to address sexual abuse in prisons and jails. BOP must comply with these regulations, and the internal policy developed to implement them emphasizes that there is zero tolerance for sexual abuse by staff or other inmates. Instead of granting compassionate release to someone who has been adjudicated guilty, based on the evidence, by a jury of their peers because they were a victim of sexual or physical abuse, the focus should be on preventing these actions from occurring in the first place, as required by PREA and BOP policy. If BOP can eliminate or significantly reduce sexual assault and physical abuse in its facilities, this portion of the proposed amendment is no longer necessary.

The MCCA is concerned with how this portion of the proposed amendment would be implemented as well. While BOP should do everything in its power to de-escalate and resolve conflicts with inmates in other ways, situations may arise that require the use of force. It's entirely possible that if the "victim of assault" provision is included in the final amendment, petitions for compassionate release will be filed after any physical confrontation between BOP personnel and an inmate, with the inmate claiming they are a victim of physical abuse. This will only be exacerbated if the amendment is expanded to include individuals whom other individuals in BOP custody victimize. It is impossible for BOP to completely eliminate the risk or instances of physical altercations between offenders in their facilities, and there will likely be petitions for compassionate release following every incident.

Rise in Violent Crime and Lack of Accountability

Over the past few years, communities across the country have struggled with increasing violent crime rates. Every quarter, the MCCA publishes a violent crime survey that includes homicide, aggravated assault, robbery, and rape data from all member agencies. According to the MCCA's latest violent crime survey, homicides in 2022 decreased by approximately 5% compared to 2021. However, aggravated assaults increased slightly, roughly 0.3%, in 2022 compared to 2021. This would indicate that the violent crime rate remained steady, but fewer of these crimes resulted in the victim's death. Further analysis of the data also shows that the level of violent crime in major cities remains significantly higher than pre-pandemic levels. For example, in 2022, homicides were up approximately 42.6%, and aggravated assaults were up 34.5% compared to 2019.

Police are just one component of the criminal justice system. MCCA members have experienced challenges with other parts of the system not doing their part to hold offenders accountable. This includes a reluctance on the part of district attorneys to prosecute certain crimes, judges releasing violent offenders on personnel recognizance or very low bonds, and prosecutors and judges not following sentencing guidelines, among other issues.

These challenges and the circumstances under which someone is considered for compassionate release occur at very different points of that individual's interaction with the criminal justice system. However, the MCCA is concerned that the overly broad nature of the proposed amendment

will significantly expand the universe of individuals who are eligible for and receive compassionate release, thereby contributing to the perception that the criminal justice system is not holding people accountable. This lack of accountability within the criminal justice system undoubtedly is contributing to the current violent crime situation in America, as offenders do not believe they will face consequences for their actions.

Conclusion

The *First Step Act* significantly changed compassionate release by allowing defendants to petition the court directly instead of having BOP do it on their behalf. Undoubtedly, the delay in updating the relevant Sentencing Commission policy statement complicated implementation and removed an important check and balance as it gave the judicial branch near-complete discretion to determine who was eligible for compassionate release. The MCCA is glad to see these challenges are being addressed.

As the Sentencing Commission finalizes the compassionate release amendment, it must ensure the updated policies are balanced and do not jeopardize public safety. It's important to remember that the *First Step Act* only addressed process, not eligibility criteria. The MCCA is not opposed to compassionate release and believes it is a valuable tool to provide relief to non-violent offenders. However, the MCCA is concerned that portions of the Sentencing Commission's proposed amendment are too broad, lack sufficient guardrails, and will be challenging to implement.

Thank you again for the opportunity to appear before you today. The MCCA looks forward to continuing to work closely with the Sentencing Commission as it updates its compassionate release policy statement. I look forward to any questions you may have. Thank you.