

Remarks as Prepared for Delivery by Chair Carlton W. Reeves

Public Meeting of the United States Sentencing Commission

Thurgood Marshall Federal Judiciary Center

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Good morning! I welcome you all to this public meeting of the United States Sentencing Commission. I am the Chair of the Commission, Carlton W. Reeves, and I thank each of you for joining us, whether you are in this room with us or attending via livestream. I have the honor of opening this meeting with my fellow Commissioners. To my left, we have Vice Chair Claire Murray, Vice Chair Laura Mate, and Commissioner Candice Wong. To my right, we have Vice Chair Luis Felipe Restrepo, Commissioner Claria Horne Boom, and Commissioner John Gleeson. We are also joined by *ex-officio* Commissioner Jonathan Wroblewski.

Today's meeting marks the end of our first policymaking cycle as Commissioners. The policies we are voting on today are the product of an enormous amount of deliberation and care. I am 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, the just thing.

When I say "us," let me be clear: I am 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, many of whom are not. No matter where they are working right now, each member of our team played an essential role in crafting the policies we are 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, and 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, district judges and judges on our courts of appeals) who took the time to give us their perspectives. There were comments from prosecutors, public defenders and probation officers.

Most comments, however, came from people who do not sit in Congress or on the federal bench. They came from people who do not have titles, or power, or status. People who may be sitting at a desk in a home or a workplace or a prison, watching this

hearing, hoping that the Commission will have listened to their pleas for change, for mercy, for justice.

We have heard these voices, in part, because of our new online comment portal. That is just one of many tools the Commission is using to make it easier for people to submit their views to us. As one commenter told us, “[T]hank you for making it easy for incarcerated people like me to tell you what we think.”¹

But our new tools aren’t the only reason we have 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 analysis written from a penitentiary in West Virginia, one person wrote, “Most inmates don’t have access to your proposed amendments.

¹ Lilian Akwuba, Comment to the United States Sentencing Commission (Mar. 5, 2023).

So they don't even know what to comment on. My family sent me most of the 290 pages.”²

Given the effort, time, and thoughtfulness that so many placed into their comments, I am compelled to repeat what I have 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 the story of our perfecting that union, making her even more perfect, by ensuring “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 this Commission, my job is to make sure the policies we issue reflect the values and wisdom of all

² Brad Bradley, Comment to the United States Sentencing Commission (Feb. 8, 2023).

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 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 fifteen years may determine whether a parent sees his young child graduate from high school; the difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away; the difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his

family.”³ 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 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.”⁴ In explaining the nature and origin of this policy, I hope to make

³ United States v. Faison, No. GJH-19-27, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020).

⁴ See, e.g., United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) (Calabresi, J.) (“It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions.”); United States v. Davis, No. 15-CR-136, 2021 WL 1561617, at *3 (E.D. Wis. Apr. 21, 2021) (Adelman, J.) (quoting Brooker); United States v. Lara, No. 95-CR-75-08-JJM-PAS, 2023 WL 2305938, at *3 (D.R.I. Mar. 1, 2023) (McConnell, J.) (“While the informal name of this statutory process, ‘compassionate release,’ has become common parlance among the courts . . . it does not actually appear in the statute[.]”); see also Hearing on Proposed Amendments Before the United States Sentencing Commission, 42-43 (Feb. 23, 2023) (statement of Kelly Barrett) (“[T]he term ‘compassionate release’ is a misnomer. Many states, including mine, have actual compassionate release statutes. They are about state prisoners with medical issues. 3582(c)(1)(A) is different. Although the [Bureau of Prisons] for years treated it like compassionate release, it is about sentencing reductions for extraordinary and compelling reasons.”)

clear how important it is that this Commission adopt this common-sense proposal – and, at Congress’s urging, take a first step toward a second chance for so many deserving people.

Before the 1980s, people in federal prisons regularly had their sentences reduced if they proved they had reformed themselves.⁵ When the Sentencing Commission was created in 1984, Congress ended this system of federal parole.⁶ 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.⁷ Congress tasked this Commission with describing what reasons counted as “extraordinary and compelling.”⁸

For decades, this sentence-reducing tool went almost entirely unused.⁹ Originally, by statute, the provision could only

⁵ Shon Hopwood, *Second Looks & Second Chances*, 41 *Cardozo L. Rev.* 83, 91 (2019).

⁶ *Id.* at 101-02.

⁷ *Id.* (citing 18 U.S.C. § 3582(c)).

⁸ *Id.* at 103 (citing 28 U.S.C. § 994(t)).

⁹ William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 *Md. L. Rev.* 850, 852 (2009).

be wielded upon request of the Bureau of Prisons.¹⁰ And the BOP limited such requests to cases where a prisoner faced death—mirroring “compassionate release” statutes passed in states during the 1990s.¹¹ In this way, the BOP transformed the “extraordinary and compelling” sentence reduction provision into a narrow “compassionate release” provision.¹²

Even when the Sentencing Commission marginally expanded this provision over 15 years ago, when it added a “catch-all” category that went beyond medical condition and age, BOP’s practices did not change.¹³

After three decades of seeing this sentence reduction tool ignored, even with the “catch-all” created by the Commission, Congress acted. In 2018, it explicitly “increas[ed]” its use by

¹⁰ Id.

¹¹ Id.; see also Hearing on Proposed Amendments Before the United States Sentencing Commission, 42-43 (Feb. 23, 2023) (statement of Kelly Barrett).

¹² Id.

¹³ See Barry, *supra* at 851-54 (noting that the full extent of these changes were enacted through 2007).

passing the bipartisan First Step Act.¹⁴ To achieve this goal, Congress gave incarcerated people – rather than the Bureau of Prisons – final say in requesting a sentence reduction.¹⁵ In doing so, Congress again tasked the Commission with the important role of describing when a judge should consider in deciding whether to use this provision. Unfortunately, the agency lacked enough Commissioners to immediately meet the moment, and our policy on the provision – which continued to reference the Bureau of Prisons – went unchanged.

As the Commission sat dormant, incarcerated people facing the COVID-19 pandemic turned to the courts. Newly able to directly ask a judge to spare them from dying of this unimagined virus in crowded prisons, they persuaded judges to implement Congress' wishes as expressed through the First Step Act and expand the flow of sentence reduction beyond a few drips. In

¹⁴ Hopwood, *supra* at 106-07 (citing First Step Act of 2018, Pub. L. No. 115-391, sec. 603, 132 Stat. 5194).

¹⁵ See generally Hopwood, *supra*.

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 these sentence reductions had an astonishingly tiny recidivism rate of one-seventh of one percent.¹⁶ Research also suggests that granting release to these kinds of incarcerated people strengthens, rather than undermines, public safety – all while reuniting families and restoring communities.¹⁷

In exercising their newfound discretion during the pandemic, judges often refused to interpret the sentence reduction provision as a mere “compassionate release” statute.

¹⁶ Molly Gill, Thousands were released from prison during covid. The results are shocking, *Washington Post* (Sept. 29, 2022).

¹⁷ See, e.g., Council on Criminal Justice Task Force on Long Sentences, *The Public Safety Impact of Shortening Lengthy Prison Terms* (Jan. 2023).

Instead, they embraced the original intent of Congress, using the tool to ensure federal sentences – when given a second look – 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 a letter we received from Markwann Gordon, a person serving over 1,600 months in federal prison on robbery and firearms charges who wrote to us to increase opportunities for second chances.¹⁸ 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 a defendant’s release from prison,” noting Mr. Gordon had been “totally rehabilitated” and was a “role model for all those who are incarcerated.” Despite all this, Judge Bartle denied Mr. Gordon’s motion, stating that neither a “draconian length in sentence” nor any of the other

¹⁸ Markwann Lemel Gordon, Comment to the United States Sentencing Commission (Jan. 23, 2023); *United States v. Gordon*, 585 F. Supp. 3d 716 (E.D. Pa. 2022), *aff’d*, No. 22-1311, 2022 WL 2582547 (3d Cir. July 8, 2022).

reasons Mr. Gordon presented were “an extraordinary and compelling reason warranting 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 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 provision, we took two simple steps. First, we endorsed 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, and having served at least 10 years of an unusually long sentence – these may all justify reducing a sentence. Second, we reaffirmed the policy adopted by the Commission over 15 years ago, granting broad discretion to those using the reduction provision. In doing so, we recognized a key lesson of the pandemic in our courts: to

do justice, judges must be able to modify sentences whenever new “extraordinary and compelling” reasons arise.

When seen in the context of history – and Congress’s expressly stated intent – the changes we are making 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 determines that doing so adequately protects the public, provides just punishment, and reflects the seriousness of their offense. If we trust judges – as we must in a democracy like ours – then we can have faith 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.”¹⁹ 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 in our national justice system.”²⁰ These benefits are the reason why a bipartisan coalition of policymakers, 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.

¹⁹ Hearing on Proposed Amendments Before the United States Sentencing Commission at 239 (Feb. 23, 2023) (statement of Dwayne White).

²⁰ Kimberly Hall, Comment to the United States Sentencing Commission (undated).

Other policies we heard a great deal about implicate a 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,²¹ 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 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

²¹ See, e.g., Hearing on Proposed Amendments Before the United States Sentencing Commission (Mar. 8, 2023) (statement of Jami Johnson) (“The criminal history rules are numerous and complex. They often lead to unjust, unnecessarily long sentences that exacerbate racial disparities. And research confirms that increasing sentences based on prior criminal convictions is often not justified by any commonly recognized goal of sentencing.”).

the time of the instant offense[,] especially since I would be subject to a violation as well as time for a new offense.”²² Moreover, Commission research strongly suggests that status points’ ability to predict recidivism – a core justification for their use – may be extremely weak.²³

In light of all this, the Commission’s final policy eliminates status points in the vast majority of criminal cases. For a limited category of defendants with extensive criminal histories, we are cutting the effect of status points in half, reflecting the idea that this tool may sometimes achieve other goals beyond predicting recidivism.

The second “criminal history” proposal we issued sought to fulfill 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 violence or an otherwise

²² Shahied Summons, Comment to the United States Sentencing Commission (Jan. 21, 2023).

²³ See generally United States Sentencing Commission, Revisiting Status Points (Jun. 2022).

serious offense” should not be incarcerated.²⁴ The Commission’s proposal sought to define who met this standard and what the consequences for meeting this standard should be.

Ultimately, we decided to answer both questions broadly. Our final policy provides a larger reduction in sentence for a larger category of people than the status quo. While we agreed to limit this reduction in a limited set of circumstances, we also agreed 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.”²⁵

Another policy attempts to address the horrors we have heard about in some of our federal prisons, including and

²⁴ 28 U.S.C. § 994(j).

²⁵ Michael Bauer, Comment to the United States Sentencing Commission (Jan. 28, 2023).

especially FCI Dublin. No incarcerated person should suffer physical or sexual abuse at the hands of those tasked with safeguarding them.

I think of the mother who wrote to us about her son, who she wrote was the “victim of an assault” by correctional officers. “My son did not commit a violent crime,” she said. “[M]y son did not murder anyone. 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.”²⁶

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

²⁶ Sandra Farley, Comment to the United States Sentencing Commission (Jan. 19, 2023).

Another policy reflects an obvious truth: fentanyl is a deadly and serious problem in our country. Every Commissioner recognized 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 agreed that it may be appropriate to adjust how penalties are assessed where fentanyl has been trafficked.

I will echo the many, many commentators who urged us and other federal policymakers to focus on “interventions based in science” to address the harms of drug use.²⁷ We will continue to ensure that policies do just that.

Similarly, all Commissioners recognize that Congress has spoken through the Bipartisan Safer Communities Act to increase penalties for certain firearms offenses. Every

²⁷ Drug Policy Alliance, Comment to the United States Sentencing Commission (Mar. 13, 2023).

Commissioner recognized the seriousness of gun violence. Nevertheless, there were deep concerns about the possible effects of increased firearms penalties, especially on communities of color. Accordingly, we have tried to promptly respond to a Congressional directive while addressing areas where disparities or injustices may arise – including, notably, by adding a downward adjustment to ensure straw purchasers without significant criminal histories receive sentences that reflect their role, culpability, and 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.²⁸ Yet I recognize that the abbreviated nature of this year’s policymaking cycle left many of us wishing we had more time to refine this policy. I promise

²⁸ Hearing on Proposed Amendments Before the United States Sentencing Commission (Mar. 7, 2023) (statement of Rob Wilcox).

my fellow Commissioners, as well as the public, that the Commission's schedule moving forward will include all the time necessary to consider and, if necessary, revisit this policy.

We received an immense amount of comment on our proposals regarding 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 fundamental importance to the operation of

the entire federal justice system.”²⁹ We all agreed that the Commission needs a little more time before coming to a final decision on such an important matter. We intend to resolve questions involving acquitted conduct next year.

We reached a similar conclusion about 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 the “categorical approach” to defining these terms. While we proposed 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

²⁹ Brief of Professor Douglas Berman and Due Process Institute as *Amici Curiae* in Support of Petitioner, Yonell Allums, Petitioner, v. United States of America, Respondent., 2022 WL 493015.

disparities, and further entrench the disproportionate treatment of people charged with drug-related offenses.”³⁰

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 are 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 mandated by the First Step Act. Most notable among these changes are those to how some incarcerated people can qualify for a “safety valve” under 18 U.S.C. § 3553(f). For a number of reasons, including the Supreme Court’s recent choice to consider open questions about this “safety valve,”³¹ the Commission is taking a narrow, neutral approach to implementing Congress’s directives on this matter.

³⁰ Scott D. Levy, Comment to the United States Sentencing Commission (Mar. 14, 2023).

³¹ *Pulsifer v. United States*, No. 22-340, 2023 WL 2227657 (U.S. Feb. 27, 2023).

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.”³² The issue was whether the guidelines reduction for acceptance of responsibility can be withheld or denied because the defendant filed a motion to suppress. In resolving this issue today, we are ensuring that more people have access to reductions in sentence for accepting responsibility for their actions.

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. As should be obvious by now, the Commission has done an extraordinary amount of work over the last six months. While I am proud of how this work reflects Commissioners’ willingness

³² Longoria v. United States, 209 L. Ed. 2d 496, 141 S. Ct. 978, 979 (2021) (Sotomayor, J.).

to hear member of the public, I am even prouder of how our work shows that Commissioners have heard each other.

As I have said many times, our strength is defined by our diversity. We see the world differently. And that is a good thing. When our views diverge, we seek to find common ground. That is an even better thing. And if we ultimately disagree, we remain united in our support for one another and the work of this Commission. And that is the best thing.