National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

February 15, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Written Testimony for Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

The National Association of Assistant United States Attorneys (NAAUSA)–representing the interests of over 6,400 Assistant U.S. Attorneys (AUSAs) working in the 94 U.S. Attorney Offices–provides the following comments regarding the Proposed Amendments to the U.S. Sentencing Guidelines.

AUSAs are dutifully committed to defending the innocent and prosecuting the guilty through our federal criminal justice system. The system relies on public trust to succeed. The U.S. Sentencing Guidelines foster this trust by promoting the predictable and fair application of the law. While individualized determinations are necessary, the guidelines are designed to encourage a degree of uniformity among similarly situated offenders. This uniformity ensures offenders across the country, regardless of case outcome, can understand their sentence and feel their sentence is fair compared to their peers.

The uniformity the U.S. Sentencing Guidelines provide also guard against other potential ills. When the guidelines are clear and well-structured, there is less room for personal bias in decision-making. Offenders from Mississippi to California can look to the guidelines and know their sentence was fair. For these reasons, we encourage judges to heed the guidelines and encourage the Commission to adopt our recommendations below.

I. First Step Act–Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)

NAAUSA has no feedback on the proposed amendment to § 1B1.13(a).

NAAUSA has concerns regarding the proposed amendments to § 1B1.13(b)(1)(C) and (D). Lessons from the COVID-19 pandemic warn against qualifying broad and ill-defined medical circumstances as extraordinary and compelling reasons for reductions in sentences.

During the COVID-19 pandemic, AUSAs received a significant and burdensome volume of medical compassionate release requests– most of which were denied. These requests placed AUSAs in the unfamiliar position of making medical determinations about inmates. As one AUSA told NAAUSA, "[The compassionate release requests are] [t]ime consuming and exhausting. I feel as if I was required to make medical decisions based upon my review of the medical records. I'm not qualified to make those determinations."

The proposed amendment amplifies these concerns. Unlike COVID-19 compassionate release, which was meant to be limited to COVID-related risk factors, the proposed amendment is far more expansive and will result in a significantly higher volume of requests. The amendment as written effectively shifts the burden to prosecutors to affirmatively disprove an inmate's medical claims. Yet, AUSAs are not trained nor skilled in interpreting Bureau of Prison (BOP) medical records. Both attorneys and judges may be inadvertently led by faulty science without adequate knowledge to know otherwise.

Further, the expected volume of these requests will make it hard for AUSAs to dedicate the necessary time and attention to understanding the medical issues behind each one. Nonetheless, AUSAs will always work hard to provide each request the diligence it is due, but we urge the Commission to understand this burden and how it will divert AUSA time away from meritorious requests and new cases.

NAAUSA proposes the Commission add language to § 1B1.13(b)(1)(C) requiring the defendant provide *independent medical documentation from at least two medical professionals* indicating (1) that their medical condition requires long term or specialized medical care, (2) that without such care the defendant is at risk of serious deterioration in health or death, and (3) that such care is not being provided in a timely or adequate manner.

NAAUSA proposes the Commission add language to § 1B1.13(b)(1)(D) requiring the defendant provide *independent medical documentation from at least two medical professionals* indicating (1) that the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and (2) that such risk cannot be mitigated in a timely or adequate manner.

NAAUSA has no feedback on the proposed amendment to § 1B1.13(3)(A), (B), or (C).

NAAUSA has concerns regarding the proposed amendment to § 1B1.13(3)(D). NAAUSA is concerned that "*an individual whose relationship with the defendant is similar in kind to that of an immediate family member*" is too vague a standard and impossible to counter.

A defendant can broadly interpret the language to include virtually any person with whom he/she maintains a close relationship. Yet it is impossible for a prosecutor to corroborate these claims without an intrusive inquiry into the defendant's personal life, and perhaps into the individual's life who is the subject of the compassionate release claim. This inquiry will be necessary to provide the judge a complete record from which to exercise

their discretion. Conducting such an inquiry would require a significant commitment of time and prosecutorial resources and result in prolonged evidentiary hearings, which will also require the commitment of significant judicial resources.

For example, imagine Defendant X claims Person Y, a lifelong friend, is similar in kind to an immediate family member, and requires the defendant to act as a caregiver.

To corroborate this claim, the prosecutor will need to dig deep into the defendant's life, which may require interviews and testimony from a wide array of witnesses, including family members, friends, associates and employers. The investigation may also require the prosecutor to locate and interview family, friends and associates of the individual alleged to require the care to determine the nature of the relationship with the defendant and whether there are other potential caregivers.

Outstanding questions remain: how long must two people have known each other to develop a relationship *similar in kind to that of an immediate family member*? Must there be any familial ties?

These inquiries are far outside the scope of traditional prosecutorial work and the assessments of which relationships would qualify under the provision are far too subjective. Adopting such an ill-defined provision will likely result in similarly situated offenders receiving disparate treatment and is precisely the type of overbroad judicial discretion the Guidelines were designed to proscribe. The current language hampers the prosecutor's ability to establish a full and complete record for the court and risks the release of unworthy offenders.

NAAUSA encourages the Commission to provide a more clearly defined standard for § 1B1.13(3)(D). For example, the Commission could limit the guidance to familial relationships that have been formally recognized under law or a similar more readily provable standard.

NAAUSA has serious concerns regarding the proposed amendment to § 1B1.13(4). The recent reports detailing sexual abuse against inmates in BOP facilities is abhorrent and demands action. Unfortunately, the action proposed in this amendment would not solve the problem and would, instead, shift the problem onto the public in the form of diminished public safety.

The proposed amendment merely addresses a symptom, not the cause, and does nothing to encourage the BOP to take concrete steps to address this problem. NAAUSA fully supports Congressional and Executive Branch action to require the BOP to address the issue of sexual assaults of inmates.

Nevertheless, releasing defendants, who are also victims, does not solve this problem. It will not enhance public safety and it will not encourage BOP to address their personnel issues. Rather, it will enable incarcerated persons to re-victimize their communities; ultimately, continuing a vicious cycle of victimization. It also sends the wrong message

about our justice system. While an inmate who is the victim of an assault is equally as deserving of justice as any other crime victim; an inmate should not receive a windfall through the granting of compassionate release.

What constitutes an extraordinary and compelling circumstance has traditionally been grounded in evidence that the defendant will not return to a life of crime, the defendant is ill, elderly, or must serve as a primary caregiver–but this circumstance lacks any similar justification.

NAAUSA urges the Commission to reject the proposal for § 1B1.13(4).

NAAUSA opposes the proposed amendment for § 1B1.13(5). First, this policy undermines the role of Congress and the rule of law. Federal law mandates a statute expressly provide for retroactive sentencing adjustments. 1 U.S.C. § 109. It is the role of Congress to decide if a sentence can be adjusted by a change in the law, not the Sentencing Commission. Further, the Supreme Court has repeatedly recognized that retroactive resentencing based on changes in the law *is not the norm*. *See Dorsey v. United States*, 567 U.S. 260, 280 (2012); *Landgraf v. Usi Film Prods,* 511 U.S. 244, 265 (1994). This principle is rooted in the rule of law to promote finality, predictability, and fairness in sentencing. This proposal directly contravenes these established principles.

Similarly, given that certain provisions of the First Step Act were specifically *not* made retroactive, the proposed amendment raises serious separation of powers concerns. The Sentencing Commission is not a legislative body made up of members directly accountable to the voters. Rather, it is a Commission appointed by the Executive Branch. Enacting a provision that allows courts to consider changes in the law that were not expressly made to apply retroactively impermissibly encroaches on Congress's legislative authority.

This amendment is also in direct tension with Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), which makes clear under what circumstances and to what extent a reduction in term based on an amended guideline may be granted.

The proposed amendment takes this policy even further and will dramatically expand access to early release. As discussed, compassionate release was greatly expanded through the COVID-19 pandemic. Thousands of BOP inmates were granted compassionate release or otherwise released from BOP custody as a result of the pandemic. The U.S. Sentencing Commission has not adequately researched the impact this unprecedented expansion of compassionate release has had on public safety, and further expanding access to compassionate release without this data would be both irresponsible and dangerous. We highly encourage the Commission to wait until those studies can be conducted and make a data-driven decision before further expanding access to compassionate release. As noted, federal prosecutors overwhelmingly reported the COVID-related expansion resulted in a significant volume of frivolous requests, which diverted substantial attorney

time away from new cases and meritorious claims. Further expansion of early release is likely to negatively impact public safety.

NAAUSA urges the Commission to reject the proposal for § 1B1.13(5).

Finally, NAAUSA supports Option 1 for § 1B1.13(6), without the inclusion of paragraph (4) and (5) which NAAUSA opposes. Option 1 properly limits the scope of additional circumstances to those "similar in nature and consequence" to the other listed paragraphs. This provision (less proposed sub-paragraphs (b)(4) and (5)) provides judges a clear benchmark for assessing unique circumstances– they must be similar to the existing paragraphs.

Options 2 and 3 lack clarity and permit subjectivity. Under Options 2 and 3, a judge is provided wide latitude to consider circumstances outside those outlined in the other compassionate release provisions. This undermines the uniform, predictable, and fair application of the law. If a judge can fashion in circumstances based on their view of what is inequitable (Option 2) or extraordinary and compelling (Option 3), then there is nothing preventing a judge from accepting a circumstance far outside the range contemplated under the law. The preceding paragraphs would serve no use at all. For example, in *United States v. Brooker*, 976, F.3d 228, 238 (2d Cir. 2020), the Second Circuit indicated that applying the FSA to the current compassionate release Guideline, a judge is free to find "extraordinary and compelling circumstances" exist where an inmate received a lengthy but lawful sentence with which the judge considering the compassionate release request disagrees. Under the Second Circuit's analysis, which Options 2 and 3 would appear to endorse, the Guideline as amended begins to look more like a "second look" statute and less like compassionate release as defined by long standing and widely accepted principles. There is nothing in the FSA that can reasonably read to endorse this type of action by the Sentencing Commission.

NAAUSA urges the Commission to adopt Option 1 for proposal for § 1B1.13(6).

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III. Conclusion

As the voice of federal prosecutors and civil attorneys, NAAUSA appreciates the opportunity to share our perspective with the Commission. Thank you for considering our comments.

If you have any additional questions or wish to set up a meeting to discuss the issues raised in these comments, please reach out to our Washington Representative, Natalia Castro, at ncastro@shawbransford.com.

Sincerely,

Steven Wasserman
President