



March 14, 2023

United States Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs—Proposed Amendments.

Re: Proposed 2022-2023 Amendments and Issues for Comment, Amendment 1, Sentencing Guidelines for United States Courts, U.S. Sentencing Commission

Dear Chairman Reeves:

On behalf of The Sentencing Project, we submit the following comments and suggestions regarding the proposed amendment one to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023 and published in the Federal Register on February 2, 2023.¹

The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. For three decades we have worked to advance evidence-based sentencing at the state and federal level.

The Commission requests comment on proposed amendments to the policy statement at §1B1.13, relating to compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Section 994(t) of Title 28, United States Code, requires the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” Since the statutory provision was amended by Congress via the 2018 First Step Act, courts have generally held that the Commission’s existing policy statement on compassionate release is outdated and operated without Commission guidance. Without such guidance, compassionate release rulings have varied widely, individuals who deserve relief have been denied, and significant circuit splits have arisen. We therefore encourage the Commission to clearly articulate in the Guidelines the circumstances where compassionate release is appropriate while allowing judges to retain discretion on par with that currently granted to the Bureau of Prisons.

A. Background

Under 18 U.S.C. § 3582(c)(1)(A)(i), a court may reduce a sentence, commonly referred to as compassionate release, based on “extraordinary and compelling reasons,” after consideration of the 18 U.S.C. § 3553(a) sentencing factors and provided that the reduction is consistent with the

¹ United States Sentencing Commission (2023), [2022-2023 Proposed Amendments to the Federal Sentencing Guidelines](#), 88 FR 7180.

applicable policy statements of the Sentencing Commission.² The bipartisan Sentencing Reform Act of 1984 abolished parole in favor of a system in which a defendant’s term of imprisonment was determined by a judge, applying presumptive sentencing guidelines, at a public sentencing hearing.³ The Sentencing Reform Act created compassionate release as a much-needed safety valve following the abolition of parole – a means of still granting relief to individuals whose continued incarceration pose little public safety benefit and for whom extraordinary and compelling circumstances necessitate release.⁴

Congress charged the Commission with “describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction.”⁵ The sole limit imposed by Congress, to avoid the replication of parole, was that “rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”⁶ The Commission’s current policy statement, §1B1.13, has defined “extraordinary and compelling” reasons to include a terminal illness; serious physical or mental health concerns of the incarcerated individual, minor child, or incapacitated partner; and age-related physical or mental deterioration.⁷ The statement also grants the Bureau of Prisons wide discretion to identify additional “extraordinary and compelling” reasons. We urge the Commission to extend that broad discretion to federal judges. The Commission’s proposed amendments to the policy statement already take significant steps toward that goal, and we suggest minor modifications to move them further.

B. Defining “Extraordinary and Compelling Reasons” to Include Additional Medical and Family Circumstances

We encourage the Commission to expand the definition of “extraordinary and compelling reasons” in the policy statement to address additional circumstances affecting the health and safety of incarcerated individuals and their families. We recommend these changes to the proposed guideline to ensure that it is maximally effective at protecting the lives of people in custody.

a. Medical Circumstances of the Individual in Custody

The proposed amendment would add two new subcategories to the “Medical Condition of the Defendant” category at new subsection (b)(1). The first would provide relief to individuals suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner. We recommend a minor alteration: as articulated by the Federal Defenders, subsection (b)(1)(C) should refer to medical care that is not being provided in a timely or “effective,” rather than merely “adequate,” manner. As Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, testified, the word “adequate” may be interpreted similarly to a deliberate-indifference standard and “discourage courts from granting

² 18 U.S.C. § 3582(c)(1)(A)(i).

³ [Sentencing Reform Act of 1984](#), Public Law 98-473; 98 Stat. 2032.

⁴ Section 3582(c)(1)(A)(i).

⁵ 28 U.S.C. § 994(t).

⁶ 28 U.S.C. § 994(t).

⁷ See USSG §1B1.13 (2018).

relief so that an individual can get medical care in the community (where other factors militate in favor of release) in all but the most extreme circumstances.”⁸ Shifting to the word “effective” will allow subsection (b)(1) to supplement, rather than parallel, the eighth amendment – allowing courts to simply find that an individual needs care more quickly or in a different manner than is available in federal prisons, without finding that the Bureau failed to provide constitutionally required care.

The second new subcategory is responsive to the future crises like the covid-19 pandemic. It provides the opportunity for relief to individuals in the following circumstances: (1) they are housed at a correctional facility affected or at risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) they are at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be mitigated in a timely or adequate manner. We recommend that this section encompass any emergency situation that threatens the lives and health of individuals in prison that cannot be mitigated.

While we applaud the Commission’s acknowledgement of the danger of infectious diseases, the last two decades have demonstrated that the health of incarcerated individuals may be threatened by extraordinary circumstances beyond pandemics. For example, Orleans Parish Prison fell into a state of chaos in the wake of Hurricane Katrina⁹ and extreme heat waves have threatened the health of individuals in southern prisons.¹⁰ As the climate warms, these extraordinary events will become more frequent and pervasive. While many may be able to be mitigated via transfers out of the impacted area, the Commission should nonetheless preserve the discretion of judges to consider such circumstances.

b. Family Circumstances of the Individual in Custody

The proposed amendment would modify the “Family Circumstances” category at new subsection (b)(3) in three ways to encompass a more accurate understanding of the family. The proposed amendment would extend the current subcategory relating to the death or incapacitation of the caregiver of a defendant’s minor child by making it also applicable to a defendant’s child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. The proposed amendment would also add a new subcategory to the “Family Circumstances” category – extending it to when a defendant’s parent is incapacitated and the defendant is the only available caregiver for the parent. Finally, the proposed amendment preserves judicial discretion by adding a more general subcategory applicable if the individual presents circumstances similar to those listed in the other subcategories of “Family Circumstances” involving any other immediate family member or an individual whose relationship with the defendant is similar to that of immediate family.

⁸ Federal Public and Community Defenders (2023), [Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut](#), Before the United States Sentencing Commission Public Hearing on Compassionate Release.

⁹ See American Civil Liberties Union (2006), [Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina](#).

¹⁰ Dholakia, N. (2022), [Prison is Already Hell and Climate Change is Making It Worse](#), Vera Institute.

We applaud this expansion and recommend that the Commission provide further guidance as to what constitutes an “immediate family member,” as federal regulatory definitions differ. For example, 29 C.F.R. § 780.308 defines “immediate family” to include parents, spouses, children, and those similarly situated, such as step-children and foster children, whereas 40 C.F.R. § 170.305 defines “immediate family” to include grandparents, aunts/uncles, nieces/nephews, and cousins. We urge the Commission to adopt the latter definition to reflect a diversity of families, especially low-income families, impacted by incarceration. The latter definition is more consistent with the reality of many Americans who reside in households outside a traditional definition of the nuclear family.

C. Commission “Victim of Assault” Proposal

The Sentencing Project is gravely concerned about the well-documented prevalence of sexual abuse and violence within the Bureau of Prisons.¹¹ We applaud the Commission’s inclusion of this proposed amendment. We urge minor changes to guarantee that the guideline encompasses the full breadth of sexual abuse and other violence within federal prisons. Currently, the guideline has the potential to exclude: (1) abuse by other incarcerated individuals acting on their own accord or at the direction of a correctional officer, contractor, or employee, (3) abuse by others who may have custody or control over the individual who are not an officer, contractor, or employee, (4) physical or sexual assault which does not result in serious bodily injury, and (5) sexual abuse which does not constitute an assault. We urge the Commission to correct these deficiencies, which exclude many survivors of abuse. For example, as Professor Erika Zunkel testified at the Commission’s February 24, 2023 hearing, the current proposal would exclude the victims of the guard at FCI Dublin who forced two women to “strip naked for him during rounds and took photos, and stored a ‘large volume of sexually graphic photographs’ on his BOP issued cell phone.”¹²

Accordingly, we join the Federal Defenders¹³ in urging the Commission to revise the guideline as follows to account for a wider range of harm:

VICTIM OF ABUSE —The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

As the Defenders note, extending relief to those who are abused by other incarcerated individuals recognizes that the purpose of compassionate release is not to penalize the Bureau, it is to provide for the safety and health of incarcerated people. Furthermore, the Bureau is responsible

¹¹ See e.g., Daniels, C. (2022), [Sexual abuse rampant in federal prisons, bipartisan investigation finds](#), The Hill; Winton, R. (2022). [Former warden at female prison known as 'rape club' guilty of sexually abusing women behind bars](#), LA Times.

¹² [Statement of Erica Zunkel Clinical Professor of Law and Associate Director, University of Chicago Law School’s Federal Criminal Justice Clinic](#) (2022), Before the United States Sentencing Commission Public Hearing on Compassionate Release.

¹³ Federal Public and Community Defenders (2023), [Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut](#), Before the United States Sentencing Commission Public Hearing on Compassionate Release.

for the safety of people in their custody and bears responsibility for preventing violence within its walls, regardless of the identity of the perpetrator.

The Sentencing Project also urges the Commission to reject the Department’s proposal that such abuse be substantiated by a finding of liability or conviction. The sentencing judge considering the individual’s application for relief is well-equipped to determine the merit of the individual’s claim of abuse. To rely on a conviction both fails to reflect the reality that the Department has a poor history of investigating and prosecuting such claims. It would also threaten the safety of incarcerated victims, who would face potential retaliation and further abuse while awaiting trial. The Department argues that a “mini-trial” on the abuse claim before the sentencing judge could complicate the investigation and prosecution of criminal cases, but the Commission should prioritize justice and safety for the survivors of such violence over the ease with which the Department secures convictions.

D. Commission Proposal to Include “Changes in Law” as an Enumerated “Extraordinary and Compelling” Reason

The Commission proposes language that would permit courts to reduce a sentence whenever “[t]he defendant is serving a sentence that is inequitable in light of changes in the law.” The Commission possesses the legal authority to adopt this language and should do so to resolve an urgent circuit split and advance safety and justice. Four courts of appeals permit a court to consider non-retroactive changes in sentencing law in combination with other extraordinary and compelling reasons¹⁴ and five courts of appeals have held the opposite.¹⁵ This deep circuit split has created profoundly unequal and arbitrary access to post-conviction justice.

The plain text of the statute makes clear that Congress did not intend to exclude changes in the law from being considered as extraordinary circumstances. If it wished to do so, it could have articulated that limit as it did with the restriction that rehabilitation alone does not rise to the level of an extraordinary and compelling circumstance. The silence of the statute on changes in law should be construed in a manner most consistent with judicial discretion. As the U.S. Supreme Court articulated in *Concepcion v. United States*, judges enjoy broad discretion to consider all relevant information in sentencing at trial, that discretion is carried forward to sentence modification hearings, and it is bounded only by express limitations on what information may be considered from the Constitution or Congress.¹⁶

Additionally, when Congress amended the statute in 2018 with the First Step Act, it could have again limited the ability of courts to consider changes in law but declined to do so. Congress’s failure to make all provisions of the First Step Act retroactive does not mean that they intended to bar all individuals from relief based on changes in the law – it merely indicates that the

¹⁴ See *United States v. Chen*, 48 F.4th 1092, 1096 (9th Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).

¹⁵ See *United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (citing *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021)).

¹⁶ [*Concepcion v. United States*](#), 597 U.S. ____ (2022).

Congress intended for such relief to not be automatic, but rather subject to the heightened criteria for compassionate relief, such as the requirement that such individuals meet the 18 U.S.C. § 3553(a) sentencing factors. Indeed, in her Senate Floor comments about the First Step Act, Senator Amy Klobuchar made clear that lawmakers were aware that courts could potentially consider changes in law to be grounds for relief, acknowledging that some prior sentencing laws “resulted in prison sentences that actually don’t fit the crime” and that the provisions in the First Step Act “allow[] people to petition courts ... for an individualized review based on the particular facts of their case.”¹⁷ As such, the Commission is well within its power to amend the policy statement to include changes in law as an extraordinary and compelling factor.

The Commission is also correct to include changes in law as a potential ground for relief as a matter of policy. This year, the United States marks the fiftieth year of mass incarceration.¹⁸ Research makes abundantly clear that extreme sentences and high incarceration rates are not necessary for public safety¹⁹ and a growing level of bipartisan acknowledgment of that fact has led Congress to repeatedly lower sentences.²⁰ The United States will not, however, meaningfully lower its incarceration rate without providing pathways to relief for the individuals already serving extreme sentences – especially those sentences that Congress has already deemed unjust. Permitting compassionate release based on changes in law helps fill this gap for individuals who can safely return to the community.

E. Commission Proposals Regarding Additional “Extraordinary and Compelling” Reasons

Policy statement §1B1.13 has always had an open-ended catchall category which empowered the Bureau to identify additional extraordinary and compelling circumstances not otherwise articulated. Vesting this power solely in the Bureau reflected that at the time of the policy statement’s drafting, the Bureau controlled compassionate release motions. With the First Step Act’s 2018 passage, incarcerated individuals are now permitted to bring their cases directly to the courts. Accordingly, the Commission should update the open-ended catch-all provision to provide the same discretion to courts as it previously has to the Bureau – as in Option 3 for the proposed sub. (b)(6). The other potential options offered by the Commission are overly restrictive and a departure from the power already granted to the Bureau, and also likely to produce substantial litigation. As the Covid-19 pandemic demonstrated, conditions may always arise that are outside the enumerated categories of relief and it is vital that courts possess the necessary flexibility to respond rapidly and efficiently when needed.

F. Conclusion

Thank you for this opportunity to provide feedback and for considering our views. The Commission’s proposed amendments are a strong step toward creating the robust compassionate release system that Congress intended and the nearly 160,000 people incarcerated in federal prisons and their loved ones deserve.

¹⁷ 164 Cong. Rec. S7747-48 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

¹⁸ Ghandnoosh, N. (2023), [Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations](#), The Sentencing Project.

¹⁹ Ghandnoosh, N. (2021), [A Second Look at Injustice](#), The Sentencing Project.

²⁰ See First Step Act of 2018, Public Law 115-391; Fair Sentencing Act of 2010, Public Law 111-220.

Sincerely,

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