



National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

Board of Directors

March 14, 2023

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U.S. Sentencing Commission
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RE: Public Comments on Proposed 2023 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)

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NAAUSA submitted oral and written testimony for the U.S. Sentencing Commission Public Hearing on February 23 and February 24, 2023. Our written testimony is reprinted below.

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 unexpected and unproductive 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 shifts the burden to prosecutors to argue around an inmate’s medical issues. 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, 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. It will allow 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.

Every other extraordinary and compelling circumstance provides reason to believe the defendant will not return to a life of crimes—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 proposal 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. The law requires finality, predictability, and certainty. 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 concerns related to the violation of the separation of powers. 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 guidance. 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), than there is nothing preventing a judge from accepting a circumstance far outside the range of the guidelines and potentially improper. 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 circumstances. 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).

II. First Step Act–Drug Offenses

NAAUSA supports Option 2 for §§2D1.1 and 2D1.11. It is critical the Commission provide clarity in the law and resolve circuit splits that result in unequal justice depending on a defendant’s location.

The conjunctive interpretation of the Ninth and Eleventh Circuits has made defendants with significant criminal histories eligible for safety-valve relief under Section 3553(f)(1). This is directly contrary to the goal of a two-level reduction.

We also feel the clear definition of “violent offense,” linked to 18 U.S.C. § 16, will promote necessary clarity and consistency within the law.

III. Firearms Offenses

NAAUSA supports Option 2 for §2K2.1.

Given the clear intent by Congress in the Bipartisan Safer Communities Act to increase penalties for firearms related offenses and the sharp increases in violent crimes committed with guns which gave rise to passage of the Act, NAAUSA believes that Option 2 is the more effective way to implement Congressional intent. NAAUSA would also recommend that the highest offense level enhancements proposed in Option 2 be adopted under the guideline.

IV. Circuit Conflicts

NAAUSA opposes the proposed definition for “preparing for trial” under §3E1.1(b) and supports adopting the framework outlined in *Wade v. United States*, 504 U.S. 181 (1992).

Currently, the government may move to provide the defendant with a one-level reduction when the defendant has “assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” §3E1.1(b).

The government is provided the discretion to bring such a motion precisely because the government is the party most aware of whether the defendant’s assistance permitted the government to avoid preparation and allocate resources effectively. The proposed amendment would significantly limit the government’s discretion to withhold the motion, undermining its purpose and the Congressional intent for the provision.

Further, as the Department of Justice [testimony](#) notes, it will be difficult to distinguish between the litigation of suppression motions (or various other pre- and post-trial challenges) and trial preparation. There is substantial overlap in these categories, and the proposed amendment will likely lead to additional litigation to define the contours of the amendment.

Conversely, the *Wade* framework—providing the government may refuse to file a motion so long as the decision is “rationally related to any legitimate Government end” and not based on “an unconstitutional motive”—provides appropriate, but not unlimited, latitude to government actors to decide when such a motion is appropriate. 504 U.S. 181, 185-87 (1992).

NAAUSA supports Option 2 for the proposed amendment to §4B1.2(b).

The Commission should define the term “controlled substance” to include both substances covered by the Controlled Substances Act *and* substances otherwise controlled under applicable state law.

First, Option 2 is consistent with the definition for a “controlled substance offense” – which includes *both* offenses under federal and state law. As the Department of Justice’s testimony highlights, Option 1 would lead to the oddity where if the state’s definition of the controlled substance is even slightly broader than the federal definition, then every state conviction involving that substance would no longer qualify as a “controlled substance offense” under §4B1.2(b). Likewise, if a particular state drug offense is not divisible by drug type, and the relevant state drug schedules include any chemical compound that is not federally controlled, then every violation of that state statute would fail to qualify as a “controlled substance offense,” even if a particular defendant’s offense conduct indisputably involved a federally controlled substance.

NAAUSA concurs with this element of the Department’s testimony entirely. We provide additional testimony only to emphasize that in 2022, drug overdose deaths soared about 100,000. Our nation is amidst a drug abuse crisis. An unnecessarily and arbitrary restriction on controlled substance sentencing will only make it harder for law enforcement to combat the spread of life-threatening narcotics. We urge the sentencing commission to consider the devastating effects drug abuse is having on our communities as it considers these provisions.

V. Criminal History

NAAUSA strongly opposes both proposed options for Zero Point Offenders as well as the related presumption of probation for zero-point offenders.

This would be a windfall to white-collar defendants, and would exacerbate existing sentencing disparities between white-collar defendants and defendants convicted of non-white-collar offenses. Furthermore, the provision in § 4C1.1(a)(4) appears to only focus only on financial hardship to individuals while ignoring cases where there is substantial financial hardship imposed on the government, financial institutions, and/or the market. In cases where the financial hardship falls on institutions or the market, proving substantial harm on individuals is often onerous if not impossible. This particular provision appears to be an attempt to relitigate how the severity of financial crimes is calculated in § 2B1.1, and NAAUSA submits that it is inappropriate to seek to achieve by reducing how criminal history points are assessed.

VI. Acquitted Conduct

NAAUSA submitted oral and written testimony for the U.S. Sentencing Commission Public Hearing on February 23 and February 24, 2023. Our written testimony is reprinted below.

Currently, a judge may consider conduct proved by a preponderance of evidence when determining an appropriate sentence for a convicted individual. Judicial discretion to

consider “acquitted conduct” acknowledges the realities of federal prosecutions and the high burden of proof required to convict an individual. Protections are already in place to ensure individuals are not improperly connected to unrelated conduct during sentencing. Allowing some consideration of conduct an individual has either not formally admitted to as part of a guilty plea or which has been found to be proven by a jury beyond a reasonable doubt ensures the court has a full picture of the individual’s conduct. The proposed amendment would impermissibly obstruct judges from conducting the statutorily required analysis for imposing a sentence under 18 U.S.C. § 3553(a) and constitutes a bridge to the eventual elimination of consideration of relevant conduct at sentencing.

It is important to note that acquitted conduct is not synonymous with notions of actual innocence. Rather, the term refers to any conduct that was determined by the factfinder to not have been proven beyond a reasonable doubt. Judges are more than capable of appropriately exercising their discretion when deciding to consider acquitted conduct or conduct not otherwise admitted to by the defendant at sentencing. Indeed, the law requires that such conduct be proven at sentencing by a preponderance of the evidence to even be considered. This burden of proof ensures the defendant is not held responsible for conduct based on insufficient evidence, while at the same time enabling the court to understand the full scope of the defendant's criminal activity.

This proposal would essentially bar the court from considering any evidence not resulting in a guilty verdict at trial or admitted at a plea. This severely and unfairly limits the court’s view of the defendant’s conduct. Given the frequent overlapping nature of evidence applicable to different offenses charged within a single case, there is a significant likelihood that the proposed amendment will generate massive amounts of litigation, disparate results among similarly situated offenders, and a lack of predictability at sentencing.

The proposed Guideline would also result in illogical and unjust outcomes. For example, consider the case of a defendant who is charged with five counts of being a felon in possession of a firearm for being in constructive possession of five firearms found in his vehicle. The defendant could be acquitted of all but one count, because there was DNA found on only one gun; however, under the proposed amendment, the court could not consider the four additional firearms recovered from the defendant’s vehicle for purposes of enhancing the defendant’s base offense level because he was acquitted of possessing the four other firearms. Such a result nullifies provisions related to accounting for relevant conduct that exist throughout the Sentencing Guidelines.

Finally, this proposal seems to rely on misconceptions about the role of conduct history in charging, plea bargaining and sentencing.

Charging and plea bargaining are distinct steps in the criminal justice process from sentencing. During the sentencing phase, the prosecution seeks to achieve a variety of objectives, such as seeking imposition of punishment, restoration to victims, facilitating rehabilitation, and deterring unlawful conduct. While charging is crime-specific, the unique goals of sentencing require a fuller picture of an individual's past conduct, including

all aspects of an offender's characteristics, background and offense conduct. Conduct that can be proved by a preponderance of evidence is critical to this picture, even if the individual was acquitted on certain offenses or did not specifically admit guilt to certain facts as part of a plea.

The proposed amendment does nothing more than allow defendants to cherry pick those facts that reflect positively on the offender at sentencing while hamstringing the court from giving relevant conduct its due weight in calculating the offender's sentencing range.

For these reasons, NAAUSA opposes the proposed inclusion of § 1B1.3(c).

VII. Fake Pills

NAAUSA supports the proposed amendment related to fake pills.

NAAUSA remains concerned about the ability of prosecutors to successfully keep illicit narcotics off the streets. Currently, [reports](#) indicate children under age 14 are dying of fentanyl poisoning at a rate faster than any other age group and child deaths by accidental ingestion are on the rise. These risks are highest when fentanyl is camouflaged as legal medication.

We fully support action by the commission to increase prosecutorial tools against those who disguise lethal poisons as legal medication.

VIII. 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