July 15, 2024

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Priorities for the 2025 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless lives, including many of our members – over 75,000 people nationwide. We welcome the opportunity to suggest priorities for the Commission in the 2025 amendment cycle. Our priorities range from specific amendment recommendations to research initiatives. We look forward to seeing what the Commission does with the myriad of recommendations it receives.

1. **Amending "victim of assault" in §1B1.13(b)(4)**

Beginning in 2022, FAMM has operated a compassionate release clearinghouse to find pro bono counsel for survivors of BOP staff sexual abuse. As of the writing of this letter, we have placed 31 cases with pro bono counsel. All the clearinghouse clients survived sexual abuse at FCI Dublin[1] and sexual abuse at FCI Tallahassee. So far, we are aware of 17 survivors who received reduction in sentence orders. And these are only the cases that we know about from survivors who have

[1] We are certain the Commission is aware of the saga of abuse at FCI Dublin that led to the closing of the facility. For more information about Dublin, see the priorities letter from Meredith Esser and Alison Guernsey. We also suggest the following: Lisa Fernandez, *Powerless in Prison*, KTVU INVESTIGATION, https://www.ktvu.com/news/powerless-in-prison-the-shutdown-of-fci-dublin; *see also* ECF No. 222 Order Granting the Mot. for Class Certification at Attach. A*, Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 4:23-cv-4155-YGR (N.D. Cal. Mar. 15, 2024).

demonstrated great bravery in coming forward. FCI Dublin was the canary in the coal mine.[2] There are likely many more survivors of abuse who are suffering in silence.[3] We are certain that more cases will materialize in the near future.[4] And as the number of (b)(4) motions increase, the Commission's standard articulated in §1B1.13(b)(4) becomes increasingly important.

Our work on behalf of survivors began when there was no binding policy statement on compassionate release. During that time, judges, defense counsel, and, occasionally, prosecutors were able to work together to identify cases of sexual abuse and use the reduction in sentence (RIS) statute to provide relief for survivors of heinous acts.[5]

With this experience in mind, FAMM wrote to the Commission in 2022 to encourage the inclusion of sexual abuse at the hands of BOP personnel as an extraordinary and compelling reason (ECR).[6] As we said then, "[s]exual abuse in custody is unequivocally an extraordinary and compelling circumstance. Prisoners who are abused by the very people responsible for ensuring their safety must have an avenue to seek a sentence reduction."[7] We were pleased that the Commission proposed amendment (b)(4). We were hopeful that when the Commission included sexual abuse as a ground for a reduction in sentence in the policy statement, that recognition would help more survivors. Unfortunately, however, aspects of the policy statement have made the path forward for survivors difficult and uncertain.

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[2] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs*., 117th Cong. 26 (2022) (observing that sexual abuse has occurred in 2/3 of the facilities that house women), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf.

[3] BOP likely knows of many survivors who have raised claims internally. We have asked BOP and DOJ multiple times to proactively initiate RIS cases for survivors of sexual abuse because we only know the cases that we know about. But BOP has refused to do so. We have also asked BOP on a number of occasions to update its Program Statement 5050.50 on RIS to align with the Commission's policy statement at §1B1.13, but the BOP has yet to do so. The lack of a program statement aligned with USSG §1B1.13 means that people eligible for compassionate release, including but not limited to abuse survivors, and staff may not even know of the expanded grounds adopted on November 1, 2023.

[4] Since the closure at FCI Dublin, we have received 95 accounts of people formerly incarcerated at FCI Dublin with claims of abuse and neglect that we are reviewing.

[5] *See, e.g.*, *United States v. Chavira*, No. 3:18-cr-4216-CAB, 2023 WL 3612389, at *1 (S.D. Cal. May 23, 2023).

[6] Letter from Mary Price and Shanna Rifkin to the Hon. Carlton Reeves at 3–4 (Oct. 17, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm2.pdf; *see also* Letter from Mary Price and Shanna Rifkin to the Hon Carlton Reeves at 10-14 (Mar. 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

[7] *Id.* at 10.

We write now to shed light on those unintended consequences. Given the barriers survivors are encountering, we urge the Commission to: (1) revisit the "substantiation" requirement; and (2) broaden the definition of "sexual abuse." Each is discussed in turn.

a. The "substantiation" standard undermines survivors of abuse and is in tension with the First Step Act

When the Commission was considering adding sexual abuse as an ECR, the Department of Justice (DOJ) agreed that, in certain circumstances, individuals who are sexually abused in custody should be eligible for a RIS.[8] But the DOJ proposed a burden of proof on petitioners in sexual abuse cases – that the conduct must be substantiated by a "criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case."[9] In written testimony from February 2023, we urged the Commission not to adopt this standard.[10] What we feared in 2023 is borne out today – the Department of Justice views the appropriateness of sentence reductions through the lens used by prosecutors rather than from the standpoint of the survivors.[11] And unfortunately, the DOJ's proposal is now included in the policy statement where it inhibits access to courts by deserving survivors.

The substantiation standard erroneously prioritizes government gatekeeping – by requiring convictions, or liability determinations – over the nature of the abuse or the experience of the survivor. This devalues the experience of the incarcerated person who is claiming to be a survivor of abuse. The letter submitted in this current amendment cycle by Meredith Esser and Alison Guernsey raises this point as well as several other issues with the substantiation standard. We agree with every point made in their letter.

We raise one additional concern – tethering an incarcerated person's claim of abuse to a conviction in a criminal case is directly in tension with the First Step Act. Under the substantiation standard, a survivor of abuse *must* prove, as a threshold matter, that the abuser was convicted in a criminal case (or found liable in an administrative or civil proceeding).[12] This barrier flies in the face of the First Step Act, which was deliberately designed to remove the chokehold that BOP had on RIS

[8] *See* Written Testimony from Jonathan Wroblewski at 5 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-andmeetings/20230223-24/DOJ1.pdf.
[9] *Id.*
[10] *See* Written Testimony from Mary Price (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf.
[11] *Id.*
[12] *See United States v. Left Hand*, No. 1:16-cr-189, 2024 U.S. Dist. LEXIS 25234, at *12 (D.N.D. Feb. 13, 2024) (observing that a defendant "must establish she was a victim of sexual abuse committed by a correctional officer. In order to do so, the sexual abuse must be established by a conviction in a criminal case . . .").

cases by allowing incarcerated individuals to petition the sentencing court for relief directly.[13] Congress intended to allow an individual to make their own case to the sentencing judge without DOJ's gatekeeping.[14] But unfortunately, (b)(4) has put the DOJ back in the gatekeeping role. By making an ECR determination dependent on a criminal conviction, the DOJ and BOP once again exercise full control. The government controls which BOP guards are indicted,[15] which survivors are identified as victims and which survivors are not,[16] the timing of the litigation, and more.

Consequently, a survivor's claim can warrant a judge's consideration for a RIS only if the government has substantiated that the abuse was investigated, prosecuted, and proven in a proceeding. There are, however, occasions when the government chooses to investigate one case against one victim and not another, or to indict one guard and not another. Those decisions may reflect choices about how to allocate scarce resources, for example, and have nothing whatsoever to do with whether an individual suffered abuse. These prosecutorial decisions do not necessarily implicate the veracity of the survivor's account. And this is precisely why the government should not control the viability of a person's RIS case. But the substantiation standard essentially collapses the fact-finding inquiry – prosecutorial discretion is now a proxy for a finding of abuse. We do not think that was intended. It was certainly not what Congress had in mind when it changed 18 U.S.C. § 3582(c) to "[i]ncrease[] the [u]se and [t]ransparency of Compassionate Release."[17]

Similarly, requiring an administrative finding by the Bureau of Prisons restores that agency to the gatekeeping role Congress deliberately ended. BOP investigations lack credibility and competency. On October 12, 2022, the Inspector General notified Colette Peters, the Director of BOP, of "serious concerns" with how BOP handles investigations of alleged misconduct by BOP

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[13] *See* First Step Act of 2018, Pub. L. No. 115-391 § 603(b); *see also* U.S. DEPT. OF JUST. OFF. OF THE INSP. GEN., I-2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013), https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf.

[14] *See* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 18 (2019) (stating the FSA intended to "[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease").

[15] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs*., 117th Cong. 26 at 17 (2022) (noting that as of 2022, 5 guards at FCI Dublin were indicted but at least 17 were under investigation for sexual misconduct); *see also* Lisa Fernandez, *25 Dublin prison employees under investigation for sex, drug, lying abuses,* KTVU FOX 2 (May 5, 2022), https://www.ktvu.com/news/25-dublin-prison-employees-under-investigation-for-sex-drug-lying-abuses.

[16] In some cases, the government is going so far as to say that survivor can only make out a claim of abuse if they are the named victim in the case, even though this appears nowhere in the Commission's policy statement. *See* ECF No. 243 Order Den. Def.'s Mot. to Reduce Sentence, *United States v. Castro*, 0:16-cr-60350-WPD (S.D. Fl. Apr. 19, 2024).

[17] *See* First Step Act of 2018, Pub. L. No. 115-391 § 603(b).

employees.[18] In December 2022, the Senate Permanent Subcommittee on Investigations also found failures in the government's processes for holding employees accountable for misconduct.[19]

And most recently, a federal judge took the extraordinary step of appointing a special master over FCI Dublin in light of the widespread sexual abuse. In deciding to impose a special master, Judge Yvonne Rogers observed that the BOP has "proceeded sluggishly with intentional disregard of the inmates' constitutional rights despite being fully apprised of the situation for years. The repeated installation of BOP leadership who fail to grasp and address the situation strains credulity."[20] Judge Rogers went on to say that, "inmates appeared to have no access to routine processes, such as the forms to file administrative grievances."[21] Shortly thereafter, BOP abruptly closed FCI Dublin because it could not ensure the safety of the people in custody at that facility.[22]

In addition to the issues raised above, the substantiation standard also sends the message to survivors that their stories and experiences are not credible on their own. This is particularly so given that in every other enumerated ECR, petitioners are permitted the opportunity to make their case to the sentencing court without having to submit specific evidence that is first approved by the government or a judicial entity. For example, in a medical case, the policy statment provides illustrative examples of what may constitute a terminal illness, but this list is not exhaustive. Critically, it does not require government pre-authorization of a medical diagnosis or medical mistreatment by BOP doctors, nor should it. But the sexual abuse standard stands in stark contrast. And this contrast has a clear message to survivors – their stories and efforts to document the heinous circumstances they have lived through are not enough.

To be sure, the policy statement does waive substantiation if there is undue delay or if the person is in imminent danger.[23] This was likely added, in part, to address concerns that the Commission had when, in the 2023 public hearings on this issue, the DOJ was unable to provide a timeline of how long it would take to adjudicate the accused guards.[24] But unfortunately, this "stopgap" has

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[18] *See* U.S. DEP'T OF JUST. OFF. OF INSPECTOR GEN., Management Advisory Memorandum, 23-001, Notification of Concerns Regarding the Federal Bureau of Prisons' (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees at 1 (Oct. 2022), https://oig.justice.gov/sites/default/files/reports/23-001.pdf.

[19] *See Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affs*., 117th Cong. 26 at 17 (2022).

[20] *See* ECF No. 222 Order Granting the Mot. for Class Certification at 1*, Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 4:23-cv-4155-YGR (N.D. Cal. Mar. 15, 2024).

[21] *Id.* at 9.

[22] *See generally* Reporting by Lisa Fernandez KTVU, FOX LOCAL NEWS, SAN FRANCISCO, https://www.ktvu.com/person/f/lisa-fernandez.

[23] USSG §1B1.13(b)(4).

[24] In fact, DOJ's inability to timely investigate and prosecute cases of abuse came to light in the civil class action case regarding FCI Dublin. According to Judge Rogers, "grievances of sexual misconduct can take months, if not years, to investigate and prosecute. Chief Reese, the head of [Office of Internal Affairs], noted in her testimony that OIA first received complaints of sexual abuse from FCI Dublin in 2019. Yet the government did not start prosecuting these cases, and requiring staff to leave FCI Dublin, until 2021." *See* ECF No. 222 Order Granting the Mot. for

not proven helpful. For starters, the policy statement does not define undue delay, which has led to different interpretations. Moreover, defense counsel and prosecutors are, once again, stuck arguing about the external process – the criminal proceeding for the guard – at the expense of the survivor. Take for example, the case of Shayla Left Hand.

Shayla Left Hand moved for a reduction to her sentence, asserting that she had been sexually abused during her time at FCI Dublin. Although the briefing in her case is sealed, the judge's order reveals that the issue in the case was not whether Ms. Left Hand had been sexually abused, but rather, whether the criminal case against the guard, former Officer Daryl Smith, had been unduly delayed. According to the court, "[i]t is fairly debatable whether [Smith's] criminal proceeding has been 'unduly delayed,' a phrase the Sentencing Guidelines do not define."[25] Ultimately, the court found that Ms. Left Hand had not established an ECR because "the corrections officer that sexually abused her has not been convicted. In so finding, the Court does not in any way dismiss the severity of Left Hand's allegations."[26] As evidenced by this example, the "undue delay" provision does not safeguard the ECR determination, even for someone who has established "severe" allegations of sexual abuse.

To be clear, as a criminal justice organization, we support a defendant's right to insist on trial. That includes all defendants. But trials undoubtedly take time and are subject to unpredictable scheduling issues, among other things. Officer Smith – at issue in Ms. Left Hand's case, was indicted in 2023 and his current trial date is set for March 2025. Intertwining survivors' rights with those of the abusers is fundamentally flawed. And it comes at the expense of the survivor. Officer Smith is out on bond, while many of his victims remain in custody with no opportunity to heal, because he has asserted his constitutional right to a trial.

b. *The definition of sexual abuse is underinclusive and creates perverse incentives for guards*

We also write to express concerns with the definition of sexual abuse in §1B1.13(b)(4). The Commission decided to define sexual abuse as involving a "sexual act" under 18 U.S.C. § 2246(2). This definition is under-inclusive and creates perverse incentives for guards to abuse people in custody in ways to limit relief for survivors.

Most of the (b)(4) cases have been filed under seal given the grievous and personal nature of the circumstances that need to be alleged. So we cannot offer a plethora of citations. However, we have worked on many of these cases, and seen that sexual abuse come in many forms. Sometimes the abuse is penetrative sexual conduct. But other times it includes gross stalking, forcing a person in custody to strip in front of guards before being permitted to use the bathroom, external groping of body parts, forcing someone in custody to watch a guard masturbate, being subjected to violent sexual language, and other horrific but not penetrative contact. Since the adoption of (b)(4), prosecutors have opposed RIS in these cases.

Class Certification at 27*, Cal. Coal. Women Prisons v. U.S. Bureau Prisons*, No. 4:23-cv-4155-YGR (N.D. Cal. Mar. 15, 2024).

[25] *See United States v. Left Hand*, No. 1:16-cr-189, 2024 U.S. Dist. LEXIS 25234, at *12 (D.N.D. Feb. 13, 2024).

[26] *Id.*

As an initial matter, sexual penetration of people in custody should not be the floor for what constitutes egregious sexual acts justifying a RIS, it should be the ceiling. In *United States v. Smith*, Ms. Smith moved for a reduction in sentence based on brutal abuse that she suffered during her time at FCI Dublin.[27] The government opposed Ms. Smith's RIS request. According to the government, although Ms. Smith suffered "disturbing and unacceptable" treatment in BOP custody, "her circumstances do not present an 'extraordinary and compelling reason' under the current policy statement. . . . because it did not involve . . . a sexual act."[28] The court nonetheless found Ms. Smith's case worthy of a RIS.

> Defendant was a victim of sexual abuse while serving her term of imprisonment. Here, Defendant suffered humiliating, degrading, and brutally offensive abuse on an ongoing basis by a federal correctional officer who was entrusted with her care. When the Court sentenced the Defendant, it did not contemplate that defendant would have to serve her sentence while being subject to such abuse.[29]

In addition to being underinclusive, the definition of sexual abuse in the policy statement creates perverse incentives for guards.

Take the case of Aimee Chavira. Ms. Chavira's case was filed before the new policy statement went into effect on November 1. The government agreed to not oppose Aimee's motion for a RIS. Aimee had been subjected to intense harassment by Office Daryl Smith:

> During a COVID quarantine, Aimee was alone in her cell and Officer Smith repeatedly locked her inside unless she removed items of clothing while he watched. One time, Officer Smith came into her cell, and when Aimee attempted to leave, Officer Smith groped her breast. In addition, during the months when Officer Smith conducted evening rounds in Aimee's unit, he would come by Aimee's cell when Aimee was using the toilet and stare at her. . . [Aimee] told [Officer Smith] to leave her alone and that she would report his abusive behavior. Officer Smith's response was, "Who are they going to believe: an inmate or a federal officer? You need cum for something to happen and you don't have that."[30]

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[27] *See* ECF No. 1185 Order Granting in Part Def.'s Mot. For Modification of Sentence, *United States v. Smith*, 5:10-cr-00009-VAP-12 (C.D. Cal, Feb. 12, 2024). Note, the briefing describing the abuse is sealed, but the court's order is public.
[28] *Id.*
[29] *Id.*
[30] *See* ECF No. 75-1 Mem. of P. & A. in Supp. of Mot.*, United States v. Chavira*, No. 3:18-cr-4216-CAB, (S.D. Cal. May 4, 2023).

This disgusting response by Officer Smith underscores the shortcomings of the definition of sexual abuse in the policy statement. The standard creates a perverse inventive for guards to perpetrate pernicious sexual abuse in ways that inoculate them from responsibility – and prevent their survivors from deserved recourse.

Ms. Chavira's case predated the adoption of (b)(4). The government did not oppose her request, and the judge granted her RIS motion. Other survivors, however, who filed after November 1 must contend with the policy statement's under-inclusive definition, facing challenges to abuse that is equally severe.

We commend the Commission for adopting the "victim of abuse" category. For the reasons above, we urge the Commission to revisit the substantiation requirement and the definition of sexual abuse.

2. Assessing the degree to which certain practices of the Bureau of Prisons are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2)

The Commission recently proposed to assess whether BOP is effective in meeting the purposes of sentencing.[31] FAMM encourages the Commission to engage in this worthy analysis.

The problems within BOP are well documented.[32] They include understaffing,[33] overcrowding,[34] denying individuals necessary medical care,[35] rampant sexual abuse in certain facilities,[36] and

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[31] *See generally* 28 U.S.C. §§ 994(o), (q).

[32] *See, e.g.*, Joe Davidson, *Senate Prison System Inquiry Reveals 'national disgrace,' Ossoff says*, WASHINGTON POST (Feb. 10, 2023), https://www.washingtonpost.com/politics/2023/02/10/jon-ossoff-bop-prison-abuse-hearings/.

[33] *See* Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards*, N.Y. TIMES (May 1, 2023), https://www.nytimes.com/2023/05/01/us/politics/prison-guards-teachers-staff.html; *see also* U.S. DEP'T OF JUST, OFF. OF INSPECTOR GEN., 23-054, CAPSTONE REVIEW OF THE FEDERAL BUREAU OF PRISONS' RESPONSE TO THE CORONAVIRUS DISEASE 2019 PANDEMIC at 44, Tbl. 3 (2023) (showing a 13% vacancy rate for all BOP employees and 21% vacancy rate for Correctional Officers, which are even higher than the rates during COVID-19), https://oig.justice.gov/reports/capstone-review-federal-bureau-prisons-response-coronavirus-disease-2019-pandemic.

[34] *See* U.S. DEP'T OF JUST., FY 2024 PERFORMANCE BUDGET, CONGRESSIONAL SUBMISSION, FEDERAL PRISON SYSTEM BUILDINGS AND FACILITIES at 2 ("The BOP faces challenges in managing the existing Federal inmate population and providing for inmates' care and safety in crowded conditions at higher security levels, as well as the safety of BOP staff and surrounding communities.), https://www.justice.gov/d9/2023-03/bop_bf_fy_2024_pb_narrative_omb_cleared_3.21.2023.pdf.

[35] *See* Devlin Barrett, *Judge Blasts Bureau of Prisons' Treatment of Dying Prisoner*, WASHINGTON POST (Oct. 14, 2022), https://www.washingtonpost.com/national-security/2022/10/14/prisons-contempt-dying-inmate/.

[36] *See, e.g.*, U.S. ATT'Y'S OFF. N.D. CAL., *Seventh and Eighth Federal Correctional Officers Charged as Part of Ongoing Federal Investigation into FCI Dublin* (Jul. 14, 2023),

refusing to act under its authority to seek release of individuals pursuant to 18 U.S.C. § 3582(c)(1)(A).

The Commission has a critical, yet largely unfilled, role in improving the experience of those in BOP and ensuring individuals are not serving more time than necessary. As Stephen Sady observed:

> Prisoners themselves are virtually voiceless regarding their conditions of confinement. Advocacy groups' suggestions can be administratively shrugged off. Litigation carried out by the few attorneys with the expertise to make their way through the procedural quagmire of administrative law face the limitless resources of a multi billion-dollar agency that takes advantage of every procedural obstacle. The Commission has unique power to offer insight and influence, given its institutional expertise and statutorily conferred authority.[37]

Below, we provide just two examples of ways by which the Commission can exert influence over the BOP.

Programming in prison helps ensure that sentences imposed "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[38] And yet, access to programming in federal prison remains a challenge.[39] As an initial matter, availability of programming, and the incentives for programming depend on an individual's PATTERN score and SPARC-13 assessment. For example, individuals with a High PATTERN score are unlikely to be able to use their programing for early release or early transfer to the community. The problems with PATTERN are now well documented.[40] PATTERN has been shown to overpredict recidivism for people of color, giving certain individuals a higher PATTERN score for reasons untethered to their likelihood to recidivate. In addition, the BOP's

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https://www.justice.gov/usao-ndca/pr/two-more-dublin-federal-correctional-officers-plead-guilty-sexually-abusing-multiple.

[37] *See* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, FEDERAL SENTENCING REPORTER, Vol. 35, No. 1 at 13 (Oct. 2022).

[38] 18 U.S.C. § 3553(a)(2)(D).

[39] *See* U.S. DEP'T OF JUST. OFF. OF ATT'Y GEN., FIRST STEP ACT ANN. REP. at 21–23 (Apr. 2023), https://www.ojp.gov/first-step-act-annual-report-april-2023.

[40] *See* Carrie Johnson, Flaws Plague a Tool Meant to Help Low-Risk Federal Prisoners Win Early Release, NPR (Jan 26., 2022), https://www.npr.org/2022/01/26/1075509175/justice-department-algorithm-first-step-act; *see also* Nat'l Inst. Of Just., *Predicting Recidivism: Continuing to Improve the Bureau of Prisons' Risk Assessment Tool, PATTERN* (Apr. 19, 2022) (recognizing, after many iterations, that there is still work to be done because "[r]esults demonstrate evidence of differential prediction across racial/ethnic groups . . . include[ing] overprediction of Black, Hispanic, and Asian males . . .").

risk and needs assessment, known as SPARC-13, which determines the appropriate programs for an individual, was not conducted on time, limiting some individuals' access to recidivism reducing programming.[41] Even though these problems with PATTERN and SPARC-13 are documented and well known, BOP will continue to rely on these systems to determine an individual's programming needs and eligibility to return to the community early.

The Department of Justice's report on the First Step Act celebrates an increased number of BOP programs available to people in custody.[42] The 2023 report on the First Step Act celebrates increased access to programming since 2022, but roughly a quarter of individuals are still not participating in First Step Act activities.[43] Moreover, the GAO recently found "BOP has some data on who participates in its programs and activities, but does not have a mechanism to monitor if it offers a sufficient amount. Without such a mechanism, BOP cannot ensure it is meeting the incarcerated population's needs."[44] The Commission should consider ways in which it can help encourage increased access to programing for individuals and enhance monitoring to ensure that individual needs are being met.

In his article, Sady recommends numerous ways the Commission can fulfill its responsibility to help ensure the BOP is advancing the purposes of sentencing.[45] We wanted to highlight one recommendation in particular. In a recent study, the Commission found a "significant reduction in the likelihood of recidivism" for people who completed the RDAP program.[46] And yet, a group of individuals who would otherwise benefit from this productive program are categorically excluded because the BOP has determined that a mere sentencing enhancement for possession of a weapon

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[41] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105139, BUREAU OF PRISONS SHOULD IMPROVE EFFORTS TO IMPLEMENT ITS RISK AND NEEDS ASSESSMENT SYSTEM at 18 (March 2023) ("[W]e found issues with BOP's ability to oversee whether risk and needs assessments are conducted on time. Specifically, BOP does not have readily-available, complete, and accurate data to determine if risk and needs assessments were conducted within the First Step Act required and BOP established timeframes. While BOP has plans to implement various mechanisms to monitor First Step Act requirements, BOP has not confirmed whether it will measure if assessments are conducted on time.") https://www.gao.gov/assets/gao-23-105139.pdf.
[42] *See* DEP'T OF JUST. OFF. OF ATT'Y GEN., FIRST STEP ACT ANN. REP. at 23–25 (June 2024), https://www.bop.gov/inmates/fsa/docs/first-step-act-annual-report-june-2024.pdf.
[43] *Id.*
[44] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105139, BUREAU OF PRISONS SHOULD IMPROVE EFFORTS TO IMPLEMENT ITS RISK AND NEEDS ASSESSMENT SYSTEM at 18 (March 2023), https://www.gao.gov/assets/gao-23-105139.pdf.
[45] *See* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, FEDERAL SENTENCING REPORTER, Vol. 35, No. 1 at 13 (Oct. 2022).
[46] *See* U.S. SENT'G COMM'N, RECIDIVISM & FEDERAL BUREAU OF PRISONS PROGRAMS, DRUG PROGRAM PARTICIPANTS RELEASED IN 2010 at 4 (May 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

is a disqualifying "crime of violence."[47] This is so even though the BOP has acknowledged that gun possessors are statutorily eligible for RDAP, but nonetheless exercised its discretion to disqualify individuals with a gun enhancement.[48] The Commission should use its authority to recommend that individuals with gun enhancements who are not otherwise statutorily disqualified be eligible for RDAP. Doing so will help reduce recidivism and ensure that a sentence meets the purposes of punishment while avoiding incarceration that is overly punitive, to the detriment of the individual and the system as a whole.

3. Promoting alternatives-to-incarceration programs and considering home confinement as a non-carceral sentence

FAMM supports the Commission's initiative to promote court-sponsored diversion and alternatives-to-incarceration programs. We believe that overincarceration is a systemic problem and one that disproportionately impacts communities of color. Identifying and strengthening feasible alternatives to incarceration that can protect community safety while reducing the prison population and lessening racial disparity is a goal the Commission should pursue. While the current guidelines encourage noncustodial sentences for some "first offenders," we believe that other population groups would greatly benefit from alternative sentencing. The experience from COVID-19 and CARES act is instructive.

FAMM urges the Commission to build on the success of the CARES Act to use non-carceral sentences for broader population groups. During the COVID-19 pandemic, Congress authorized the BOP to release certain groups of people in custody to home confinement. Even people with lengthy terms of imprisonment remaining on their sentences were transferred to home confinement. This was an experiment brought on by necessity given the public health emergency. But it was an experiment that proved successful and the lessons from this success should not be lost.

Among the over 13,000 people who were transferred to home confinement beginning in March 2020, only 22 individuals were rearrested for new offenses.[49] That is a recidivism rate of 0.17%. This illustrates the feasibility of using home confinement as a viable and safe alternative to custodial sentences. We encourage the Commission to study and consider the use of home confinement as an alternative to incarceration, building on this success.

4. Reconsider the weight of youthful offenses on adult criminal history calculations

Last year, the Commission proposed a priority to reconsider the impact of youthful offenses on criminal history scoring. FAMM applauded this initiative and provided a lengthy comment

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[47] *See* U.S. DEPT. OF JUST. FED. BUREAU OF PRISONS, Program Statement No. 5162.02 at 3 (July 24, 1995); *see also* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).
[48] 62 Fed. Reg. 53690-01 (Oct. 15, 1997).
[49] *See* Senator Cory A. Booker, *CARES Act Home Confinement, Three Years Later* at 4 (June 2023), https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf.

supporting an option to eliminate youthful offenses from the adult criminal history calculation.[50] We articulated a number of reasons in support of our position – including racial disparity, unreliability of state convictions, state disparities in treatment of youthful offenses – and those reasons ring true today. We were disappointed that the Commission did not eliminate these offenses from the criminal history calculation. For all the reasons we articulated in 2023, we would once again urge the Commission to eliminate youthful offenses from the adult criminal history calculation.

5. Delink guidelines from mandatory minimums

Drug trafficking sentences, tied to statutory mandatory minimums, bear the lion's share of responsibility for mass incarceration in the federal system. Prior Commissions have attempted to limit the impact of mandatory minimums on guidelines for these offenses, and yet, drug sentences remain stubbornly long and more people serve such sentences than for any other category of conviction. One way to get at this problem is to decouple the guidelines from drug trafficking mandatory minimums.

Today, 64,574 people incarcerated in the federal Bureau of Prisons – 44.3 percent of the entire BOP prison population – are serving sentences for drug convictions.[51] Drug trafficking convictions accounted for nearly one-third of all cases sentenced under the guidelines in 2023.[52] In 2022, over 73 percent of cases subject to mandatory minimums were drug trafficking cases.[53]

It goes without saying that the vast majority of people convicted of drug trafficking are sentenced to prison terms.[54] The roughly 19,000 people sentenced for such crimes in 2023 are serving terms averaging 82 months.[55] Those sentences, nearly seven years long, are for the most part the product of departures and variances from the drug trafficking guidelines. Only one quarter of the 19,000 people sentenced for drug trafficking were sentenced within the calculated guideline range.[56] Departures lowered sentences for roughly 32 percent and judges granted variances in 7,800 cases or 41.1 percent of all trafficking cases.[57]

Former Commissions have acted to lower guideline sentences for drug trafficking crimes, most notably in 2014 when drug guidelines were reduced by two levels across the board, following a

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[50] *See* Mary Price & Shanna Rifkin Letter to Hon. Carlton J. Reeves (March 2023).
[51] *See* U.S. DEPT. OF JUST. FED. BUREAU OF PRISONS, *Inmate Statistics, Offenses*, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated July 6, 2024).
[52] *See* 2023 U.S. SENT'G COMM'N Q. DATA REP. at Fig. 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2023_Quarterly_Report_Final.pdf.
[53] *See* U.S. SENT'G COMM'N, QUICK FACTS, MANDATORY MINIMUM PENALTIES at 2 (2023) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf.
[54] *See* 2023 U.S. SENT'G COMM'N Q. DATA REP. at Tbl. 7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2023_Quarterly_Report_Final.pdf.
[55] *Id.* at Tbl. 6.
[56] *Id.* at Tbl. 10.
[57] *Id.*

similar reduction made in 2007 for crack cocaine guidelines.[58] The amendments limited the reduction to two levels so as to, in the Commission's words, "maintain consistency" with the corresponding statutory minimums.[59]

In light of the evolution of drug policy in recent years, and the unequivocal impact of the war on drugs on mass incarceration, we believe now is a good time to revisit the decision to anchor the drug guidelines with mandatory minimum penalties. Review is warranted in light of the Commission's longstanding criticisms of mandatory minimum sentences.[60] We also believe this review is called for under the Commission's duty to amend guidelines, periodically considering data and comments on their operation.[61]

The data are in: the drug guidelines do not provide judges with sentencing ranges that meet the purposes of punishment. As discussed above, guideline ranges for drug trafficking hover well above advisory guideline sentences.[62] Should the Commission act to bring the guidelines in line with practice, the operation of §5G1.1 in the case where a calculated guideline range still falls below the statutory minimum will maintain the consistency that § 994(b)(2) requires.[63]

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[58] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES at 21–24 (Apr. 2014) (providing reasons for the reduction by two levels of drug trafficking offenses in 2014 and explaining that the reduction was unlikely to affect plea bargain rates), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments_0.pdf; *see also* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES at 70 (May 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20070501_RF_Amendments_0.pdf.

[59] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 21(Apr. 2014) (citing 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code″), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments_0.pdf; *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").

[60] *See, e.g.*, U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (Aug. 1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf; *see also* U.S. SENT'G COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (2011), https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[61] *See* 28 U.S.C. § 994(t).

[62] 2023 U.S. SENT'G COMM'N Q. DATA REP. at Fig. 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2023_Quarterly_Report_Final.pdf.

[63] *See* USSG §5G1.1(c)(2) (provides "In any [] case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not less than any statutorily required minimum sentence").

Not only do the calculated guideline ranges routinely exceed the sentenced impose, also there is no statutory basis for anchoring the guidelines with the mandatory minimums to which they correspond.[64] When addressing mandatory minimums, the Commission has a variety of choices.

First, it can set the guidelines "so that the base offense level for a Criminal History Category I offender corresponds to the first guideline range on the sentencing table with a minimum guideline range *in excess of the mandatory minimum*."[65] This is what it did in 1987 for drug offenses with five- and 10-year mandatory minimums. At that time the quantity triggering the five-year mandatory minimum for crack cocaine – five to 49 grams – was assigned base offense level 24, which calls for a sentencing range of 51-63 months.[66]

Second, the Commission can calibrate the guideline so that it "*include[s] the mandatory minimum* at any point within the range," which it did, first for crack cocaine in 2007 and then for all drugs in 2014.[67]

Third, "the Commission may set the base offense level below the mandatory minimum and rely on specific offense characteristics and Chapter Three adjustments to reach the statutory mandatory minimum."[68] If, those adjustments and specific offense characteristics fail to reach the mandatory minimum, §5G1.1(b) ensures that the guidelines maintain consistency by inserting the mandatory minimum.[69] This is the method the Commission chose in 2004 with respect to child pornography possession and trafficking offenses, in response to the PROTECT Act.[70] The agency explained:

> After engaging in extensive analysis of its data, including a review of typical trafficking and receipt offenders, offense characteristics, and rates of below guideline sentences for these offenses, the Commission adopted the third, most lenient option of those typically used by the Commission, and selected base offense level 18 for possession offenders and base offense level 22 for trafficking and distribution offenders. The Commission's analysis revealed that a majority of offenders sentenced under §2G2.2 were subject to specific offense characteristics that increased their offense level. Specifically, the overwhelming

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[64] *See* U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
[65] *Id.* at 44 (emphasis in original).
[66] *Id.* at 44–45.
[67] *See* U.S.S.G §1B1.10(d) (listing Amendments 706 ("crack minus two") and 782 ("drugs minus two").
[68] *See* U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES at 45 (Oct. 2009) (emphasis in original), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
[69] *See* USSG §5G1.1(b) (stating that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence").
[70] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES at 15–16 (May 2004), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20040430_RF_Amendments_0.pdf.

majority of these offenders received a 2-level enhancement for use of a computer (89.4%) and a 2-level enhancement for material involving a child under 12.[71]

Finally, the Commission could select a base offense level without regard to the mandatory minimum and, in a case in which the guideline calculation fails to reach the mandatory minimum, the mandatory minimum sentence would be applied through application of §5G1.1(b). However, the Commission has eschewed this approach fearing it would create sentencing "cliffs," and lead to unwarranted disparity.[72]

We encourage the Commission to revisit the decision to maintain the mandatory minimum within the calculated guideline range in these cases. It is clear from departure and variance practice that the current guidelines call for sentences in excess of those needed to meet the purposes of sentencing. It is equally apparent that our prisons hold too many drug trafficking defendants for too long. A straightforward way to both heed the feedback from judges and attack over-incarceration of people convicted of drug trafficking crimes would be to delink the guidelines from their corresponding mandatory minimums and lower them. Doing so would permit the Commission to fashion guideline ranges more consistent with current practice, help the Commission meet its obligation under § 994, and provide lower sentences to replace those that are still too lengthy. While sentencing cliffs might occur, the fact that potentially many people will receive sentences more aligned with the guidelines and judicial discretion, may outweigh the fact that some people will receive statutory mandated sentences. And, the Commission's actions could also be seen as a message to Congress from the agency and the judiciary that today's mandatory minimums are greater than necessary to achieve the purposes of punishment.

6. Study the trial penalty and take action to limit its impact on federal sentences

Last year, we welcomed the Commission's decision to study the delta between sentences imposed following trial and those imposed pursuant to a plea agreement. We also appreciated the invitation to FAMM and other organizations led by the National Association of Criminal Defense Lawyers (NACDL) to discuss our views on the trial penalty with Commission staff. We found that conversation rewarding and productive.

We look forward to the results of the Commission's study on the trial penalty. We write simply to encourage the Commission to carry over the priority to the coming year. We are certain the Commission's study will find that the trial penalty distorts the operation of the guidelines and results in unwarranted sentencing disparity. Maintaining the agency's focus on the practice may lead it to consider proposing guideline amendments that might mitigate some of the harms caused by the trial penalty or at least lessen the guidelines' unintended contributions to those harms.

For example, the Commission could critically examine the practice of including an obstruction of justice enhancement when defendants testify in the guilt phase.[73] The Commission could also

[71] U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 46 (Oct. 2009), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.
[72] *Id.*
[73] *See* USSG §3C1.1.

explore the current guideline limitation on awarding an acceptance of responsibility adjustment after trial and a third level only on the government's motion.[74] The Commission might also embed in the guideline commentary a statement discouraging the imposition of the trial penalty and/or encouraging judges to take the impact of the trial penalty into consideration when sentencing defendants convicted by the jury. The Commission's admonition to the federal Bureau of Prisons in the update to P.S. §1B1.13, and the BOP's failure to heed it, were the sparks that triggered First Step Act reforms to 18 U.S.C. § 3582(c)(1)(A).[75]

We expect additional opportunities to amend guidelines to limit to some extent the impact of the trial penalty may become apparent when the Commission publishes its findings. In the meantime, we urge the Commission to carry over its focus on the trial penalty to this amendment cycle.

7. Reconsider the limitations on retroactivity in USSG §1B1.10

On December 11, 2007, the U.S. Sentencing Commission took an historic vote to make the two-level reduction to crack cocaine sentencing retroactive.[76] During that meeting, the Commission also unanimously amended USSG §1B1.10, to both add a public safety filter and ensure that judicial discretion with respect to retroactivity would be strictly limited. The amendment clarified that in determining the amended guideline range's retroactive application, except in very limited circumstances "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range. . . ."[77]

At the meeting where the vote occurred, only Commissioner John Steer addressed this extraordinary limitation, imposed a few short years after the Supreme Court's decision in *Booker v. United States*, an opinion that had shaken guideline sentencing and its champions to its core. He explained:

> Important for me and many of us, I imagine, is that it makes public safety a central concern upon which the Court should focus in determining whether and by how much within the limits authorized by the Commission sentences may be reduced. And in light of the *Booker* case and [its] progeny, it does as much as reasonably . . . can be done by us to outline the

[74] *See* USSG §3E1.1; *see also id.* at cmt. n. 2.
[75] *See* Mary Price, *The Compassionate Release Clearinghouse, COVID-19, and the Future of Criminal Justice*, 35 ABA CRIMINAL JUSTICE (NO. 3) 51, 53 (2020) (noting that when Senators who queried the BOP about whether it had increased reduction in sentence motions in light of the Commission's urging learned that BOP had not, they introduced the bill amending § 3582(c)(1)(A) that was adopted as part of the First Step Act), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/fall/compassionate-release-clearinghouse-covid-19-future-criminal-justice/.
[76] U. S. SENT'G COMM'N, Transcript of Meeting on Retroactivity (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071211/20071211_Transcript.pdf.
[77] *See* USSG §1B1.10(b)(2)(A).

> special limited nature of this remedial procedure and the manner in which the Commission believes the authority may be exercised consistent with the Sentencing Reform Act.[78]

Commissioner Steer's oral statement is the only reason offered for adopting the limitation, which several years later easily survived a Supreme Court challenge.[79]

So focused was the criminal justice community on the imperative to make the crack reduction retroactive that only three of 33,000 commenters had even addressed the proposed change to §1B1.10.[80] In a pointedly direct observation, one of them reminded the Commission of the inherent competence of the courts to evaluate further reductions in light of 18 U.S.C. §3553(a) and added:

> Courts had no trouble apply § 1B1.10 without additional guidance when the drug guideline was amended to benefit non-Black defendants, and there is no reason to suspect they would have any now. To the contrary, in the wake of the Supreme Court's decision in *Rita*, the Commission should trust district courts to exercise their discretion in a manner that will serve the purposes of sentencing and, in the process, participate in the evolution of just sentencing policy.[81]

Whatever compelled the decision in 2009 – be they ongoing concerns about the impact of *Booker v. United States* and the continuing relevance of the guideline system[82] or fears that thousands of former crack prisoners would be released early to communities[83] – those concerns and others have

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[78] *See* U. S. SENT'G COMM'N, Transcript of Meeting on Retroactivity at 4 (Dec. 11, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071211/20071211_Transcript.pdf.

[79] *Dillon v. U.S.*, 560 U.S. 817, 130 S.Ct. 3683, 177 L. Ed. 2d 271 (2010) (holding that *U.S. v. Booker*'s holding does not apply to § 3582(c)(2) proceedings and therefore does not require treating §1B1.10 as advisory).

[80] U.S. SENT'G COMM'N, Public Comment from November 1, 2007 (Nov. 2007), indicating only three commenters remarked on "Procedural Guidance," https://www.ussc.gov/policymaking/public-comment/public-comment-november-1-2007. Testifying at the Commission, Steve Chanenson also discussed limiting reductions so as to dampen any impact of Booker on §1B1.13 proceedings. *See* U.S. SENT'G COMM'N, Public Hearing on Retroactivity at 154-158 (Nov. 13, 2007), https://www.ussc.gov/sites/default/files/Transcript111307.pdf.

[81] Letter from Jon M. Sands to Hon. Ricardo Hinojosa, U.S. Sent'g Comm'n Chair at 10 (Oct. 31, 2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_003.pdf.

[82] *See,* e.g., U.S. SENT'G COMM'N, Transcript of Public Hearing at 105 (Feb. 15, 2005) (Commission Chair launched two days of hearings on the *Booker* decision by explaining that "[t]he Commission . . . feels strongly that there should be substantial weight given to the sentencing guidelines in imposing a sentence. The reason for that, as far as the Commission is concerned, is quite simple. The statute itself requires the Commission to have considered the factors in the Sentencing Reform Act in initially promulgating the guidelines as well as in the amendments to the guidelines. The promulgation and the amendment of the guidelines also has required by statute the approval of the United States Congress because anything that the Commission does gets sent to Congress and, unless they vote not to approve it, becomes law."), https://www.ussc.gov/sites/default/files/20050215-16_Hearing_Transcript.pdf.

[83] *See, e.g.*, Letter from Alice Fisher to Hon. Ricardo H. Hinojosa, U.S. Sent'g Comm'n Chair at 7 (Nov. 1, 2007) (predicting that retroactivity would return "serious and often violent offenders who are most likely to offend again" and pose a danger to public safety."),

long since been laid to rest. *Booker* is not retroactive and retroactivity recidivism rates correspond generally under those for full-term cohorts.[84] Judges now have deep experience applying §1B1.10 and in resentencing individuals in other contexts where they are authorized to exercise their discretion to determine the extent of and bases for further reductions.[85]

We urge the Commission, therefore, to reexamine whether the limitations placed on §1B1.10 still bear support and if not, revisit the rule limiting judicial discretion to recognize post-offense rehabilitation and other factors that could weigh in favor of a departure or variance for an individual granted retroactive relief under USSG §1B1.10.

8. Visit a prison

Inspired by the Commission's commitment to encouraging firsthand accounts of the impact of the agency's work on incarcerated people, we urge the commissioners and staff to visit, and hold a dialogue or listening session, in one or more federal prisons this amendment cycle.

Since 2019, FAMM has encouraged policymakers to tour facilities through our Visit a Prison program. In the past year alone, 110 federal and state policymakers and stakeholders in 15 states and the District of Columbia have visited correctional facilities and met with prison leadership, staff, and incarcerated people. Those trips generated insights and impressions that inform ongoing efforts to reform our justice system.

For example, Pennsylvania State Rep. Marla Brown (R-Lawrence) wrote last year, "[f]or many of us, prisons exist out of sight and out of mind. Even some of our legislators and prosecutors have never visited a jail [or] prison or spoken with incarcerated people to gain knowledge. I recently visited the State Correctional Institution-Albion in Erie County and spoke with some life-sentence inmates. It was an experience that changed me. We have a duty as state representatives to be sure every human being in this country is treated with dignity, despite their background."[86]

The people who staff federal prisons and those who live in them are sentencing and BOP experts. We believe engaging with them firsthand would greatly benefit the Commission's understanding of how the Commission's actions and BOP practices can combine to best meet the purposes of

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https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20071100/PC200711_001.pdf.

[84] U.S. SENT'G COMM'N, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: the 2007 Crack Cocaine Amendment at 1-2 (May 2014), (finding no higher rates of recidivism by people who received retroactive relief than by similarly situated people had been released prior to retroactivity), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[85] *See, e.g.*, *Concepcion v. U.S.*, 597 U.S. 481, 492–94, 142 S. Ct. 2389, 213 L.Ed. 2d 731 (2022) (discussing and endorsing the widespread practice of courts taking into account post-sentencing rehabilitation and changes in sentencing law when resentencing individuals).

[86] FAMM, *FAMM hosted Pennsylvania lawmakers for #VisitAPrison blitz during April's Second Chance Month*, https://famm.org/famm-hosted-pennsylvania-lawmakers-for-visitaprison-blitz-during-aprils-second-chance-month/ (last visited July 15, 2024).

sentencing. And, prison visits could help the Commission should it decide to explore programming in federal facilities, as we urge in Section 2 of this letter.

The Commission marked the 25th anniversary of the Sentencing Reform Act (SRA) by holding seven regional hearings in 2009 and 2010. The SRA turns 40 this year and one way to acknowledge that anniversary would be to do a different kind of regional meeting: ones to meet with and hear from people who are incarcerated pursuant to sentencing policies introduced by the Act.

We are happy to introduce the Commission to other lawmakers and policymakers who have made the trek to prison. You can hear from them firsthand about the benefits to their work of a visit inside.

9. Conclusion

FAMM thanks the Commission for considering our input on issues critical to federal sentencing. We also appreciate the agency's invitation to incarcerated individuals to write directly to the Commission. The Commission's commitment to hear from those whose lives your work touches is deeply appreciated. We look forward to the Commission's public hearings on these issues.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel