

UNITED STATES SENTENCING COMMISSION

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PUBLIC MEETING

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THURSDAY
FEBRUARY 23, 2023

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The United States Sentencing Commission met in the Mechem Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle N.E., Washington, DC 20002 at 9:00 a.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT:

CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio

ALSO PRESENT:

KENNETH P. COHEN, Staff Director
KATHLEEN C. GRILLI, General Counsel

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:04 a.m.

3 CHAIR REEVES: Good morning. I'm
4 Carlton W. Reeves, the Chair of the United States
5 Sentencing Commission, and I welcome you, I
6 welcome every one of you, to our first public
7 hearing of my tenure as chair. I thank each of
8 you for joining us, whether you are in this room
9 with us or attending via livestream.

10 I have the honor of opening this
11 hearing with my fellow commissioners. To my left
12 we have Vice Chair Claire Murray, Vice Chair
13 Laura Mate, and Commissioner Candice Wong. To my
14 right, we have Vice Chair Luis Felipe Restrepo,
15 Commissioner Claria Horn Boom, and ex-officio
16 Commissioner Jonathan Wroblewski.

17 Due to circumstances beyond his
18 control, Commissioner John Gleason is not here,
19 but he's certainly here in spirit. We're also
20 joined by Commission employees, some of whom are
21 in this room, many of whom who are not. No
22 matter where they're working right now, each one

1 of our employees played an essential role in
2 making this day possible.

3 This commission may have lack of
4 quorum of commissioners for years, yet it has
5 never lacked people who care about our mission
6 and the pursuit of fairness in our criminal
7 justice system. I speak on behalf of all of our
8 commissioners when I say to every person in our
9 agency, what you do is important.

10 What you do is seen and appreciated by
11 all of us. Without you, our work cannot get
12 done. Please, ladies and gentlemen, join me in
13 acknowledging, in recognizing and showing
14 appreciation for our employees of the Commission.

15 (Applause.)

16 CHAIR REEVES: Finally, I want to
17 thank those who are providing us with comments on
18 our proposed amendments to the sentencing
19 guidelines.

20 Today and tomorrow, we will be hearing
21 from an esteemed group of individuals providing
22 us with testimony in person. The discussion

1 today will focus on the proposed amendment on
2 compassionate release. Tomorrow's hearings is
3 dedicated to two topics: the proposed amendment
4 on sex abuse of a ward, and the proposed
5 amendment on acquitted conduct. Today and
6 tomorrow, I promise that your extensive journeys
7 and preparations will be worth it.

8 When you speak to the Commission, you
9 will be heard, yet there are many commenters who
10 are not here today, nor will they be here
11 tomorrow. Many of them gave us their thoughts
12 through our new online portal. You can find it
13 at www.ussc.gov. It is simple, it is easy and it
14 is effective. I urge anyone who cares about our
15 work to submit a comment through the portal
16 before March 14th, before our March 14th
17 deadline.

18 When you speak to the Commission,
19 again, you will be heard. So far, we have
20 received over 1,500 comments. Some are from
21 federal judges. Some are from Senators. About
22 90 percent are from currently incarcerated

1 people. It does not matter if you sit in the
2 halls of Congress or at the desk of a prison
3 library. When you speak to the Commission, you
4 will be heard.

5 Let me explain why. Congress gave the
6 Commission what it called extraordinary powers
7 and responsibilities to improve the fairness and
8 effectiveness of federal criminal justice as a
9 whole. To make sure those powers were used by
10 policymakers of the highest quality, Congress
11 created rules to ensure Commissioners reflected a
12 diversity of backgrounds.

13 Looking beside me, it is clear that
14 those procedures have worked. We were nominated
15 and confirmed in an overwhelmingly bipartisan
16 spirit. As you can see, some of us are men.
17 Most of us are women. We're black, white, Asian,
18 and Latino. Some were born into citizenship, and
19 one of my good friends here applied for and
20 earned citizenship. Some of us have been
21 prosecutors. Some of us have served as public
22 defenders.

1 We are from Iowa, Kentucky, Maryland,
2 New Jersey and New York. One of us is from the
3 home of the NFC championship team. I had it
4 written here that they might have been the Super
5 Bowl champions, but from Philadelphia. But one
6 of us -- and people from Mississippi know I'm
7 going to put it in, but one of us is from the
8 home of two of those players on that championship
9 team, Yazoo City, Mississippi.

10 While we recognize and celebrate our
11 diversity, we acknowledge its limits. I think of
12 an observation Commissioner Boom made in last
13 month's meeting about the gaps in our knowledge
14 and the need for us to fill those gaps with
15 expertise and data.

16 The more I thought about Commissioner
17 Boom's remark, the more I find myself in
18 agreement with it. We Commissioners have seen
19 the criminal justice system as attorneys,
20 policymakers, and advocates. Some of us have had
21 family members and close friends who have
22 suffered as victims. But we have not seen the

1 criminal justice system as doctors, as
2 correctional employees, as public health
3 professionals, as academics, as scientists, and
4 we certainly have not felt the criminal justice
5 system as an incarcerated person.

6 I think about the gaps in our
7 knowledge as they apply to the amendments we will
8 be discussing today. As commissioners, we have
9 overseen prison officials, but we have not been
10 their wards. We have acquitted others of
11 conduct, but we have never been acquitted. We've
12 never stood before a judge and a jury, praying
13 that the system has worked as promised. We've
14 granted compassionate release from federal
15 prison, but we have never had to apply for it.

16 Congress recognized our limited
17 perspectives by telling us to do our work by
18 examining a wide range, a wide spectrum of views.
19 It has told us to amend guidelines in
20 consideration of the comments and the data we
21 receive.

22 And Congress has told us to create

1 federal sentencing policy that reflects the
2 advancement in knowledge of human behavior as it
3 relates to our criminal justice process. As
4 chair, I take these duties seriously, and so do
5 my colleagues. Doing justice, searching for
6 truth demands nothing less. The Commission's
7 policies need to reflect not just our
8 perspectives, but your research, your data, your
9 experiences.

10 And so, when you speak to the
11 Commission, you will be heard because you must be
12 heard. We commissioners have a great deal of
13 listening to do. Today, we will be taking
14 testimony on proposed amendments regarding
15 compassionate release. Tomorrow, we will be
16 taking testimony on proposed amendments on sexual
17 abuse of a ward and acquitted conduct, and we
18 will have a second set of hearings on March 7th
19 and 8th to receive testimony on our proposed --
20 on the proposed amendments.

21 Panelists, you will each have five
22 minutes to speak. We've read your written

1 submissions. Your time will begin when the light
2 turns green. You have one minute left when it
3 turns yellow, and no time left when it turns red.
4 If I cut you off, please understand. I'm not
5 being rude, as we have so much to cover today and
6 tomorrow and such a limited time to hear from
7 everyone.

8 For our audio system to work, you'll
9 need to speak closely into the microphones.

10 Although we're working on making sure that the
11 mic is never hot, you as citizens and anybody
12 else should always assume a mic is hot. Again,
13 assume it's hot because you know we want to hear
14 from you, and again, you will be heard at all
15 times when you speak to the mic.

16 So, when all panelists are done
17 speaking, commissioners may ask questions. I'm
18 sure we will ask questions. So, thank you,
19 ladies and gentlemen, for joining us today and I
20 -- and on behalf of every Commissioner here, we
21 look forward to a very productive hearing.

22 Now, let me introduce the first panel,

1 a panel of one. It is -- it will come from the
2 executive branch's perspective on compassionate
3 release. That perspective will be presented by
4 Robert Parker, Chief of the Appellate Section in
5 the Criminal Division at the Department of
6 Justice.

7 In that role, Mr. Parker oversees the
8 section's appeals work and serves as a principal
9 advisor to the Department leadership on criminal
10 law issues. Mr. Parker has previously worked as
11 an assistant to the Solicitor General and served
12 as attorney advisor in the Office of Legal
13 Counsel. Mr. Parker, we're ready when you are,
14 sir.

15 Panel I: Executive Branch Perspective

16 MR. PARKER: Thank you, Chair Reeves,
17 and thank you to the Commission for inviting me
18 to speak today.

19 Compassionate release is a complicated
20 issue. It requires the Commission to strike a
21 careful balance that respects the finality of
22 criminal judgments, ensures consistency, and

1 addresses the interests of defendants,
2 prosecutors, victims, courts, and the public, all
3 while remaining faithful to the limits Congress
4 has placed on this extraordinary form of relief.

5 Many of the Commission's compassionate
6 release proposals strike the right balance, and
7 we support them. We agree that compassionate
8 release may be warranted in response to a public
9 health emergency. Indeed, during the COVID-19
10 pandemic, we supported release for many
11 defendants at risk of severe medical
12 complications for the disease, particularly
13 before effective vaccines were available to
14 mitigate that risk.

15 We agree that family caregiving
16 responsibilities should extend beyond those
17 currently listed to include, for example, care of
18 parents and incapacitated adult children. We
19 agree that compassionate release should be
20 available for certain victims of physical or
21 sexual abuse in prison, as long as that
22 misconduct has been independently established so

1 that compassionate release hearings do not become
2 mini-trials before an investigation is complete.

3 And we agree the district courts
4 should be permitted to identify additional
5 extraordinary and compelling reasons similar to
6 those expressly listed. As the pandemic showed,
7 we often can't predict what extraordinary and
8 compelling circumstances may arise in the future.

9 We have some minor suggestions on
10 several of these proposals with the goal of
11 providing more clarity to courts and litigants.
12 These suggestions are set forth in our letter,
13 and I'm happy to answer questions about them.

14 All of these proposals have a few
15 things in common. They relate to extraordinary
16 factual circumstances arising while the prisoner
17 is incarcerated that are unique to the life of
18 the prisoner and that present a compelling case
19 for compassion despite the criminal judgment.
20 Those limits are consistent with the text and
21 history of Congress' authorization of this narrow
22 form of relief and with almost four decades of

1 practice, including by this Commission.

2 Some of the other proposals before you
3 today would greatly expand compassionate release
4 in ways that Congress did not intend. We oppose
5 these proposals, and we urge the Commission not
6 to adopt them.

7 First, non-retroactive changes in law
8 are not extraordinary and compelling reasons for
9 compassionate release. Applying a change in law
10 prospectively is typical, not extraordinary, and
11 although Courts of Appeals disagree on the
12 meaning of extraordinary and compelling, they all
13 agree that the expansion proposed here, which
14 would make non-retroactive changes in law a
15 stand-alone reason for compassionate release, is
16 foreclosed by the Sentencing Reform Act.

17 Second, the proposal catch-alls not
18 tied to existing grounds for compassionate
19 release do not provide sufficient guidance to
20 courts. As written, they could be applied to
21 effectively make compassionate release a
22 substitute for collateral review or even a new

1 form of parole. The Courts of Appeals have
2 widely held that such an expansion is not
3 authorized.

4 But even if such dramatic expansions
5 of compassionate release were permitted by
6 statute, there are several reasons not to go down
7 that path. Using compassionate release to reduce
8 sentences based on non-retroactive changes in
9 law, disagreements with mandatory minimum
10 punishments, disquiet over the length of a
11 lawfully imposed sentence, or alleged errors in a
12 conviction or sentence would severely undermine
13 the principles of finality and consistency that
14 are the hallmarks of the Sentencing Reform Act.

15 There are no limits on when and how
16 often a defendant can move for compassionate
17 release. Throwing open the door to compassionate
18 release on grounds far beyond traditional limits
19 will likely result in a flood of motions, and
20 even if most are denied, the burden on courts and
21 the justice system will be enormous.

22 It also will create an intolerable

1 burden on victims. As you will hear from other
2 witnesses today, courts should not grant release
3 to prisoners without hearing from the victims of
4 their crimes. We strongly urge the Commission to
5 protect the interests of victims in its policy
6 statement and have proposed language to do so.

7 None of this is to say that equity in
8 the criminal justice system does not favor
9 applying some changes in law retroactively or
10 empowering courts to revisit some lengthy
11 sentences. The Department stands ready to work
12 with Congress in addressing those issues through
13 appropriate legislation, but the Commission's
14 policy statement is not the right mechanism to do
15 so.

16 I welcome the Commission's questions.

17 CHAIR REEVES: Mr. Parker, thank you.
18 You have set the example.

19 (Laughter.)

20 CHAIR REEVES: I'll turn it over to
21 any Commissioner who has any question of Mr.
22 Parker.

1 VICE CHAIR RESTREPO: Good morning,
2 Mr. Parker.

3 MR. PARKER: Morning.

4 VICE CHAIR RESTREPO: So, with respect
5 to the victims, right, I think everybody on this
6 panel agrees that that's a paramount concern.
7 What is the Department's policy -- is there a
8 Department policy with respect to notifying
9 victims when a compassionate release motion is
10 filed in their particular case?

11 MR. PARKER: So, the Attorney General
12 recently issued new guidelines for addressing
13 victim issues, and I think, fairly read, those
14 guidelines would cover notification to victims in
15 these circumstances.

16 We certainly do our best to ensure
17 that victims are aware of what is happening,
18 assuming that the victims want to be notified.
19 Remember, sometimes being reminded of the crime
20 is itself a victimization, and so some would
21 prefer not to be.

22 I think the larger issue here, though,

1 is that for -- to this point. There has been no
2 explicit recognition in the Commission's policy
3 statement of those interests, and that is very
4 important to have that.

5 One reason it's important to have that
6 is, as we have seen in some cases, the government
7 sometimes does not even know that a compassionate
8 release motion is filed. Many of these are filed
9 pro se. There have been instances where courts
10 have acted on them without even waiting for the
11 government to weigh in, including granting them.

12 And so, I do think it's very
13 important, for those reasons, that the Commission
14 address this in its policy statement.

15 VICE CHAIR RESTREPO: Thank you.

16 VICE CHAIR MURRAY: Do you think there
17 are any limits on our ability to impose
18 procedural requirements on courts? Clearly, we
19 can set substantive criteria under 994(t). If we
20 wanted to -- your victim notification policy is a
21 procedural requirement.

22 If we wanted to say you have to have

1 a hearing, you have to notify the government and,
2 you know. An extreme would be you have to have
3 the AG sign off on any catch-all reasons. Are
4 there limits on what we can do procedurally?

5 MR. PARKER: I don't know. I mean,
6 Commissioner Murray, I think that there may be
7 some, but I don't think that it would encompass
8 something like this. Ensuring that victims'
9 interests are respected during the process, I
10 think, is part and parcel of defining the
11 extraordinary and compelling reasons and then
12 providing the framework in which they can be
13 considered.

14 We don't have a position on whether
15 more granular procedural requirements such as,
16 you know, like timing requirements or page limits
17 or things like that could be addressed in the
18 Commission's policy statement. Perhaps they
19 could, but I think that this one would clearly
20 fit within what the Commission can and should do.

21 VICE CHAIR MURRAY: One of the most
22 critical functions for the Commission is to

1 resolve circuit splits, and there's obviously a
2 very real circuit split here between a number of
3 circuits, I believe it's four on one side and
4 five on the other, as to whether non-retroactive
5 statutory changes are recognizable under
6 compassionate release.

7 There are some comments that we've
8 received that indicate that a change in law
9 proposal, such as proposed in (b)(5), would
10 result in splits. Do you agree with that and, if
11 not, why not?

12 MR. PARKER: No, I don't agree with
13 that because the courts that have held that
14 changes in law do not -- are not cognizable bases
15 for compassionate release, and that is the
16 majority of the Courts of Appeals at this point.
17 They have done so based on an interpretation of
18 the term "extraordinary and compelling" in the
19 statute.

20 And so, if this court -- I'm sorry, if
21 this Commission were to determine that changes in
22 law were a basis for finding extraordinary and

1 compelling circumstances, it would not change the
2 law in those circuits because of course, the
3 Commission cannot override the plain meaning of
4 Congress' text, and so I think the circuit
5 conflict would simply be perpetuated.

6 The way that the Commission can
7 resolve the circuit conflict is by making clear
8 that changes in law are not a basis for granting
9 this form of relief. We think that is not only
10 consistent with the text of the statute, it's
11 also quite consistent with the entire history of
12 this provision, which has been addressed not only
13 in the legislative history of the Sentencing
14 Reform Act, but also in subsequent legislative
15 history of amendments to the compassionate
16 release provision.

17 All of that history indicates that
18 Congress had in mind the sorts of circumstances
19 that are currently reflected in the policy
20 statement: terminal illness, advanced age, things
21 of that sort. It does not indicate -- and I
22 would note also they are unusual circumstances

1 that arise after the sentencing. They're not
2 just things that were known at sentencing and
3 already taken into account or potential errors in
4 the conviction.

5 All of that, I think, suggests that
6 the appropriate course is to not include a
7 changes in law provision, but the fact that not
8 including that would resolve the circuit
9 conflict, as the Supreme Court often defers to
10 the Commission to do, I think is simply an added
11 reason to do it.

12 VICE CHAIR MURRAY: Why doesn't Brand
13 X militate the other way? Doesn't 994(t) entrust
14 us to interpret extraordinary and compelling? Is
15 your argument predicated on the idea that there
16 is no ambiguity in extraordinary and compelling?

17 MR. PARKER: Well, it is that
18 extraordinary and compelling clearly means
19 something other than ordinary circumstances like
20 the fact that a change in law applies
21 prospectively. There may be some disagreement
22 that can be had about whether a particular

1 factual circumstance is extraordinary and
2 compelling, whether a particular illness may be,
3 something of that sort. But the ordinary
4 operation of the criminal law I don't think can
5 be extraordinary and compelling.

6 I would note that every Court of
7 Appeals has so held. Even the Courts of Appeals
8 that allow this factor to be considered as part
9 of a totality analysis recognize that it is not
10 extraordinary and compelling standing alone, and
11 that, I think, simply underscores the limits on
12 what the Commission can do and what Congress
13 enacted.

14 VICE CHAIR RESTREPO: What's the
15 Department's position? I don't know if you can
16 speak to the Department --

17 CHAIR REEVES: Oh no, no, no, no. Go
18 ahead. I'm not trying to interfere. I just want
19 to make sure the Commission's always speaking
20 loudly into the microphone. We're having a
21 conversation with Mr. Parker and that person
22 standing against the wall back there. So, just

1 make sure we're always speaking loudly into the
2 mic, so that we can all -- so that everyone can
3 hear you.

4 VICE CHAIR RESTREPO: So, you said
5 that standing alone, retroactive changes can't
6 justify compassionate release. What if it's
7 coupled with other factors, much like
8 rehabilitation alone cannot constitute the basis
9 for compassionate release? What if it's coupled
10 with other factors?

11 MR. PARKER: Well, that is the
12 position that some Courts of Appeals have taken,
13 and there is some surface appeal to it.

14 As the other Courts of Appeals that
15 have looked at this have explained, however, it
16 suffers from a logical fallacy. It suggests that
17 you can take a legally impermissible reason,
18 couple it up with some factual circumstances that
19 are themselves insufficient, and somehow yield,
20 at the end of the day, an extraordinary and
21 compelling reason. We don't think that that's
22 the appropriate way that this should be applied.

1 I would also note, though, that this
2 is not how it has actually been handled in
3 practice. When you look at the cases that have
4 relied on non-retroactive changes in the law --
5 and for these purposes, we are generally talking
6 about the first step as non-retroactive changes
7 to 924(c) sentencing and to recidivist drug
8 sentencing.

9 The courts that have relied on that,
10 typically, the analysis is very, very heavily
11 weighted toward a disagreement with the decision
12 not to make those changes retroactive. Almost
13 all of the reasons given for the grant of
14 compassionate release rely heavily on that, and
15 then often marry up post-sentencing
16 rehabilitation as the additional reason.

17 Occasionally, there will be other
18 reasons cited, but oftentimes those are
19 themselves related to the sentencing issue, the
20 non-retroactive sentencing issue. One example is
21 the relative youth of the offender, which has
22 resulted in him serving a longer sentence. Of

1 course, the youth of the offender is known at the
2 time of sentencing. It's already taken into
3 account in the sentencing judgment to the extent
4 it can be. And so, we think that the way that
5 courts are applying this demonstrates why this is
6 difficult.

7 One other thing that I would just note
8 before I conclude on that point is it in many
9 ways perpetuates the types of disparities and
10 creates new disparities that it is at least
11 stated the purpose is to resolve. It is very
12 difficult to understand how one defendant can go
13 into one court, and a judge can look at the fact
14 that a non-retroactive change in law exists and
15 shave decades, potentially, off the defendant's
16 sentence.

17 And another sentence, maybe -- or I'm sorry,
18 another defendant, maybe a co-defendant or a
19 similarly situated one, goes before a different
20 judge who says "I don't think that that is
21 extraordinary and compelling. It's pretty
22 ordinary to me," and no relief.

1 That in itself is a very troubling
2 disparity, one that the Sentencing Reform Act was
3 enacted to avoid. And I think, in deciding not
4 to make these changes retroactive, Congress made
5 a considered judgment that it did not want those
6 types of disparities to exist.

7 COMMISSIONER HORN BOOM: Good morning.

8 MR. PARKER: Good morning.

9 COMMISSIONER HORN BOOM: So, as far as
10 non-retroactive changes in the law, the
11 Department's position is clear that that would
12 not in and of itself qualify as extraordinary and
13 compelling reasons.

14 What is the Department's position on
15 whether non-retroactive changes in the law could
16 be considered under the 3553(a) factors? So,
17 sort of in the second step that courts must
18 undertake in determining whether or not a
19 sentence reduction under the statute is
20 appropriate?

21 MR. PARKER: Judge Boom, the answer is
22 we believe that it is appropriate to consider

1 them under the 3553(a) factors, and that reflects
2 the ordinary two-step analysis that you will see
3 in all of these cases.

4 You will have a threshold
5 determination of eligibility, which is meant to
6 be a very narrow category of offenders. But
7 then, once that has been determined, once it has
8 been determined that the prisoner is within that
9 category, the court is largely unfettered in the
10 kinds of information that it can consider in
11 determining whether release is warranted.

12 Let me give you just an example of how
13 this is likely to play out in practice. Let's
14 say you have a defendant with a terminal illness,
15 and he qualifies for compassionate release as a
16 result. The court -- it is entirely within the
17 court's power at the subsequent sentence
18 modification stage to say this defendant has a
19 terminal illness. It would be in the public
20 interest to allow him to receive end of life care
21 at home and not in the prison.

22 There has been a change in law. Other

1 defendants, if he were sentenced today, would be
2 out already and able to receive that care at
3 home, and it makes no sense to treat him
4 differently for that purpose, and so he is
5 entitled to this.

6 What we disagree with, as I've pointed
7 out in my answers to some of the other questions,
8 is the idea that that change in law itself can be
9 the extraordinary and compelling reason that
10 warrants release.

11 VICE CHAIR MATE: Good morning. I
12 want to switch gears a little bit from the new
13 law to the provision regarding victims of sexual
14 assault and physical abuse, and the Department's
15 suggestion to the Commission to require an
16 additional independent finding before a court can
17 grant compassionate release.

18 Can you give us some information on
19 how long it's taking the Bureau of Prisons to
20 conduct these investigations into these kind of
21 allegations? So if we're requiring an
22 independent finding such as that, about how long

1 are we looking at for that to --

2 MR. PARKER: Thank you Commissioner
3 Mate. I'm not, I don't have an answer for you
4 specifically. Obviously every case is different.
5 The Deputy Attorney General, as I think the
6 Commission is aware, convened a working group to
7 address these issues. Its report was issued in
8 November of 2022, and one of its recommendations
9 was to prioritize and speed up the process of
10 investigating and if necessary prosecuting these.

11 That is very recent, and so I don't
12 know that I have much that I can share
13 statistically with you. What I can say is that
14 although the Department is thoroughly committed
15 to providing timely justice in every one of
16 these cases, sometimes the investigations can
17 take time, because not every allegation that is
18 raised is entirely clear-cut.

19 And oftentimes, these sorts of --
20 these sorts of crimes occur in circumstances
21 where they may be difficult to -- it may be
22 difficult to determine exactly what has happened

1 to whom and by whom. The reason that we think it
2 is so important to have an independent
3 determination before the compassionate release
4 determination is made is because otherwise
5 compassionate release hearings become mini-trials
6 on that very question.

7 That can impede the government's
8 ability to conduct a thorough and appropriate
9 investigation. I think it's also important to
10 note that while there is a victim who has alleged
11 serious misconduct, there is also an accused, who
12 has a right to present a defense.

13 And moreover, we're not just worried
14 about improper grants of compassionate release
15 due to, you know, an insufficient factual record
16 when the compassionate release is sought; we're
17 also concerned about improper denials, because it
18 is quite likely that if a, you know, a
19 compassionate release motion is considered too
20 soon and there just isn't enough evidence, a
21 court may deny it and say I don't see enough
22 evidence that this actually happened.

1 Such a judicial finding could
2 significantly complicate the government's ability
3 to bring criminal charges. It could
4 significantly complicate BOP's ability to pursue
5 administrative remedies internally. And so for
6 all those reasons, we think it is critical that
7 there be some independent determination, not just
8 a criminal conviction. It can also be an
9 administrative finding of liability or a civil
10 finding of liability. But there has to be
11 something before the compassionate release
12 hearing.

13 COMMISSIONER HORN BOOM: So some
14 commentators have used the example in support of
15 Options 2 and 3, that give courts very broad
16 discretion in fashioning, you know, additional
17 grounds for extraordinary and compelling reasons
18 that in the current policy statement, as written,
19 the Bureau of Prisons has essentially unfettered
20 discretion in determining any other circumstance
21 that might warrant extraordinary and compelling
22 reasons for release.

1 What is the Department's response to
2 that, in that you know, your position is Options
3 2 and 3, you know, essentially provide too much
4 discretion and not enough guidelines for or
5 guardrails maybe I should say for courts. But
6 the current policy statement as written, you
7 know, essentially gives that unfettered
8 discretion really to the Bureau of Prisons. Now
9 I know they didn't exercise that discretion, but
10 what is your counter to that argument?

11 MR. PARKER: Well, so as explained in
12 our testimony, we support the adoption of the
13 Option 1 catch-all, which would place authority
14 in the courts to do so. The only, the only
15 caveat is that the court's discretion to identify
16 additional extraordinary and compelling reasons
17 is appropriately in our view linked to the other
18 enumerated reasons that we have already been
19 discussing, minus the change in law, which we
20 oppose.

21 VICE CHAIR MATE: Right. But the
22 Bureau of Prisons, the policy statement as

1 currently written does not have those guardrails.

2 MR. PARKER: That's right. I mean
3 historically, the Bureau of Prisons has
4 interpreted this provision narrowly to include
5 the sorts of things that are currently reflected
6 in the policy statement. So terminal illness,
7 advanced age, that sort of thing. So I mean I
8 don't see any likelihood that the Bureau of
9 Prisons would change its view to expansively
10 interpret extraordinary and compelling
11 circumstances.

12 I think that's why it has this kind of
13 BOP-focused catch-all has made sense to this
14 point. But now that, now that prisoners are able
15 to bring compassionate release motions on their
16 own, I think it makes sense to have a catch-all
17 that places some discretion in the hands of the
18 courts, because BOP may not be involved to
19 consider whether additional, extraordinary and
20 compelling circumstances are warranted, as long
21 as there are limits on that that are consistent
22 with the other enumerated circumstances.

1 VICE CHAIR MATE: I guess my question
2 is, you know, do you believe that the policy
3 statement as currently written really exceeds the
4 authority of the Commission? I understand that
5 the Bureau of Prisons does not exercise, you
6 know, really did not exercise the discretion that
7 -- I mean if you just read the words, right, it
8 looks like it's pretty unfettered discretion to
9 fashion other extraordinary and compelling
10 reasons.

11 And so, you know, do you believe that
12 that also has probably exceeded the Commission's
13 authority?

14 MR. PARKER: Well, I wouldn't say that
15 it exceeded the Commission's authority, only
16 because I don't think it possible to read that
17 portion of the existing policy statement in a
18 vacuum. I think it has to be read on connection
19 with the existing regulations and program
20 statements and other things that BOP has issued
21 governing this.

22 That reflects, I think, an appropriate

1 dialogue between the Department and the
2 Commission, and of course Congress for the first
3 step back, had made BOP the gatekeeper for these
4 sorts of motions. As a result, I don't -- I
5 would hesitate to say that it exceeds the
6 Commission's authority.

7 But that's only because there are
8 other sources of law and other limitations that
9 cabin what that means.

10 CHAIR REEVES: Returning to this issue
11 of instances where one has been accused of
12 misconduct, on the job correctional officer being
13 a basis for that, you indicated that, you know,
14 there's an administrative process that one might
15 go through through BOP. But how does that
16 process interface with -- suppose it's criminal
17 conduct that also is handled a referral to the
18 U.S. Attorney's Office, going before a grand
19 jury, doing all that, and the administrative
20 process that might or might not be occurring.

21 Does the administrative process shut
22 off or yield to whatever might be handled, what

1 might be occurring on the criminal side? And how
2 does that portend with any sort of delay or any
3 sort of, you know, just how long the process may
4 take?

5 And secondly, when you say that the
6 administration process should be through, is
7 that the process where that administrative
8 decision is finally concluded, or at the final
9 stage, because obviously I think the BOP has a
10 process where there may be a finding, and a
11 person can appeal that finding, and when does it
12 become final I guess?

13 MR. PARKER: So thank you Judge
14 Reeves. I am not sure that I can answer the
15 first part of your question definitively, simply
16 because I do not know as a practical matter what
17 prosecutors might do if there is a pending
18 administrative process. I would have to take
19 that back, but we could certainly get that
20 information for you.

21 CHAIR REEVES: I guess the question
22 is, what does BOP do when they --

1 MR. PARKER: Right.

2 CHAIR REEVES: When they learn that
3 there's a criminal investigation going on? Do
4 they stop the administrative process?

5 MR. PARKER: So I think that -- the
6 answer is I don't know, and I will find out for
7 you. I can tell you that federal prosecutors
8 take this very seriously, and they are aggressive
9 in pursuing these cases when it is warranted,
10 including by criminal charges.

11 In answer to your second question, I
12 think that it would be appropriate to await the
13 outcome of the appeal process. Again, I can't
14 tell you exactly how long that will take because
15 I imagine it changes by case to case. Certainly
16 I think a finding of no, that there has not been
17 abuse by an initial, in an initial administrative
18 hearing.

19 If the prisoner appeals that, we
20 should await to see that. If there is a finding
21 of abuse and I honestly don't know what the
22 appeal possibility might be administratively, but

1 I think that that would be a much, a much more
2 compelling circumstance in which we think
3 compassionate release may be authorized.

4 CHAIR REEVES: Thank you.

5 VICE CHAIR MURRAY: And how are these
6 administrative proceedings initiated? So
7 particularly in the case of prisoner on prisoner
8 violence. Is there kind of initiation as of
9 right? How does, who makes the decision whether
10 there will be --

11 MR. PARKER: I'm sorry. I may have
12 missed the second part.

13 VICE CHAIR MURRAY: How are these
14 investigations that would lead to an
15 administrative decision initiated? So
16 particularly in the case of punitive prisoner on
17 prisoner violence, as opposed to employee on
18 prisoner violence? Are they always initiated
19 when there is a complaint? Is there kind of an
20 initiation as of right or is it only sometimes?

21 MR. PARKER: I know that they can be
22 initiated by a complaint. I would have to -- I

1 will ask whether it is possible for them to be
2 initiated in other ways, and we can provide that
3 information to the Commission as well. I'm just
4 not sure if there may be other circumstances in
5 which they can be -- the administrative process
6 can be activated.

7 CHAIR REEVES: Mr. Parker, thank you
8 so much. You made this seem so easy for us, and
9 for everybody else who comes behind you I think.
10 Thank you so much for your testimony.

11 MR. PARKER: Thank you. It was a
12 pleasure being here.

13 CHAIR REEVES: All right.

14 (Pause.)

15 CHAIR REEVES: Ladies and gentlemen,
16 our second panel consists of three attorneys,
17 whose practices provide us with unique
18 perspectives on compassionate release. First, we
19 have Kelly Barrett, who is the first assistant
20 federal defender in the Connecticut Office of the
21 Federal Defender. She co-teaches a challenging
22 mass incarceration clinic and the Mental Health

1 Justice Clinic at Yale Law School.

2 Ms. Barrett also serves on the
3 Connecticut District Court's Support Court team,
4 which assists people under federal pre-trial and
5 post-conviction supervision who struggle with
6 substance abuse.

7 Next, we will have Natasha Sen, a
8 criminal defense attorney who represents
9 participants in federal drug court in Vermont.
10 She has previously served as a federal and state
11 public defender in that state. Ms. Sen chairs
12 the Commission's Practitioners Advisory Group and
13 is a member of the Second Circuit's Criminal
14 Justice Act Advisory Panel.

15 Finally, we have Joshua Matz, a
16 partner at Kaplan, Hecker and Fink LLP, whose
17 practice spans a multitude of areas, including
18 constitutional and civil rights law. His work
19 has addressed criminal justice reform, the
20 interpretation of the First Step Act and the
21 separation of powers.

22 Mr. Matz has written extensively on

1 constitutional issues with Harvard Law Professor
2 Lawrence Tribe. We will first hear from Ms.
3 Barrett and then from Ms. Sen, and finally from
4 Mr. Matz. Ms. Barrett, we're ready for you.

5 Panel II: Practitioners' Perspective

6 MS. BARRETT: Thank you. Thank you
7 for giving me the opportunity to testify on
8 behalf of federal, public and community
9 defenders. Section 3582(c)(1)(A) is not a
10 compassionate release statute. Everyone uses
11 that phrase "sometimes" as a convenient
12 shorthand, but like the Second Circuit said in
13 Brooker, the term "compassionate release" is a
14 misnomer.

15 Many states, including mine, have
16 actual compassionate release statutes. They are
17 about state prisoners with medical issues.
18 3582(c)(1)(A) is different. Although the BOP for
19 decades treated it like compassionate release, it
20 is about sentence reductions for extraordinary
21 and compelling reasons. A court can grant a
22 motion without releasing anyone; it can just

1 reduce the sentence, and nothing is off limits in
2 the extraordinary and compelling analysis other
3 than rehabilitation alone.

4 Congress did not even take
5 rehabilitation off the table, just rehabilitation
6 alone. Defenders appreciate that the proposed
7 policy statement does not categorically take
8 anything off the table either. It would allow
9 courts to consider the entire constellation of
10 circumstances impacting a sentence, not just a
11 proscribed subset.

12 You are the policymaking authority for
13 3582(c)(1)(A), and this is the right policy. I
14 know legal objections have been raised against a
15 proposed (b)(5) and (b)(6), and defenders will
16 address those in our comments. You will see that
17 we have no doubt that the Commission can
18 promulgate the policy statement that you've
19 proposed, and ultimately you will have to decide
20 what is the best policy.

21 As a defender who has represented
22 dozens of clients seeking reduction in sentence,

1 what I am focused on is how that policy would
2 play out for real people. Real people like
3 Vincent Clark, a man who received a reduction in
4 sentence, who graduated from our reentry court
5 just yesterday. Unfortunately, I could not be at
6 his graduation because I was traveling here, but
7 I am so happy for him.

8 He is thriving. In addition to
9 graduating from reentry court, he is working 50
10 hours a week, got his own apartment and is taking
11 care of his children. It is the best he's ever
12 done in his life. He was released in January
13 2021 about a year and a half early, and he told
14 me that it was getting the sentence reduction
15 that empowered him to thrive as never before.

16 It meant so much to him that the court
17 would look into his case and into who he had
18 become so long after sentencing. Vincent's case
19 is a great illustration of the holistic analysis
20 the judges in my district use, and the proposed
21 policy statement would allow. In Vincent's case,
22 there were multiple extraordinary and compelling

1 circumstances. High end COVID risk, the
2 harshness of his sentence as compared to co-
3 defendants, and the fact that his sentence was
4 based on what even the DOJ now agrees is an
5 unwarranted disparity between crack and powder
6 cocaine.

7 We cannot know whether the court would
8 have granted relief if Vincent had presented just
9 one or some of those circumstances. But the
10 court did not have to go through an artificial
11 process of separating them out. It considered
12 the entire constellation of circumstances,
13 factually and legal, and found that relief was
14 appropriate.

15 A high percentage of the people that
16 we have represented on reductions in sentence
17 have benefitted from our reentry, and they are
18 doing just astoundingly well. One example,
19 Nelson, served 24 years in prison. He
20 participated in a restorative justice-based
21 program at Otisville that was transformational.
22 Later, he developed serious health issues and

1 while at Brooklyn MDC was assaulted by a fellow
2 inmate.

3 Thankfully, our court granted his
4 reduction in sentence, and within weeks he was
5 getting life-saving cancer treatment at Yale New
6 Haven Hospital. There's not a doubt in my mind
7 that he would have died in prison if our court
8 did not release him. At his reentry court
9 graduation his judge came and spoke about how
10 glad he was that he made that decision.

11 Now in addition to graduating from
12 reentry court, Nelson is mentoring others, and he
13 was home to take care of his wife when she
14 suffered a debilitating brain aneurysm recently.

15 Another man we represented, Hector,
16 was sentenced to life in prison. He turned his
17 life around when he met Chaplain Pat Patterson,
18 who told him God will forgive your sins, but
19 nowhere in the good book does it say that you
20 will not be punished for them, and he was
21 punished. He served 30 years in prison.

22 At his reduction in sentence hearing,

1 Hector made an impassioned demonstration of
2 remorse, and the victim's family did not object
3 to his reduction in sentence. The court reduced
4 his sentence to 30 years, and when he graduated
5 reentry court she said that she was very glad
6 that she made the decision to release him, and
7 later at a reentry reunion embraced him with a
8 hug.

9 This is something worth emphasizing,
10 how judges have been grateful in the past few
11 years that they finally have the discretion to do
12 the things in cases that cried out for relief,
13 and in my experience our judges have gotten it
14 right.

15 The proposed policy statements
16 appropriately expand the enumerated categories
17 and also grant courts discretion to recognize
18 idiosyncratic circumstances. Thank you.

19 CHAIR REEVES: Thank you, Ms. Barrett.
20 Ms. Sen.

21 MS. SEN: Good morning. My name is
22 Natasha Sen, and on behalf of Practitioners

1 Advisory Group I thank you for the opportunity to
2 provide testimony on this proposed amendment.

3 The PAG is a group of private practitioners who
4 represent individuals and organizations who are
5 charged under the federal criminal laws, and we
6 strive to provide our perspective on these
7 proposed amendments, all of them. But today, of
8 course, I will focused on our compassionate
9 release proposals.

10 We certainly appreciate the
11 Commission's willingness to consider our
12 positions as it purposes to amend this particular
13 guideline. My testimony this morning will
14 highlight the PAG position, and the PAG will
15 follow this with more detailed, extensive written
16 comments in its March submission.

17 The PAG supports the Commission's
18 proposed revisions to U.S. Sentencing Guideline
19 1(b)(1).13. Specifically, the PAG endorses the
20 proposal permitting individual defendants to file
21 motions for sentence reductions directly with the
22 district courts. This is consistent with the

1 First Step Act, and it reflects Congress'
2 intention to broaden the ability of individual
3 defendants to seek relief.

4 The PAG also supports the Commission's
5 proposal to move the list of extraordinary and
6 compelling reasons from the commentary into the
7 text of the guideline itself, and to expand upon
8 the criteria that courts may consider to be
9 extraordinary and compelling. The PAG favors the
10 inclusion of health risks to a defendant as a
11 basis for granting relief.

12 We've recently witnessed in the course
13 of the pandemic how quickly devastating
14 consequences can occur to individuals,
15 particularly those who are housed in congregant
16 settings like jails and prisons.

17 This guidance will allow courts in the
18 future to quickly evaluate and consider risks to
19 a defendant's health that are currently
20 unknowable and unpredictable, and which were not
21 contemplated at the time of the original
22 sentence. PAG members have multitudes of stories

1 about their clients who were granted motions for
2 compassionate release.

3 I will highlight only two of them from
4 my colleague Susan Walsh, who practices in the
5 Southern District of New York. She had
6 represented a client who had been sentenced to
7 120 months, and was subject to deportation. Her
8 client was suffering from a degenerative kidney
9 disorder and the court found, when he filed his
10 compassionate release motion, that his condition
11 was actually deteriorating because he was not
12 obtaining treatment in the BOP.

13 Combined with the deteriorating kidney
14 disorder, it also made him at much higher risk of
15 severe consequences should he contract COVID-19.
16 In that case, he served 49 months of a sentence
17 and the court reduced that sentence to time
18 served and allowed him to be released.

19 Similarly, Ms. Walsh represented a
20 defendant who had served 51 months of an 84 month
21 sentence. This client suffered chronic asthma
22 and chronic obstructive pulmonary disease. His

1 sentence too was reduced to time served, because
2 again the court was able to find that based on
3 the specific risks on that defendant's health, it
4 imposed a severe risk of higher consequences
5 should he contract COVID-19 in prison.

6 In fact in that case, the court found
7 that there were cases of COVID-19 that were
8 spreading in the prison.

9 The PAG also endorses the Commission's
10 proposal to add two new categories to the list of
11 circumstances that may constitute extraordinary
12 and compelling relief. Defendants who are
13 sexually assaulted or physically abused by BOP
14 officers or employees and changes in the law that
15 make a defendant's sentence inequitable. If the
16 Commission adopts the category for victims of
17 sexual assault or physical abuse, the PAG also
18 recommends that the Commission consider expanding
19 it in two ways.

20 First, the PAG suggests that the
21 guideline include serious psychological injury as
22 a basis for relief. In our experience, our

1 clients who are sexual assault survivors can
2 experience profound psychological injury that can
3 be longer-lasting and more harmful than the
4 physical trauma that this amendment clearly
5 contemplates.

6 Second, the PAG recommends that the
7 Commission not limit relief to assaults committed
8 by BOP personnel, but include sexual and physical
9 assaults committed by other inmates. While the
10 perpetrators of these assaults may be different,
11 the impact on an institutionalized individual can
12 be no less traumatizing or deserving of relief.

13 Given that the BOP is entrusted with
14 the care of our clients, the PAG sees no
15 principle distinction to limit relief based on
16 the identity of the perpetrator. The PAG too
17 believes that changes in the law including -- I
18 apologize. Thank you very much for the
19 opportunity to speak to the Commission.

20 CHAIR REEVES: I'm sure you'll follow
21 up with -- you'll deal with that when we get your
22 questions (sic). Mr. Matz. I apologize for

1 that, Ms. Sen.

2 MR. MATZ: I'm sorry to cut in. Thank
3 you so much for inviting me to testify and for
4 the opportunity to submit a comment with my
5 colleagues at Kaplan, Hecker and Fink.

6 My focus is comparatively narrow and
7 speaks directly to the question that Judge Boom
8 highlighted earlier, and the sole question that I
9 addressed in my comment and that I would propose
10 to address today is whether proposed section
11 1(b)(1)(13)(b)(6) exceeds the Commission's legal
12 authority under 28 U.S.C. 994(t).

13 As demonstrated in my comment, which
14 provides a more comprehensive, textualist and
15 structural analysis, all three proposed versions
16 of (b)(6) comply with that statutory requirement.
17 This conclusion rests on two premises: an
18 interpretation of Section 994(t) and an
19 interpretation of the three proposed versions of
20 (b)(6), and I'll address those each in turn.

21 Starting with the statute, Section
22 994(t) directs the Commission to "describe what

1 shall be considered extraordinary and compelling
2 reasons for a sentence reduction," sorry,
3 "including the criteria to be applied and a list
4 of specific examples." This raises a question.
5 How precisely must the Commission describe the
6 criteria to be applied in that list of specific
7 examples?

8 In my mind that's really a question of
9 degree. On one extreme, the Commission might
10 simply say to courts you figure out what
11 extraordinary and compelling reasons are, and it
12 may believe that it has satisfied its statutory
13 obligation by delegating to the courts the
14 obligation to figure that out.

15 On the opposite extreme, a much more
16 restrictive view of the statute, the Commission
17 may conclude that in order to satisfy its
18 statutory obligation it must essentially strip
19 courts of any discretion by offering highly
20 explicit criteria and examples, along with a
21 finely articulated framework meant to govern
22 every case that may arise.

1 In my view, not to sound like
2 Goldilocks, a more moderate reading of the
3 statute is most sound as a matter of textualist
4 interpretation, as confirmed by attention to
5 structure, history, judicial precedent and prior
6 Commission practice.

7 For the reasons given in our comment,
8 the Commission must provide meaningful criteria
9 and specific examples, but it can properly leave
10 a measure of reasoned judgment and discretion to
11 courts in identifying case by case where
12 extraordinary and compelling reasons exist.

13 The Commission's general policy
14 statement must therefore offer meaningful
15 guidance about the characteristic or significant
16 qualities of what ought to satisfy the standard,
17 but it need not attempt a comprehensive or
18 preclusive reckoning.

19 As set forth in more detail in my
20 statement, the conclusion follows most directly
21 from the plain language of the statute, which
22 notably includes an obligation to "describe" what

1 "should qualify," to do so while "including
2 criteria" and to address reasons that are
3 "extraordinary and compelling," a term that by
4 its sort of definition defies ordinary
5 expectation.

6 Every one of those words connotes
7 breadth rather than narrowness, and so while the
8 Commission must provide something in its
9 description, it need not provide a comprehensive
10 understanding, and a thorough survey of judicial
11 precedent reveals powerful support and no
12 contrary authority for this interpretation, which
13 squares with both consistent Commission practices
14 since 2007, as well as the structure, purpose and
15 history of the operative statutory provision.

16 The key question then is whether each
17 of the proposed versions of (b)(6) satisfies that
18 standard. In my view they do, and I would focus
19 on Options 1 and 3, because that's what everyone
20 else appears to have focused on in their
21 comments, although we address Option 2 in our
22 comments as well.

1 Option 1 refers to circumstances or
2 combinations thereof "similar in nature and
3 gravity to the other enumerated provisions." By
4 its terms, the option provides meaningful
5 guidance to courts, one of whose core functions,
6 particularly in the sentencing context, is
7 reasoning by analogy and comparison to other
8 specific legal and factual settings.

9 This is the basis on which I believe
10 the Justice Department advocated that position
11 earlier today. Option 3 does not include any
12 such express reference. It instead refers to
13 other extraordinary and compelling reasons than
14 the ones the Commission has elsewhere enumerated.
15 Despite this breadth, however, any reasonable
16 interpreter, especially one guided as I was by
17 Justice Scalia's authoritative Handbook of Legal
18 Interpretation, would understand that this
19 provision covers only reasons of equal gravity to
20 the other sections of section 1(b)(1)(13)(b).

21 This follows from the whole text
22 canon, which makes clear that the proposed

1 (b)(6)(3) would be read and disciplined by
2 reference to the rest of the structure of the
3 statutory section, of the guideline rather, and
4 it also follows from the adduced and generous
5 principle, which makes clear that when there is a
6 list of enumerated things and then a broader
7 catch-all at the end, the catch-all by necessity
8 refers to things of a similar kind as those that
9 came before it.

10 I would conclude with just one
11 thought. I realize that I'm about to hit time,
12 which is that in my view many of the arguments
13 that have been advanced for why Option 1 provides
14 more specificity than Option 3 are in fact
15 mistaken.

16 I think the reference in Option 3 to
17 offenses of a similar nature as those that are
18 otherwise enumerated may cause some confusion,
19 and that Option 3 may in fact be preferable and
20 more clear in operation than Option 1 is, and I'm
21 happy to address that if the Commission has any
22 questions about it.

1 CHAIR REEVES: Thank you Mr. Matz, and
2 I turn it over to my colleagues.

3 VICE CHAIR RESTREPO: Ms. Barrett, in
4 your papers you refer to the medical care issue
5 and suggest that we change the language, so to
6 speak, and instead of "adequate" you suggest that
7 the language would be "timely or effective."
8 From a boots on the ground perspective, how would
9 that work? Who's going to determine whether it's
10 timely and effective?

11 MS. BARRETT: That would be determined
12 by the district court judge. This is something
13 that our courts have done routinely in
14 Connecticut. One example was the recent case of
15 my client, Delaina Cruz (phonetic), who was
16 suffering from MS.

17 She had been receiving care while in
18 the State Department of Correction, but when she
19 started her sentence in the BOP, she was seeing
20 medical. It's not that she wasn't being seen,
21 but they weren't doing anything to effectively
22 treat the MS.

1 She called me regularly just crying in
2 pain. They were assigning her to top bunks, even
3 though she was supposed to be assigned to bottom
4 bunks. She wasn't receiving adequate medical
5 infusions to treat the MS. So that was an
6 example where one could have seen it as providing
7 adequate treatment, in a sense that a medical was
8 seeing her. But it wasn't effective to treat the
9 MS, and our judge and in fact even the prosecutor
10 in that case didn't object.

11 We've had other instances where
12 clients were suffering from dental problems,
13 dental, severe gum infections. They were being
14 seen by medical. Thankfully our judge released,
15 in the case of Tylon Vaughn, released him and
16 shortly after being released it was determined
17 that the infectious matter was seeping into his
18 heart, and he just barely received treatment in
19 time.

20 So I think our judges have been making
21 these decisions for years, and are handling it
22 very well based on the records we've submitted

1 and the pleadings of both parties.

2 VICE CHAIR RESTREPO: Thank you.

3 CHAIR REEVES: Commissioner
4 Wroblewski.

5 COMMISSIONER WROBLEWSKI: Thank you
6 Mr. Chairman, and thank you all for your
7 testimony today. Mr. Matz, I just want to ask
8 you one question. First of all, thank you for
9 submitting your testimony. I found it very, very
10 helpful. I read your testimony as saying that
11 Options 2 and 3 on the surface don't appear to
12 provide the necessary guidance, but that you feel
13 they're okay, 2 and 3, because you read into them
14 interpretive canons that the enumerated list
15 limits the catch-all.

16 If I'm right on that, why at this
17 stage where we haven't actually promulgated
18 anything, why don't we actually say that in
19 Option 3, rather than leave that to judges to
20 interpret based on knowledge of Justice Scalia's
21 book and these interpretive canons. Why not just
22 say it?

1 MR. MATZ: It's a great book. I do
2 recommend it. Look, I think the Commission might
3 well conclude that that is more prudent path. My
4 sort of focus on my comment is whether the
5 proposed options satisfy the applicable statutory
6 requirement. I believe that they do, for the
7 reasons given in my comment.

8 As to the question of whether the
9 Commission may nonetheless conclude that it's
10 worth clarifying a little bit more, that would be
11 perfectly reasonable. But I would note one
12 important point, and this is a part of the
13 Justice Department's testimony that I struggled
14 with in listening to it earlier, right.

15 Option 1 refers to circumstances that
16 are similar and sort of nature and consequence to
17 the other enumerated circumstance. But in
18 practice, and this is what I would find confusing
19 about it, right, the other enumerated categories,
20 the ones that you would expect to see are going
21 to see, are going to be medical circumstances,
22 age of the defendant, family circumstances of the

1 defendant.

2 It would seem to me awfully peculiar
3 to say that you can only also count other
4 circumstances similar in nature to those if --
5 but if by that what you mean is that their nature
6 also relates to medical or family circumstances
7 or age-related reasons. It would be really weird
8 for the Commission to say with respect to these
9 kinds of issues, here is really what we're
10 talking about, and to be fairly precise about it,
11 and then for the catch-all to potentially be
12 limited to only versions of the same thing, if
13 you see what I mean.

14 And so that the concern I would have
15 is that the reference in proposed Option 1 to
16 offenses, to circumstances of the same nature is
17 that in some respect what you want to capture is
18 circumstances of a different nature that are
19 equally extraordinary and compelling, right.

20 Circumstances of a medical nature are
21 addressed by the policy statement. Circumstances
22 about the family circumstances of that nature are

1 addressed. So you want to capture circumstances
2 of a different nature but similar gravity. In my
3 respect, in my view that's why Option 1 may
4 actually end up being a bit confusing, if the
5 Justice Department's view is accepted.

6 The representative from the Justice
7 Department seems to suggest that Option 1 would
8 only capture things of the same nature as the
9 other categories. That could be actually very
10 confusing in practice. So it would make more
11 sense in my view to adhere to something like
12 Option C, but potentially to say other
13 extraordinary and compelling reasons of equal
14 gravity or equal significance as the other
15 options.

16 But there is just inherently some
17 element of judicial discretion there. In my
18 mind, the question is whether that judicial
19 discretion is adequately structured and guided by
20 reference and analogy to the other more
21 specifically enumerated categories, and as a
22 matter of the Commission's statutory authority.

1 I believe the proposed version is, but that it
2 may well be reasonable to seek to add a bit more
3 clarification.

4 COMMISSIONER WROBLEWSKI: Can I just
5 ask one quick follow-up, and I believe the word
6 that the Commission has used in its proposed
7 amendment is similar, and the language that you
8 quote from Justice Scalia's book is where general
9 words follow an enumeration of two or more
10 things. They apply only to things, and this is
11 the operative word, "of the same general kind or
12 class specifically mentioned."

13 I understand the words are different,
14 similar, same kind or class, but we're getting at
15 the same thing. Am I correct?

16 MR. MATZ: That may be right. I mean
17 with respect to Option 1, that's where you're
18 referring to the use of the word "similar," which
19 does not appear in Option 3. It says "similar in
20 nature and consequence." That may capture the
21 same idea. I think it will likely result in
22 litigation and confusion around how similar it

1 has to be.

2 Does it have to be of the same kind?
3 What is similar to a medical issue or what is
4 similar to an age-related issue frankly is
5 something that as a practicing lawyer I would
6 find somewhat perplexing to litigate. I look at
7 the examples that the federal defenders gave in
8 their submission at pages 11 to 14, where they
9 describe a wide range of circumstances in which
10 courts have found extraordinary and compelling
11 reasons since 2018.

12 It's not obvious to me that many of
13 those decisions which struck me as correct would
14 be similar in nature to a family-related
15 circumstance. If what the Commission really
16 wants to capture is sort of similar and
17 extraordinariness and compellingness, in some
18 ways similar in gravity, similar in sort of the -
19 - how unusual and momentous and important they
20 are, I think there are better words for that than
21 those given in Option 1, which I frankly think
22 will cause confusion in practice, and that I

1 think Option 3 is closer to it.

2 But if the Commission were inclined to
3 add a few words there to convey the point more
4 precisely, I defer to the policy experts. But as
5 a matter of legal authorization that would make
6 perfect sense in my mind.

7 VICE CHAIR MURRAY: Can I ask another
8 follow-up? And thank you for your submission. I
9 also found that very helpful.

10 But I understand your reading in
11 Section 3 in terms of ejusdem generis, but
12 obviously some other very thoughtful witnesses
13 have read the provision differently, including
14 you know, the Criminal Law Committee, which is a
15 group of judges read it, as I think their words
16 were just repeating the statutory text without
17 adding anything.

18 Am I right that if Section 3 meant
19 that, if it meant repeating the statutory text
20 and delegating to judges, you would think it was
21 not legal?

22 MR. MATZ: I would think it was not

1 legal. The answer -- so that I hope you don't
2 mind me -- so in 2006, the Commission did a
3 version of that. The original 2006 policy
4 statement was just a restatement of extraordinary
5 and compelling circumstances in a vacuum, and
6 everyone at the time, as I understand it,
7 believed that was not kosher, and that it was bad
8 policy and that it probably wasn't consistent
9 with the authorization.

10 So if the whole policy statement was
11 just that, then I do not believe that would
12 comply with the statutory obligation.

13 VICE CHAIR MURRAY: Well, let me make
14 a statement. So you have the -- say you have the
15 policy statement as proposed but with catch-all
16 3, and say we made it very explicit that catch-
17 all 3 should be interpreted the way many of the
18 other witnesses have interpreted it, we said, you
19 know, no inferences should be drawn from any of
20 the rest of the list. This is just a delegation
21 to the courts to determine what extraordinary and
22 compelling is. And you would think that that did

1 not satisfy our obligations under 994(t)?

2 MR. MATZ: Probably. It would
3 certainly be a much harder question. But I don't
4 think that's how many -- I mean with respect to
5 other folks who may have read it that way, I
6 don't think that's a reasonable way to interpret
7 it. First of all, it could potentially raise
8 superfluity concerns, because there would be a
9 question about what work the other enumerated
10 provisions are doing.

11 If you then have a catch-all that says
12 "but not regarding those, you can do anything you
13 want." So I don't think that would be a natural
14 reading of (b)(6), even if just read in the way
15 that you're describing. But I do think that any
16 sort of ordinary interpreter would look at it by
17 reference to the earlier provisions.

18 That's what the Justice Department I
19 took to be referring to earlier, in saying that
20 it believes Option 1 -- it did not object to the
21 statutory basis for any of the options, and it
22 thought Option 1 would sort of have that

1 reference to the other things as well.

2 I'd also point out that in practice,
3 right, in looking at how courts have interpreted
4 extraordinary and compelling in recent years,
5 it's hardly been a free for all. And so I think
6 there have been some understanding that the sort
7 of the language on the page has a meaningful
8 disciplining effect.

9 VICE CHAIR MURRAY: And then my other
10 question is, I apologize for asking a second --

11 CHAIR REEVES: No, no, go ahead.

12 VICE CHAIR MURRAY: But is it your
13 sense that given your reading of Option 3, if we
14 were to amend Option 3 to say those reasons
15 should be, using your words, similar in gravity
16 and kind to the enumerated reasons, that it would
17 not change the meaning of the provision?

18 MR. MATZ: I don't think it would
19 change it. I think it would maybe make a bit
20 more explicit what I believe any interpreter
21 would sort of otherwise arrive at, which is that
22 this appears as part of a whole provision. You

1 look at it as part of the statutory plan within
2 the provision. You don't just think, you know,
3 you don't just sort of read it in a vacuum.

4 And so those words of a similar kind
5 versus of a similar gravity, I'm sure that other
6 folks that are in the trenches much more would
7 have strong views about what the implications of
8 specific word choice would be. But I think
9 something of that nature could be perfectly
10 reasonable to clarify just a little bit what I
11 think would otherwise be readily apparent, which
12 is this isn't meant to capture things of a
13 different kind, or of much less gravity than what
14 is otherwise captured by the enumerated
15 provisions.

16 VICE CHAIR MURRAY: That's all.

17 COMMISSIONER WONG: Ms. Barrett, in
18 your written testimony, you had raised an
19 interesting concern about Option 2. You said
20 that the phrase "changes in defendant's
21 circumstances and intervening events" did not
22 have established meaning, and so they presented

1 litigation, uncharted litigation territory.

2 I'm curious if you think the same
3 might be said or the same pitfalls might be said
4 as to changes in law, and that phrase.

5 MS. BARRETT: In terms of the proposal
6 for (b)(5)?

7 COMMISSIONER WONG: Whether there is
8 an established meaning yes, to whether change in
9 law constitutes. For instance, is it only
10 statutory changes, or do you think there could be
11 litigation over whether that extends to a Supreme
12 Court decision or a Court of Appeals decision or
13 a specific district judge decision? Would it
14 need to be in circuit? Would it need to be out
15 of circuit?

16 Have you seen any kind -- do you
17 believe that changes in law provides an
18 established meaning?

19 MS. BARRETT: We think it does provide
20 an established meaning. We don't think it needs
21 to be further clarified. Our judges have been
22 considering a number of factors using their

1 discretion, and I think that that's keeping the
2 modification, sentence modification within the
3 judiciary, consistent with the way sentencing is
4 done.

5 It's something that judges are used to
6 doing in the process of individualized sentencing
7 determinations and individualized modification
8 decisions. And so I don't think that it will
9 present confusion.

10 COMMISSIONER WONG: And does that
11 establish meaning then, that judges have been
12 applying? Does that extend to case law and not
13 just statutory changes, and if so at what level?

14 MS. BARRETT: I think that it can.
15 It's not -- with the changes in law, it's not
16 that every change in law is going to require
17 automatic relief. That's the essence of it
18 needing to be extraordinary and compelling, and
19 that's the essence of why it needs to be an
20 individualized determination in each case by the
21 specific judge.

22 Who is in the best position to

1 determine that, since that is the judge that
2 presided at sentencing, knows the history and
3 circumstances of the case, the nature and
4 circumstances of the offense and so forth. And
5 so every change in law will not be extraordinary
6 and compelling. Every change in law for each
7 person will not render the same degree of
8 extraordinariness or compellingness.

9 And so in that sense, it's an
10 individual determination based on the
11 circumstances in front of the judge.

12 COMMISSIONER WONG: Do you think there
13 is an established understanding that changes in
14 law extend to case law, changes in case law? I
15 understand as applied to the facts, every judge
16 has to exercise their discretion, make an
17 individualized determination as to whether that
18 constitutes sufficient extraordinary and
19 compelling reasons.

20 But is there an established meaning or
21 understanding as to whether changes in law extend
22 to case law, changes in case law?

1 MS. BARRETT: I think it is. I don't
2 see an issue with that. It hasn't not been an
3 issue for our judges. I certainly think that's
4 something we can address more in our written
5 comment.

6 VICE CHAIR MATE: Ms. Barrett, I have
7 a question going back to the medical issues for
8 just a second, and the Department's proposal to
9 add a requirement of an independent finding in a
10 separate proceeding before a court can grant
11 relief.

12 This is for you too Ms. Sen, in terms
13 of the practical effects of that. Do you have
14 any thoughts on the practical effects and access
15 to relief without additional requirement?

16 MS. BARRETT: Yes, we would disagree
17 with that. One of the driving forces behind the
18 First Step Act was to take the administrative
19 delay out of the hands of the Bureau of Prisons,
20 which was extremely slow to act for many, many
21 years. Our judges have had no problem analyzing
22 medical issues.

1 We've had no problem -- we have a very
2 orderly process in Connecticut. I've never
3 experienced a situation described by the
4 Department of Justice where a judge will rule
5 without giving the other side an opportunity to
6 respond.

7 We have hearings. We provide records.
8 Everyone has an opportunity to be heard including
9 victims. So there doesn't need to be a separate
10 administrative proceeding. The whole purpose of
11 the First Step Act is to avoid that, and I don't
12 think that would be Congress' intent, and I think
13 it would be significantly problematic given the
14 administrative delays.

15 With regard to the administrative
16 process that is required, which is that we
17 contact the warden and allow the Bureau of
18 Prisons to respond or wait 30 days, I would just
19 note even with regard to that baseline
20 administrative hurdle, I almost never receive a
21 response from the warden, and it's usually the
22 case that 30 days passes and then we're able to

1 proceed. So I don't think that that would be
2 helpful.

3 MS. SEN: I would take the same
4 position. In our experience, district court
5 judges are very well versed and skilled in how to
6 handle this kind of evidence. And so they can
7 make determinations. They have been making these
8 kinds of determinations in all kinds of cases
9 every day across this country.

10 In every federal court, a sentencing
11 judge is considering exactly these kinds of
12 records to determine what happened, whether or
13 not, what the extent of the injury was.

14 So we feel very strongly that there
15 does not need to be some kind of separate finding
16 through either a criminal case, which could take
17 forever, depending on the district, an
18 administrative hearing, and one of the concerns
19 with the administrative hearing is that here,
20 given the context of the proposal, this would be
21 a proceeding by the BOP regarding one of its own
22 employees.

1 I don't see, given I think the PAG's
2 position would be, given the history of how BOP
3 has considered these kinds of issues, we would be
4 very reluctant to place in the hands of an
5 administrative proceeding and the BOP, you know,
6 to wait for that finding. As the Department of
7 Justice explained just before, that proceeding
8 would require potentially the completion of
9 appeals.

10 That too could take forever, and I
11 think what's the important point here is that the
12 whole purpose, as we read it, of this statute and
13 of this guideline is to allow courts to act
14 quickly. The reason that we're seeking
15 extraordinary and compelling relief is because
16 there is an extraordinary and compelling reason
17 why a client is at risk in remaining
18 incarcerated.

19 And so to bog that down through a
20 separate proceeding would really defeat somewhat
21 the purpose of allowing these proceedings to move
22 forward.

1 COMMISSIONER HORN BOOM: I have a
2 question. First, thanks to each of you for your
3 excellent and thoughtful written submissions, and
4 my question can be addressed to any one of you.
5 What about the argument for those who are
6 advocating for a more narrow list of amendments
7 to this particular guideline provision, what
8 about the argument that Congress in revising the
9 statute under the First Step Act, only made
10 procedural changes.

11 That is the, you know, the statute was
12 rocking along, that not much was happening
13 because the Bureau of Prisons was not exercising
14 its authority to file such motions. And so the
15 only thing, the only change that Congress made
16 was a procedural change, and so what justifies
17 the wholesale revision of the substance
18 essentially of the guidelines in response to that
19 procedural change?

20 And again, my question can be answered
21 to -- directed to any one of you.

22 MR. MATZ: I'm happy to take a very

1 short initial stab at it, which is -- which is
2 the Commission always has the authority to review
3 and revise any guideline that it sort of
4 considers in need of such attendance,
5 particularly when there are circuit splits that
6 now exist as to some of these issues that didn't
7 previously exist, and that the Commission is
8 potentially in a position to revise, to address
9 and resolve.

10 The Supreme Court has denied many cert
11 petitions presenting some of these issues
12 precisely based on its apparent expectation that
13 the Commission will do that job. You know and
14 beyond that, I'd sort of maybe note the obvious
15 point, that the substance may be in need of some
16 revision when in the prior world, the substance
17 was almost non-existent because the Agency
18 charged with actually operationalizing it
19 essentially didn't do its job.

20 And so in a world in which there are
21 now defendant-filed motions that are going to be
22 going to courts, where there's hardly any

1 meaningful body of practice or precedent from the
2 Bureau of Prisons as an entity that previously
3 could have sought to define what extraordinary
4 and compelling reasons are, it would probably be
5 of great value to everybody involved for there to
6 be a revisitation of this, both in light of
7 lessons learned from the last several years and
8 in light of the failure of the Bureau of Prisons
9 to bring the provision to life in a way that
10 would offer the kind of guidance, that I would
11 assume everyone involved in the system might now
12 find beneficial.

13 COMMISSIONER HORN BOOM: All right.

14 CHAIR REEVES: Anyone else wish to
15 weigh in?

16 MS. BARRETT: Yes, thank you. I agree
17 with Attorney Metz. I think in addition to the
18 fact that the Bureau of Prisons failed to act for
19 so many years, the fact that the Congress passed
20 the First Step Act indicates that there was an
21 intention by Congress to increase the use of
22 reduction in sentence.

1 And in addition, over the years there
2 have been gaps in time in which the Commission
3 had not promulgated specific a policy statement.
4 So in that sense, this is an evolving process,
5 and the way that the Commission, the guidance
6 interacts with what's actually happening on the
7 ground and in courts I think is important.

8 Given Congress' intent to expand the
9 use of reduction in sentence through the passage
10 of the First Step Act, I think it's appropriate
11 to reconsider the evolution of the Commission's
12 policy and why this policy is so important. So I
13 think in a sense, I mean there's always been a
14 catch-all since the Commission has promulgated
15 policy.

16 So the broad statement was always
17 there, but I think the Commission's policymaking
18 power is meant to interact with the way the law
19 and changes in the law are evolving.

20 MS. SEN: I would also agree with
21 those two positions, and just state that the
22 purpose of the First Step Act was to broaden the

1 availability of this relief to individual
2 defendants. I think that by just reading it as a
3 procedural issue doesn't do justice to what
4 Congress' purpose was in passing it, and I think
5 that's fairly clear in the legislative history.

6 VICE CHAIR MATE: The criminal --

7 CHAIR REEVES: Vice Chair Mate and
8 then Commissioner Wong.

9 VICE CHAIR MATE: I have one question.
10 There have been some comments and concerns raised
11 about changes in the law and the broader catch-
12 all provision generating unwarranted disparity in
13 the system. I know Ms. Barrett, I remember you
14 mentioning Mr. Vincent and the relief in that
15 case addressing unwarranted disparity between
16 crack versus powder cocaine.

17 So I guess I'm curious whether kind of
18 -- you think these new laws and a broad catch-all
19 generates unwarranted disparity, or provides some
20 relief from unwarranted disparity? And I
21 mentioned Mr. Vincent particularly, but either
22 one or the other.

1 MS. BARRETT: Sure. I can take a stab
2 at addressing that. I think the disparities
3 issues that's been raised is a bit of a red
4 herring. I think that I would have five
5 responses to that. 3582(c)(1)(A) actually
6 remedies disparities. It's not, it's not a
7 problem; it's a solution.

8 Secondly, we have to remember that the
9 statute also requires judges to consider the 3553
10 factors, and one of those factors is preventing
11 unwarranted sentence disparities. So that's an
12 additional guardrail built into the statute.

13 Thirdly, if we're talking about only
14 cases where extraordinary and compelling
15 circumstances are met, so by definition we're
16 talking about an extraordinary circumstance. And
17 so by definition, if there's a disparity it's
18 likely to be warranted, rather than unwarranted.

19 Fourth, we should not be aiming for
20 uniformity. Sentencing is not a uniform process,
21 modification is not a uniform process. It's a
22 highly individualized process. In my experience,

1 unwarranted uniformity is more of a problem than
2 warranted disparity. I think what was
3 particularly inspiring to me was Chief Judge
4 Katzman's words in the Second Circuit decision in
5 Davis, in which he wrote that he doubts that in
6 an effort to avoid unwarranted disparities, that
7 it would be consistent with the First Step Act to
8 "level down," that is to withhold opportunity for
9 the greater whole.

10 In other words, just because some
11 courts have denied opportunities, that's not a
12 reason for deny for all people. Instead, we
13 should be looking to level up and create
14 opportunity for the greater whole. So I don't
15 see it as a problem. I see it as the solution to
16 a problem.

17 MR. MATZ: And maybe just one very
18 quick point on that, which is you know, appellate
19 review is meant to serve an important function
20 there, and there would be appellate review of how
21 district courts are doing this, and the
22 Commission is not a potted plant. I mean the

1 entire structure of how the Commission, as I
2 understand it, is meant to operate is in part in
3 dialogue with sentencing courts.

4 So the Commission would remain in a
5 position to observe trends in sentencing at the
6 district court and appellate level, and to
7 approve or disapprove trends that in the
8 Commission's view improperly exacerbate disparity
9 or reflect confusion over the appropriate
10 application of its standards.

11 CHAIR REEVES: Thank you. That wraps
12 up this second panel. We've all done real well,
13 I think, in sticking with our time constraints.
14 I know that there will be supplemental
15 submissions and we welcome that. So thank you
16 again to this panel. We're now going to take
17 about a 15 minute break, and we'll resume
18 testimony in about that time, about, in about 15
19 minutes. So please walk around, make yourself
20 comfortable and we will be in recess.

21 (Whereupon at 10:33 a.m., the above-
22 entitled matter went off the record and resumed

1 at 10:53 a.m.)

2 CHAIR REEVES: Thank you all so much.
3 That was a real great couple of panels, and an
4 introduction of who we are. We're about to start
5 our next panel, and I'll just remind the
6 Commissioners through this break, I understand
7 that the people standing on the wall, I want to
8 make it look like this place is packed.

9 The people standing along the wall are
10 having a little difficulty hearing us. So
11 please, make sure you're broadcasting through the
12 microphone and just keep your voice up. We do
13 want to talk to these people before us, but we
14 want to make sure that they in the back hear us.
15 So as we get ready for our third panel, our third
16 group, these people will provide us with
17 perspectives from law enforcement professionals.

18 Our first panelist is Steve Wasserman,
19 who serves as the president of the National
20 Association of Assistant United States Attorneys.
21 The Association represents more than 6,000
22 federal prosecutors and civil attorneys across

1 the country. I emphasize "civil" because people
2 -- I was a civil AUSA, and people tend to
3 overlook that there's a civil division in the
4 U.S. Attorney's Office.

5 Mr. Wasserman also serves as an
6 Assistant United States Attorney in the District
7 of Columbia, where he has spent the last 13 years
8 prosecuting violent and drug-related crimes.

9 Our second panelist is Brenda Goss
10 Andrews, who serves as the national president of
11 NOBLE, the National Organization of Black Law
12 Enforcement Executives. NOBLE represents over
13 3,000 members, including chief executive officers
14 and command level law enforcement officials from
15 federal, state, county, municipal law enforcement
16 agencies. Ms. Andrews has previously served as
17 chair of the NOBLE National Civil Rights
18 Committee, and as a deputy chief in the Detroit
19 Police Department.

20 Our third panelist is Chief Kathy
21 Lester, who is here representing the Major Cities
22 Chiefs Association. The Association is composed

1 of nearly 80 leaders of law enforcement agencies
2 from the largest cities in the United States and
3 Canada. Chief Lester currently leads the
4 Sacramento Police Department, which she has
5 served in a wide range of roles for nearly 30
6 years.

7 We will first hear from Mr. Wasserman,
8 then Ms. Andrews and finally Chief Lester. Mr.
9 Wasserman, we're ready for you sir.

10 Panel III: Law Enforcement Perspective

11 MR. WASSERMAN: Good morning,
12 Commissioners. My name is Steven Wasserman and I
13 am currently an Assistant U.S. Attorney in
14 Washington, D.C. I'm here today in my capacity
15 as president of the National Association of
16 Assistant U.S. Attorneys, that represent over
17 6,400 AUSAs working around the country.

18 I want to make it clear that today my
19 statements are made on behalf of NAAUSA and are
20 not made on behalf of the Department of Justice
21 or the United States Attorney's Office. AUSAs
22 are committed to defending the innocent and

1 prosecuting the guilty through our federal
2 criminal justice system. The system relies on
3 public trust to succeed.

4 The U.S. sentencing guidelines foster
5 this trust by promoting the predictable and fair
6 application of the law. While individualized
7 determinations are necessary, the guidelines are
8 designed to encourage a degree of uniformity
9 among similarly situated offenders.

10 This uniformity ensures offenders
11 across the country, regardless of which district
12 they are prosecuted in, can understand their
13 sentence and know that their sentence is fair
14 compared to similarly situated offenders.

15 The comments we present today are
16 rooted in furthering this uniformity and
17 fostering public trust in the justice system.
18 I'll begin with the proposal for Section 1B1.13-5
19 and 6 before moving to the other sections.
20 First, NAAUSA opposes the proposal for Section
21 1B1.13-5. This policy undermines the role of
22 Congress and the rule of law. Federal law

1 mandates the statute expressly provide for
2 retroactive sentencing adjustments. It is the
3 role of Congress to decide if the sentence can be
4 adjusted by a change in the law, not the
5 Sentencing Commission.

6 Further, the Supreme Court has
7 repeatedly recognized that retroactive
8 resentencing based on changes in the law is not
9 the norm. As the Court has made clear, the rule
10 of law requires finality, predictability and
11 certainty. The proposal directly contravenes
12 these established principles.

13 Similarly, given that certain
14 provisions of the First Step Act were
15 specifically not made retroactive, the proposed
16 amendment raises serious concerns related to the
17 separation of powers. Sentencing Commission is
18 not a legislative body made up of members
19 directly accountable to voters. Thus, by
20 effectively adding a retroactivity provision into
21 the law, this proposal impermissibly encroaches
22 on Congress' legislative authority.

1 This amendment is also in direct
2 tension with Section 1(b)1.10, which makes clear
3 under what circumstances and to what extent a
4 reduction in term based on an amended guideline
5 may be granted. The U.S. Sentencing Commission
6 has not adequately researched the impact on
7 public safety the pandemic's unprecedented
8 expansion of compassionate release has had.

9 Further expanding access to
10 compassionate release without this data would be
11 both irresponsible and dangerous. We highly
12 encourage the Commission to wait and make a data-
13 driven decision before expanding access to
14 compassionate release. NAAUSA urges the
15 Commission to reject the proposal for Section
16 1B1.13-5.

17 Second, NAAUSA opposes -- supports,
18 excuse me, Option 1 for subsection 6, without the
19 inclusion of subparagraphs (4) and (5), which
20 NAAUSA opposes. Option 1 properly limits the
21 scope of additional circumstances to those
22 "similar in nature and consequence" to the other

1 listed paragraphs. This provides judges a clear
2 benchmark for assessing unique circumstances.

3 Option 2 and 3 lack clarity and permit
4 subjectivity. Under Options 2 and 3, the judge
5 is provided wide latitude to consider
6 circumstances outside the guidelines. This
7 undermines the uniform, predictable and fair
8 application of the law.

9 If a judge can justify circumstances
10 based on their view of what is inequitable, for
11 example under Option 2, or extraordinary and
12 compelling as under Option 3, then there is
13 nothing preventing a judge from accepting a
14 circumstance far outside what's been
15 traditionally and historically accepted under the
16 guidelines, and therefore potentially improper.

17 The preceding paragraphs would
18 essentially serve no use at all. NAAUSA urges
19 the Commission to adopt Option 1 for Section
20 1B1.13-6.

21 Next, NAAUSA has concerns regarding
22 the proposed amendment to Section 1B1.13-(b)(1)

1 (c) and (d). Lessons from the COVID-19 pandemic
2 warrant against qualifying broad and ill-defined
3 medical circumstances as extraordinary and
4 compelling reasons for a reduction in sentences.
5 During the COVID-19 pandemic, AUSAs received a
6 significant and burdensome volume of medical
7 compassionate release requests, most of which
8 were denied.

9 These requests placed AUSAs in the
10 unfamiliar position of making medical
11 determinations about inmates. The proposed
12 amendment amplifies these concerns. Unlike
13 COVID-19 compassionate release, which was meant
14 to be limited to COVID-related risk factors, the
15 proposed amendment is far more expansive. Yet
16 AUSAs are not trained nor skilled in interpreting
17 BOP medical records.

18 Both attorneys and judges may be
19 inadvertent misled by faulty science or
20 incomplete records.

21 CHAIR REEVES: Thank you Mr.
22 Wasserman. We'll move on to the next when the

1 red light comes on.

2 MR. WASSERMAN: Okay.

3 CHAIR REEVES: I apologize.

4 MR. WASSERMAN: No, no, no. Thank
5 you. I appreciate it.

6 CHAIR REEVES: All right. Ms. Goss
7 Andrews.

8 MS. GOSS ANDREWS: Thank you. To the
9 Commission chair, Judge Carlton Reeves and the
10 Commission, I bring you greetings on behalf of
11 the executive board, members and constituents of
12 the National Organization of Black Law
13 Enforcement Executives.

14 My name is Brenda Goss Andrews, and I
15 am the president of NOBLE. NOBLE serves as the
16 conscious of law enforcement by being committed
17 to justice by action. Our organization was
18 founded in 1976 in Washington, D.C. by a group of
19 African-American executives.

20 In full transparency, our organization
21 supported the Formerly Incarcerated, Reenter
22 Society, Transform Safely Transitioning Every

1 Person, shortened to First Step Act of 2018.

2 NOBLE felt that the First Step Act struck a
3 balance between maintaining public safety while
4 improving reentry, rehabilitation, workforce
5 training programs and sentencing.

6 It is NOBLE's continued hope that the
7 First Step Act will strengthen bipartisan efforts
8 in reforming the nation's criminal justice system
9 ensure equity in the administration of justice.

10 Our organization joins many law enforcement
11 leaders in the belief that America can reduce
12 incarceration levels while also reducing crime.

13 To this aim, we applaud the efforts of
14 this body in amending several policies to ensure
15 the implementation and execution of the First
16 Step Act. NOBLE's testimony reflects in response
17 to the U.S. Sentencing Commission changes in
18 policy Section 1B1.13 concerning compassionate
19 release. We support the revision to the policy
20 statement that reflects that 18 U.S.C. Section
21 3582(c)(1)(A) was amended by the First Step Act,
22 authorizing a defendant to file a motion seeking

1 a sentence reduction.

2 We further support the proposed
3 amendment that revises the list of extraordinary
4 and compelling reasons. We support subsection
5 (b) that lists the following subcategories:
6 terminal illness, the inability to provide self
7 care due to suffering from a physical or mental
8 condition, functional impairment or age-related
9 deterioration; the defendant suffers from a long-
10 term medical condition and cannot receive timely
11 or adequate specialized medical care; the
12 defendant is negatively impacted by ongoing
13 outbreaks of infectious disease or ongoing public
14 health emergency due to the resident correctional
15 facility or the exposure to said disease, such as
16 we saw in COVID.

17 NOBLE supports the proposed amendment
18 that revises the list of extraordinary and
19 compelling reasons. We support subsection (b)
20 that lists the following subcategories: family
21 circumstances, the death or incapacitation of the
22 caregiver, the incapacitation of the defendant's

1 spouse or registered partner, incapacitation of
2 the defendant's parent, where the defendant is
3 only caregiver for this person, and other things
4 dealing with family members.

5 NOBLE supports the proposed amendment
6 that revises the list of extraordinary and
7 compelling reasons, subsection (b) that adds two
8 new categories, victim of assault, defendant is
9 seriously injured due to sexual assault or
10 physical abuse by an employee or a contractor of
11 the Bureau of Prisons, and changes in law;
12 defendant's sentence is inequitable due to
13 changes in the law.

14 Additionally and lastly, NOBLE
15 supports the proposed amendment, the three
16 options that revises the provision currently
17 found in application note 1(d) of Section 1B1.13,
18 which includes the very three options. The
19 overall support by NOBLE for U.S. Sentencing
20 Commission changes to the policy center on our
21 support for the First Step Act.

22 However, this support is also based on

1 historical data that suggests that a high quality
2 compassionate release program can expand the pool
3 of eligible candidates, while reducing
4 overcrowding in the federal prison centers.
5 Lastly, the court will assess whether the
6 circumstances exist, whether the defendant is a
7 danger to society, or if a reduction is
8 warranted.

9 On behalf of the law enforcement
10 leaders of NOBLE, I thank you for supporting law
11 enforcement in your mission to maintain public
12 safety. Our members stand ready to meet the
13 needs of our committee and nation. Thank you
14 again for this opportunity to provide testimony.

15 CHAIR REEVES: Thank you, Ms. Goss
16 Andrews. Ms. Lester.

17 CHIEF LESTER: Thank you. Judge
18 Reeves and distinguished members of the
19 Commission, thank you very much for the
20 opportunity to participate in today's hearing. I
21 currently serve as the Chief of Police in
22 Sacramento, California, and it is also my honor

1 to testify on behalf of my Major Cities' Chiefs
2 Association colleagues.

3 My testimony will provide a local law
4 enforcement perspective on the Commission's
5 proposed compassionate release amendment. The
6 MCCA supports compassionate release as long as it
7 focuses on providing relief to non-violent
8 offenders who do not represent a threat to public
9 safety. However, the MCCA is concerned that the
10 proposed amendment is too broad and lacks
11 sufficient guardrails.

12 The proposed amendment would add a new
13 subcategory of medical circumstances under which
14 an offender can be granted compassionate release.
15 This criteria is very similar to what was used to
16 justify the early release of thousands of
17 offenders throughout the COVID-19 pandemic. MCCA
18 members have seen firsthand how these factors
19 have resulted in the early release of offenders
20 who represent a threat to public safety.

21 For example, in one major city more
22 than ten percent of the offenders granted

1 compassionate release recidivated within months.
2 The MCCA is concerned that the proposed amendment
3 is making the same mistakes made during the
4 pandemic by over-expanding eligibility for relief
5 via broad and subjective criteria.

6 The Sentencing Commission needs to
7 further specify what constitutes the
8 "extraordinary and compelling reasons" required
9 for compassionate release under this new
10 subcategory to address this issue. Another
11 portion of the proposed amendment would make
12 offenders "serving a sentence that is inequitable
13 in light of changes in the law" eligible for
14 compassionate release.

15 The MCCA believes this provision
16 should be removed from the final amendment, as it
17 runs contrary to Congressional intent.
18 Furthermore, compassionate release is not the
19 appropriate method to address potential sentence
20 reductions due to a change in the law. While
21 Congress has enacted legislation to revise
22 criminal penalties and statutes, it does not

1 always make these changes retroactive.

2 Although the Sentencing Commission has
3 the authority to determine what constitutes
4 extraordinary and compelling circumstances that
5 warrant compassionate release, Congress has
6 historically addressed retroactivity as part of
7 sentencing reform legislation. Considering this
8 precedent a change in the law, unless there is an
9 explicit retroactivity prohibition, should not be
10 considered extraordinary and compelling
11 circumstances.

12 The MCCA also strongly believes that
13 no person should live in fear or be subjected to
14 sexual assault or physical abuse while in the
15 custody of BOP. However, the provision of the
16 proposed amendment that would make individuals
17 who are victims eligible for compassionate
18 release is misguided.

19 Instead of granting compassionate
20 release to someone who's been adjudicated guilty
21 based on the evidence by a jury of their peers
22 because they were a victim of sexual or physical

1 abuse, the focus should be on preventing these
2 actions from occurring in the first place, as
3 required by the Prison Rape Elimination Act and
4 existing BOP policy.

5 If BOP can eliminate or significantly
6 reduce these crimes in their facilities, this
7 portion of the proposed amendment is no longer
8 necessary. While BOP should also do everything
9 in its power to deescalate conflicts with
10 inmates, situations may arise that require the
11 use of force. Under the proposed amendment, this
12 would likely result in a compassionate release
13 petition being filed after any physical
14 confrontation between BOP personnel and an
15 inmate.

16 This will only be exacerbated if the
17 amendment is expanded to include individuals whom
18 other individuals in BOP custody victimize. Over
19 the past few years, communities nationwide have
20 struggled with increasing violent crime rates.
21 According to MCCA data, in 2022 homicides were up
22 approximately 42.6 percent, and aggravated

1 assaults were up 34.5 percent compared to 2019.

2 MCCA members have reported that a lack
3 of accountability within the criminal justice
4 system is contributing to this trend. The MCCA
5 is concerned that the overly-broad nature of the
6 proposed amendment will significantly expand the
7 universe of individuals who receive compassionate
8 release, contributing to the perception that the
9 criminal justice system is not holding people
10 accountable.

11 As the Sentencing Commission finalizes
12 the compassionate release amendment, it must
13 ensure that the updated policies are balanced and
14 do not jeopardize public safety. For example,
15 there must be a risk assessment that at a minimum
16 accounts for the crimes committed, criminal
17 history and proclivity to reoffend prior to
18 granting any individual compassionate release.
19 The MCCA strongly recommends that such an
20 assessment be part of any effort to implement the
21 Commission's updated guidance.

22 In closing, while the MCCA does not

1 oppose compassionate release, it is concerned
2 that portions of the Sentencing Commission's
3 proposed amendment are too broad, lack sufficient
4 guardrails and will be challenging to implement.
5 Thank you again for the opportunity to testify,
6 and I look forward to any questions you may have.

7 CHAIR REEVES: Thank you so much,
8 Chief Lester. Now I'll turn to my colleagues
9 here to ask questions of anyone on the panel.

10 COMMISSIONER WROBLEWSKI: You know I'm
11 not shy.

12 CHAIR REEVES: I know.

13 COMMISSIONER WROBLEWSKI: Chief
14 Lester, thank you. Thank you all for coming and
15 for your testimony today. Chief Lester, you
16 talked about the experiences during the pandemic.
17 Were amongst your membership, is there or have
18 you identified best practices, because as you
19 say, you support compassionate release. You
20 think what the Commission has proposed is too
21 broad. Is there some jurisdiction or
22 jurisdictions that you think are models that

1 this Commission should follow?

2 CHIEF LESTER: I can't point to a
3 specific jurisdiction, but I think there are
4 guidelines in place that are open to
5 consideration for consideration for compassionate
6 release. I think what most of the agencies
7 represented by MCCA would be looking for would be
8 more of an individualized risk assessment.

9 I know we certainly talk about
10 disparities and the challenges with overly-broad
11 risk assessments. But to do something very
12 specific and to use professionals, which are best
13 practices, to include at a minimum social
14 scientists, mental health professionals, some
15 legal experts to really create the proper risk
16 assessment, so you can achieve the goals, which
17 would be to, you know, reduce populations but
18 also to ensure public safety.

19 COMMISSIONER WROBLEWSKI: Are you
20 familiar -- one follow up. Are you familiar,
21 Chief Lester, with the various risk assessment
22 tools that are in place in the federal system,

1 because there actually are a number of them. The
2 First Step Act required the Justice Department to
3 create a risk assessment tool, which is used to
4 evaluate every prisoner on an annual basis. And
5 then of course the courts also have different
6 risk assessment tools, and I'm curious if you
7 think that those are sufficient, if they need to
8 be adjusted in any way, what your feelings are on
9 those?

10 CHIEF LESTER: No, and I am not
11 familiar with the specific ones. I think our
12 concern would be the fact that there is a
13 provision that we really see as overly broad and
14 for a variety of reasons you could find reasons
15 to release individuals without going through a
16 proper assessment. So while there may be some in
17 place, I think that's our concern, that you would
18 see an increase in petitions and overly-broad
19 interpretations of the factors that are required
20 to be considered.

21 CHAIR REEVES: I have a question for
22 you, Mr. Wasserman. You indicated about the --

1 and I may have interrupted you before you
2 finished, but I think you were talking about the
3 criminal AUSAs basically responsible for
4 reviewing medical records and things of that
5 sort, you know. It would sort of a new area for
6 them when they receive any of these compassionate
7 release requests.

8 But each U.S. Attorney's Office, I
9 think, represents medical institutions, either
10 military base hospitals, VAs or public health
11 services or public health centers, and they're
12 all covered by the FTCA. So therefore when those
13 entities are sued, there are AUSAs who defend
14 those entities.

15 Why couldn't the U.S. Attorney Offices
16 sort of have civil AUSAs partner with the
17 criminal AUSAs in these areas where there are a
18 need to review medical records and that might
19 overly burden the criminal side of the office?

20 MR. WASSERMAN: (off mic) Thanks for
21 the question. I think the challenge, and perhaps
22 -- as I was saying, perhaps the distinction on

1 the civil side is that often those assessments
2 are done in coordination with say an expert, a
3 doctor. That in my experience really isn't
4 occurring in the compassionate release context.

5 So while civil AUSAs certainly, you
6 know, could assist in that, I'm not sure that
7 even civil AUSAs possess the knowledge to
8 evaluate these medical records and make a
9 presentation to the court without the assistance
10 of an expert. Just the pure numbers of petitions
11 or motions that we will get, I think, will so
12 overwhelm most offices' abilities to handle that,
13 based at least on what's contemplated in the
14 proposed guidelines.

15 What I was going to suggest, and I
16 didn't get a chance to finish, was that any
17 request for a medically motivated compassionate
18 release motion be accompanied by a medical
19 opinion by two independent doctors. We address
20 this in the criminal context oftentimes in
21 competency situations, where we actually do have
22 an expert appointed by the court and in some

1 cases the offender is sent to a medical facility
2 run by BOP to be assessed by an expert.

3 So those situations have, you know,
4 actual medical experts that are evaluating the
5 medical documentation. I'm not a doctor, none of
6 my colleagues are doctors. So I mean I can look
7 at medical records but, you know, my ability to
8 parse those out and perhaps probably the judge's
9 ability to parse those out are going to be
10 limited without some additional help.

11 CHAIR REEVES: And to follow up with
12 respect to the inmates obtaining the expert
13 reports of two independent physicians, how would
14 you propose that they do that, because they're
15 inmates who generally defined by the accounts
16 that they have there that, you know, might be
17 subject to being taken for fines and restitution.
18 So very little money left to hire experts.

19 MR. WASSERMAN: Understood, and I
20 think that would be something that the court and
21 the government would probably need to address,
22 you know. What mechanism is used to see that an

1 inmate can in fact get that independent medical
2 assessment, I think, needs to be addressed by the
3 courts, by the government. I'm not, you know,
4 suggesting a particular procedure, but I'm also
5 not suggesting that the inmate procure those
6 independent assessments themselves and pay for
7 those themselves.

8 CHAIR REEVES: Okay, thank you Mr.
9 Wasserman.

10 VICE CHAIR RESTREPO: Are you
11 suggesting that the inmate should be sent to FCI
12 Butner and get two independent evaluations at
13 Butner before they can pursue a compassionate
14 release motion?

15 MR. WASSERMAN: No.

16 VICE CHAIR RESTREPO: What is, so what
17 is -- going back to Judge Reeves' question, how
18 realistic is it for these inmates to get two
19 independent medical professionals to support the
20 compassionate release motion?

21 MR. WASSERMAN: Well, let me correct
22 that. I'm not suggesting a particular procedure.

1 I'm suggesting a way for the government and the
2 judge to evaluate an inmate's medical claims. As
3 of now under the current procedure, it's BOP
4 medical records and it's evaluated by the AUSA
5 and the judge.

6 In my opinion, that's not sufficient,
7 particularly when we're talking about
8 compassionate release, a sufficient basis to make
9 an assessment. In some circumstances it might
10 be, you know. There may not be much debate about
11 whether somebody's terminally ill, but as the
12 broader that you make these medical
13 circumstances, the more nuanced the assessment,
14 the medical assessment is going to need to be or
15 will be.

16 So how that is affected, whether it's
17 by sending an inmate to a medical facility, a
18 BOP-run medical facility or making the inmate
19 available for examination by an independent
20 doctor, you know, I'll leave that to the
21 policymakers.

22 CHAIR REEVES: Vice Chair Mate.

1 VICE CHAIR MATE: This is a question
2 for you, Chief Lester. Thank you very much for
3 your testimony. I really appreciate it. Going
4 to the public safety point in connection with the
5 medical releases, I was curious the example you
6 gave where there was the -- I think you said
7 about ten percent recidivism. Is that in a
8 jurisdiction where as part of the release
9 decision the court was making an individualized
10 assessment of the situation on top of the medical
11 reason?

12 So for example under our statute, the
13 court is required to go through the 3553(a)
14 factors, including considering risk to the public
15 and public safety issues. Did that happen in
16 this jurisdiction?

17 CHIEF LESTER: This is a large
18 jurisdiction. I can't speak to the specifics,
19 but what we saw in this jurisdiction I think was
20 common throughout the country in which decisions
21 had to be made very quickly, to try and protect
22 the safety of inmates. This was really during

1 the COVID pandemic.

2 And I think that's probably where our
3 challenge is with this. If you read Section
4 (d)(1) and (2), they're just very overly-broad
5 criteria under similar circumstances that we saw
6 during COVID. The example that I was referring
7 to was one of our larger agencies, and what had
8 happened was the agency was given a list of 1,760
9 inmates. They were asked to recommend
10 individuals for release.

11 I don't know specifically what those
12 recommendations were based on. But based on that
13 analysis, they determined that only about five
14 percent of the inmates, they felt, didn't
15 represent a threat to public safety. What
16 happened was 1,400 of those 1,760 inmates were
17 released and 135, approximately ten percent of
18 the individuals were rearrested 236 times within
19 a month of being released.

20 And then later in 2020, that same
21 agency was provided with a list of 1,100 -- I'm
22 sorry 1,125 individuals who had been granted

1 early release, and within a month of being
2 released, more than 200, approximately 18
3 percent, were arrested again. I think that
4 speaking to some of the other witness testimony,
5 it would be difficult to know exactly the impacts
6 on public safety that COVID and these early
7 releases had, and perhaps it was because some of
8 the individualized risk assessments or factors
9 hadn't been, you know, hadn't been made
10 consistent.

11 I think that's why, one of the big
12 reasons that we're here to speak on this issue,
13 to ask for that. Thank you.

14 VICE CHAIR RESTREPO: Chief Lester,
15 those numbers, do they reflect state prisoners,
16 county prisoners or federal prisoners?

17 CHIEF LESTER: State, sir.

18 (Pause.)

19 CHAIR REEVES: All this dead silence,
20 no questions. Well, I do have another one,
21 particularly for Mr. Wasserman. In light of what
22 we heard earlier from the Department of Justice

1 and maybe some of the other witnesses, about
2 victim notification. I presume NAAUSA is in
3 favor of that.

4 Have you all thought about how that
5 notification might occur? Who would be
6 responsible for the notification? I know on the
7 mandatory victim witness side, on the front end
8 the U.S. Attorney's Office is responsible for
9 notifying any victim. Will that operate
10 similarly on the compassionate release side in
11 your view?

12 MR. WASSERMAN: I don't see why it
13 couldn't. I have to confess. I don't know what
14 the mechanism currently is within the Department
15 or the U.S. Attorney's Office for how that
16 notification goes out, but I mean our office's
17 notification system is somewhat automated,
18 meaning a hearing is set and a victim receives a
19 letter with that information.

20 So I don't see a reason why that
21 process or mechanism wouldn't work as it relates
22 to compassionate release.

1 CHAIR REEVES: Do you know the other
2 thing, maybe some other witnesses might be able
3 to tell us, but do we know, as a percentage of
4 federal criminal crimes, how many by percentage,
5 what's the breakdown of ones that might actually
6 have victims, versus you know, the gun cases?
7 You might not have the victim is the United
8 States, or for the drug cases, the victim is the
9 United States.

10 So do we know as a percentage how many
11 crimes that are charged and prosecuted by the
12 federal government actually have victims, the
13 robbery cases, the other type? Do we know that?

14 MR. WASSERMAN: I couldn't tell you
15 the percentage. I think it would be not an
16 insignificant amount, because obviously in white
17 collar cases, fraud cases, you know, you can
18 sometimes have hundreds if not thousands of
19 victims. Obviously, you know, a good chunk of
20 the cases are narcotics cases that, you know, may
21 not have a specific victim, although certain, in
22 certain instances they might.

1 That's not an insignificant amount of
2 cases that we prosecute federally, and then of
3 course you have the more traditional violent
4 crime cases, which are probably a smaller
5 percentage overall of federal prosecutions. But
6 again, I think the number of victims that would
7 need to be notified is not insignificant. I
8 don't know. I don't know how helpful that is as
9 a data point, but --

10 CHAIR REEVES: Thank you, Mr.
11 Wasserman.

12 VICE CHAIR MURRAY: Mr. Wasserman,
13 could you talk a little bit about resources? So
14 what, and I'm sure this is hard to quantify, but
15 what share of resources are going into
16 compassionate release motions now versus at the
17 height of COVID? One thing that's been hard for
18 me, at least, to get a handle on is how that
19 resource allotment will change with a new policy
20 statement?

21 So on the one hand you could say, you
22 know, for two-three years there's been no policy

1 statement, and so maybe things have been as wide
2 open as they could be, you know, leaving aside
3 catch-all 3. On the other hand maybe, you know,
4 many districts formally act in the shadow of the
5 policy statement. They say that the old policy
6 statement is persuasive, so maybe things are more
7 narrow.

8 Could you give us your best assessment
9 of, and I realize it's hard to predict the
10 future, where the quantity of motions is kind of
11 heading?

12 MR. WASSERMAN: Well, you know, given
13 the proposed amendments and I think, you know,
14 more than likely some degree of expansion that is
15 going to occur, there's going to be, I think, a
16 significant increase in those motions. You know,
17 the -- we have the COVID-19 pandemic that gave us
18 at least some indication of what would happen
19 when, you know, it's expanded significantly, and
20 I mean I can tell you, for my -- for me alone, I
21 had, I think, about seven compassionate release
22 motions that I had to deal with myself from the

1 start of the pandemic through the end of 2020.

2 So and we have a fairly large office
3 and a section that typically is devoted to
4 handling those types of motions. Given the
5 number, the volume, it had to be handled by folks
6 all over the office. I think that the proposed
7 amendments run the risk of overwhelming many U.S.
8 Attorney's Offices with these motions.

9 The one, I suppose, mitigating factor
10 during COVID was that at least there was a period
11 of time where a lot of districts were not in
12 trial, were not able to do as many of the
13 investigations that they typically would do
14 because of the shutdown. So that may have
15 allowed for a little bit more flexibility to
16 handle the volume.

17 But we still struggled, and my concern
18 is now that we're sort of back to a normal court
19 schedule, that we will be overwhelmed without
20 additional resources. Obviously that takes away
21 from our ability as AUSAs to investigate new
22 cases, to handle those as they come in.

1 VICE CHAIR MURRAY: One thing the
2 Justice Department had raised that I forgot to
3 ask them about is the idea of putting the burden
4 on the defendant to establish familial or
5 familial-like relationship. Is that something
6 that you think is feasible and would be helpful
7 in terms of workload?

8 MR. WASSERMAN: You know, I did not --
9 I was not familiar or did not, was not made aware
10 of the specific suggestions by the Department on
11 that particular guideline. I know from our
12 standpoint, we have concerns about our ability to
13 really verify the legitimacy of sort of non-
14 traditional familial relationships.

15 I mean, and I think in our full
16 testimony I discussed what type of investigations
17 the U.S. Attorney's Offices would need to do
18 verify that, you know, a sort of outside the
19 immediate family type relationship was being
20 asserted as one of these relationships.

21 Interviewing the defendant, the
22 defendant's family, the defendant's friends,

1 perhaps the individual who is alleged to be, have
2 the relationship, employers. You can see how,
3 you know, you can really kind of go down a rabbit
4 hole in trying to verify the legitimacy of those
5 relationships, and the amount of time and
6 resources that it would take.

7 So you know, we would, I think,
8 encourage the Commission to try to narrow that
9 scope of relationships to more traditional,
10 traditionally recognized relationships. Whether
11 it's grandparents, uncles, you know. Again, I'm
12 not making specific suggestions. But I think the
13 further out you go from traditional familial
14 relationships, the harder and harder it gets for
15 the government and ultimately the court to verify
16 the legitimacy of those claims.

17 VICE CHAIR MURRAY: Thanks.

18 CHAIR REEVES: Well look. It appears
19 that this is a panel where we have not many
20 questions. So thank you. If there's anything
21 you wish to add, because you do have a minute or
22 two. If there's anything anyone wishes to add,

1 you may. Yes ma'am.

2 CHIEF LESTER: Your Honor, do you mind
3 if I just add one follow-up statement. So
4 there's a federal sentencing snapshot about
5 compassionate release trends. It was published
6 as part of the Public Affairs Office. It goes
7 back to 2020. We did see nationally a big
8 increase in the number of, you know,
9 compassionate release requests by defendants. Of
10 the ones that were granted, according to the data
11 in 2020, about 96 percent were filed by the
12 defendant.

13 Reasons given, 72 percent of those
14 were COVID health concerns and 28 percent were
15 other reasons. It goes on to say that offender's
16 age, the length of the original sentence imposed
17 and the amount of time already served by the
18 offender emerged as the central factors that
19 impacted the likelihood an offender would be
20 granted relief.

21 Of note, it does appear that there are
22 disparities across the country in high and low

1 grant rates. For example, in the First Circuit
2 48 percent were granted, and in the Fifth
3 Circuit, only 15 percent were granted. So I just
4 want to say thank you very much for taking on
5 this issue, and looking to further enhance the
6 guidelines. I really do believe that they're
7 necessary for uniformity and consistency across
8 the country. So thank you.

9 CHAIR REEVES: You're welcome. All
10 right.

11 MR. WASSERMAN: I would just echo a
12 lot of what Major Cities Chiefs Association said,
13 and I would just encourage the Commission to
14 recall that, you know, even at the federal level,
15 recidivism rates are north of 50 percent.

16 So the risk assessment tools while,
17 you know, incorporated I think within the
18 compassionate release guidelines as they
19 currently are drafted and obviously in the
20 3553(a) factors that all judges consider, we're
21 still not great at predicting recidivism. I
22 think that needs to be factored in as you expand

1 what's historically been considered compassionate
2 release eligible folks that, you know, generally
3 I think everybody agreed were pretty unlikely to
4 recidivate.

5 Terminally ill people, elderly people,
6 people with serious family health issues or
7 caregiving issues. The more you expand that, the
8 greater likelihood I think you're going to have
9 of those folks recidivating. So I'd just ask you
10 to consider that.

11 CHAIR REEVES: Thank you. That
12 concludes this panel. I appreciate your comments
13 and like we've told everyone else, you're free to
14 supplement your testimony. I do encourage it.
15 I'm talking to the public now. I do encourage
16 you to go to our website, where you can read the
17 testimony of these witnesses. They'll always be
18 there for access and continue to look to our
19 website for our information concerning these
20 hearings, our work and all the rest of our
21 hearings that we have coming up. Thank you so
22 much to this panel.

1 (Pause.)

2 CHAIR REEVES: Our fourth panel is a
3 panel of one. He'll provide us the perspective
4 from the judiciary. Here to provide that
5 perspective is the Honorable Randolph D. Moss,
6 who serves as a federal district judge in the
7 District Court of the District of Columbia.

8 Judge Moss is with us today in his
9 capacity as Chair of the Judicial Conference's
10 Committee on Criminal Law. He also serves as the
11 liaison representative from the Administrative
12 Conference for the United States. Judge Moss has
13 previously served as a Deputy Assistant Attorney
14 General, acting Assistant Attorney General, and
15 Assistant Attorney General in the Office of Legal
16 Counsel.

17 Judge Moss as always, it's good to see
18 you, and we look forward to hearing from you, and
19 we're ready to hear from you sir.

20 JUDGE MOSS: All right. Well
21 likewise, Chairman Reeves, and good morning to
22 you and good morning to members of the Sentencing

1 Commission. I should start off by saying how
2 pleased I am and how pleased the Criminal Law
3 Committee is to have a quorum of the Sentencing
4 Commission. We know the many difficult issues
5 that you face, and I don't think we -- okay,
6 thanks.

7 We don't envy you the amount of work
8 that lies ahead and the difficult decisions that
9 you need to make. I am here today to speak on
10 behalf of the Criminal Law Committee of the
11 Judicial Conference. I think that with respect
12 to the notion of speaking on behalf of the
13 judiciary, Judge Reeves, I think you know like I
14 do that you can count up the number of judges in
15 the country and that's how many opinions there
16 are of the judiciary.

17 So but I have cleared my comments
18 through the Criminal Law Committee, and so I can
19 represent the views of the Criminal Law Committee
20 today. Usually, Chairman Reeves, we're
21 privileged to have the chair of the Sentencing
22 Commission, who appears before the Criminal Law

1 Committee and updates us on our Newark, and this
2 is the first time during my tenure that the
3 tables have turned, and I get the opportunity to
4 appear before you, and I'm honored to be here and
5 I thank you for having me.

6 My comments, as you know, are directed
7 at the amendment to Section 1B1.13 on the
8 reduction in term of imprisonment under 18 U.S.C.
9 Section 3582(c)(1)(A). As you all know quite
10 well, Congress enacted the First Step Act in 2018
11 and in relevant part amended 18 U.S.C. Section
12 3582 to allow individuals convicted of federal
13 crimes, who have exhausted their remedies, to
14 seek sentence reductions by filing motions for
15 compassionate release and that, as you know, is a
16 significant change since under prior law only the
17 Director of the Bureau of Prisons could file that
18 type of motion.

19 The combination of that new process
20 and the pandemic resulted in a truly dramatic
21 increase in the number of compassionate release
22 motions filed in federal district courts across

1 the country. Federal courts went from fewer than
2 50 compassionate release motions per month on
3 average before the pandemic, to as many as 2,000
4 per month during the height of the pandemic. And
5 between 2021 and March 2022, we averaged 427,
6 between 427 and 565 compassionate release motions
7 per month.

8 The numbers now are down, perhaps in
9 response to one of the questions that was raised
10 earlier. But I think they're still above the
11 pre-First Step Act numbers at this point in time.
12 And as you know, these motions can be extremely
13 demanding.

14 At times, they require urgent
15 attention. The judges of us, I think in all
16 remember at the height of the pandemic, being up
17 very late at night and feeling as though they had
18 to turn to the compassionate release motions
19 before anything else because lives were at stake.

20 And we were placed in the position in
21 which we had to make complex medical and public
22 health decisions in addition to have to weigh or

1 re-weigh the 3553(a) factors. So the motions not
2 always but frequently are very demand. They're
3 obviously important, but they do command a great
4 deal of resources and they often result in --
5 they come to the front of the queue in ways that
6 other things that we often can't turn to quite as
7 quickly because of them.

8 Compassionate release litigation has
9 also occupied the appellate courts, and has
10 resulted in circuit splits on important issues.
11 We hope that by revisiting the policy statement
12 now, the Commission can put at least some of
13 those issues to rest and provide additional
14 guidance to the courts and litigants.

15 The present amendments raise a host of
16 policy issues, and I think you've heard from
17 other panels respecting the policy issues. The
18 Criminal Law Committee's comments, however, focus
19 on issues relating only to the administration of
20 the judicial system. We'll leave it to others to
21 comment on the important policy questions that
22 you're considering.

1 I won't repeat everything that's in
2 our written comments, and instead will just
3 mention a handful of themes and a few issues that
4 may warrant further attention. At the most
5 general level, the Criminal Law Committee urges
6 the Commission to adopt clear standards that will
7 hopefully avoid or minimize inconsistent
8 application, circuit splits and uncertainty.

9 But we understand that compassionate
10 release is not always a one-size-fits-all
11 proposition. But where possible, having clear
12 standards will certainly be helpful to the
13 courts. Judge Reeves made this point when he
14 expressed the hope that the proposed changes will
15 bring "greater clarity to the federal courts, and
16 more uniform application of the compassionate
17 release across the country, and the Criminal Law
18 Committee joins in that hope.

19 To some of the specifics, we note that
20 the proposed amendment would move the existing
21 commentary on extraordinary and compelling
22 reasons to the main text of Section 1B1.13(b) and

1 the Criminal Law Committee supports that
2 proposal, and we think that we'll avoid
3 uncertainty regarding the status of the list of
4 reasons.

5 With respect to the expanded medical
6 provision, I just want to flag a couple of
7 questions that I hope you all will consider. The
8 proposal to expand the category of medical
9 conditions to include conditions that require
10 long-term or specialized care that is not being
11 provided by a prison in a timely or adequate
12 manner, raises at least a couple of questions.

13 First, it would be useful to have
14 guidance on how if at all courts should take into
15 consideration other mechanisms that might address
16 a particular medical crisis, such as the use of
17 prison furloughs under 18 U.S.C. Section 3622(a),
18 particularly where a medical crisis perhaps
19 requires specialized care, but it's short-term in
20 nature.

21 Second, it would helpful to have
22 guidance on how if at all or to take into

1 consideration other remedies for deficient
2 medical care that might address concerns in a
3 more systemic manner. If the Bureau of Prisons
4 is incapable of providing certain types of
5 medical care, one question that would arise is is
6 that an issue that needs to be addressed under
7 the Eighth Amendment or in some other manner, and
8 how courts should consider or think about those
9 issues when considering a compassionate release
10 motion.

11 The bracketed proposal to add a
12 category for defendants who have been the victims
13 of sexual assault or physical abuse committed by
14 correctional officers or, in the alternative, by
15 others and other inmates raises a similar set of
16 questions.

17 The Criminal Law Committee of course
18 strongly supports any and all efforts to protect
19 those who are assaulted in prison from further
20 abuse, and we recognize the extreme trauma that
21 can result from prison assaults.

22 If the Commission decides to adopt

1 this proposal, courts would benefit from specific
2 guidance on a range of questions. Let me just
3 give you a couple of examples. First, when would
4 such a motion be ripe for consideration and on
5 what type of record? Should courts wait for any
6 criminal or administrative investigation to be
7 complete before considering a motion? Should
8 courts consider other factors such as whether the
9 assailant has been fired or criminally charged or
10 convicted, and how should courts assess and
11 measure the extent of the trauma or injury caused
12 by the attack?

13 The bracketed proposal to add a
14 category for defendants serving sentences that
15 are inequitable in light of changes in the law
16 also raises a series of questions concerning how
17 the Commission anticipates the courts will and
18 should implement such a rule, if it's adopted.
19 How would such a category apply, for example,
20 when Congress adopts changes in the law that
21 either decides not to make it retroactive or
22 simply doesn't decide retroactivity?

1 What would qualify as a change in the
2 law? Would the new category apply, for example,
3 to changes in rules or procedures that make it
4 more difficult for the government to obtain
5 convictions in similar cases? Would it apply to
6 changes in the law that relate to prior
7 convictions that formed part of the defendant's
8 criminal history, but not -- but don't go
9 directly to the conviction at issue?

10 And again, if the Commission decides
11 to adopt the proposal, the court would benefit
12 from whatever clarity -- courts would benefit
13 from whatever clarity you could offer on those
14 issues.

15 So we've highlighted a number of other
16 issues for your consideration in our written
17 comments, and I won't try your patience by
18 repeating what's in our comments today,
19 particularly when I'm the only one that stands
20 between you and the lunch break.

21 But I do want to thank you again for
22 working on this important issue. We knew this

1 was an issue of highest priority when a new
2 Commission was formed, and we appreciate the
3 speed and the attention that you've given to this
4 important issue. I think the courts will benefit
5 from whatever guidance you can provide to us. I
6 would be happy to answer any questions to the
7 extent that I can.

8 CHAIR REEVES: You sit in the enviable
9 position of not being able to defer to anybody
10 else now.

11 MR. MOSS: Yes sir.

12 CHAIR REEVES: So all questions will
13 be directed to you, Judge.

14 MR. MOSS: Wow. I'll do my best.

15 CHAIR REEVES: Okay, thank you.

16 VICE CHAIR MURRAY: I'm not sure you
17 are aware, some of the proposals of your other --
18 your co-witnesses have made about ways to make
19 the compassionate release determination less
20 resource-intensive, but at the risk of sort of
21 hitting with them on the fly, I'd be really
22 interested in your thoughts on them.

1 So the Department of Justice suggested
2 that perhaps in the case of an assault victim,
3 that those compassionate release motions should
4 not go forward until there had been an
5 adjudication already, so that the court will be
6 presented with an already-adjudicated incident.
7 NAAUSA suggested that in the case of medical,
8 potential medical release that they -- that the
9 defendant be required to produce two independent
10 medical assessments about whether, about how dire
11 their situation is.

12 The Department, the Justice Department
13 recommended that the defendant be -- have the
14 burden of establishing family relationships. I
15 think we've fleshed out maybe some issues with
16 some of those, but just from an administration of
17 justice perspective, I'd be interested in your
18 thoughts on how much juice there is in terms of
19 if it's worth the squeeze.

20 MR. MOSS: Well, I will, I will
21 qualify this by first saying that we're at the
22 point now where it would be probably my personal

1 views as a judge, since it's nothing I've
2 discussed with any of my colleagues at this
3 point, and I don't want to get involved in any
4 substantive policy disputes.

5 But with respect to judicial
6 resources, I mean those of us who were judges and
7 district court judges in particular during the
8 pandemic, saw how demanding those motions were.
9 But they were also very important, and we did the
10 best we could. I do think that in general, we
11 were of the view that more information on medical
12 issues was helpful.

13 There was a process I think along the
14 way where we worked with the Bureau of Prisons
15 through the Criminal Law Committee, to ensure
16 that the medical records at least were provided
17 to judges or to the Justice Department, so the
18 Justice Department could then provide it to the
19 judges when we're facing -- when we were facing
20 compassionate release motions.

21 And you know, I think we all have
22 these experiences of sitting there and feeling as

1 though we were a little bit out of our depth in
2 acting as doctors, in trying to decide whether a
3 particular score on a kidney test meant that
4 somebody had severe kidney disease or mild or
5 moderate kidney disease, and how that affected
6 the risk that was posed by the pandemic.

7 So I think more information is better
8 than less information, and in general, you know,
9 being a judge the more information you can get to
10 make difficult decisions, the better off you are.
11 I don't have a view on whether -- who the burden
12 should be on or whether it means two reports
13 versus one report, and I think that quite frankly
14 those issues may vary depending on the
15 circumstances as to what is needed.

16 I think one of the comments made
17 during one of the earlier panels at the earlier
18 panel was, you know, if someone is terminally ill
19 from cancer, you probably don't need two reports
20 to make that type of assessment.

21 COMMISSIONER HORN BOOM: Judge Moss,
22 thank you for your submission and your work on

1 the Committee. In speaking informally just with
2 other district court colleagues, I have had some
3 interesting discussions. No one has advocated
4 that compassionate release should be more
5 expansive or less expansive, but rather that the
6 Commission just needs to bring clarity, to give
7 us the tools and the guidelines that we need to
8 make these important decisions.

9 I really appreciate the practical
10 perspective that the submission from the CLC
11 provides in really raising some sort of nuts and
12 bolts concerns that district court judges across
13 the country, I think, are facing in trying to
14 grapple with these decisions and some of the
15 proposed amendments.

16 I think, you know, one question that
17 I have is, you know, does the Committee have
18 concerns with, and I think that is expressed in
19 particular, you know, what are the provisions
20 that bring you concern as far as judicial
21 resources in addressing the various proposed
22 amendments? What are the ones that, you know,

1 you would flag as potentially inviting, you know,
2 just an amount of motions that might be simply
3 really difficult or challenging for the courts to
4 be able to sift through?

5 MR. MOSS: Well, I think that ends up
6 to my mind circling back to the question of
7 clarity, because if there truly are extraordinary
8 and compelling reasons for somebody's early
9 release and if the 3553(a) factors are satisfied,
10 you know. We were hired to do a job and we're
11 going to do the job that we have to do.

12 I think the concern though is to the
13 extent that there is lack of clarity, it can
14 invite a deluge of motions that don't satisfy
15 most standards, those type, those standards.
16 Just as one example, and I think this is a
17 reasonable example, is with the question of
18 changes in the law that render the original
19 decision inequitable. One could imagine a
20 circumstance in which you have somebody, a
21 defendant, who every week files a new
22 compassionate release motion.

1 I think we've all had cases involving
2 serial litigants that even where the motions that
3 we face may not ultimately be well taken, they
4 occupy an enormous amount of judicial resources
5 sifting through those motions and explaining why
6 it's not well taken. If you're getting a motion
7 every week, there's a new decision that somebody
8 who's incarcerated thinks shows that there's been
9 a change in the law in some way that now tilts
10 the field somewhat more in that defendant's
11 favor.

12 You can imagine a real deluge in
13 litigation resulting from something like that,
14 and that's just an example. I don't mean to be
15 commenting on the substance of the proposals, as
16 much commenting on the benefit of having some
17 clarity of what it means to be a change in the
18 law that rises to the level that the Commission
19 thinks would warrants a court's consideration.

20 COMMISSIONER HORN BOOM: I may have
21 missed it in the materials, but has the CLC taken
22 a position on repetitive filings that, you know,

1 should there be a limit on the number of
2 compassionate release motions that an offender
3 can file?

4 MR. MOSS: So the only thing that we
5 as a Committee have said about that was in our
6 comments is we did note with respect to the
7 bracketed proposal on inequitable sentences in
8 light of developments in the law, that this issue
9 that I just mentioned with respect to the risk of
10 serial filing. We haven't taken a position with
11 respect to whether in other respects there should
12 be some limit.

13 CHAIR REEVES: Commissioner Wong.

14 COMMISSIONER WONG: Judge Moss, Judge
15 Moss, thank you for being here. I note that, you
16 know, the D.C. Circuit actually is sort of on the
17 more restrictive end of the circuits when it
18 comes to changes in law and whether compassionate
19 release motions can be filed based on non-
20 retroactive changes.

21 I'm just curious whether based on data
22 or anecdotally you and your colleagues actually

1 feel like you've been, you've seen lots of a
2 deluge or be less inundated from perhaps
3 colleagues in other circuits as a result of that?

4 MR. MOSS: Well I think the opinion
5 you're talking about came down in the past six
6 months or so, after the number of cases was a
7 little bit more on the decline. So I'm not sure
8 I can give you an empirical judgment about what
9 the effect of that would be.

10 But the other thing I would say about
11 the question of considering changes in the law,
12 changes in circumstances that may have rendered
13 the original sentence inequitable in some way, is
14 I think you have to think about it in two ways or
15 from two perspectives. There's the first
16 question about whether you just clear the first
17 hurdle of whether this is an extraordinary and
18 compelling circumstance.

19 But then there's the question of just
20 applying 3553(a) factors, and I think those are
21 very different to my mind considerations. I
22 don't want to certainly get crossways with the

1 D.C. Circuit.

2 I can't recall quite frankly offhand
3 whether the D.C. Circuit opinion draws that
4 distinction between that initial hurdle of
5 whether someone who's shown some circumstance
6 that is extraordinary and compelling, and then
7 what you can consider in applying 3553(a)
8 factors.

9 COMMISSIONER WROBLEWSKI: Judge, can
10 I jump in?

11 CHAIR REEVES: Yes.

12 COMMISSIONER WROBLEWSKI: Thank you
13 Judge Moss for being here. Thank you for the
14 testimony. I know what it's like to herd cats to
15 get to one piece of paper, so we appreciate that.

16 MR. MOSS: It's always good to see
17 you.

18 COMMISSIONER WROBLEWSKI: Yeah. So I
19 especially appreciated the comments on the
20 enumerated provisions, but I want to talk a
21 little bit about the catch-all.

22 MR. MOSS: Yes.

1 COMMISSIONER WROBLEWSKI: Because I
2 think we all share the goal of creating a clear
3 standard. We also all recognize that there are
4 some things we can't anticipate, which leaves us
5 in this conundrum about the catch-all. But I
6 think there are two particular challenges that I
7 want to ask you about.

8 One is what I've heard from witnesses
9 so far and also from district court judges, is
10 there seems to be a little bit of a disconnect
11 between the way compassionate release is laid out
12 in 1B1.13. Here are these factors, 1, 2, 3. If
13 you meet this one check, you're past -- you're
14 past the gate and then we go to 3553(a).

15 I don't know if you heard the defense
16 panel earlier today, but they talked about a
17 totality analysis, they talked about a
18 constellation of circumstances.

19 How do we capture that, because it
20 seems to me again a little bit of a disconnect
21 between the way district court judges actually
22 evaluate a particular defendant, and whether

1 there are extraordinary and compelling
2 circumstances, and the way it's written out,
3 which suggests okay, do you meet this one, do you
4 meet that one, do you meet that one?

5 So that's question number one, and
6 then I've got to give you the second question
7 too. The second question --

8 MR. MOSS: That way I can decide which
9 one I want to answer.

10 COMMISSIONER WROBLEWSKI: Yeah. The
11 second part of the problem is once we decide
12 that, there is this question of again words from
13 an earlier panel, the gravity, the consequence.
14 It's not just your run of the mill case; it's
15 something that really, I don't know, breaks your
16 heart. It does something more than, and so we
17 have to capture that concept too.

18 So it seems we have to capture two
19 concepts that we're really struggling to do, and
20 I wonder if you have any suggestions on how to do
21 it, the constellation of circumstances, and how
22 do we capture the circumstances that meet the

1 gravity test.

2 MR. MOSS: Right. Well I, as usual,
3 I think you put your finger on the most difficult
4 issue, and it's an issue that we struggled with
5 in thinking about our comments because
6 ordinarily, I think the Criminal Law Committee
7 would take the view that maximizing judicial
8 discretion is a good idea, and let judges figure
9 out in each individual case what they think the
10 right thing to do is, and we'll get to a just
11 result by doing that.

12 But as you can see in our comments,
13 there's a tension here which you put your finger,
14 which is we need guidance in doing that, and
15 having clarity in the process is essential. So
16 this is an unusual circumstance for us, in which
17 we're not coming in and simply saying give the
18 judges as much discretion as you can and we'll
19 figure out the right thing to do. We're saying
20 we need discretion to deal with the unusual
21 circumstance, the unanticipated circumstance. We
22 recognize that, and not everything is

1 anticipated.

2 I mean who thought about the pandemic?
3 My suspicion is is that when the original policy
4 statement was drafted, there wasn't a lot of
5 discussion about potential pandemics and how they
6 might affect prisons. But there is a need for
7 that clarity, you know. I'm glad that you all
8 have to make those decisions rather than I do as
9 to how you strike that balance.

10 At the end of the day, I do think that
11 there is some balancing, though, that is inherent
12 in the overall structure of the statute to start
13 with, which is you first consider compelling and
14 extraordinary circumstances. But then the court
15 has to decide whether release is warranted in
16 light of the 3553(a) factors, and I think at that
17 stage in the process, courts can and I think they
18 did during the pandemic weigh circumstances.

19 You know yeah, somebody who has just
20 another six months left incarcerated on their
21 sentence and they have a very grave illness, that
22 if they get COVID there's a good chance that

1 they're going to die, versus the case in which
2 somebody's been sentenced to 30 years in prison
3 and they're five years into their sentence, and
4 it was, you know, a truly heinous crime that they
5 committed.

6 There is a significant risk that
7 person faces, and I do think that the judiciary,
8 in addressing the cases even under the old
9 guidelines or the lack of guidelines previously,
10 did engage in that weighing as part of the
11 3553(a) considerations.

12 But I agree with you, that's a hard
13 question and I'm not sure I have for you today
14 any great answers as to how to strike that
15 balance, other than the fact that we do really
16 value clarity and it will help us to have
17 clarity.

18 CHAIR REEVES: May I ask this question
19 with respect from a district judge's perspective?
20 Even with all the clarity we might have, that
21 will not stop a prisoner from filing something.

22 Our courthouses are always open to

1 receive petitions from anyone and sometimes
2 prisoners file motions that they are not entitled
3 to file. For example, a motion to set aside
4 their guilty plea or a motion -- or to appeal
5 their conviction, when they've waived it through
6 their guilty plea.

7 I mean so even with all the clarity
8 one might -- that we may give them, that really
9 might not impact the number of cases that are
10 actually filed that's going to get, have to get
11 the attention of a judge, right?

12 MR. MOSS: Well you know I think I
13 agree in part. I think that it probably will
14 help some. But there always will be filings that
15 are not well taken, and you're absolutely right.
16 The courthouses are open and people are entitled
17 to file it, and what one person might think is a
18 filing that's not well taken, someone else might
19 disagree with them thinking it is well taken.

20 So I agree with that proposition, and
21 I think there will always be filings that judges
22 think are not well taken. In fact, we wouldn't -

1 - there wouldn't be any need for us if every case
2 was one in which relief was granted, so that you
3 need a judge to make those decisions.

4 But I do think it probably would have
5 some effect on the burden on courts and the
6 number of filings, but it also would have some
7 benefit -- the clarity would have additional
8 benefits even beyond the number of filings. It
9 would make it easier for the district judges to
10 address the cases when they do come in the door.
11 It would minimize circuit splits and the
12 uncertainty that comes with circuit splits, and
13 it would minimize inconsistencies around the
14 country.

15 I know that that's one of the missions
16 of the -- of the Sentencing Commission is to do
17 your best to promote consistency around the
18 country, and I think having clear standards is
19 something that is more likely to promote
20 consistency in decisions around the country as
21 well.

22 CHAIR REEVES: Thank you, Judge Moss.

1 You're off the hot seat now because --

2 MR. MOSS: Lunch time.

3 CHAIR REEVES: --we're about to go to
4 lunch. Ladies and gentlemen, we're going to
5 break for lunch. We will resume testimony in a
6 little bit over an hour. We will come back here
7 at 1:15 with our next panel. Please make sure
8 you're seated and ready to hear that next panel
9 at 1:15. Thank you all so much for all your
10 attention.

11 MR. MOSS: And thank you.

12 CHAIR REEVES: All right.

13 (Whereupon at 12:08 p.m., the above-
14 entitled matter went off the record.)

15 CHAIR REEVES: Thank you all. I hope
16 everyone had a good lunch, maybe not so good
17 where you ate too much and you might fall asleep.
18 I don't think you'll fall asleep on this
19 testimony, however. But again, thank you for
20 joining us. We're prepared to have our fifth
21 panel, and our fifth group of panelists will
22 provide us another unique perspective from a

1 diverse range of advocates, citizens and
2 communities.

3 Our first panel is Mary Price, who
4 serves as general counsel of FAMM, a national
5 non-profit advocacy organization that focuses on
6 criminal justice reform. Ms. Price is the
7 founder of the Compassionate Release
8 Clearinghouse, which recruits, trains and
9 supports attorneys to provide pro bono
10 representation to people in federal prison
11 seeking compassionate release.

12 Ms. Price also serves as a special
13 advisor to the American Bar Association's
14 Criminal Justice Section, and as a member of the
15 National Association of Criminal Defense Lawyers
16 First Step Implementation Task Force.

17 Our second panelist is Alan Vinegrad,
18 who serves on the board of the Center for Justice
19 and Human Dignity. The Center aims to reduce
20 prison incarceration while improving prison
21 conditions. Mr. Vinegrad is a former United
22 States attorney for the Eastern District of New

1 York and currently works as a senior counsel in
2 Covington and Burling's white collar defense and
3 trial practice group.

4 Our third panelist is Kelly Surdis.
5 Ms. Surdis is the sister of Jason Burgeson, who
6 was shot and killed in 2000 during a carjacking.
7 Ms. Surdis has recently provided a victim impact
8 statement advocating against a compassionate
9 release motion filed by one of the men who killed
10 her brother.

11 Ms. Surdis has testified on behalf of
12 victims before the Rhode Island Senate, and
13 previously spearheaded a letter-writing campaign
14 focuses on the federal Department of Justice.

15 Our fourth panelist is Janiene
16 Mallory. Ms. Mallory is the sister of Monica
17 Johnson, who was murdered two decades ago. Ms.
18 Mallory provided a victim impact statement
19 advocating against compassionate release for the
20 man who killed her sister. Ms. Mallory is a
21 victim's rights advocate, a registered nurse, a
22 mother of three and the wife of the man who

1 previously served time in prison.

2 We will first hear from Ms. Price,
3 then from Mr. Vinegrad, then Ms. Surdis and
4 finally Ms. Mallory. Ms. Price, we're ready to
5 hear you. Make sure your microphone is on.

6 Panel V: Community Perspectives

7 MS. PRICE: All right, I'll try again.
8 Can you hear me?

9 CHAIR REEVES: Yes. You might want to
10 move it up a little bit.

11 MS. PRICE: Yeah, how about that?

12 CHAIR REEVES: Yeah, yeah. Just
13 always speak up.

14 MS. PRICE: All right, I shall.
15 Thanks for the advice.

16 CHAIR REEVES: All right.

17 MS. PRICE: I want to say first of all
18 speaking for FAMM, that I'm here to tell you that
19 we think it's splendid that the Sentencing
20 Commission has proposed to add (b)(5), defining
21 changes in the law that would render a sentence
22 inequitable, and an extraordinary and compelling

1 reason.

2 This is an important decision that
3 you're posed to make, and I know that you're
4 examining this position with help from experts
5 and stakeholders, and from a variety of different
6 angles. I want to ask you to look at it through
7 another lens, and that's a lens that is shown by
8 previous Commissions that have taken on important
9 questions, and done work that has influenced
10 sentencing law and policies in ways that reach
11 beyond the outer-most limits of what the
12 guidelines can do.

13 So using the tools that it has, the
14 Commission with data, reports and amendments to
15 the guidelines, earlier Commissions have been
16 incubators of reforms, bringing to life reforms
17 that might have taken decades longer or maybe
18 even never happened at all. So you have the
19 chance to follow in those footsteps.

20 I want to talk about two examples of
21 Commissions that have generated work that has
22 then led beyond the guidelines themselves. So

1 first of all, due to work by earlier Commissions,
2 Congress right now is considering equalizing the
3 penalties between crack and powder cocaine. U.S.
4 Attorney's Offices have been instructed to align
5 crack and powder charging. I don't think the
6 state of affairs would have existed without
7 earlier Commissions' work.

8 In late 2007, then-Commission Chair
9 Judge Ricardo Hinojosa summed up generations of
10 Commission history very simply by opening a
11 hearing on whether to make the so-called Crack
12 Minus Two amendment retroactive. He said
13 "Federal sentencing policy has been an issue that
14 the Commission has worked on for a long time,
15 promulgated amendments before that have not gone
16 into effect, as well as sent their statements in
17 or reports to Congress at least four times on the
18 issue.

19 "We've promulgated the Crack Minus Two
20 amendment, which the Commission felt was a very
21 small step. In the end, Congress is the one that
22 can have the solution to the problem." So the

1 Commission had done all that they could do with
2 respect to crack cocaine.

3 Three years later, the Department of
4 Justice testified on behalf of parity, and
5 shortly after that Congress passed the Fair
6 Sentencing Act, dramatically lessening the
7 disparity between crack and powder cocaine. In
8 2018, Congress made the Fair Sentencing Act
9 retroactive. None of that would have happened
10 without leadership shown by the Commission, doing
11 what it could do within the limits of its
12 authority.

13 In another example, we can draw a
14 straight line from the Commission's work in
15 compassionate release in 2016 to the First Step
16 Act changes in 2018. As you know in 2016, the
17 Bureau of Prisons was firmly in control of
18 compassionate release, and there were very few
19 motions. The Commission very well knew that the
20 Bureau of Prisons had hijacked judicial authority
21 or the judicial role in compassionate release,
22 denying even people who were terminally ill for

1 reasons that Congress had committed to the
2 courts, such as safety of the community or
3 seriousness of the offense of conviction.

4 So when the Commission amended the
5 policy statement in 2016, it included this
6 remarkable message directed at the Bureau of
7 Prisons. It said stay in your lane. Bring the
8 motions if they comply with the guideline, and
9 let judges do their job. And the following year,
10 the group of Senators asked the Bureau of Prisons
11 had it increased compassionate release in light
12 of this guidance from the Commission, and while
13 later the Department of Justice came back and
14 essentially the answer was no, that there had not
15 been much of an increase.

16 So at that point the Senators heard
17 enough and they drafted the Grace Act, which
18 became incorporated in the First Step Act, and
19 which is the authority that we're talking about
20 today. The amendments that were made took
21 control away from the Bureau of Prisons or gave
22 it to -- or at least control with the Bureau of

1 Prisons.

2 So it was a game-changer, and I don't
3 think it would have been possible without the
4 work that the Commission did in 2016. So I think
5 that Commission has both the authority and the
6 duty adopt (b)(5) and resolve the conflict.
7 Absolutely the other voices are telling you that
8 giving judges the tools to consider sentences
9 that can no longer be imposed state and that are
10 inequitable is not your job.

11 That's something that belongs to the
12 political branches. But the Commission was set
13 up to do just this: Congress created the
14 Commission, a politically neutral expert body,
15 situated above the fray to address some
16 interesting and challenging issues like this.
17 And it's important. Several hundred people are,
18 have been released by judges exercising this
19 authority who would have lingered for decades or
20 died in prison. You're going to be hearing from
21 some of those people later on today.

22 Their freedom was possible because

1 judges wisely exercised discretion that we are
2 asking you to preserve. So embrace this job,
3 know that if you do, you're going to stand on the
4 shoulders of Commissions, frankly those from the
5 earliest years, who have addressed themselves to
6 important issues with creativity and
7 forthrightness.

8 They helped forge reforms that our
9 system benefits from today. And you also have
10 the benefit of several years of litigation, of
11 judges actually making these rulings. So you're
12 not writing either on a clean slate or wondering
13 about what the impact is going to be on the
14 system.

15 I want to close with the words of
16 then-Commissioner now Justice Ketanji Brown-
17 Jackson, when she explained -- may I? Okay,
18 thank you. Justice Jackson when she explained
19 the Commission's decision to make the Fair
20 Sentencing Act changes retroactive without
21 limitations urged by the Department.

22 Her words apply with equal force

1 today. I believe that the Commission has no
2 choice but to make this right. Our failure to do
3 so would harm not only those serving sentences
4 pursuant to the prior penalty, but all who
5 believe in equal application of the law and the
6 fundamental fairness of our criminal justice
7 system.

8 CHAIR REEVES: Thank you Ms. Price.
9 Mr. Vinegrad.

10 MR. VINEGRAD: Chairman Reeves and
11 members of the Commission, I'm Alan Vinegrad.
12 I'm a lawyer with Covington and Burling, and I'm
13 here today on behalf of the Aleph Institute and
14 the Center for Justice and Human Dignity, two
15 not-for-profit organizations committed to helping
16 bring about a better, fairer and smarter criminal
17 justice system for all.

18 In a previous life, I was a member of
19 the Department of Justice for 12 years. Aleph
20 and the Center enthusiastically support the
21 Commission's proposed amendments to 1B1.13.
22 Those amendments are a long-awaited, thoughtful,

1 carefully crafted and measured response to
2 Congress' directive in the Sentencing Reform Act
3 that this Commission delineate the circumstances
4 in which persons in federal custody may be
5 released or have their sentences reduced for
6 extraordinary and compelling reasons.

7 The amendments provide reasonable
8 examples of when a defendant's medical condition
9 or family circumstances may constitute an
10 extraordinary and compelling reason for sentence
11 reduction or release.

12 The medical condition amendments
13 appropriately take account of serious medical
14 conditions, as well as situations similar to the
15 one that we have endured for the last three
16 years, due to the COVID-19 pandemic, where a
17 defendant's health and indeed their life can be
18 put in jeopardy if they remain in prison.

19 The family circumstances amendments
20 correctly recognize that a defendant's adult
21 children or parents or other close family
22 members, just like their minor children or spouse

1 or partner, may require care that only the
2 defendant can provide if released from prison.
3 The amendments correctly reflect that imprisoned
4 victims of sexual assault or physical abuse by
5 corrections employees or contractors, the very
6 people who are obligated to ensure their safety,
7 present an extraordinary and compelling
8 circumstance that may warrant their release.

9 The amendments provide potential
10 relief for the inequity that arises when a
11 defendant is serving a longer, sometimes much
12 longer sentence than would otherwise be the case
13 if they were sentenced today for the same
14 conduct. We believe that this amendment is
15 authorized by the discretion given to this
16 Commission under the Sentencing Reform Act to
17 describe what constitutes an extraordinary and
18 compelling reason.

19 It is consistent with the discretion
20 given to judges to take all facts into account in
21 making sentencing-related decisions, unless
22 prohibited by law from doing so. And 3582(c)

1 contains no such prohibition other than the
2 rehabilitation alone provision. And importantly,
3 this amendment is the right thing to do, to
4 enable judges to address individual cases of
5 manifest sentencing injustice, consistent with
6 the legislative history of the compassionate
7 release statute.

8 The amendments correctly preserve the
9 discretion of a judge to find that other,
10 unspecified circumstances may, in an individual
11 case, qualify as an extraordinary and compelling
12 reason justifying a sentence reduction or
13 release. If the COVID pandemic proved anything,
14 it's that we can't always anticipate every
15 extraordinary circumstance that might justify
16 extraordinary relief.

17 One final point. To those concerned
18 about the proposed expansion of compassionate
19 release criteria, it bears emphasis that those
20 changes will not guarantee the release of a
21 single defendant, not one.

22 A judge must still find, based on

1 credible and reliable evidence, that the reasons
2 for release are in fact extraordinary and
3 compelling in that particular case, that the
4 defendant is not a danger to the community, and
5 that lowering the defendant's sentence is
6 consistent with the 3553(a) factors, including
7 their criminal history, the nature of their
8 offense, the need for just punishment, the need
9 to protect the public and other statutory
10 factors.

11 These are not empty words. In the
12 last three years of the more 23,000 compassionate
13 release motions that were denied, 3553(a) was the
14 reason for the denial in over 12,000 of them, and
15 protection of the public was the reason for the
16 denial in over 3,000 of them. What that suggests
17 is that judges can be trusted to make these
18 decisions and to make them conscientiously, just
19 like they do every day for a whole host of other
20 potentially life-altering matters. Thank you.

21 CHAIR REEVES: Thank you, Mr.
22 Vinegrad. Ms. Surdis.

1 MS. SURDIS: Thank you. While
2 preparing my verbal testimony for today, I
3 wondered how I could possibly fit 23 years of
4 lost grief, heartache and pain into a five minute
5 limit. Here lies my attempt. My brother was 20
6 years old and his girlfriend 21 years old, when
7 they were both carjacked, kidnaped and shot
8 execution style in the head by five men that did
9 not know them.

10 Their bodies were left hugging one
11 another covered in blood, with not one of the
12 five men having a shred of guilt or remorse as
13 they drove away in my brother's truck. Carl Jung
14 stated that I am not what happened to me, that I
15 am who I choose to become. Well I'll tell you
16 that I stand here before you today, not as a
17 victim but as a warrior who has been placed into
18 this role over and over again.

19 I have now been through three
20 compassionate release motions in the last several
21 years, and going through this process for the
22 families of victims of violent crimes, just one

1 single time is too much. The ultimate goal, one
2 would hope during sentencing of violent criminals
3 would be the enactment of a fair, just and final
4 sentence.

5 Fair sentencing offers punishment to
6 criminals, but it also provides families a peace
7 of mind and an ability to enter into a healing
8 phase of their lives. However, these
9 compassionate release motions, filed years after
10 the fact, repeatedly drag the victims right back
11 to the initial day of the crime and revictimize
12 all over again, forcing victims and families to
13 pick up the sword to fight.

14 I will tell you that this wears away
15 at our souls. I believe the weight of this
16 burden was a considerable factor in my own
17 father's death in 2018, and in addition, 21 years
18 ago I was six months pregnant with my daughter
19 when I had to testify on the stand for one of the
20 defendants. Today, she sits behind us in the
21 audience, all these years later still enduring
22 the same nightmare with me, still fighting.

1 How would her life be different if
2 only her uncle had not been murdered?
3 Compassionate release motions for violent
4 criminals should be handled differently than for
5 that of non-violent criminals. I understand that
6 there may be some extraordinary and compelling
7 circumstances for non-violent offenders to be
8 released.

9 However, I ask of you that in cases of
10 murder, violent crime, kidnaping and sexual
11 assault, that no compassionate release motions
12 should allow to be filed or granted. It must be
13 taken into the consideration the nature of the
14 crime and the previous backgrounds of offenders.
15 In our case, all five men that murdered my
16 brother and his girlfriend had previous records,
17 41 pages of previous records and four out of five
18 were out on probation on the night of my
19 brother's murder.

20 I speak today for the families that
21 have unfortunately had the offenders in their
22 cases released, and according to your most recent

1 data report, last year 87 murderers, ten
2 kidnapers and over 1,000 offenders with robbery
3 and firearms charges in the federal system were
4 released. In my opinion, that number is 1,097
5 too many.

6 There is a 64 percent recidivism
7 according to your data report, that violent
8 offenders will reoffend. That means that at
9 those percentages, 700 percent of those that were
10 released -- I'm sorry, 700 of those criminals
11 that were released last year will reoffend.

12 I ask of you to consider that there
13 must be protection built into these amendments
14 for victims and families that have been affected
15 by these crimes, yet may not still be able to
16 stand up and fight, attend hearings and write
17 letters, pleading to keep violent criminals in
18 jail.

19 If there are no family members left to
20 give statements in relation to violent crimes,
21 does this somehow lessen the original crime? It
22 is extremely difficult for those of us that are

1 left in the wake of destruction which criminals
2 have created, to have to worry about the
3 possibility of violent offenders getting out of
4 jail on superfluous compassionate release
5 motions, and two of mine that I have been through
6 were superfluous.

7 All of us warriors who are still
8 standing here after tragic events at the hands of
9 another have all been given life sentences.
10 We've all been given a terminal illness that from
11 which we cannot escape, and there is no
12 extraordinary or compelling circumstance which we
13 can present in order to evade the hell that we
14 have been handed.

15 In closing, I ask of you to have
16 compassionate consideration for all the victims
17 and their families. Allow us to heal and allow
18 us to move forward. Allow us to put behind us
19 the worry of violent criminals being released
20 through the First Step Act. Thank you.

21 CHAIR REEVES: Thank you. Thank you,
22 Ms. Surdis. Ms. Mallory.

1 MS. MALLORY: Good afternoon
2 Commission. My name is Janiene, and like Ms.
3 Surdis I am the victim of -- well, the family
4 member of a victim of violent crime. I also can
5 speak from the other side of the aisle also. I
6 have a family history of my parents and brother
7 and even my husband being incarcerated, and
8 having learned lessons about being a citizen of
9 the world and following the rules and the law,
10 and learning from being incarcerated.

11 So I do believe that compassion should
12 be granted to some people that learned their
13 lessons or are victims of their circumstances,
14 and are led to lives that aren't worthy of, you
15 know, being free at that time.

16 But these people served their time,
17 come home and do well. I just ask, like Ms.
18 Surdis said, that when you guys consider the
19 changes in the compassionate act release, I do
20 believe that judges do have reason and can make
21 decisions.

22 But I do think violent criminals

1 should be excluded from being considered for
2 compassionate release, for they have not
3 considered the family members, they have not
4 considered -- they don't -- while they're
5 committing their acts of crimes, they're not
6 thinking about hold us -- I'm not able to hold my
7 sister's hand. She was not able to walk her
8 daughter down the aisle. She was not able to be
9 at her son's graduation.

10 I just ask that when these criminals
11 are considered, that they are excluded from being
12 even given any compassion, because they didn't
13 consider the consequences of their actions. I
14 wrote a long statement and I may have rambled,
15 because I myself have been through areas where I
16 felt people should have showed compassion for my
17 mother or for me, but we made it.

18 But these people who commit violent
19 crimes, they should not be considered in any type
20 of compassion because the consequences -- they
21 know the consequences of their actions, and they
22 shouldn't be considered to -- be allowed to be

1 free and roam the streets, because being a
2 citizen of the community, it's a right and you
3 have to follow the rules. Sorry I'm not --
4 that's all I have to say.

5 CHAIR REEVES: Thank you Ms. Mallory.
6 I turn now to my fellow Commissioners. Any
7 questions from the members of this panel?

8 (Pause.)

9 COMMISSIONER WROBLEWSKI: So thank you
10 all for being here and to Ms. Surdis and Ms.
11 Mallory, thank you for your courage to come here
12 and to share your stories with us. If you could
13 just also let us know, I'm curious, the
14 interaction you had with the court when the
15 compassionate release motions were filed, whether
16 you were satisfied with that.

17 I understand your position that you
18 don't think that violent offenders should even be
19 eligible, but I'm curious about that. We have
20 proposed some language that would require victims
21 to be notified whenever there is -- whenever the
22 court is considering compassionate release and to

1 be heard.

2 So I'm just curious first about your
3 experience, and if you have any thoughts on this
4 particular addition.

5 MS. SURDIS: Well thank you for
6 asking. I have a lot. So one of the defendants
7 that filed for compassionate release in my
8 brother's case, he did have a terminal illness,
9 okay. He was -- he had a brain tumor, he had
10 less than six months to live, and he filed in
11 2020.

12 We were notified on Friday before
13 Memorial Day weekend, and our statement had to be
14 in North Carolina by Tuesday in order to be
15 considered as a valuable input on whether or not
16 he should be released.

17 So when we got the mail on Friday, I
18 immediately talked to my brother's friends and my
19 family. We all wrote letters like within two
20 hours, and I had to overnight that to Butner, the
21 prison in Butner in North Carolina and make sure
22 that it was, you know, heard.

1 In addition to that, you know, we made
2 a phone calls where we actually spoke to that
3 inmate's advocate at the prison, where we left a
4 lot of messages. But I do think that the victim
5 notification is flawed unfortunately. I've seen
6 it at the state level because one of the
7 defendants of the five is at the state level, and
8 I've seen it in the federal level.

9 The other two people who filed were at
10 the federal level, and that's when I mentioned
11 this superfluous motions. One of them has sleep
12 apnea and he thinks he should be able to get out.
13 18 million Americans have sleep apnea, and he
14 filed as that was his motion on why he thinks he
15 should be able to get out.

16 Another one wanted to be able to help
17 his family members pay bills. Maybe he should
18 have thought of that before he was encouraging
19 murder. But you know, that's just one of the
20 things about this becoming so broad, is that you
21 know, violent offenders can file for these crazy
22 reasons that really are not, you know, in

1 alignment I think with what you all have
2 intended.

3 I do believe that, you know, they
4 should have some, you know, compassion for
5 certain people, but maybe not victims and
6 families -- well, violent crimes excluded.

7 MS. MALLORY: We were notified -- I
8 think we had a timely response when Mister, I
9 don't even know, Ronald was offered compassionate
10 release. We were offered the judge's statement,
11 which you know when I read it, it was kind of to
12 me out of line, that he tried to make a reason.
13 I do respect the judge's reasonings, and I'm glad
14 he did consider our statements in his
15 determination.

16 We had time, but I do think that the
17 victims should be notified. I think that they
18 should be notified timely, but they shouldn't be
19 also asked to relive it. I just think that there
20 should be some exclusionary circumstances because
21 each time that you have to relive going through
22 it like when we were asked to write the victim

1 impact statements again, it was like going
2 through it all over again.

3 The night that my sister was killed,
4 not only was my sister at the place where the
5 gunmen shot up the entire club and killed
6 multiple people, but my brother was there. My
7 other sister was there. My sister-in-law was
8 there, my aunt was there. It was multiple people
9 and they walked out together that could have died
10 at that same moment.

11 So reliving that, it brought tears to
12 my eyes and thinking about her two children, and
13 she was also pregnant at the time, her two
14 children being left motherless, me being left
15 sisterless and my brother being left without his
16 wife. So it's like it was a lot. So reliving
17 that to write the letter was too much.

18 I think there should just be some
19 exclusions and like she said, I think I'm a nurse
20 also. I've watched people die. I've held
21 people's hands die. I don't think that if you
22 kill my sister, my mother, my brother, you don't

1 deserve to have anyone hold your hand while you
2 die. You can die right in jail and the nurse can
3 hold your hand, and it's the same difference,
4 because you should have considered that when you
5 kill somebody's sister, mother, son, daughter.
6 Sorry.

7 CHAIR REEVES: May I follow up and
8 just ask a question about that notice for each of
9 you. Do you -- did that communication come -- do
10 you recall if communication requesting your input
11 came from the court or did it come from the U.S.
12 Attorney's Office, because I assume you all had
13 dealt with the victim witness coordinator before
14 trial or before the -- before the conclusion of
15 the first, of the initial case?

16 But when the person is seeking
17 compassionate release, do you know how you
18 received notice or who was requesting?

19 MS. SURDIS: So as in my case, I mean
20 my case is probably different than a lot because
21 I had five defendants in our case. One of them
22 was a direct letter from the Bureau of Prisons,

1 Mr. Warden Scarantino I believe was his name, and
2 he was the one who told us that we had to -- had
3 until Tuesday, the 26th, to respond with the
4 written testimony.

5 We had not heard other than that. I
6 am registered in the victim notification system,
7 so that I should be getting automatic emails on
8 movement on the case for all the defendants.
9 That was not the case, and then with another one,
10 we did two of the other ones, which one of the
11 appeals was just denied last week. Those all
12 came from the U.S. Attorney General's Office in
13 Rhode Island. So it was two separate methods.

14 CHAIR REEVES: And that would have
15 been some persons possibly had been convicted on
16 state charges? You said the U.S. Attorneys.

17 MS. SURDIS: The United -- so the
18 United States Attorney General, because this case
19 happened in Rhode Island, the United States
20 Attorney General's Office in Rhode Island had
21 been the people to prosecute that case. There
22 was also one defendant who went to state trial,

1 but that was separate. I didn't kind of include
2 that in this, but yes.

3 So the victim's advocate did reach out
4 to us from the federal level, to tell us about
5 the compassionate release motions for the other
6 two defendants that were the ones I said
7 superfluous, yeah.

8 CHAIR REEVES: Okay, thank you. And
9 Ms. Mallory?

10 MS. MALLORY: The prosecutor notified
11 us. We're not -- we're not on the list of
12 notification of when the criminal is moved
13 around. She found us and notified us, and she
14 was the prosecutor on the case. I guess she was
15 just -- she had compassion and she notified us.

16 CHAIR REEVES: Thank you.

17 VICE CHAIR RESTREPO: If I can just
18 follow upon the same line of questioning? How
19 can the system be improved in terms of reaching
20 out to victims and what sort of information
21 should be communicated to the victims? Should a
22 compassionate release motion even be considered?

1 MS. SURDIS: Well, I mean I think
2 that's a tough question to answer, because I feel
3 like every victim's family in violent cases may
4 have a different answer to that. It's
5 multifaceted. You know, I really wanted to be
6 involved in every step of the process, so for me
7 I really wanted to know when somebody was filing.

8 But you know, for my parents, you
9 know, it was very difficult, you know. Just the
10 other week the one at the state level, he decided
11 he wanted a new trial. It's 23 years later, and
12 now he had to get, you know, file a motion where
13 we had to go to court two weeks ago and see him,
14 where he gets to file an appeal and try to get a
15 new trial.

16 My mother was pretty much suicidal.
17 She was screaming into the phone. She didn't
18 want to deal with this anymore. This is 23 years
19 of torture for us. So I mean I'll fight til the
20 day they're all gone, or my daughter, who's
21 behind me, will hopefully continue the fight
22 after I'm gone. But you know, I do think that

1 you should at least be given the option to speak
2 or be heard.

3 But like I said, what if I was dead
4 and no one was there to still fight. Like you
5 know, how does that, how does that weigh in the
6 court's opinion if there's no one there to speak
7 for the victim's family? Did that answer your
8 question?

9 VICE CHAIR RESTREPO: It did, it did.
10 I know that everybody's different, but it sounds
11 like you'd like more information rather than less
12 information?

13 MS. SURDIS: Yes, and I was a little
14 disheartened at, you know, finding some of the
15 updates on my own. I have somebody who's a
16 reporter, and he would call me and say hey, did
17 you know that so and so did this, and I would say
18 what?

19 I had no idea because I wasn't
20 notified. I wish that I would have been
21 notified. I just think there's a lot of moving
22 parts. You guys probably don't have enough

1 people to act in the victim advocacy roles, you
2 know, and everything boils down to money.

3 But if you had more people that were
4 victim's advocates that could really, you know,
5 reach out and perhaps reduce their case load,
6 that would be maybe one way to make the system
7 more efficient, at least from the victim's family
8 standpoint.

9 MS. MALLORY: I don't actually know
10 the process, so to speak on how it could be
11 improved. It worked for us. It worked for our
12 family, but I believe from the prosecutor being
13 passionate about the situation. So I don't have
14 any.

15 MR. VINEGRAD: Can I answer a question
16 not put to me?

17 CHAIR REEVES: Sure Mr. Vinegrad.

18 MR. VINEGRAD: I mean I think the
19 victim notification proposal makes sense.
20 There's an argument that it's already required
21 under 3771, but I have no problem with the
22 Commission making that clear. But two

1 suggestions in light of the comments that we've
2 heard. First, have some provision for reasonable
3 advance notice of whatever proceeding is going to
4 take place, so that people are not in the
5 position of doing a Memorial Day scramble like
6 Ms. Surdis was in her case.

7 And number two, you could have what
8 I'd call an opt-out provision, where victims
9 could choose in advance, you know, at the time of
10 the underlying original case, whether they do or
11 don't want to be notified of future proceedings,
12 because there may be people, unlike perhaps Ms.
13 Surdis, who just don't want to hear about it and
14 don't want to be notified about it and can make
15 the decision that they don't want to have any
16 indication or prompt to have to relive the
17 experience.

18 So you could have an opt out provision
19 like class action potential plaintiffs do all the
20 time.

21 CHAIR REEVES: Thank you.

22 COMMISSIONER HORN BOOM: I have a

1 question. First thank you to each of our
2 panelists for your submissions. We all
3 appreciate it very much. My question is directed
4 to Ms. Mallory. You're a nurse I understand from
5 the submission, and are you a nurse in a state or
6 federal prison?

7 MS. MALLORY: No. I'm actually a
8 nurse. I'm a travel nurse actually, but I've
9 worked at multiple different hospitals, and the
10 one hospital where I've actually had the
11 opportunity to interact with prisoners, murderers
12 and violent murderers, I worked at Augusta
13 University Medical Center for six months.

14 They I guess have the contract for --
15 I don't know if it's the state or the federal
16 prisoners, because when you walk in, they're
17 patients, they're not prisoners. But you do know
18 and we do find out information about them, and
19 you try not to look it up because it's very
20 difficult when you're on the other side of that,
21 to take of those.

22 COMMISSIONER HORN BOOM: Okay. I took

1 it, so that thank you for that explanation. I
2 thought you must be within one of the prison
3 systems, and so I was going to ask you about
4 another proposed amendment that we had
5 concerning, you know, defendants who may be at --
6 who are at increased risk of suffering a severe
7 medical complication or death, as a result -- oh
8 no, I'm sorry.

9 My question is about not the outbreak
10 but for those who are suffering from a medical
11 condition that requires long term or special
12 medical care, and without timely and adequate
13 medical care, they might deteriorate even further
14 that the Bureau of Prisons' medical facilities is
15 not providing. So I will -- I can retract my
16 questions, because you might not have anything to
17 add to that.

18 But I thought that you had worked
19 within a Bureau of Prisons or state sort of
20 prison hospital, and I wanted to get your
21 thoughts on timely and adequate medical care and
22 expansion under that ground.

1 MS. MALLORY: I do know for the state
2 of Georgia we have the medical prison, but once
3 the care escalates beyond the -- I think it's a
4 600, 600 correctional facility for medically
5 needed inmates. It's either three to six. It's
6 in Augusta. Anyway, but once they can't care for
7 them, they come to our hospital. Then the
8 regular state prisoners come also.

9 So once they are not able to be cared
10 for at the medical hospital or the infirmary, I
11 don't know what you guys call it there, they come
12 to the hospital and sometimes they're there for
13 three months, six months and sometimes they wind
14 up in nursing homes. But they come with two
15 guards.

16 COMMISSIONER HORN BOOM: Okay, and any
17 reflections on, you know, do you feel like that
18 procedure is working for the folks who need that
19 care, or should there be changes to that?

20 MS. MALLORY: I think it works, but I
21 think the set up is pretty expensive. And I mean
22 not to not be compassionate, but they send two

1 prison guards and most of the time these
2 patients, by the time they come to us, aren't
3 even able to get up out the bed.

4 COMMISSIONER HORN BOOM: Thank you.

5 VICE CHAIR MURRAY: Thank you all for
6 your testimony, and thank you in particular to
7 Ms. Mallory and Ms. Surdis. I know how hard it
8 must be for both of you to be here. It's another
9 revictimization. My question is Ms. Vinegrad
10 and Ms. Price.

11 I think both of you spoke about the
12 sort of explicit exclusion from the grounds for
13 compassionate release for rehabilitation standing
14 alone, which is the only sort of explicit
15 exclusion. I was wondering if either of you
16 think that there are any implicit or structural
17 exclusions? Are there -- is there anything that
18 is, assuming it is grave enough, outside of
19 bounds?

20 I'm thinking of like things that would
21 be grounds for a second or successive habeas
22 petition; things that could be seen on direct

1 appeal; things like policy disagreements with
2 mandatory minimums. You can imagine like a
3 situation where a judge sentenced someone as an
4 initial matter, and said gosh, I'm bound by the
5 law to sentence you to 25 years. In fact, I
6 think you should be in prison for three years.

7 And then that person came back after
8 ten years, and they said well I still -- I hold
9 my same position. I think you will have grounds
10 for compassionate release. Do you think anything
11 is off, is sort of structurally out of bounds?

12 MS. PRICE: I'm not sure I can speak
13 to structurally out of bounds. But I think one
14 of the ways that your proposal has been
15 characterized is that standing alone, a change in
16 the law is sufficient to warrant consideration
17 for compassionate release. That's not what you
18 said. What you said, or at least what the
19 proposal says is a change in the law that would
20 rendered continued service of the sentence
21 inequitable.

22 I think the second part of that

1 carries not structural limitation. I'm not sure
2 I'm going to be able to answer that question; I
3 want to think about it a little bit. But I don't
4 think we've paid enough attention to your
5 inclusion of that limiting principle, that we've
6 had now three years, I think, of judges grappling
7 with this issue of whether or not a change in the
8 law should be considered.

9 They've mostly come down, I think, on
10 the side as one of a number of circumstances.
11 But I really like the formulation that you
12 propose, that inequitable, while not necessarily
13 having -- I mean I want to think a little bit
14 about how we would, how we would work with that
15 equitable, and we should keep this conversation
16 going.

17 But I do think that it is a real
18 limiting principle. I know that judges, when
19 they're looking at these cases, are thinking
20 about equity and not just a change in the law.
21 If it was just a change in the law, that's
22 retroactivity and that's not what you're

1 considering doing. So I think that yeah, I mean
2 I'll stop there. But I want to think a little
3 bit more about your question and maybe come back
4 in our comments about the structural limitations.
5 Thank you.

6 MR. VINEGRAD: Yeah, a few quick
7 points. I mean I can envision situations where,
8 and I think this is what you may have been
9 getting at, where you know, somebody files a
10 3582(c) motion, but when you see it and you read
11 it it is in fact a 2255, or it is in fact an
12 appeal of their conviction, or you know, the
13 chair's example before of, you know, wanting to
14 withdraw the plea and that's an extraordinary and
15 compelling reason.

16 I can see courts creating, you know,
17 a body of law, as courts do every day, saying no,
18 that's not the function of the compassionate
19 release provision. You know, the courts that
20 have upheld reliance upon this factor I think
21 have all made clear that it's part of all of the
22 individual facts and circumstances of the case,

1 before they can determine whether or not there
2 are extraordinary and compelling reasons for
3 release.

4 And so I think that, you know, it may
5 dissipate if not eliminate entirely any potential
6 tension, structural or otherwise, with other
7 provisions dealing with non-retroactivity. And
8 then, you know, as I said before, you've got what
9 I think the popular word these days is
10 "guardrails," we used to call limiting
11 principles.

12 But guardrails, you know, such as
13 3553(a), such as danger to the community, which
14 frankly would address the situation of the
15 defendants in Ms. Surdis' case and cases like
16 those, people with extensive criminal records.
17 That's exactly what courts have routinely denied
18 these motions on that ground.

19 But at the end of the day, I think
20 this issue is, you know, special in a sense that
21 Congress has very clearly on this particular
22 issue told the Commission you're the ones who are

1 given the authority and the responsibility to
2 tell us what does or does not qualify. And so
3 absent some direct prohibition like the
4 rehabilitation alone provision, it's within the
5 Commission's discretion to determine how to
6 articulate that for courts around the country.

7 COMMISSIONER WROBLEWSKI: I'd like to
8 follow -- go ahead, Candice.

9 COMMISSIONER WONG: Mr. Vinegrad, can
10 I just follow up on the 2255 discussion. So you
11 had said just now that you could see courts
12 holding that compassionate release should not be
13 a substitute for a 2255 motion. Is that
14 something that you think the Commission should or
15 should not clarify, and just more generally, how
16 do you see the interplay of compassionate release
17 and 2255, which as you all know have, you know,
18 is a very carefully crafted scheme in terms of
19 the procedural mechanisms, time limits, various
20 limitations that are there?

21 How do we avoid compassionate release
22 being an end run around all those limitations?

1 MR. VINEGRAD: Right, yeah. I mean a
2 couple of points. One, you know, there are
3 probably some easy examples. When I say 2255,
4 you know, the grounds are potentially endless.
5 So just to take an easy one, you know. If it's
6 2255 based on ineffective assistance of counsel,
7 and that's it, and that's you know, put in the
8 form of a compassionate release motion.

9 I could see, you know, an area for
10 guidance, where the Commission would say we're
11 not intending 1B1.13 to be a substitute for
12 issues in which there's already legally
13 prescribed avenues for potential relief.

14 I might take this up further in the
15 comments that we submit by March 14th, because I
16 think, you know, there may be further
17 clarifications that the Commission could provide
18 in the way of commentary by suggesting those go
19 in the policy statement itself, that would give
20 guidance, as you often do, about what you
21 contemplate, by what this provision would allow
22 or what it would not allow.

1 I think by and large, many of the
2 compassionate release motions that have been
3 granted within circuits that authorize it, aren't
4 granting them intentioned with the kind of
5 structural, I keep using that word, issue that
6 that was identified earlier, the sort of what I
7 call more purely on the grounds of some
8 extraordinary and compelling circumstance
9 developing, you know, later in time that doesn't
10 have some other prescribed remedy, but
11 nevertheless justifies relief.

12 CHAIR REEVES: Yes, Ms. Price.

13 MS. PRICE: Thank you. The other
14 thing I think that structurally delineates those
15 two situations is that the statutes are very
16 different. I mean the statute governing 2255
17 guards finality, right? There are procedural
18 bars that are super-important, and it gets to the
19 question of constitutional legal error.

20 I'm not a constitutional or a habeas
21 scholar, but it seems that that's a very
22 different thing than 3582(c)(1)(A), which was a

1 way to carve out an exception to finality, to say
2 that there are extraordinary and compelling
3 reasons when we get to go back and visit
4 something, and Commission, you'll describe what
5 those are and help define those.

6 So I think, I think that there's a
7 limiting principle just built into the nature and
8 the structure of those two authorities, to
9 revisit sentences, that may be useful to sort of
10 sorting out this question.

11 COMMISSIONER HORN BOOM: I guess just
12 to follow up on that, but when that change is
13 simply a non-retroactive change in the law, how
14 do you reconcile that with the procedures that
15 are, you know, the clear guardrails and
16 procedures that are outlined under 2255?

17 MS. PRICE: Again, I'll refer back to
18 the proposal, which is not simply changes in the
19 law, but changes in the law that would render the
20 continued service of the sentence inequity. I
21 think that that's really important and bears, you
22 know, bears maybe a little bit more conversation

1 and definition. It's not, it's not an illegal
2 sentence. It's not a sentence that's being
3 imposed contrary to the Constitution or to the
4 law.

5 It's a perfectly legal sentence that
6 was imposed appropriately at the time it was
7 imposed, but for a reason that's intervened, in
8 this case a change in the law as you proposed,
9 that is significant enough that in looking at
10 that individual sentence, in light of all the
11 other factors. But in looking at that sentence,
12 it has rendered the sentence inequitable, that it
13 is unjust to continue to keep this person
14 incarcerated.

15 I don't know that we can put a lot of
16 simple boxes around that. Judges have been
17 grappling with this for the last few years, and I
18 think examining those reasons, examining their
19 decisions to understand how they have found their
20 way to understanding what is or isn't
21 inequitable. To the extent that they've, that
22 they've articulated inequity as a principle, it

1 would be probably useful for us to look at.

2 Thank you.

3 CHAIR REEVES: Thank you. I'm
4 breaking my own rule right now, because the
5 victim stuff is so very important to the
6 Commissioners and to all the policymakers. So
7 I'm wondering if, if there were a rule that
8 required a court considering a compassionate
9 release motion to make sure they consider or
10 either be required to consider what the victims
11 might have submitted or what the trial court
12 might have relied upon from the victims during
13 the sentencing?

14 And if a victim, you know, that that
15 -- you start out from that sort of form, that a
16 compassionate release court must at least look at
17 that. And that stays where it is unless, as a
18 default provision, and I think that Mr. Vinegrad
19 sort of mentioned sort of an opt out provision,
20 unless the victim submitted something different
21 from what they or opposite from what they
22 submitted. Then a court has to at least, from a

1 starting point, consider what was -- what a
2 victim may have submitted at the time of the
3 sentencing.

4 Would that soften? I mean would that
5 help at all, if there were a rule that required
6 the judges to do that?

7 MS. SURDIS: I think, I do think that
8 would assist. I think that would help, yes. You
9 know, one of the defendants in the case, you
10 know, he was ordered by the judge to apologize to
11 the families at sentencing and he refused. But
12 then he decided later that he wanted to apologize
13 20 years later, 23 years later.

14 Unfortunately, you know, I think that
15 -- I don't know. I just think that it's just not
16 fair for us to have to keep going through it, and
17 if you're, if you're not of the mind set to stay
18 and abide by the laws when they are created to
19 not be a public health risk and go out and murder
20 people, then you should then not be able to
21 decide 20 years later that you're sorry, or that
22 you want to file one of these motions because

1 you're sick of being in prison or you have sleep
2 apnea or you're tired.

3 You know, four out of the five in our
4 case pled guilty. So they pled guilty, but yet
5 they were still allowed to file a compassionate
6 release motion years later. So I don't know if
7 that's something else that should be considered.

8 CHAIR REEVES: Okay. Ms. Mallory, Ms.
9 Surdis especially, thank you for your testimony.
10 Mr. Vinegrad and Ms. Price, thank you for your
11 testimony and just thank you. We appreciate you
12 coming forward.

13 (Pause.)

14 CHAIR REEVES: Thank you for your
15 continued. Our sixth panel today will provide us
16 with perspectives from two of the Commission's
17 advisory groups. The first panelist is Ms. Jill
18 Bushaw, who serves as chair of our Probation
19 Officers Advisory Group. Ms. Bushaw serves as
20 Deputy Chief United States Probation Officer from
21 the Northern District of Iowa.

22 In the Probation Office, she has

1 previously served as a sentencing guidelines
2 specialist, and as a supervisory and assistant
3 deputy chief overseeing the Presentence
4 Investigations Unit.

5 The second panelist is Professor Mary
6 Graw Leary, who serves as chair of our Victims
7 Advisory Group. Professor Leary is the senior
8 associate dean for Academic Affairs and a
9 professor of law at the Catholic University of
10 America.

11 Professor Leary has previously worked
12 in a range of positions in our criminal justice
13 system, including as an assistant United States
14 attorney for the District of Columbia as the
15 Director of the National Center for Prosecution
16 and Child Abuse, and as a director in the
17 National Center for Missing and Exploited
18 Children's Office of Legal Counsel. Ms. Bushaw,
19 we're ready to hear from you. Thank you.

20 Panel VI: Advisory Group Perspectives

21 MS. BUSHAW: Thank you, and good
22 afternoon. It is an honor to appear before you

1 all today on behalf of the Probation Officers
2 Advisory Group.

3 You've heard testimony already today
4 from a variety of perspectives, the legal
5 perspective, law enforcement, concerned citizens.
6 Because of our role in the system today, the
7 probation officer's perspective will largely
8 focus on applicability issues with regards to
9 these proposed amendments.

10 As you are all well aware, the First
11 Step Act gave 1B1.13 renewed significance. The
12 first defendant-filed motion that I became aware
13 of involved a female inmate with terminal breast
14 cancer that had metastasized in the bone. Her
15 request for compassionate release to the BOP and
16 her subsequent appeals were denied.

17 The basis for the denial was that her
18 medical illness did not have an end of life
19 trajectory of 18 months or less. However, 1B1.13
20 didn't require a specific prognosis of life
21 expectancy, only that the defendant be suffering
22 from a terminal illness.

1 This is a case that prior to the First
2 Step Act wouldn't have even been brought before
3 the court. It is cases such as this that confirm
4 POAG's support for 1B1.13 being amended to
5 authorize defendants to directly file motions for
6 compassionate release. POAG imagines the weight
7 judges feel when deciding what sentence to
8 impose, and how that weight would be compounded
9 when it is a matter of deciding whether or not a
10 sentence should be amended based upon dire health
11 and life circumstances.

12 Therefore, it is essential that 1B1.13
13 provide guidance and parameters to assist with
14 that difficult determination, yet empowers and
15 entrusts our courts with the necessary
16 discretion, as they make an individual assessment
17 of each compassionate release motion. POAG
18 believes the amendment under subsection (b)(1)(3)
19 helps achieve this goal by expanding the types of
20 medical issues to conditions that require long
21 term or specialized care.

22 The current proposed amendments are

1 issue-driven in light of the events that have
2 occurred over the last several years. POAG
3 commends the Commission for including the
4 language under (b)(1)(d), which captures the
5 heart of the issue presented by ongoing concerns
6 with COVID-19, but is also broad enough to
7 address any similar health crisis in the future.

8 This amendment will put the Bureau of
9 Prisons in a better position to address any
10 future medical emergencies and to protect those
11 who are in their custody.

12 With regard to subsection (b)(3)
13 pertaining to family circumstances, POAG also
14 supports that amendment as the proposed changes
15 are comparable to the types of circumstances that
16 already qualify as a factor, and commends that
17 this subsection was expanded to individuals who
18 are similar in kind to that of an immediate
19 family member.

20 The next amendment at 1B1.13(b)(4)
21 pertaining to a new category that includes
22 inmates who are victims of sexual assault and

1 physical abuse. The commonality of this new
2 provision with the other compassionate release
3 criteria is that all of them have to do a changed
4 circumstances.

5 Being a victim of sexual and physical
6 abuse is a changed circumstance. The recent
7 investigation into the BOP's handling of this
8 issue is both incredibly tragic and
9 disappointing. POAG is hopeful that the current
10 circumstances are just a representation of this
11 moment in time, and that the BOP implements the
12 proposed reforms to the extent that there isn't a
13 need for a Chapter 1 of the guidelines to provide
14 for an amended sentence due to sexual and
15 physical abuse by correctional officers.

16 POAG therefore determines that this
17 issue might be best addressed by the BOP rather
18 than referring to the court. However, POAG also
19 recommended Option 3 pertaining to subsection
20 (b)(6), which would provide the court the
21 discretion to rely on this as a compassionate
22 release factor in cases where they believe it

1 would be appropriate.

2 And finally and perhaps most
3 significantly is the impact of the proposed
4 amendment to include changes to the law as a
5 factor under 1B1.13(b)(5). POAG recognizes the
6 changes in the law would be hard to ignore, when
7 the impact of the sentence is known.

8 At times when reviewing a case that is
9 on supervised release, it serves as a reminder of
10 the significant difference between a sentence
11 that was imposed years ago, compared to the lower
12 sentence that is presently imposed for the same
13 offense, when it appears the only difference
14 between those two is the date on their judgment.

15 However, POAG believes it is important
16 to the integrity of our system that the already-
17 existing statutory provisions that address
18 changes in the law be the vehicle for addressing
19 those issues, rather than duplicating those types
20 of provisions by including them into the
21 structure of compassionate release. Thank you
22 for your time and for your attention to this

1 important matter.

2 CHAIR REEVES: Thank you, thank you.
3 Professor Leary.

4 MS. GRAW LEARY: The Victim Advisory
5 Group thanks the Commission for this opportunity
6 to -- sorry.

7 CHAIR REEVES: Mic.

8 MS. GRAW LEARY: I'm a lawyer. I'm
9 used to speaking loudly. Thank you. The Victim
10 Advisory Group thanks the Commission for this
11 opportunity to speak regarding the proposed
12 amendments of extraordinary and compelling
13 relief, and wants to express its real
14 appreciation for the Commission weighing these
15 really complex issues at a complex time.

16 As stated in our written testimony,
17 our group is a group of professionals from across
18 the country who work with victims survivors in a
19 variety of capacities, including prosecutors,
20 advocates and private attorneys. We met several
21 times to go over these provisions. I must say
22 that as a group, we reached the conclusion that

1 when we look at it as a package, we have grave
2 concerns about the proposed amendment.

3 Our specific objections are laid out
4 in our written testimony, but we want to speak
5 more generally as to the package as a whole. We
6 also began our -- have a threshold comment that
7 we acknowledge that some of the goals of the
8 proposed amendments and what the offenders are
9 litigating are valid goals. But we simply
10 conclude that extraordinary and compassionate
11 release is not the appropriate vehicle through
12 which they should be achieved.

13 And as some courts have called it,
14 this can create what they've referred to as a
15 discretionary parole system, which is in direct
16 contradiction to the legal framework of our
17 sentencing programs, as well as the current
18 Victims Rights Act.

19 I would like to first talk a little
20 bit about the victim experience and then talk
21 about some of our legal concerns. The previous
22 witnesses obviously replace anything that this

1 Committee could say about the victim experience.
2 But I just wanted to echo some of their points.
3 What our members tell us is that the victim
4 survivors that they work with go through a period
5 where they have certainty.

6 They sit in a courtroom, and after
7 being traumatized as victims of crime,
8 traumatized to go through a trial, if they're
9 fortunate enough to have their cases investigated
10 and prosecuted, have a verdict which they may or
11 may not be happy with, finally get a chance at
12 the sentencing to address the court about the
13 impact that this has had on them, leave that
14 courtroom with certainty.

15 Many of them tell my members, our
16 members, that this is the first tangible, solid
17 thing that has happened to giving them some
18 control over their life in the previous years,
19 whether they're victims, survivors or family
20 members of crime victims. And then years later,
21 they experience the reopening of wounds to
22 discover only that the offender in their case has

1 been released or, if they're fortunate enough, as
2 you've previously heard, they might get notice of
3 a potential hearing, where they have to go
4 through the excruciating decision of how much
5 energy they have again to reopen those wounds.

6 Except this time if they do it, they
7 don't do it with the scaffolding of support
8 that's available to them during a current
9 prosecution as victim survivors. This broadening
10 of extraordinary and compelling release provision
11 would put thousands of victim survivors through
12 this experience after the criminal justice system
13 has promised them quite the opposite.

14 And it's not just the victim survivor
15 experience that matters, but this is in violation
16 of their legal rights, their right to protection,
17 their right to timely notice of court proceedings
18 involving release, their right to be present, to
19 be heard, and most importantly to be treated with
20 fairness and respect for their dignity.

21 The proposals taken as a whole
22 reintroduce uncertainty, sentencing disparities

1 and unfairness. Not only does this violate the
2 Criminal Victims Rights Act, but it raises
3 concerns about the Sentencing Reform Act, and in
4 this instance I refer to page three of your
5 sentencing guidelines, where in your own
6 sentencing guidelines the introduction reads
7 "Congress first sought honesty in sentencing.

8 It sought to avoid the confusion and
9 the implicit deception that arose out of a pre-
10 guideline system. The practice usually resulted
11 in a substantial reduction in sentence, and
12 secondly, Congress sought uniformity in
13 sentencing."

14 The other legal concerns that we have
15 are laid out in our written, our written
16 comments, but they do involve the very -- the
17 procedural purpose of the First Step Act as it
18 relates to this provision, as well as the very
19 purpose of extraordinary and compelling relief.

20 But we do propose that at a minimum
21 change, that as a minimum change to the
22 guidelines that the guidelines include a

1 requirement for a hearing before any offender is
2 released, that require the victim to be present -
3 - not require the victim to be the present, allow
4 the victim to be able to present, and if not
5 present, the court make a finding that proceeding
6 with the victim is justified, either because they
7 or counsel received notice and waived their
8 right, or efforts were made to notify the victim
9 and their counsel, and neither could be located.

10 If the court is not satisfied, the
11 hearing must be postponed and if satisfied, the
12 court must consider a prior victim impact
13 statement and cannot infer absence means
14 acquiesce. I apologize. I didn't see the red
15 light, Your Honor. Thank you.

16 CHAIR REEVES: That's fine. Thank you
17 for your opening. Open it up for our
18 Commissioners. Mr. Wroblewski.

19 COMMISSIONER WROBLEWSKI: I really
20 want one of you to jump in first next time.
21 Thank you both for testifying. I really
22 appreciate it. I have one question for each of

1 you. First for Miss, is it Bushaw? I'm sorry.

2 MS. BUSHAW: Yes.

3 COMMISSIONER WROBLEWSKI: Okay, thank
4 you again for being here. Could you tell us how
5 different probation offices around the country
6 are involved when a compassionate release motion
7 is filed, in terms of fact-finding? So one of
8 the concerns that the Criminal Law Committee laid
9 out and that we've heard is these motions require
10 fact-finding.

11 Whether it's an illness or whether
12 it's a family member. Are probation officers
13 involved in that in some districts, in all
14 districts and so forth, and how is that going?
15 What concerns do you have about that?

16 And for Professor Leary, there are
17 currently in many, many states there are parole
18 systems where offenders have an opportunity for
19 release. Are there any best practices in terms
20 of working with victims in those parole states
21 that you could point to again as a model that the
22 Commission might be able to follow? You know

1 that we've proposed some language about
2 notification and so forth, but I'm curious about
3 that. So those are my questions, thank you.

4 MS. BUSHAW: Okay. With regard to
5 probation officer involvement at the
6 compassionate release stage, it's actually up to
7 this very little. We ordinarily -- ordinarily
8 the compassionate release motions are between the
9 BOP and the courts, and then oftentimes we
10 wouldn't be aware of the case until it was on the
11 verge of being granted, and then we would have
12 them on supervised release and we would need to
13 be involved at that point in terms of verifying
14 the residence and developing a release plan and
15 what-not.

16 But in terms of just applying the
17 eligibility criteria, probation largely hasn't
18 been involved in that. However, if the proposed
19 amendment regarding changes in the law is
20 imposed, I envision that that will then mean that
21 probation office would be involved at that stage,
22 because the court would -- and sometimes does ask

1 if this case was resentenced today, what will be
2 the impact?

3 And that isn't easy to do. As you can
4 imagine, when you look at all the different
5 changes that we've had over the years, there's
6 guideline impact, statutory impact. Burglary
7 used to be a predicate offense. The recency
8 points under criminal history would need to be
9 addressed.

10 There's a lot to figuring out what the
11 sentence would have been today compared to -- and
12 you can't even answer that question sometimes,
13 especially if, you know, the statutory provisions
14 changed and somebody who was a career offender at
15 the original sentencing and because the statutory
16 period has changed, the career offender offense
17 level changes.

18 Well, the court may not have addressed
19 some of the underlying objections because it
20 didn't matter. So it's just really hard to
21 figure that out. So at this point, we haven't
22 been involved very much. But if this has

1 changed, I envision we'll be involved quite a bit
2 in the future, trying to determine the impact of
3 the change to the law.

4 MS. GRAW LEARY: Thank you for the
5 question. I can tell you that in our dialogue
6 with our group, a few of our members coming from
7 different states, and I can get you the exact
8 provisions, talked about how in their local
9 jurisdictions, these proceedings are not allowed
10 to proceed unless the victim survivor is there or
11 there is an affirmative filing, as I've indicated
12 in our proposal, and that's what generated from
13 our proposal is the state experiences.

14 Secondly, we talked about not having,
15 I believe that Your Honor was referencing this,
16 not an opt in notification decision, but of
17 course an opt out provision is important. I
18 would say some of the challenges here, and I
19 think you alluded to it in the last panel, is not
20 every victim witness survivor is the same, of
21 course, and they're not the same throughout all
22 of these years.

1 And so that is a real challenge for
2 the notification aspects, and of course it
3 depends what type of crime it is as well. As
4 this Commission well knows, a victim of child
5 sexual abuse material could receive notices at
6 such a voluminous level that those are harmful
7 for victim survivors of even the notice. But
8 what decisions when they're 17 and 18, 19 made
9 for them by their parents not where they are a
10 few years later really depends. So in that
11 notification piece, it's a very complex area.

12 I would say what are not good
13 practices, if I could give a couple of -- extend
14 my answer a little bit, and that is what you've
15 heard before. The short time frame, the short
16 time frame or many of my colleagues or allied
17 professionals report struggling with a court to
18 even let the victim witness survivor speak or
19 address the court, or when the victim survivor is
20 not there, looking out at a courtroom, seeing a
21 completely assembled one side of the courtroom,
22 which of course the offender has the opportunity

1 to do.

2 The overstrapped prosecutors office
3 can't even locate the victim survivor, and the
4 conclusion the court and some colleagues have
5 reported some courts seem to draw is acquiescence
6 from that imbalance, when in fact it couldn't be
7 and often is either self-preservation, as you
8 heard from our previous panel, or an inability
9 notwithstanding all of the reaches of the
10 prosecutor's office to find folks.

11 VICE CHAIR RESTREPO: I have a
12 question for Officer Bushaw. It's my
13 understanding that in the ordinary course of
14 things, when somebody's released from the Bureau
15 of Prisons to their community to go to a halfway
16 house or a step-down unit, and when somebody's
17 released on compassionate release there is no
18 step down. They go straight home. How does that
19 impact the work of the probation officer assigned
20 to those cases?

21 MS. BUSHAW: So there would be an
22 option for a halfway house if the court added

1 that condition as part of the granting
2 compassionate release, but the chances of a
3 halfway house accepting someone with severe
4 medical issues are probably very slim, because
5 they also aren't able to care for those issues.

6 Sometimes they're put on location
7 monitoring if they have severe medical issues,
8 and so that takes an incredible amount of
9 resources from our officers to maintain their
10 schedules every single day, especially if they
11 have a lot of medical appointments and taking the
12 equipment on or off. But beyond that, it's just
13 another case on our caseload. We don't have a
14 lot of compassionate release cases historically.

15 Even prior to the First Step Act, I
16 could only remember a few, and we also haven't
17 had several since the First Step Act was signed.
18 So it's pretty limited, but with these changes,
19 that definitely could expand that and then that
20 would impact the workload of our office.

21 COMMISSIONER HORN BOOM: Are you done?

22 VICE CHAIR RESTREPO: Yes.

1 COMMISSIONER HORN BOOM: All right.
2 Following up on Commissioner Wroblewski's
3 question concerning sort of the probation
4 office's involvement with motions for
5 compassionate release, I was a little bit
6 surprised that, you know, you said so far
7 probation offices have not been significantly
8 involved.

9 In every compassionate release case
10 that I analyzed where I actually granted it, I
11 worked really closely with the probation office
12 to discern what types of conditions should be
13 placed on those folks after release for a period
14 of supervised release essentially.

15 But I'd like for you, along those --
16 along that vein, to comment on, you know, how you
17 do think, not just with the changes in the law
18 proposed amendment, but specifically the family
19 circumstances and the significant medical, which
20 I think is (b)(3), and then the significant
21 medical issues that aren't being adequately or
22 timely provided.

1 Because you know, as a sitting DJ
2 looking at these motions, under the family
3 circumstances, the first place I will turn is to
4 the probation office and, you know, find a
5 probation officer and say, you know, I'm going to
6 need you to run down who is -- is this person who
7 is like a family member to this defendant truly
8 like a family member for this offender?

9 Or what kind of relationship did the
10 offender have with, you know, his or her child
11 prior to being incarcerated, such that is this
12 the appropriate caregiver if that, you know,
13 child is now incapacitated? Similarly, I'll turn
14 to the probation office to say what were the
15 medical, you know, what was the medical
16 conditions that offender may have been suffering
17 from while, you know, at the time that they were
18 incarcerated and so on.

19 And so I guess I'd just like to get
20 your perspective on the probation office's role
21 in that, you know, resources and how you would be
22 able to approach those requests, because I can

1 assure you, I don't know where else I would turn
2 on those fact-finding questions other than the
3 probation office?

4 MS. BUSHAW: Yes, and that is our
5 role, and I should clarify. In the few cases
6 that we've seen in the past, the judge reached
7 out to us before granting that compassionate
8 release motion, because we're part of the process
9 of getting it ready, conditions, verifying the
10 residence, verifying what their medical needs are
11 and what-not.

12 So we are involved in that. But I was
13 just mainly referring to just whether or not it
14 should be granted, yes or no. We haven't weighed
15 in on that level. But yes, that would be
16 something that we would be involved with. If
17 this gets expanded, then we are going to be
18 involved with that even more.

19 When I read this, it just reminded me
20 of the importance of a thorough investigation at
21 the sentencing stage, and making sure their
22 relationships are thoroughly described, their

1 medical issues just aren't referenced. They're
2 referenced and verified so the court has that,
3 because it may not seem relevant at the time of
4 sentencing, but it comes more relevant later on,
5 and then the court has a better historical
6 perspective of this defendant, and then they can
7 refer back to that and then just add to that.

8 So that makes the compassionate
9 release investigation a little bit easier if
10 we've done a really, really good job at the
11 sentencing stage of providing those types of
12 information.

13 VICE CHAIR MATE: Can I ask a quick
14 follow-up to that question or to her question
15 about kind of the investigation you're doing. I
16 remember in kind of early COVID days, there were
17 some issues I heard from probation about getting
18 the medical records necessary to help with the
19 supervision, and getting that all set up
20 appropriately, and getting those medical records
21 from BOP.

22 Has that issue been addressed? Like

1 are you all getting the medical information you
2 need to assist in the supervision on those cases?

3 MS. BUSHAW: I don't know that I have
4 enough specific information to know if we're
5 getting really good medical information from the
6 Bureau of Prisons. But I know that we would give
7 it our best effort, and sometimes we have to go
8 directly to medical facilities. The hard part of
9 that is the releases and getting in contact with
10 someone who can sign the release and then get it
11 back to us in a decent amount of time, and then
12 we have to send a records request and then wait
13 for the records to come back before the judge can
14 proceed.

15 So that's a hurdle at the
16 compassionate release stage, and it's also a
17 hurdle at the sentencing stage. It's just really
18 getting those records and they matter. They, you
19 know, up to that point it's a self-reported
20 diagnosis, and sometimes what you see in the
21 medical records is a little different than what
22 they've indicated their medical issues are, so it

1 really matters. But it's just a -- it's a slow
2 process.

3 COMMISSIONER WONG: Can I follow up on
4 that? When you just said that verifying medical
5 needs is something that probation officers assist
6 with. What does that -- what does entail and how
7 complicated is that in practice? Can you give us
8 just like a practical window into that? There's
9 a reported diagnosis. You obtain records. Do
10 you sort of opine or recommend to the judge that
11 you have confirmed that the characterization is
12 accurate or what's that verification entail?

13 MS. BUSHAW: It's fairly
14 straightforward. It's a matter of releasing,
15 getting the records. But you know, sometimes the
16 records are hundreds of pages and medical
17 terminology that isn't always easy to interpret.
18 But we would just probably share the actual
19 records with the court.

20 If we were approached by our district
21 court judge to say I have this motion pending; I
22 need more research, I need more records. That

1 would fall on us, and we would take care of
2 requesting those, unless it was a matter that the
3 district court required the defense or the
4 government to obtain and submit those as part of
5 a court record.

6 But otherwise, it's just a matter of
7 getting the release signed and submitting the
8 records request to the medical facility.

9 CHAIR REEVES: Any further questions
10 of this panel? Great.

11 VICE CHAIR MURRAY: Question for Ms.
12 Leary, Professor Leary. We heard a request from
13 the last panel to sort of carve out certain
14 violent offenders from compassionate release
15 eligibility, and I wonder if that, in your view
16 and from what you've heard from your members, if
17 that was more salient with respect to some of the
18 proposed reasons for compassionate release than
19 others?

20 I'm thinking that there's several
21 harms that a victim experiences. One is the, is
22 just the fact of having to live through the whole

1 thing again with you through the process of
2 compassionate release motion. But another is,
3 and that would probably pertain equally to all
4 the factors.

5 But another is fear of the perpetrator
6 getting out and perhaps reoffending, and that
7 would maybe pertain more to some, some factors
8 than others, probably the terminally ill or
9 medically released, or elderly offender would be
10 less salient. So I wonder if you had any
11 thoughts on that.

12 MS. GRAW LEARY: Sure. I think our
13 thoughts are on the way that this would, the
14 provision was originally written prior to the
15 amendment doesn't raise a lot of those concerns,
16 because it was so narrow and it was extraordinary
17 and compelling, and it does reflect the
18 legislative history which talks about terminal
19 illness, etcetera.

20 So in those instances, you're exactly
21 right. A victim of violent crime is not only
22 less concerned about personal safety when we're

1 talking about some extreme circumstances, but
2 also it's going to be much more rare, it's going
3 to be extraordinary that this would happen. With
4 these amendments and so with the broadening of
5 some of that medical language, that is not the
6 case anymore, right?

7 It is not -- it is both broadened in
8 number and broadened in what will qualify and
9 trigger. And as was eloquently said by the
10 previous panel, these are motions that are made
11 with people with very lengthy sentences two,
12 three years in. Their victim survivors are not
13 anticipating any of this at all.

14 With regard to personal safety, one
15 additional point if I may is just to say a lot of
16 times or I should say my colleagues report
17 several victim survivors who have been the
18 victims of violent crime really just focusing on
19 personal safety at that point, because in their
20 mind they just have to move, right?

21 That's their primary goal, not to
22 participate in a hearing or anything like that,

1 because they didn't see this coming at all, and
2 they've got very limited bandwidth and that's
3 their priority.

4 CHAIR REEVES: I hear no more
5 questions from the Commissioners. We will take
6 a brief recess, right, at this point for about 15
7 minutes. So please be returned to your seats.
8 Thank you Professor Leary, thank you Ms. Bushaw
9 for your testimony.

10 (Whereupon at 2:35 p.m., the above-
11 entitled matter went off the record and resumed
12 at 2:50 p.m.)

13 CHAIR REEVES: We have a special guest
14 back there. We want to make sure that that
15 person is all settled down and happy. All right.
16 Our seventh group of panelists will provide us
17 with a perspective of formerly incarcerated
18 individuals. Our first panelist is Dwayne White.
19 Mr. White was previously sentenced to 25 years in
20 federal prison as part of false stash house
21 prosecutions in Illinois.

22 Mr. White served more than 11 years in

1 prison, until he was granted compassionate
2 release in 2011, with the court citing the
3 "injustice and unfairness" of his "prosecution
4 and resultant sentence." Mr. White currently
5 lives in Zion, Illinois raising his daughter,
6 Dearra, working at a medical supply company and
7 participating in a local gun violence prevention
8 initiative.

9 Our second panelist is Derrell, excuse
10 me, Derrell Gaulden. Mr. Gaulden was previously
11 sentenced to a term of over 30 years in prison,
12 which included stacked five year terms for a
13 Section 924(c) firearms offense. After serving
14 23 years of his sentence, Mr. Gaulden was granted
15 compassionate release with the court citing the
16 "remarkable rehabilitation" and the Bureau of
17 Prison's failure to effectively treat his serious
18 medical conditions.

19 Since his release, Mr. Gaulden has
20 gotten married and launched his own trucking
21 company, trucking business.

22 Our third panelist is Adam Clausen.

1 Mr. Clausen was previously sentenced to a term of
2 over 200 years in federal prison. After serving
3 more than 20 years of that term, a judge granted
4 Mr. Clausen's motion for a compassionate release,
5 citing a "remarkable record of rehabilitation"
6 and an off the chart sentence, as described by
7 the judge.

8 Since his release, Mr. Clausen has
9 gotten married, become a father and served as an
10 advocate for criminal justice and corrections
11 reform. Our fourth panelist is Ms. Gwen Levi,
12 Levy, excuse me. Levi, I'm sorry, I'm sorry.
13 Levi like the jeans.

14 Ms. Levi was previously sentenced to
15 a term of over 30 years in federal prison. Her
16 term was shortened thanks to a Sentencing
17 Commission amendment. Later, after serving more
18 than ten years in prison, Ms. Levi was granted
19 compassionate release with the court citing her
20 age and medical conditions. Today, she serves as
21 an advocate for criminal justice reform and on
22 behalf of incarcerated people.

1 Our fifth panelist is Mr. Brant Brim.
2 Mr. Brim was sentenced to life in federal prison,
3 in part due to prior drug convictions used to
4 enhance his statutory maximum penalties. After
5 serving more than 25 years in prison, a court
6 granted Mr. Brim's motion for compassionate
7 release with a motion citing his rehabilitation,
8 the need to care for his elderly mother and the
9 changes in law reflected in the First Step Act.

10 Today, Mr. Brim cares for his mother,
11 spends time with his children and grandchildren,
12 and works to reduce community violence in South
13 Los Angeles. We will first hear from Mr. White,
14 then from Mr. Gaulden, then Mr. Clausen, then Ms.
15 Levi and finally from Mr. Brim. Mr. White, we're
16 ready to hear from you sir.

17 Panel VII: Formerly Incarcerated Individuals

18 MR. WHITE: Thank you for this
19 incredible opportunity to speak to you about
20 compassionate release.

21 Thank you for this incredible
22 opportunity to speak to about compassionate

1 release. My name is Dwayne White. I am 35 years
2 old and I live in a suburb north of Chicago,
3 Illinois. I work night shift from 5:00 p.m. to
4 5:00 a.m., four nights weekly at a medical supply
5 company. When I'm not working, my favorite
6 activity is loving by my family.

7 At 22 years old, I was sentenced to a
8 25 year mandatory minimum, due to federal law
9 enforcement's fake stash house sting operation.
10 Two weeks after my arrest, I learned that my
11 then-girlfriend was expecting. My 12 year-old
12 daughter Deara is my guiding light and has
13 transformed my life.

14 I remember landing in Chicago after my
15 release and going to baggage claim, where my
16 family would be waiting to meet me. I gave my
17 daughter Deara the biggest hug. It was the first
18 time I had ever seen or hugged her in the real
19 world. For 11-1/2 years of her life, all of our
20 visits had been behind bars.

21 Compassionate release changed my life
22 in every way. It's hard to even put into words.

1 I believe our justice system was built on mercy,
2 and every person is a person with hopes and
3 dreams, even the people behind bars. I believe
4 courts should take mercy on people when there are
5 changed circumstances. Second chances should not
6 be frowned upon.

7 My changes was best seen when I was
8 outside. It's impossible to show how much you've
9 changed in prison while still in prison, and
10 people can dramatically change while inside. I
11 also used my freedom to help others. I work for
12 the Gun Violence Prevention Program to teach
13 young people how to value their life and freedom,
14 and my ability to change is clear, and everyone
15 deserves a chance to show you how they've fixed
16 their life.

17 Since my release, I've had the chance
18 to focus on my life and what's important to me,
19 and family has always been at the top of that
20 list. My mom always instilled in us the
21 importance of strong family ties and respecting
22 and loving each other. I love to get food and

1 try new restaurants with Deara, as well as
2 watching her cheerlead at basketball games
3 weekly.

4 I communicate with my brothers and
5 sisters every day. It's important to me because
6 family is all that you have. I find it
7 incredibly spiritually and personally fulfilling
8 to maintain such strong family ties. Christmas
9 of 2021 was a perfect example of my newfound
10 happiness. My older brother and I were both
11 incarcerated at the beginning of that year.
12 Neither of us was supposed to see that Christmas.

13 We both won our appeals and the two of
14 us getting out of prison meant all of my brothers
15 and sisters could be under the same roof in my
16 mom's house. We were completely happy and had an
17 amazing time. Do I think I'm a productive member
18 of society? Yes, I do. I work at a medical
19 supply company. My mother has a rare condition
20 that sometimes happens to long-term diabetics.

21 One night recently she was in a lot of
22 pain and the strongest woman I have ever met told

1 me she couldn't take it anymore. Thankfully, I
2 was there to call the ambulance. We had no idea
3 what was going on until the hospital visit, and
4 the nurse told me the products used on my mom
5 came straight from my warehouse. I was grateful
6 and it was a full circle moment.

7 Compassionate release offers so many
8 opportunities. I'm proud of the progress I made
9 while inside for my future. It's not easy to
10 change while in prison, but I did, and so have
11 many others. I maintained a relationship with my
12 daughter. I wrote books. I also had a lot of
13 time to think about my future and goals. I'm
14 also going to classes for my commercial driver's
15 license.

16 Change brings unforeseen and amazing
17 opportunities. Building back my career and my
18 family and my life is my focus. I so appreciate
19 the opportunity that I've been given to do so.
20 Compassionate release changes the lives of many.
21 Compassionate release is not just about releasing
22 prisoners; it's about judges having the ability

1 to answer prayers of little girls and boys who
2 want their parents released.

3 It's about judges having the ability
4 to answer the prayers of parents who have
5 incarcerated children. I believe the lack of
6 parental structure and guidance is definitely the
7 leading cause of young children being led astray
8 and following the wrong path. This leads to a
9 dark cycle of souls trapped in the system.

10 While at the Gun Violence Prevention
11 Program, I work to inspire the youth who come
12 from where I do, by showing them how life on the
13 streets is not the way. My story of change is a
14 huge inspiration to those who have brothers and
15 sisters still on the inside or facing the
16 streets, and I sincerely hope that more lives can
17 be changed through judges granting compassionate
18 release.

19 Please know that not only can people
20 change, but the system should take mercy on them
21 when they have changed due to extreme
22 circumstances. Thank you very much.

1 CHAIR REEVES: Thank you, Mr. White.
2 Mr. Gaulden.

3 MR. GAULDEN: Good afternoon.

4 CHAIR REEVES: Make sure your green
5 light is on.

6 MR. GAULDEN: Good afternoon.

7 CHAIR REEVES: There you go.

8 MR. GAULDEN: All right. My name is
9 Derrell Gaulden. I was granted compassionate
10 release July 19th of 2022, me and my twin
11 brother, by a Chief Judge Jay Randal of the
12 Southern District of Georgia. I'd like to thank
13 him and thank the United States Sentencing
14 Commission for the opportunity to speak today.

15 I was young, my father was in the
16 military. We got to do a lot of moving around,
17 and when he got out of the military we came back
18 to south Georgia, right, in 1987. That's right
19 about the time of the crack epidemic that landed
20 me and my twin brother in a spot where we could
21 make a lot of money real fast, and that's what we
22 decided to do.

1 In 1998, my brother and I were
2 indicted by the federal government. We decided
3 we were not going to do any testifying, so that
4 got me and him both 30 plus years. It put my mom
5 in bad health and it sent me and him both to
6 different prisons, because identical twins can't
7 be in the same prison. So I got to spend the
8 first 26 years of my life every day with him, and
9 then for 23 years I didn't get to see him.

10 My lawyer and Mr. Judge Randal Hall
11 got both of us released the same day on
12 compassionate release. As I wrote to my lawyer
13 one time before, I've been dedicated to change
14 since the beginning of my sentence. It's not, it
15 wasn't towards when they were saying
16 compassionate release or the CARES Act.

17 I wanted to change that first week
18 that I got sent to a penitentiary and it's like
19 wow, this is not where I'm supposed to be. So
20 that's what I did. Every college course I could
21 take, I jumped on it. The drug class, they said
22 you've got to -- you're volunteering, but you

1 don't do drugs and to send your PSI. I wanted to
2 know different things and I said that it's not
3 just smoking the drugs, it's selling drugs is an
4 addiction. I did that in '99, and every college
5 course they came up with, I wanted to take.

6 I did that. I wrote my brother just
7 about once a month or so to keep, make sure he
8 was on the right page, okay. My father died from
9 seizure complications when he was 44. I have
10 seizures real bad too, and it happened right at
11 44. I wasn't getting the medical attention and
12 they was just loaded me up on medications. I was
13 in a coma for over a month, and I got back out,
14 couldn't even walk. I was in a wheelchair for
15 months, and I bounced back from that and like I
16 said, I didn't let that hold me down. I kept on
17 going.

18 Every legal thing that was coming up,
19 the 18 to 1, I was denied that. So I was still
20 sentencing at 100 to 1. Compassionate release
21 came out, my lawyer put it in and they granted us
22 both compassionate release. I was thankful not

1 to die in prison behind the seizures and being
2 stuck in a cell where if you have one, it's
3 nobody in there to keep you from choking on your
4 tongue.

5 My brother, he has seizures but he
6 also has sarcoids or something like that, okay.
7 I got out. My probation officer gave me all kind
8 of instructions of hey go to this clinic right
9 here. I'm not on blood pressure, heart meds or
10 anything. I take less seizure meds now, and that
11 gives me the complications behind taking the
12 seizure meds. I don't even have those most of
13 the time now because they reduced it.

14 I've only had one seizure since I've
15 been out. Me and my wife, I've gotten married,
16 we started a business. We're signed up for
17 Savannah Tech for a CDL class. I think we start
18 March the 27th. Everything's positive, going in
19 the right direction. It was because of
20 compassionate release.

21 I've been rehabilitated way before
22 this. I've left a lot of friends that took

1 college courses with me, helped me with learning
2 accounting and so many different things, and
3 they've exhausted all their remedies in the
4 courts. I think that compassionate release will
5 be able to help them too. Thank you.

6 CHAIR REEVES: Thank you. Mr.
7 Clausen.

8 MR. CLAUSEN: Commissioners, good
9 afternoon. I appreciate the opportunity to be
10 able to hear, to be able to speak with each of
11 you today, to offer a different perspective,
12 because I've been listening in on the hearings
13 all day, and initially what I intended to talk
14 about has changed a little bit.

15 I want you to remember two things when
16 you think back and recall my five minute
17 testimony. I want you to look at me and see the
18 face of exactly what everyone who has come before
19 in opposition of compassionate release, of
20 expanding it, of making sure that someone like me
21 has the opportunity to be here today.

22 I'm a repeat violent offender. I was

1 sentenced to over 200 years in prison. There was
2 no reason for me to hold on to any shred of hope.
3 What you hear over there, that's my son. That's
4 the potential. He would not be here if I were
5 not here today, if people did not believe in me
6 and grant me the opportunity to be here.

7 Now what it took for me to be here
8 today, that list of extraordinary and compelling
9 achievements, in addition to a change in the law,
10 that 924(c) law which everyone agrees was unjust,
11 it was not made retroactive. Therefore, I had no
12 opportunity for recourse in the courts.
13 Compassionate release gave me that vehicle, gave
14 me that means.

15 The list of extraordinary and
16 compelling achievements, I don't think you can
17 comprehend the challenges, the adversity that
18 each of us up here had to endure and overcome
19 simply living through those circumstances. The
20 state of incarceration in this country is not
21 meant to rehabilitate. What we accomplished is
22 truly extraordinary. What I am asking the

1 Commission to please, to please do is to set a
2 standard, to set a high standard for those on the
3 inside to aspire to, that will instill hope where
4 there is currently little more than despair.

5 Likewise, by setting that same
6 standard, you send a clear message to the
7 judiciary to give them the confidence to rule in
8 a case like mine where to be honest, few judges
9 in this country would take a chance on someone
10 like me. To look at my criminal record, that
11 would be the immediate disqualification,
12 regardless of what I accomplished on the inside,
13 the number of lives that I was able to positively
14 impact.

15 It took great courage on the course of
16 my judge, Judge Gerald Pappert, to grant my
17 compassionate release. It also took great
18 compassion by Assistant U.S. Attorney Bob Zalzheimer
19 (phonetic), to not only not oppose that release,
20 that sentence, but to make the statement that he
21 would not appeal, that the government would not
22 appeal my sentence.

1 What that did was it allowed my
2 sentence unfettered discretion, which the reality
3 is that very, very rarely happens with judges
4 today. Their rulings are left open to scrutiny,
5 as we've seen with so many compassionate release
6 cases. So I'm asking you, Commissioners, to
7 please set that standard, to have that courage to
8 do the difficult thing, where the easy course
9 would have been to deny my motion, where the easy
10 course would be to set those restrictions and
11 limitations that limit the number of individuals
12 who are able to receive relief.

13 I would not be here without the
14 relentless pursuit of justice by my attorney,
15 Shon Hopwood, who because of his lived experience
16 is an advocate like no other. I am forever
17 grateful to have people like him who believe in
18 me, who built the relationships necessary with
19 the U.S. Attorney's Office and with the
20 judiciary, that allowed me to be here today.

21 The second thing I want you to
22 remember is the face of my young son, because he

1 represents the potential that resides all across
2 this country in our prisons. Given the
3 opportunity, they too can do incredible things on
4 this side. Thank you.

5 CHAIR REEVES: Thank you, Mr. Clausen.
6 Ms. Levi.

7 MS. LEVI: First of all, I want to
8 thank you for this opportunity to come before
9 you. I was sentenced originally to 400 months.
10 Okay. I was sentenced originally to 400 months,
11 and I knew at that time that I would have to make
12 some drastic changes in my life, in my mind, in
13 my mind set.

14 I began to, as many of us did, take
15 all the classes, all the programs, do all the
16 things that I could do to try to make sure that I
17 would, if given an opportunity because I felt
18 that I would get an opportunity to come home,
19 that I would not die in prison. So therefore I
20 started doing all the things that I could to so-
21 called rehabilitate myself.

22 But it wasn't so much to rehabilitate

1 myself, as to transform my mind set, to transform
2 my heart, and I believe I did that. I started
3 working with programs dealing with seniors
4 organizations, met with the American Disabilities
5 Unit, got wheelchair ramps and this put in places
6 that there weren't none, and doing all the things
7 that I thought I should be doing.

8 Each time I tried to, one of the laws
9 or one of the amendments that you all made I
10 applied for. Denied, denied, denied. In 2016
11 and 2015, my daughter died of lung cancer. Three
12 months later, I was diagnosed with lung cancer.
13 Six months later, I was classified as Stage 3 and
14 possible terminal.

15 I was transferred from out of a state
16 prison where I had been sent in a transfer
17 agreement with the Federal Bureau of Prisons and
18 the Department of Corrections of Maryland. After
19 nine years of being there, close home to my
20 family, got sent to Carswell, Texas to a federal
21 medical facility, and witnessed compassionate
22 release in reality.

1 Nine days after I was there, three
2 women had a memorial service. Two had received
3 compassionate release and the Federal Bureau of
4 Prisons had not let them out. One was waiting
5 for compassionate release and passed, and all
6 three passed away.

7 I went back up to my room and I said
8 Lord, you can have compassionate release. I
9 don't want to die. I don't want to be terminal.
10 I don't want to die, I don't want to go home to
11 my momma, who was still living. I don't want to
12 go home to my momma. Please, please, I will find
13 another way. I will stay here until you show me
14 another way. I do not want to go home on
15 compassionate release and die on my momma.

16 Three months later, I got my
17 prognosis, cancer-free and I began another
18 search, another commitment to do all the things I
19 could do, to make sure that I would be a useful
20 person inside if I didn't get out. But I knew
21 inside some way there was going to be a way for
22 me to get out.

1 And fortunately, the First Step Act
2 came into play. It reduced my 400 month sentence
3 to 292 months. A year and a half later, after
4 getting that reduction, I put in for the CARES
5 Act and was granted the CARES Act in June 2020.
6 Because of my behavior inside and my capacity to
7 maybe get sick from COVID and the support of my
8 warden, I was granted that CARES Act.

9 But guess what? My warden recommended
10 it, but it was turned down. I ended up writing
11 my warden and saying please, please, I'll never
12 forget it. You have been granted by the Justice
13 Department discretion to select people who in
14 your facility that you think could be useful
15 citizens, could be rehabilitated and go back into
16 society and be useful.

17 Please, use that discretion and send
18 me home to my momma. Nine days later, my
19 compassionate release, I'm sorry, my CARES Act
20 denial was reassessed and I was sent home under
21 the CARES Act. Going home, I didn't have
22 computer literacy, I didn't have computer skills.

1 I knew once I got home, I got sent from the
2 halfway house, the very next day I was put on
3 home confinement.

4 No programming, no except for the
5 programming that I was fortunate to have done
6 while I was inside. Because of COVID, I couldn't
7 go back to the halfway house. I was left to my
8 own to figure out how to navigate the telephone.
9 I couldn't put any job applications because
10 everywhere I went they said you had to do it
11 online. So I asked could I come back over to the
12 halfway house to take some computer classes,
13 which they had about 100 computers sitting in
14 there.

15 No, sorry, can't come back. I said
16 what do you mean? Fortunately, I had some
17 organizations that I had learned about while I
18 was inside. FAMM was one of them. Maryland
19 Justice Project is another one. They were local
20 organizations, national organizations that I had
21 begun to like talk to and lobby with and work
22 with when I got out on that compassionate

1 release.

2 One of them decided we're going to
3 start a free computer class. I went to that
4 class, a free computer training class. They, I
5 got permission from my parole officer, I got
6 permission from the halfway house, started the
7 classes. First Saturday, second Saturday, third
8 Saturday they decided to call me and for four
9 hours they couldn't get me because I turned my
10 phone off.

11 I'm in class. We can't have on our
12 phone on in class. They started calling me at
13 eleven o'clock and at one o'clock I got out of
14 class, and from one o'clock to three o'clock I
15 saw the messages as soon as I got out and I
16 started calling them. I didn't reach them until
17 three o'clock, and at three o'clock I was told
18 that I had been -- was being remanded back to the
19 halfway house. I was to call them, it was a
20 Saturday evening. I was to call them every two
21 hours until they told me to come in.

22 So Saturday night, ten o'clock, I

1 called. That was going to be my last call for
2 the night. I told them, I said okay, I'll talk
3 to you in the morning. She says no, you're going
4 to call me at twelve o'clock and two o'clock in
5 the morning, 2:00 a.m. and 4:00 a.m., which I
6 did. My son, when I told him that, he drove from
7 Virginia and came and slept at the bottom of my
8 bed to make sure that I made those calls.

9 But to no avail. Monday morning I was
10 told that later on that day, at 2:29, to report
11 to the halfway house and pack a bag. My mom
12 wasn't home, I hadn't told her about what was
13 going on because I didn't want to worry here,
14 because I figured that okay, Monday morning it
15 will be straightened out. But guess what? It
16 wasn't. I got remanded back to prison. I got
17 sent from Baltimore to D.C. Jail to await the
18 marshals to pick me back up.

19 I had been deemed an escapee, because
20 for four hours -- even after they got the
21 information, even after they saw the pictures of
22 me being in class, I still was violated and sent

1 back. It wasn't until organizations like FAMM
2 and those organizations that I said that I had
3 been volunteering with and had been helping other
4 people, it wasn't until those organizations, my
5 family, my sons, my mother made a public outcry
6 about what was happening to me, that my judge
7 looked at that and realized that after what they
8 told them what I was doing and what was going on.

9 She looked at it and said she had
10 discretion, and she looked and said yes, Ms. Levi
11 doesn't deserve to go back and be in prison until
12 she's 93 years old and granted me compassionate
13 release, and that's why I'm here.

14 I want to make sure that you all
15 understand that there are going to be some
16 extenuating circumstances that don't go into the
17 law, don't go -- and there's going to have to be
18 judges who can use their discretion to look into
19 these situations like mine that was not a clear
20 violation, but I was sent back.

21 There are judges that had that
22 compassion and all I'm saying is please, with

1 this amendment, allow those judges to be able to
2 use that discretion, so that people like me can
3 come back home and not be threatened and sent
4 back to prison. Most of us come home, we're
5 getting jobs, we're opening families. Yet things
6 that we're doing positive, the amount of people
7 who came home under the CARES Act, the recidivism
8 rate is I think zero point something percent.

9 Please allow the judges to use that
10 compassionate release to give them that ounce of
11 freedom that they can deserve. I would say --

12 CHAIR REEVES: Thank you. Ms. Levi,
13 I'm so sorry.

14 MS. LEVI: I've got to say this.

15 CHAIR REEVES: I'm so sorry.

16 MS. LEVI: I got released from my
17 probation yesterday on my way here. I got to
18 tell you this.

19 CHAIR REEVES: Thank you. I'm so
20 sorry.

21 MS. LEVI: It's okay.

22 CHAIR REEVES: We want to hear from

1 Mr. Brim too.

2 MS. LEVI: I know.

3 CHAIR REEVES: And we want to be able
4 to ask you all questions, so but thank you.
5 Thank you so much. Mr. Brim.

6 MR. BRIM: Thank you, thank you.
7 Thank you for taking the time to hear from me
8 today. My name is Bryant Brim. I served 26
9 years of a life sentence for a non-violent drug
10 offense.

11 I was granted compassionate release
12 almost exactly two years ago today. When I went
13 into custody, I tried to focus, stay positive,
14 stay out of trouble, stay hard, work hard and did
15 everything that was asked of me. I kept
16 believing that some day I would get a chance to
17 go back to my family.

18 My family is what I want to talk about
19 today. When you go into custody, your family
20 does the time with you. My wife Sheila Hyde Brim
21 (phonetic) has taken care of our children by
22 herself. She moved family, she moved our family

1 forward. My six kids grew up, graduated, started
2 new jobs and their own families. All of my
3 children and grandchildren didn't abandon me.

4 We exchanged letters and they came to
5 visit. I took life skill courses to help me
6 better myself, a better father and a grandfather.
7 My family is everything to me and they continue
8 to give me hope. My family is also part of why I
9 was released. While inside, my mother Ruth Brim,
10 who I call mommy, got sickened. She had a heart
11 disease and started having strokes and seizures
12 that left her partially blind and partially
13 paralyzed.

14 My brother E tried to take care of
15 her, but he is a serious alcoholic and oftentimes
16 left my mom alone for hours, even days at a time.
17 You can't imagine how scared I was in prison when
18 I called my mother and the phone would just ring
19 and ring and ring. For nearly nine years, I was
20 separated in prison knowing she was sick and
21 alone at home, and I couldn't care for her unless
22 I was released.

1 Now that I am out, my family is my
2 life. My being out of prison have meant all the
3 difference to mommy. She is a different person.
4 Every morning now I get up and head over to her
5 house. I bring her breakfast each morning. I
6 even switched her over to decaffeinated coffee,
7 because it's better for her heart. But don't
8 tell her.

9 CHAIR REEVES: She can hear you.

10 MR. BRIM: We sit and talk and she
11 tell me stories about my dad and about the old
12 days in the neighborhood. A lot of days she has
13 appointments and I drive her wherever she need to
14 go. On our way home, I always take her out to
15 eat as a special lunch. We drive around the
16 neighborhood and she tells me about the things
17 that have changed. She spent so much time in the
18 house, but she really enjoy these drives.

19 My mother's doctor tells me she really
20 turned around since I'm out. Before, she wasn't
21 always taking her medication. Now I make sure
22 she take everything consistently. Before, she

1 wasn't staying hydrated, but I sit with her and
2 make sure she sips on water. Before when my
3 brother was around, he would bring her Kentucky
4 Fried Chicken to eat, because that's what she
5 said, she said she wanted.

6 But now I make sure she eat healthier.
7 I even set up systems for my friends and family
8 in the neighborhood to make sure I have a backup
9 in case I am caught up at work or other things in
10 an emergency. It feel good to know she is on the
11 right, stable path. One of mommy doctors, Dr.
12 Tyeesha Jones, give me a big hug the other day,
13 thanking me for what I have done to turn her
14 around.

15 You can see from the pictures I
16 submitted with my written statement, it's like
17 she's a whole new person. I'm not saying this
18 because I think I deserve praise for what I've
19 done for my mom. Mommy gave me everything and
20 now I get to give her this.

21 I'm saying this because compassionate
22 release didn't just change my life, it changed

1 hers too. My brother E, who was my mother's
2 caretaker while I was in prison, now he is in
3 prison. If I hadn't been released, I really
4 don't know what would have happened to my mom.

5 Now that I'm out, I also get to be
6 part of my children and grandchildren's life too.
7 My daughter calls and says there's an event at
8 the elementary school or my granddaughter is
9 having a volleyball game and I am there. I try
10 my best to show up every time I'm invited. Of
11 course, I am doing other things too. I am
12 working. I am attending therapy to try to work
13 on myself. I volunteer and giving back to my
14 community, and I try to stay up on what's going
15 on in the law and help others who are left
16 behind.

17 That's why I am so grateful to be able
18 to talk to you today. At the age of 35, the
19 justice system was ready to lock me up and throw
20 away the key. I am so grateful for compassionate
21 release, and I am grateful that I have time, that
22 the time came before the judge who allowed to

1 consider everything about me, he considered the
2 way the law looks different now on life sentence
3 for drug offense, and considered the fact that my
4 mom needed a caretaker.

5 I had worked hard in prison to make
6 myself a better person, and I want to end this by
7 saying I believe that compassionate release
8 shouldn't be for only an ill prisoner to have up
9 to 18 months to live, and I feel that's a burden
10 on his family. You're coming out and you've got
11 six months. They only let you out at 18 months.
12 I ain't never seen nobody get out that have 18
13 months to live. Six months, 30 days, 90 days.
14 That's a burden.

15 Well, we can be a person like me and
16 be helpful. I'm helpful to my community. I work
17 with LAPD, the Watts Task Force. That's it,
18 yeah.

19 CHAIR REEVES: Thank you, Mr. Brim.
20 Thank you all, gentlemen and Ms. Levi. Any
21 questions from any Commissioners?

22 VICE CHAIR RESTREPO: I want to

1 congratulate all of you on what you've
2 accomplished since you were released from
3 custody. It's very impressive. I have two
4 questions for Mr. Clausen. Mr. Clausen, during
5 your testimony now, you referenced a standard we
6 should set that will inspire people. Could you
7 tell me what that, what you meant by the
8 standard, what it would look like?

9 The other question I have for you with
10 respect to victims. There were clearly victims
11 in your case. One of the victims was beaten, I
12 think pistol whipped. How does that factor into
13 the compassionate release equation, and how
14 should judges consider the impact these crimes
15 has on victims, particularly victims of violent
16 crime?

17 MR. CLAUSEN: A very good question,
18 and I'd like to begin by me answering the second
19 aspect first. Victims of crimes, I make very
20 clear I have deep regrets for all of the crimes
21 that I committed, for all of the persons harmed,
22 and it weighed heavy on me daily throughout the

1 course of my incarceration.

2 It was always a matter of have I done
3 enough time to serve the interests of justice,
4 and have I done enough to give back, to balance
5 out the scales of what I had taken from others.
6 Believe me, that weighed heavy and at some point
7 I felt after 20 years, that hopefully those
8 scales had at least been balanced, that I had
9 given back. I had positively impacted more lives
10 than I had harmed, and I would hope that 20 years
11 was sufficient to serve the interests of justice
12 for those persons who were harmed.

13 I do want to add that I believe most
14 professionals within the U.S. criminal justice
15 system at this point have become desensitized to
16 the amount of time that we give out. You've
17 heard the terms served, the terms that were given
18 to each of us up here. Those sentences are
19 extreme, and it's -- if you have never served one
20 day in prison, you do not know what it means to
21 endure those hardships.

22 So for those accomplishments that each

1 of us had on the inside, simply programming goes
2 against social norms, to have the encourage to do
3 that, to try and improve yourself under those
4 conditions. I would hope that the Commission
5 could set a standard, as I said, where
6 programming, where the significance of
7 participating in the few programs that do exist,
8 that you recognize the significance of such,
9 because it's not easy. It's not easy to do those
10 things on the inside.

11 And as far as a standard, that it be
12 just clear enough so that we have a guidepost.
13 Those of us on the inside, especially individuals
14 who are serving 924(c) sentences, where there's
15 little to no hope. By creating a mechanism that
16 instills hope, you can change the culture of the
17 entire prison system.

18 Let me just be clear. By creating
19 this mechanism, having that shred of hope changes
20 everything. I was one of the few that believed I
21 would at some point get a second chance, that I
22 had people, family that believed in me. That

1 allowed me to hold on to hope. I watched many
2 others who are not that fortunate.

3 So I ask that that standard be set,
4 that it not be the accomplishments that I had
5 because that would be unrealistic. I had to do
6 things that had never been done before, never in
7 Bureau of Prisons history. That's not a standard
8 others can live up to. So that it be realistic,
9 and that judges have the discretion to credit, to
10 give credit where that credit is due, where the
11 scales have been balanced, where it is truly
12 equitable and just.

13 VICE CHAIR RESTREPO: Thank you.

14 CHAIR REEVES: Vice Chair Mate.

15 VICE CHAIR MATE: I want to echo the
16 congratulations to all of you. I really
17 appreciate you taking the time to travel here and
18 share your experiences with us and submitting
19 your written testimonies. All been very helpful
20 and we really appreciate it.

21 I think every one of you, maybe I
22 missed one, mentioned programming in -- oh,

1 sorry. Mentioned programming in prison as being
2 helpful. I'm also wondering, are there certain
3 things since you have left prison that have
4 helped you succeed, because every one of you has
5 been successful since leaving prison, succeed in
6 the community? That can go to any one of you if
7 there's anyone who wants to start on that.

8 MS. LEVI: For me, family first of
9 course. I have four sons and my mom's 95 and
10 she's active and engaging and strong, just she's
11 awesome. But not just family but community. If
12 I didn't have the community support when I came
13 home, I wouldn't have known how to navigate the
14 new Baltimore.

15 I wouldn't have known the good places
16 to go. I might have, I might have reverted back
17 to the old places that I knew, but I didn't even
18 have to because I -- the organizations, those
19 non-profit organizations, those mayoral programs,
20 those reentry programs, they work.

21 We need more of them; of course we
22 need more of them. But the few that were there,

1 I was able to take advantage of and like I said,
2 I got my computer skills. I still don't know how
3 to navigate that phone too well but, you know,
4 I'm learning.

5 But it was organizations. It was not
6 the Federal Bureau of Prisons that did reentry.
7 It was organizations that I went to, University
8 of Maryland, organizations that I went to get
9 training, to get learning, to learn how to become
10 an advocate. I now go down to Annapolis,
11 Maryland and lobby for bills.

12 We've got -- oh man. The last two
13 years we've done some remarkable things in
14 Maryland. I lobbied all last year for voters
15 rights for formerly incarcerated, men and women.
16 Me and a couple of other ladies traveled all
17 around the state with my probation officer's
18 permission, and we registered 1,100 formerly
19 incarcerated people to vote, you know.

20 There are opportunities and those
21 opportunities have to be put in place. So I'm
22 hoping that after you finish with the

1 compassionate release, jump on reentry and do
2 some stuff there.

3 (Laughter.)

4 MR. CLAUSEN: I would just add to that
5 --

6 MS. LEVI: Put programs out there for
7 us.

8 MR. CLAUSEN: I think you have a panel
9 here of individuals who would all volunteer to
10 help, especially with the Bureau of Prisons, in
11 making a more robust offering, because clearly
12 you can see from our experiences what worked for
13 us could work for others, and I would love that
14 opportunity to work with the Bureau to help
15 develop that.

16 MR. BRIM: And I'd like to add
17 something on that. Like in my situation, I had a
18 life sentence with no possibility of parole, no
19 good time. But I took programs consistently in
20 prison to better myself because with my family I
21 believed that I was coming home, with all my
22 motions getting denied, motion after motion, and

1 my mom got real sick and compassionate release
2 would help me get out.

3 But the programs like she said, Ms.
4 Gwen, we get programs like to better ourselves,
5 prepare ourselves for the streets is the only
6 street for other programs, not the BOP. But I
7 took every program. If you check my record, two-
8 three times, and didn't get no good times and
9 wasn't getting no -- I couldn't get no release
10 because I didn't have no release date. So that's
11 all I wanted to say on that.

12 COMMISSIONER HORN BOOM: I just want
13 to say thanks to each and every one of you. I
14 have such deep respect for your rehabilitation
15 efforts, both within the Bureau of Prisons and
16 what you're doing for your communities and your
17 families upon release.

18 You know, one of the defining themes
19 it seems in each of your submissions to the
20 Commission is that you immediately had hope and
21 decided in your own mind that you, you know, were
22 some day going to emerge from the Bureau of

1 Prisons' custody and be free.

2 I guess my question is, you know, what
3 do you attribute that hope to and are there
4 additional programs or resources within the
5 Bureau of Prisons that could be strengthened to
6 give others that kind of hope? I mean in
7 addition to some of the things that we're
8 considering. So if there's anyone who hasn't
9 addressed a question, maybe Mr. White, you could
10 start, and then if anyone else wants to chime in.

11 MR. WHITE: One of the programs that
12 I feel really helped me, that I feel would
13 benefit more people if it would be strengthened
14 was the Men of Influence Program.

15 For the first three and a half years
16 of my prison sentence, I was incarcerated in USP
17 Leavenworth in Kansas. There is a program there
18 called Men of Influence. I went to six other
19 penitentiaries after USP Leavenworth and neither
20 one of those prisons had the Men of Influence
21 Program.

22 And what the Men of Influence Program

1 is is a program of incarcerated individuals, of
2 course, who have all done time, and in my case
3 each one of those men had been incarcerated for
4 pretty much longer than I had been alive. They
5 helped change my mind set. I wanted to change a
6 lot of things, but I didn't know better so I
7 didn't know how to think better.

8 The Men of Influence Program really
9 helped me. So if you could strengthen that and
10 get that into more prisons, I'm 100 percent
11 positive it will benefit more people just like
12 did me.

13 COMMISSIONER HORN BOOM: Thank you.
14 Anyone else?

15 COMMISSIONER WROBLEWSKI: I know we're
16 out of time, but I just want to, in addition to
17 thanking all of you for being here and for having
18 the courage to tell your stories, I just want to
19 also thank the families who have been supporting
20 you all of those years and have kept you going
21 through all of this, and here supporting you. We
22 see you too, and we really appreciate you being

1 here.

2 CHAIR REEVES: Thank you for your
3 extraordinary courage, your extraordinary
4 optimism. Don't know how anyone could be facing
5 a 200 year sentence, knowing that they would die
6 if they were to complete it, could have any hope
7 or optimism. You all are an extraordinary group
8 of people. Thank you so much for sharing your
9 stories, and we'll take it under consideration
10 along with all that we have heard today. Thank
11 you so very much.

12 VOICES: Thank you.

13 (Applause.)

14 (Pause.)

15 CHAIR REEVES: We are now preparing
16 for our final panel today, our eighth panel. I
17 thank you all for staying with us and I'm sure
18 this testimony too will be very beneficial to us.
19 This eighth panel will provide us with an array
20 of academic perspectives.

21 Our first panelist is Professor Erica
22 Zunkel, who serves as a clinical Professor of Law

1 at the University of Chicago Law School. In her
2 work, as associate director of the School's
3 Federal Criminal Justice Clinic, Professor Zunkel
4 supervises students representing people charged
5 with federal offenses and incarcerated people
6 seeking compassionate release and clemency.

7 Professor Zunkel has previously served
8 as a trial attorney at the Federal Defenders of
9 San Diego, Incorporated.

10 Our second panelist is Mr. Paul J.
11 Larkin, who serves as the John Robert Victoria
12 Rumble Senior Legal Research Fellow at the
13 Heritage Foundation. During his service at the
14 Department of Justice, Mr. Larkin worked as an
15 assistant to the Solicitor General and as an
16 attorney in the Criminal Division's Organized
17 Crime and Racketeering Section.

18 He has also served as counsel to the
19 Senate Judiciary Committee, and as the acting
20 director of the Environmental Protection Agency's
21 Criminal Investigation Division.

22 Our third panelist is Professor Andrea

1 Harris, who serves as an adjunct professor at the
2 University of Virginia School of Law. In that
3 role, Professor Harris runs the Federal Sentence
4 Reduction Clinic, which has assisted in the
5 drafting and filing of dozens of compassionate
6 release motions in recent years.

7 Professor Harris has also spent
8 decades working as a public defender in the
9 federal and state systems, and currently serves
10 as an assistant federal public defender in the
11 Western District of Virginia.

12 Our fourth panelist is Professor
13 Caitlin J. Taylor, who serves as an Associate
14 Professor at LaSalle University. Professor
15 Taylor's research investigates the collateral
16 consequences of mass incarceration and the
17 experiences of people released, released from the
18 criminal legal system.

19 Professor Taylor teaches courses on
20 Corrections, Criminal Justice, Ethics and
21 Statistics in LaSalle's Department of Sociology
22 and Criminal Justice.

1 Our fifth panelist is Professor
2 Jennifer Mascott, who serves as an Assistant
3 Professor of Law at George Mason University's
4 Antonin Scalia Law School. Professor Mascott
5 serves as the co-executive director of the C.
6 Boyden Gray Center for the Study of
7 Administrative State, and as a public member of
8 the Administrative Conference of the United
9 States.

10 She has also served as Deputy
11 Assistant Attorney General in the Department of
12 Justice's Office of Legal Counsel, and as an
13 Associate Deputy Attorney General. We will first
14 hear from Professor Zunkel, then from Mr. Larkin,
15 then Professor Harris, Professor Taylor and
16 finally Professor Mascott. Professor Zunkel,
17 we're ready for you.

18 Panel VIII: Academic Perspectives

19 MS. ZUNKEL: Honorable Chair Reeves,
20 Vice Chairs and Commissioners, thank you for
21 giving me the opportunity to testify today. The
22 previous panel, which included my incredible

1 client, Dwayne White, is a really important
2 reminder of what's at stake today.

3 Some of the witnesses have urged this
4 Commission to narrow its proposals significantly,
5 including the Department of Justice, which
6 recommends throwing out the (b)(5) proposal
7 altogether, and adopting Option 1 for the catch-
8 all category. I want to be very clear about what
9 the real world consequences of those
10 recommendations would be.

11 They would mean that Dwayne, Adam,
12 Bryant and Gwen would still be behind bars rather
13 than testifying before you today. Their freedom
14 is a direct result of judges having the ability
15 to consider changes in the law and other
16 unenumerated, extraordinary and compelling
17 reasons.

18 I first want to talk about the
19 importance of proposal (b)(5) through the lens of
20 Dwayne's case. Dwayne, as you heard, was
21 convicted in connection with the government's
22 stash house reverse sting tactic. After he was

1 sentenced, the tide turned dramatically on stash
2 house stings, and the government ceased the
3 practice.

4 But Dwayne was left behind in prison
5 with no recourse to recognize his changed
6 circumstances. After the First Step Act, my
7 students and I filed a motion that raised several
8 reasons for Dwayne's release, including his 851
9 enhancement that could not be imposed today,
10 severe sentencing disparities and the
11 government's disavowal of the stash house
12 operations.

13 After we filed, the Seventh Circuit
14 decided that one of the reasons we raised, non-
15 retroactive sentencing changes was categorically
16 barred from the judge's consideration. The judge
17 released Dwayne anyway, because he recognized
18 Dwayne's situation for what it was, extraordinary
19 and compelling, without considering the changes
20 in law.

21 (b)(5) would provide clear guidance to
22 judges that cases like Dwayne's involving changes

1 in the law that render the ultimate sentence
2 inequitable are extraordinary and compelling. Of
3 course it also gives judges the discretion to
4 conclude the opposite and deny the motion. Under
5 the Department's recommendation, Dwayne could not
6 bring a motion under (b)(5).

7 With no (b)(5) and with Option 1 as
8 the catch-all, I don't think Dwayne would have
9 much success convincing a judge that his case is
10 similar in nature or consequence to any of the
11 enumerated categories. That means Dwayne would
12 still be behind bars rather than making his
13 family and his community stronger. There seems
14 to be widespread agreement that the Commission
15 has the authority, the legal authority to
16 promulgate (b)(5).

17 The Commission also has the duty to do
18 so. Without a clear resolution, the circuit
19 split that we see will become more entrenched,
20 contrary to the Commission's charge of promoting
21 uniformity and avoiding unwarranted sentencing
22 disparities. (b)(5) hits the reset button. The

1 Supreme Court has confirmed the power of an
2 agency like the Commission to define ambiguous
3 terms in the face of conflicting case law like we
4 see.

5 Under the Brand X doctrine, after the
6 Commission defines those terms, courts then
7 "review the agency's construction on a blank
8 slate." The Commission's (b)(5) proposal
9 correctly resolves the circuit split by honoring
10 the plain text of 3582 and 994(t). The beauty of
11 the Commission's proposal is that it adds an
12 important narrowing mechanism.

13 It is not enough there to just be
14 changes in the law. Those changes must make the
15 sentence inequitable. That will allow judges to
16 filter out the run of the mill case from the
17 truly extraordinary ones like Dwayne's. But I
18 noticed that several written statements don't
19 even mention that important narrowing mechanism,
20 including the Department's, which
21 mischaracterizes the proposal as permitting
22 reductions "based on the mere fact that

1 sentencing law has changed."

2 Moving to the catch-all category,
3 Option 3 mirrors the policy statement's current
4 language and is the best choice because it
5 provides flexibility. We should heed the lesson
6 of the COVID pandemic, so we're not taking
7 ourselves down the line from going too narrow
8 today. Option 1, especially with no (b)(5),
9 would leave judges powerless to address unique
10 situations that we cannot possibly predict today.

11 I was going to end today by talking
12 about data and administrability but I decided to
13 scrap that, because I want to speak to this from
14 a human perspective.

15 I kind of can't believe that I'm
16 saying this, but I've been a federal criminal
17 defense attorney for almost 20 years, and through
18 that time I've seen a lot of things that are sad,
19 that feel unjust. I've seen families broken,
20 I've seen people broken, and I've been around
21 long enough to see laws change and us have a
22 different understanding of what's harsh and how

1 things can be different today.

2 And when I see the laws change, I
3 think back to conversations I've had with
4 prosecutors and judges, who bemoan having to
5 impose long mandatory minimum sentences, or
6 prosecutors that told me they wish their hands
7 weren't tied and that they could do something to
8 help.

9 Seeing the expansion of compassionate
10 release has given me hope. It gives me hope to
11 see our system make a little bit of space to
12 recognize we don't always get it right the first
13 time around. People change, circumstances
14 change, laws change. Let's let compassionate
15 release do what it was always supposed to do, and
16 recognize when those changes are extraordinary
17 and compelling.

18 We know that there are other Dwaynes,
19 Adams, Bryants and Gwens who are still behind
20 bars. They deserve a shot at justice, and our
21 system will be better for it if they have that
22 shot. Thank you.

1 CHAIR REEVES: Thank you, Professor
2 Zunkel. Mr. Larkin.

3 MR. LARKIN: The question is not
4 whether some of our sentencing laws are unduly
5 harsh. They are. The question is not whether
6 there are people in prison who should be
7 released. They should. The question instead is
8 who is responsible for making that judgment, and
9 in particular whether when Congress passed the
10 First Step Act it radically changed the nature of
11 confinement and release that had been adopted
12 throughout our history, applied by the executive
13 branch through commutation and parole, and
14 ultimately culminating in the Sentencing Reform
15 Act of 1984.

16 Statutory interpretation is a holistic
17 endeavor. So let's look at the whole of the
18 First Step Act, not just for words that are in
19 the current statute. If you look and it's
20 printed at pages eight to ten of my written
21 statement, you will see that the full text of
22 what was before Congress and what the members of

1 Congress therefore voted on, is brimming with
2 references to the historic problem of how do you
3 deal with a prisoner who is knocking on heaven's
4 door.

5 Traditionally, before the Sentencing
6 Reform Act came into being, the President would
7 commute someone's sentence just like a governor
8 would, or someone could be granted parole.
9 Congress tried to eliminate parole in the
10 Sentencing Reform Act, and for a brief period I
11 think it did, although believe it or not, I think
12 parole is back in effect though I'm the only
13 person I think in western civilization who holds
14 that view.

15 What Congress did not do was change
16 the authority given by statute to the Attorney
17 General and the BOP director to decide where a
18 prisoner should be housed. Nor did it change the
19 statutes giving those two parties the authority
20 to decide what medical care is appropriate. Nor
21 did Congress give the district courts or this
22 Commission the authority to answer the myriad

1 practical problems that result if you follow
2 through and apply, you know, generally all of the
3 new provisions that you want to add to sentencing
4 guidelines or policy statements or whatever.

5 Reading the statute to deal with the
6 traditional problem not only is consistent with
7 what Congress wanted to do, which was allow
8 prisoners to go to court and make their own case,
9 without giving the BOP the ability to strangle
10 their claim in the crib, but not create the
11 myriad other practical problems that result from
12 all this.

13 Those are problems that Congress
14 should resolve. Maybe Congress should do
15 something about a second look. It's not an
16 unreasonable position to think that people can
17 change, particularly when you consider the length
18 of some of the sentences that we impose. But
19 that is Congress' responsibility. It is not the
20 responsibility of district courts and it's not
21 the responsibility of this Commission.

22 Four words, extraordinary and

1 compelling reasons, is not an adequate
2 justification for the various different reforms
3 you would like to see done. They are beyond the
4 authority of this Commission. The Commission
5 should tell Congress to do that. The Commission
6 should tell the President to do that. But the
7 Commission shouldn't tell district courts to go
8 ahead and do all this, because there's nothing in
9 the statute that tells them how, and anything you
10 say is extra-statutory.

11 The result of all that will be the
12 same disparities that Congress sought to address
13 when it passed the original Sentencing Reform
14 Act. Thank you.

15 CHAIR REEVES: Thank you. Professor
16 Harris.

17 MS. HARRIS: Good afternoon Mr.
18 Chairman and Commissioners. Thank you for
19 inviting me to speak to the Commission in my role
20 as an adjunct professor of the Federal Criminal
21 Sentence Reduction Clinic at the University of
22 Virginia School of Law, on the very important

1 topic of compassionate release.

2 I understand that there may be a
3 couple of UVA Law grads on the Commission, so
4 this makes the honor even, even greater. When
5 Congress passed the Sentencing Reform Act of
6 1984, it specifically built several safety valves
7 for modification of an otherwise final sentence
8 into the statute.

9 The legislative history states that
10 the first safety valve, found in Section
11 3582(c)(1)(A), applies regardless of the length
12 of sentence to the unusual case in which a
13 defendant's circumstances are so changed that it
14 would be inequitable to continue the confinement
15 of the prisoner. Congress emphasized that the
16 value of this safety valve lies in the fact that
17 it assures the availability of specific review
18 and the reduction of the term of imprisonment for
19 extraordinary and compelling reasons.

20 This provision keeps the sentencing
21 power in the judiciary where it belongs, yet
22 permits later review of sentences in particularly

1 compelling situations. Congress' expansion of
2 3582(c)(1)(A) to allow inmates to directly file
3 motions for sentence reduction now allows for the
4 original intent of this provision to be fully
5 realized.

6 Over the last three years, students in
7 the UVA Sentence Reduction Clinic have worked on
8 a variety of Section 3582(c)(1)(A) motions based
9 on extraordinary and compelling reasons falling
10 within several categories proposed for addition
11 to the policy statement in 1B1.13, and I would
12 like to highlight a few of the proposed
13 amendments that fill gaps in the current version
14 of the policy statement.

15 First, with regard to proposed
16 amendment (b)(1)(C) relating to the need for
17 long-term or specialized care, this proposal
18 fills a gap in the current policy statement,
19 which provides that extraordinary and compelling
20 reasons exist in the case of illnesses or other
21 physical or mental conditions from which a person
22 is not likely or not expected to recover.

1 It is equally important to include a
2 provision that covers a situation where a person
3 may recover if -- from the serious health
4 condition they are facing if they simply received
5 specialized medical care in a timely manner. As
6 Mr. Crowe's case, which is cited in my written
7 testimony demonstrates, he was in danger of
8 losing a limb if he did not get specialized care,
9 and his case would have fallen squarely within
10 the ambit of this new proposed condition.

11 But I think one of the beauties of
12 this condition or of this provision is that it
13 may be needed only rarely if the BOP is able to
14 provide timely and necessary medical care. But
15 it is critically important in the cases in which
16 the BOP is either unable or unwilling to provide
17 such care.

18 Second, proposed amendment (b)(4)
19 relating to victims of assaults also fills a gap
20 in the current policy statement. The unfortunate
21 reality is that inmates are sometimes subjected
22 to physical and sexual abuse at the hands of BOP

1 employees or contractors, or at the hands of
2 other inmates. It is appropriate to include both
3 categories of assault as an extraordinary and
4 compelling reason in 1B1.13.

5 In addition, the Commission's
6 definition of serious bodily injury is too
7 limiting, and will prevent many inmates who are
8 suffering from physical or mental harm that
9 doesn't meet that very strict standard of serious
10 bodily injury from receiving relief, even though
11 their circumstances are so changed that it would
12 be inequitable to continue to confine them.

13 Third, proposed amendment (b)(5)
14 addresses a gap in the current policy by allowing
15 district courts to consider cases where the
16 individual is serving a sentence that is
17 inequitable in light of changes to or
18 clarifications of, in the case of 924(c)
19 provisions, of the law. This Commission has been
20 presented with many examples of individuals who
21 are serving extraordinarily long sentences
22 including life, for crimes for which they would

1 not receive that sentence today.

2 I outline two such cases in my written
3 testimony. Antonio Williams received a mandatory
4 life sentence at age 22, but would not face any
5 sentencing enhancements today. In reducing his
6 sentence, the district court judge stated that he
7 found his circumstances to be extraordinary and
8 compelling at the time he had to impose that life
9 sentence back in 2013, but that they were even
10 more extraordinary and compelling today in light
11 of Congress' expressed intent that that type of
12 mandatory life sentence doesn't fit the crime.

13 His co-defendant, Alfonco Britton,
14 also received a mandatory life sentence after
15 trial, but today would only face a mandatory
16 sentence of 25 years. In both of these cases,
17 the district court found that the gross disparity
18 between the sentences that they received and the
19 ones Congress now believes to be an appropriate
20 penalty, constitute an extraordinary and
21 compelling reason.

22 Importantly, this disparity did not

1 create an automatic right to a sentence
2 reduction, and the court went on to evaluate in
3 each case whether the Section 3553(a) factors
4 supported the court's exercise of discretion in
5 reducing the sentence. Giving the courts the
6 option to consider changes in the law is in
7 keeping with the Congressional intent that
8 Section 3582(c)(1)(A) provide a safety valve in
9 unusual cases where it would be inequitable to
10 continue to allow the current sentence to stand.
11 Thank you.

12 CHAIR REEVES: Thank you, Professor.
13 Professor Taylor.

14 MS. TAYLOR: Good afternoon,
15 Commissioners. Thank you for the opportunity to
16 offer public comment on the proposed amendment.
17 I'm honored to be here as the sole social
18 scientist on this very impressive panel of legal
19 scholars, so thank you very much. It's with
20 great enthusiasm that I would like to detail my
21 support for the expanded use of compassionate
22 release.

1 First, I would like to offer my
2 support for the proposed amendment's Family
3 Circumstances section, which appropriately
4 acknowledges the invaluable roles of people
5 incarcerated as parents to their own children and
6 caretakers to elderly loved ones. Some scholars
7 have pointed out that parental separation from
8 children due to mass incarceration has not been
9 on the scale in American society since chattel
10 slavery.

11 We have decades of scientific evidence
12 that confirms the negative impacts of parental
13 incarceration on children's health and well-
14 being, and future involvement in the criminal
15 legal system. The incarceration of any family
16 member also diminishes the family's financial
17 status and harms family members' psychological
18 well-being.

19 While an individual's crime may
20 negatively impact their community, removing that
21 individual from their community and their
22 families also removes all of the positive impacts

1 that individual may have as a parent, caregiver,
2 member of a local religious group, community
3 volunteer and so forth.

4 In considering the significant racial
5 and ethnic disparity in the federal prison
6 system, we know that these negative family and
7 community impacts disproportionately impact black
8 and Hispanic Americans. As such, the proposed
9 amendments expansion of the family circumstances
10 that would qualify for compassionate release is
11 certainly a commendable step in the right
12 direction.

13 However, with all of the scholarly
14 evidence we have on the negative impacts of
15 incarceration on families, I would like to
16 suggest that the Commission also consider further
17 expanding the eligibility criteria in this
18 section to include not only circumstances in
19 which an incarcerated individual is the only
20 available caregiver or parent, but also
21 circumstances in which there is substantial
22 evidence that the incarcerated individual plays a

1 particularly unique or valuable role in their
2 families.

3 Second, I would like to offer my
4 support to the proposed amendment's victim of
5 assault section, which would grant compassionate
6 release eligibility to incarcerated individuals
7 who have experienced serious bodily injury as a
8 result of sexual or physical abuse from a
9 corrections officer or other BOP employee. We
10 have a solid body of evidence that confirms the
11 negative impacts of victimization during
12 incarceration on future psychological distress,
13 as well as increases in recidivism.

14 The potential use of compassionate
15 release to increase access to physical and mental
16 health treatment in their community, away from
17 the environment in which someone was victimized,
18 may help to mitigate the negative effects of
19 victimization on future outcomes.

20 However, these negative effects exist
21 regardless of whether the person was victimized
22 by a BOP employee or by someone else

1 incarcerated. As such, expanding this category
2 to include victimization from others who are
3 incarcerated may be worthy of consideration.

4 I'd like to conclude with a bit of a
5 bolder perspective to consider. The Sentencing
6 Reform Act grants the U.S. Sentencing Commission
7 authority to determine what should qualify as
8 extraordinary and compelling reasons to justify
9 compassionate release. What more extraordinary
10 and compelling reason for compassionate release
11 exists than our nation's current status of mass
12 incarceration, which has historically and
13 geographically unprecedented.

14 No society ever in time, ever on the
15 planet, ever in human history has locked up
16 people like we have in this country in recent
17 decades. So that alone, in my opinion, calls for
18 a massive reimagining of how we define
19 extraordinary and compelling. Thank you again
20 for this opportunity and your thoughtful action
21 on these reforms.

22 CHAIR REEVES: Thank you, Professor

1 Taylor. Professor Mascott.

2 MS. MASCOTT: Thank you so much
3 Chairman and Commissioners for inviting me to be
4 here this afternoon. I teach right in the areas
5 of Constitutional interpretation of the
6 separation of powers at Scalia Law School, and
7 today I'm here speaking in my -- with my personal
8 views as an academic, and don't represent my
9 institution officially.

10 I'm going to comment on the
11 Commissioners' request for analysis of proposed
12 paragraphs (b)(5) and (b)(6) in particular, on
13 factual and legal changes occurring after
14 original imprisonment and conviction, and as a
15 number of my colleagues have noted in written
16 statements, of course in Section 994(t), the
17 Commission's of course given the power and the
18 authority and responsibility to evaluate
19 extraordinary and compelling circumstances that
20 would justify sentence reductions.

21 But I think in contrast to how some of
22 the other written statements describe that role

1 as having responsibility to define extraordinary
2 and compelling, that standard of course has an
3 objective plain meaning already in the statutory
4 terms. Context fills out a little bit more
5 perhaps the approach the Commission should take
6 in evaluating it, and I think instead the way to
7 conceive of 994(t) under its terms is the
8 Commission having a responsibility to explain, as
9 it has in the current policy guidelines and in a
10 number of proposals here, specific factual
11 circumstances that would measure up to
12 extraordinary and compelling reasons to modify a
13 sentence.

14 And in fact 994(t), it also gives
15 instructions to give specific examples and
16 criteria to use. I think that perhaps raises
17 some concerns with the way that (b)(5) and
18 several of the options in (b)(6) currently are
19 worded and framed. For example, in (b)(5) and
20 Option 2, that reference legal changes and
21 factual changes after imprisonment, the
22 Commission's proposals currently as written seem

1 to impose a new standard of something that's
2 inequitable.

3 That's obviously its own broad term,
4 meaning unfair, unjust, and seems to be
5 establishing a different separate new standard
6 that not necessarily -- that doesn't necessarily
7 rise to the level of something that's
8 extraordinary and compelling.

9 So unless the Commission were able to
10 explain or justify how every sentencing
11 difference or factual difference rises to --
12 that's inequitable rises to the level of
13 extraordinary and compelling, I think it
14 transgresses the Commission's authority to change
15 that standard rather than relying on Congress to
16 do so.

17 The other problem perhaps with those
18 proposals is that in contrast to a number of
19 other paragraphs listed previously, they also
20 don't list specific examples and criteria. I
21 think a similar problem perhaps arises also with
22 the way Option 1 is currently worded, because it

1 would allow the defendant to present any other
2 circumstance or combination of circumstances, and
3 it's similar to the previously worded ones in
4 paragraphs 1 through 3.

5 But again, unless that we're having to
6 make those circumstances rise to the level of
7 extraordinary and compelling, it again could
8 shift the comparative point to the Commission's
9 own guidelines rather than the statutory text
10 itself. And then with Option 3, just referencing
11 extraordinary and compelling circumstances, that
12 might almost be tautological.

13 I mean to the extent that you think a
14 commentary 1(d) currently is fine, that doesn't
15 really make that much of a change. But I guess
16 querying how necessary it is if it doesn't again
17 list the specific examples about the other
18 circumstances that might rise to the
19 extraordinary and compelling.

20 You study that for a minute on the
21 meaning of the statutory terms themselves.
22 Obviously as a number of folks have referenced,

1 there is a circuit split on conclusions about the
2 level of the Commission's authority under the
3 statutory text here. But the plain meaning of
4 the terms themselves, as a couple of the opinions
5 have pointed out, most recently the Sixth Circuit
6 sitting en banc and also the D.C. Circuit it's
7 quite -- according to its plain meaning, is a
8 very high standard, meaning unusual, far from
9 common, having little or no precedent, such
10 circumstances, and it's not clear, in fact far
11 from clear that sentencing changes would always
12 measure up to that standard, as some of those
13 opinions point out.

14 And then if we look even further to
15 the statutory context, of course the default
16 instruction in 3582(c) is that the court may not
17 modify sentences but for these exceptions, which
18 I think is a call to the Commission and to courts
19 to look very specifically and precisely at what
20 the limits are on the range of authority to
21 modify sentences for extraordinary and compelling
22 reasons.

1 And then even looking at the First
2 Step Act's enactment in 2018, as a number of
3 opinions and other folks here pointed out,
4 Congress took the opportunity there to modify
5 some of the compassionate release provisions, but
6 imposed really procedural changes or reporting
7 and notification requirements and didn't change
8 the actual substantive standard. And in fact
9 looking at the reporting notification provisions
10 that they put in place, it seems that they
11 reflect a lot of the medical and health reasons
12 that the Commission had already pointed out in
13 the previous version of the guidelines,
14 suggesting that those kinds of circumstances are
15 what Congress continues to have in mind as
16 extraordinary and compelling, as opposed to some
17 of the sentencing changes that are dealt with in
18 other portions of statutory schemes, but
19 explicitly identified by Congress as reasons for
20 sentencing modifications here.

21 So with that in mind, I'm happy to of
22 course answer questions, and thank you again for

1 the opportunity.

2 CHAIR REEVES: Thank you all. I'll
3 now turn to my fellow Commissioners. Jonathan
4 Wroblewski, you've been first every time.

5 COMMISSIONER WROBLEWSKI: I'm always,
6 I'm always ready. I'm always ready. Thank you
7 all for being here, and thank you for your
8 testimony. I want to especially call out
9 Professor Taylor. There's nothing like a bold
10 proposal, and I really appreciate it. I've been
11 known to make some of them, so thank you for
12 that. But my question actually goes to Professor
13 Zunkel. I was struck by two things that you
14 said.

15 First of all on the (b)(5) proposal,
16 you said this is not for the run-of-the-mill
17 retroactive application, and you were surprised
18 that that's not obvious from the words. The
19 words talk about changes in law, and then it has
20 this what I think is a pretty opaque word, called
21 the inequitable word.

22 Why shouldn't we be more explicit

1 about that? Why don't we just say this is not
2 for the routine retroactive application? So
3 that's number one. The second thing I was struck
4 by is Dwayne White, your client, despite the fact
5 that in the Seventh Circuit changes in law are
6 not considered extraordinary and compelling, he
7 was granted compassionate release.

8 It seems to me from listening to his
9 story and frankly the four others who were on the
10 previous panel, it's because as Ms. Barrett, who
11 testified hours and hours ago from the public
12 defender's office, it was because of a
13 constellation of circumstances related to their
14 lives, the people's lives aren't just oh, the law
15 changed and that's it. He spent years in prison
16 and did all kinds of programming. He described a
17 lot of that. He was committed to his family, all
18 kinds of other things, a constellation of
19 circumstances.

20 Again, why don't we say that? Would
21 you be okay if we said both of those things out
22 loud, that this is not for, a workaround for

1 retroactivity. It's not meant as a workaround
2 for habeas, but it's meant for extraordinary
3 circumstances beyond the few enumerated
4 provisions, looking at a constellation of
5 circumstances, whatever the words will figure out
6 that meet some very high standard of gravity,
7 extraordinariness. I'm not sure what the words
8 are.

9 But that's what we're looking for and
10 we should authorize judges and tell me, rather
11 than doing all the opaqueness of, you know, you
12 can do anything you want or, you know, changes in
13 the law, but as long as it's inequitable. You
14 know, why not be clearer?

15 MS. ZUNKEL: Well, I think that that
16 raises a number of good questions. I do think
17 that it gets to the heart of why judges are so
18 good and well-equipped to do this kind of
19 inquiry, and why I think that the (b)(5) proposal
20 does provide some guidance for district judges.

21 So what courts have been struggling
22 with in this interim period is people coming with

1 changes in the law and saying this change in the
2 law means I should get compassionate release. I
3 think what we see, if you look in the district
4 court's opinions, district court opinions where
5 judges are granting based on changes in the law,
6 it's a very, as you say, individualized inquiry.

7 It's often not just the change in law,
8 and that's why I do support and in my written
9 statement I talk a lot about a totality of
10 circumstances. I think judges need discretion to
11 be able to do that, which is why I think having
12 (b)(5), having inequitable as an anchoring point,
13 judges can look and see what are other reasons
14 that in this interim period judges have granted
15 compassionate release?

16 I think in some ways, the body of law
17 that we have right now can be very instructive.
18 It's what's so interesting about what we're doing
19 is we have had this laboratory essentially for
20 the past four years, and we're seeing what are
21 judges struggling with? Where are they granting?
22 So I think the totality of circumstances is

1 important, and that's why I don't think that
2 Option 1 really captures the judge's ability to
3 consider a wide range of reasons, and why I think
4 Option 3, which is the current language, is
5 appropriate.

6 VICE CHAIR MATE: I have a follow-up
7 question about the laboratory, and this is maybe
8 -- I think this is for Professor Zunkel and
9 Harris and the laboratory of the Seventh Circuit
10 and the First Circuit.

11 You know, we currently have a circuit
12 split on different factors that may or may not be
13 able to be considered, and there are some
14 circuits that have said more factors rise to the
15 level of extraordinary and compelling, and some
16 circuits that say less of them do. Have we seen
17 in the circuits that allow more an unmanageable
18 number of cases?

19 MR. CLAUSEN: So I guess I'll answer
20 that, since I'm in one of those circuits. I'm in
21 the Fourth Circuit, and I -- it would be my
22 position that no, we haven't seen an unmanageable

1 number of cases. Now very early on in the
2 pandemic, I think we were all across the country
3 feeling a little bit of an unmanageable number of
4 cases because there were so many COVID, you know,
5 medical-based motions.

6 And so for a while, it felt like
7 that's all we were doing. But you know, the
8 pandemic is hopefully waning, on its last legs
9 and vaccines came out. And so after that, you
10 know, the number of cases that has, from my
11 experience, gone down significantly, and the
12 courts seem able to manage the caseload.

13 Now some, some motions kind of linger
14 for a while after they've been filed. But one of
15 the things I also wanted to point out, so there's
16 a recent case in the Fourth Circuit that came
17 out, U.S. v. Ferguson, that kind of addresses the
18 you can't use compassionate release as an end run
19 around 2255, and that's a case that specifically
20 talks about, I think, the defendant in that case
21 raised the issue of well actually his original 30
22 year sentence was invalid because they didn't

1 indict him for the silencer in his indictment.

2 So he threw that in his compassionate
3 release motion, and the Fourth Circuit very
4 quickly considered that and said no, you can't --
5 this 3582 isn't the proper vehicle for those
6 kinds of motions that are really properly a 2255
7 motion. So I think the, you know, we started to
8 see the courts addressing those kinds of things,
9 and I think that demonstrates that 3582 is
10 manageable and that courts know how to, you know,
11 keep their decisions to the areas that the
12 statute allows.

13 MS. ZUNKEL: I can certainly speak to
14 the two part thing in a district or in a circuit,
15 where compassionate release has been narrowed
16 considerably. I think the important thing to
17 think about is there is a difference between
18 categorically saying that cannot be an
19 extraordinary -- something cannot be an
20 extraordinary and compelling reason for release,
21 like a non-retroactive sentencing change, and
22 permitting it with these guardrails around

1 (b)(5).

2 So it is inequitable? That's a higher
3 standard. That's going to force judges to look
4 at that constellation of factors, look about, you
5 know, the circumstances in which the sentence was
6 imposed. I can tell you in Dwayne White's case,
7 as I mentioned, after we filed the motion, the
8 Seventh Circuit came down with its Stafford
9 decision, which said, you know, district court
10 judge, you can't consider that at all.

11 Reading between the lines in the
12 judges' opinion, I think that that would have
13 been a compelling part of that constellation of
14 factors, the fact that Dwayne's sentence would
15 ten years lower today and he would likely already
16 be out, in addition to all of the other things
17 that the judge, you know, concluded.

18 COMMISSIONER HORN BOOM: I have
19 question for Mr. Larkin. You mentioned that, you
20 know, perhaps this idea or notion of a second
21 look is a consideration that we should, we should
22 take, although I think you disagree that, you

1 know, it's Congress' job and not the courts or
2 the Commission. I think that's certainly a fair
3 and debatable point.

4 But what do you believe that second
5 look should look like? What would be the
6 parameters of that, setting aside, you know, who
7 is the appropriate body to determine, to make the
8 ultimate decision? You know, we heard from the
9 panel before of the formerly incarcerated folks,
10 and what I found really interesting and
11 compelling from each of them was that they each
12 had some kind of hope, even with some of them who
13 really should have had no hope, and that that was
14 --

15 It appeared to be really the impetus
16 for them to program and rehabilitate themselves.
17 And so, you know, this idea of a carrot if every
18 inmate had this carrot, like maybe regardless of
19 my original sentence, there is this possibility
20 somewhere down the road, whether that's after 20
21 years there's a second look or 25 years, whatever
22 that is.

1 So I'm just curious. Set aside, you
2 know, which body should be the body that
3 ultimately makes that decision. What would that
4 -- what do you think that second look should look
5 like?

6 MR. LARKIN: Well, it should probably
7 look like what you would look, have looked at a
8 prisoner if you were doing it honestly, to see if
9 he should be released on parole. Or if he should
10 be awarded good time credits or earned time
11 credits, and I personally think the latter is
12 probably better and certainly more politically
13 sellable, if that's a relevant factor.

14 COMMISSIONER HORN BOOM: Good time
15 credits?

16 MR. LARKIN: That's right, good or
17 earned time. It's better because you're making -
18 - you're putting the decision in the hands of the
19 people who are closest to the inmates, who are
20 able to make that sort of judgment. What you
21 could do is expand the availability of good or
22 earned time credits.

1 I mean even if you look at it just
2 from a political perspective, prosecutors hate
3 the notion of eliminating mandatory minimums?
4 Why, because it's a great hammer, right? And
5 they all -- any time somebody wants to eliminate
6 mandatory minimums, they say oh no, we need this
7 to get pleas, etcetera, etcetera, etcetera.

8 Okay fine. That, you know, as
9 whatever benefit that argument should have, it
10 doesn't carry over into the back end when you're
11 deciding whether somebody should get credit for
12 what he or she has done in prison, either to
13 learn how to read and write, for example, which
14 is not often -- not always the case, or taken
15 other steps in order to improve his or her
16 character.

17 So you would want to make decisions
18 like what we did, to some extent, if we were
19 being honest about parole, rather than just using
20 parole as a way of releasing people because you
21 had caps on the number of people that you could
22 confine, all that sort of stuff. You wouldn't

1 want to call it parole, because then it would
2 never sell politically because you would make it
3 look like you're just trying resurrect and once-
4 buried program.

5 So you have to work at it through the
6 political system, with an eye towards coming from
7 the back end expanding the amount of good time
8 available, to the point where you could even
9 expand the good time so that it would cut into a
10 mandatory minimum. I mean that would be my
11 recommendation, because then the prosecutors
12 can't say oh, you're taking away my ability to
13 get guilty pleas.

14 You're saying no, we're giving the
15 Bureau of Prisons the authority to decide after X
16 years, and that's a purely arbitrary judgment.
17 10, 15, 20, whatever. After X years, we're going
18 to decide whether we should now look at this, and
19 give the person credit that would normally be
20 deemed good time or earned time, but credit in
21 that format.

22 The problem is if you try to do that

1 now, either you the Commission or judges as
2 judges, there are, you know, have a bazillion
3 questions that have to be answered that will only
4 be answered arbitrarily. Now legislators are
5 entitled to act arbitrarily, but agencies are
6 not. And you know, what's the standard of
7 review? Just simple things like that.

8 Who gets to appeal? Does the
9 defendant get to appeal or the offender rather
10 and the government? So what's the standard of
11 review on appeal? How many times can you seek
12 release? What happens if you apply for clemency
13 and the President turns you down? What effect if
14 any should that have?

15 Should the President say, you know,
16 this is a close case. We want others, you know,
17 the White House to take a look at it. Personally
18 I think we have a big problem we've suffered
19 under is presidents have not aggressively used
20 their pardon and commutation power. I think
21 that's a tragedy, because I think there are
22 people that should be released, and people who

1 should be exonerated.

2 Now no president is going to get
3 elected or reelected based on what he does with
4 pardon clause authority. There are too many
5 other things out there. I'm not Pollyanna-ish
6 about this stuff, okay. I understand. But as a
7 theoretical and practical way of solving it, the
8 best way to look at it, I think, is go from the
9 back to the front.

10 Yeah, I think we should eliminate
11 mandatory minimums, but you know, that ain't
12 gonna happen. I think some of the sentences are
13 too long. I think we should disassociate the
14 weight of drugs from the length of the sentence.
15 That ain't gonna happen either.

16 But if you come at it from the back
17 end, you can get a long way towards where you
18 want by adding to the credits that people can
19 get, and essentially give yourself an argument
20 that this is not something prosecutors, the
21 Justice Department, U.S. Attorneys should be able
22 to argue about.

1 We're not changing the charging
2 authority. We're not changing the sentence the
3 district court can impose. We're letting the
4 Bureau of Prisons make these judgments. That's
5 how I think you should do this. But when you
6 said "we" when you're asking the question, I
7 agree with you that the "we" is not y'all, and
8 it's not district courts. That's a judgment only
9 Congress can make.

10 But you know it's their job to do
11 that, and the President's job to use his
12 commutation power if Congress won't do it. So
13 tell them they need to do that, both of them.
14 Thank you.

15 COMMISSIONER WONG: Just to shift
16 gears a little bit.

17 CHAIR REEVES: Commissioner, go ahead.

18 COMMISSIONER WONG: What's interesting
19 is throughout this panel and throughout the whole
20 day, everyone keeps coming back to what did
21 Congress intend, you know, with the First Step
22 Act with respect to compassionate release. Did

1 they envisions the proposals that we have here?
2 Would this go beyond that, and we've heard all
3 different takes on whether Congress merely meant
4 to procedurally expand it and did not intend to
5 broaden the substantive scope, and others who say
6 it was intended.

7 I guess my question for all of you is
8 to what extent should we be giving weight to the
9 backdrop against which Congress was legislating
10 in the First Step Act, which was three and a half
11 decades in which I don't think there's any
12 dispute that the understanding of extraordinary
13 and compelling for that three and a half decades
14 was associated with a much more narrow criteria
15 associated with terminal illness and extreme
16 familial circumstances? Is that, you know.

17 MR. LARKIN: I think that's what's
18 going on here. The Bureau of Prisons didn't
19 exercise the authority properly? Why? Because
20 it's not something that people at the BOP get
21 rewarded for, okay? You have an incentive system
22 set up in the law to get people to do things, and

1 in the government you create incentives to get
2 people to do things.

3 They were so afraid that you would
4 release somebody and then he would commit some
5 horrific crime, that they wouldn't exercise this.
6 Or they didn't see it as a priority and they have
7 limited amount of hours in the day to do the
8 things they want to do. So they didn't push
9 these things, and the result was you had people
10 die who the warden had said should be released,
11 but the BOP in Washington didn't act on the
12 request.

13 That's what this whole matter is
14 about. What's why when you look at the portion
15 of the statute I quoted at pages eight to ten of
16 my submission. It's focused, it's brimming with
17 a discussion of how are we going to deal with
18 this problem of people not getting released, so
19 they can cross the River Styx at home, in the
20 company of friends, or at least as a free person?

21 That's what's going on. They're not
22 talking about whether somebody got raped by a

1 prison guard. They're not talking about whether
2 there is a terrible disease that is infecting
3 everyone in prison, which also is infecting
4 everyone outside the prison. None of that.

5 And they weren't talking about well,
6 let's just create this general, you know, all
7 around, you know, release mechanism if you find
8 something is really extraordinary. I mean the
9 judge hasn't been born who can't write a
10 grammatically correct opinion in any case, saying
11 that the facts here are, you know, pretty
12 extraordinary and compelling, and if he can't,
13 then he hasn't gotten assistance from the lawyer
14 trying to make that argument.

15 I mean that's what Congress was
16 dealing with. Let the prisoner go to the judge
17 and say they told me I've got six months to live.
18 They told me that I've got Lou Gehrig's disease.
19 I'm going to be dead in 12 months. Let that
20 person go to the judge and the judge turn to the
21 AUSA and say factually is he right, and if he is,
22 why are we here?

1 You do that often enough and AUSAs
2 will tell the BOP let these people out. That's
3 what this is about. This is not an effort by
4 Congress to create some new way of revising the
5 Attorney General's and the BOP directors'
6 authority to manage their prisons, to manage
7 health care. It's all about making sure that
8 people can get released if they're dying. That's
9 what was going on.

10 CHAIR REEVES: I suspect there's some
11 disagreement on this panel.

12 MS. ZUNKEL: Can I jump in?

13 MR. LARKIN: I'm shocked. I really
14 am.

15 (Laughter.)

16 CHAIR REEVES: So I'm not taking over
17 your question, but I do if there's anyone on the
18 panel who has a different view.

19 MS. ZUNKEL: I do have a different
20 view. I think it's important to look. The
21 changes to 3582 were titled "Increasing the
22 Transparency and the Use of Compassionate

1 Release." So it was clearly on Congress' mind
2 that compassionate release, 3582, needed to be --
3 they want to be used more and they want it to be
4 more transparent.

5 The fundamental change was saying that
6 federal judges should do this job, not the Bureau
7 of Prisons. The backdrop of that is, you know,
8 as Mr. Larkin says, the Bureau of Prisons wasn't
9 doing the job. For decades we had the culture of
10 3582 keyed to medical reasons and family
11 circumstances, and there wasn't a lot of
12 opportunity to develop I mean anything else,
13 because the Bureau of Prisons just wasn't making
14 these motions, even in categories that clearly
15 fit within.

16 The Bureau of Prisons has had the
17 discretion under the catch-all category all this
18 time, I think, to define other reasons that are
19 not medical, that are not family circumstances.
20 The catch-all says they can be different. They
21 just didn't do it. But when we look back, look
22 at what Congress said in the First Step Act by

1 putting judges in charge and saying increase the
2 use, increase the transparency, we also have to
3 look back at the original statute.

4 I will tell you when I was a federal
5 defender and in my criminal defense career, I
6 never handled compassionate release. I never
7 handled 3582 motions because we weren't involved
8 in that process.

9 So I think there's some relearning or
10 learning that all of us have to do about what
11 this mechanism is about. As I've gone in and
12 looked at it in litigating these motions, it's
13 not called compassionate release like Ms. Barrett
14 talked about. It's not called medical
15 compassionate release or geriatric release.

16 It's an exception to finality for
17 sentencing reduction, where there are
18 extraordinary and compelling reasons. That's
19 what the statute says. Then it says you, the
20 expert agency, you decide, you describe
21 extraordinary and compelling reasons. The only
22 reason we are taking off the table is

1 rehabilitation alone, and I think that that was
2 because it was done at the same time as parole
3 was abolished.

4 Everything else is on the table. So
5 I look at the First Step Act being significant
6 for the reasons I stated, but I also think it's
7 very important to go back and read 994(t) and
8 3582.

9 MR. CLAUSEN: I would just add, you
10 know, I don't disagree that you know, the fact
11 that BOP wasn't really filing any motions is what
12 prompted Congress to have the conversation and
13 amend, you know, start the process to amend the
14 statute. I think what Congress doesn't say is
15 oftentimes just as important as what they do say.

16 And what they did in the First Step
17 Act was they just added to 3582(c)(1)(A). They
18 added the ability for a defendant and inmate to
19 bring a motion directly. They didn't take
20 anything away from the statute. They didn't take
21 anything away from the Commission's authority to
22 describe what constitutes extraordinary and

1 compelling.

2 They have, they had the ability to do
3 that. They had the ability to limit it, you
4 know. Defendants can file these motions, but
5 only on the current grounds that currently exist.
6 They didn't do that. They left it to the
7 Commission to decide what are the appropriate
8 grounds and, you know, part of the Commission's
9 authority is to constantly revise and review and
10 look at changes in the law.

11 I mean a lot has changed since 2006,
12 when the policy 1B1.13 was first enacted. But a
13 lot has changed since, you know, 1984 when the
14 Sentencing Reform Act was passed to begin with,
15 and the provisions was included. So I would
16 suggest that what Congress didn't say with regard
17 to the changes to 3582(c)(1)(A) is just as
18 important as the change that they did make, and
19 it left the discretion with this Commission to
20 decide what are the extraordinary and compelling,
21 or describe what the circumstances might look
22 like.

1 CHAIR REEVES: Vice Chair Murray, I
2 think you had a question.

3 VICE CHAIR MURRAY: Thanks to this
4 panel. This has been a great conversation. I
5 appreciated your submissions. I think one of the
6 things that comes up a lot in our commentators,
7 both in the case law and today, in terms of
8 concerns about Option 3 of the catch-all and
9 sometimes about (b)(5) as this sort of elephants
10 and mouse holes point, right. So what Congress
11 did was change who could file and add some
12 provisions about notice for terminal illness.

13 And are we sort of circumventing all
14 these very reticulated schemes that Congress had,
15 you know, in terms of habeas, 8th amendment
16 litigation, direct appeal, making things
17 retroactive themselves. I mean it's hard to
18 imagine to me a 924(c) stacking case, where
19 there's not, you know, equitable issues, right?
20 Like I don't know what that case looks like, so
21 I'm going to stack 924(c)'s and then, you know,
22 that doesn't count as having a difference in

1 equity.

2 But I wonder, you made me think of
3 this Professor Harris when you brought up the
4 Ferguson case. What would you all think in terms
5 of like practicalities and maybe in terms of
6 concerns about separation of powers, of us
7 carving out some of those issues? So saying,
8 taking some things off the table.

9 So taking things that would be
10 cognizable under habeas if there were not
11 procedural issues, or things that were cognizable
12 under direct appeal, carving those out. I'd be
13 interested in your thoughts. Thanks.

14 MS. ZUNKEL: I think when I read the
15 Judicial Conference's submission, I think they do
16 raise some of sort of the nuts and bolts of how
17 would this work, and I think that those questions
18 and concerns are real, and you guys have to
19 grapple with them.

20 And I think it's trying to find the
21 right balance of too much narrowing and we being,
22 you know, some pathways open. I think it would

1 be reasonable to list some examples of things,
2 changes in the law that you think are primarily,
3 you know, centrally sort of animating (b)(5). I
4 think, you know, I think, you know, I think that
5 that would provide some guidance.

6 I think the other question, and this
7 sort of animates all of this, is overlap. If
8 there's some overlap with other remedies, how
9 much of a problem is that? Because 3582 is
10 saying this is -- this is an explicit exception
11 to sentence finality, and it serves a different
12 purpose than habeas.

13 In habeas, what you're trying to do is
14 vindicate a right. Your sentence is illegal or
15 your conviction is illegal, and this is -- this
16 is different. This isn't coming and saying
17 automatically reverse my conviction or
18 automatically reverse my sentence to send me back
19 to start over again. It's saying these issues
20 make my situation extraordinary and compelling
21 under changes in the law. It's framed with
22 inequitable.

1 That gets me in the door if I can show
2 the extraordinary and compelling reason, and then
3 the question is, is the sentencing reduction
4 appropriate, not wiping anything off the books.
5 I provided some examples in my written testimony,
6 where I do think that there's -- people have been
7 talking a lot about compassionate release in
8 terms of well, people are just getting out right
9 away, or there's an automatic reduction to time
10 served.

11 I think what we see is that judges are
12 very thoughtfully considering those issues, and
13 seeing 3582 as a sentencing modification vehicle,
14 and saying I think a 12 month reduction is
15 appropriate but not time served. So I see, I see
16 the fact that there might be some overlap with
17 other remedies as not, not a problem on the
18 whole, and I think like Professor Harris said,
19 district court judges can use their -- all of the
20 experience that they have to say the reasons that
21 are being raised really do, like in the Ferguson
22 case, feel like an end run around habeas.

1 Or if it's another situation like I
2 described in my written testimony with my client,
3 Christopher Blitch, where he had diligently
4 pursued habeas for years pro se. His district
5 court judge acknowledged that he had a
6 meritorious issue that they judge acknowledged I
7 think I overlooked it, gave him a certificate of
8 appealability and the Seventh Circuit said we --
9 there may be an issue here, but we're
10 procedurally barred.

11 That to me would be an example of yes,
12 there was an avenue to habeas, but I think, you
13 know, while 3582 is cognizing these extraordinary
14 and compelling circumstances, habeas is very
15 concerned with deference and finality. So there
16 are two different I think purposes underlying the
17 statutes.

18 MS. MASCOTT: Vice Chair Murray, are
19 you proposing that the guidelines would have
20 additional provisions that actually say
21 categorically certain types of legal changes
22 don't rise to the level of extraordinary and

1 compelling?

2 I certainly think that if you were to
3 make the case that there are other statutes and
4 other provisions that make certain changes and
5 deal with certain issues, that the Commission
6 could make a case for saying that these types of
7 changes in isolation can't as a statutory level
8 rise to the level of extraordinary and
9 compelling, because Congress clearly dealt with
10 them, dealt with them elsewhere?

11 It sounds like also what the
12 colleagues are saying here is that there's
13 actually not -- making that kind of change or
14 note in the guidelines wouldn't actually
15 necessarily even mean that anybody who'd been
16 here today wouldn't have gotten relief, because
17 you could say in isolation these things don't
18 measure up.

19 That in and of itself could provide a
20 fair amount of guidance certainly, I think.

21 COMMISSIONER WROBLEWSKI: Let me draw
22 an analogy to the relationship between Section

1 1983 and the federal habeas statute for state
2 prisoners. You can't use a 1983 action to
3 challenge your conviction. You can only do that
4 under the habeas statute. Why? The habeas
5 statute is designed to nullify the judgment that
6 allows the state to hold you in custody at all.

7 Similarly, 2255 allows someone to
8 challenge the federal government's ability to
9 hold somebody in custody at all. So you can't
10 use the sentencing guideline provision to nullify
11 what 2255 is going at, just like you can't use
12 1983 to nullify what 2241 and 2242 and the others
13 are designed to deal with.

14 You have to accommodate the existing
15 statutes, to make sure that you don't use this
16 other mechanism as a way of undermining all the
17 other ways of looking at it. So if there's
18 another way of -- another statute that's relevant
19 here yes, those other statutes should and have to
20 be considered.

21 COMMISSIONER WROBLEWSKI: Ms. Mascott
22 can I -- Professor Mascott, can I ask a question

1 just to follow up what you said before? So
2 Section 994(a)(2) authorizes the Commission to
3 make general policy statements regarding the
4 appropriate use, that's through statutory words,
5 the appropriate use of 3582.

6 So rather than saying it's not
7 extraordinary and compelling, could the
8 Commission write a policy statement that would
9 say 3582(c) and all the other little subsections,
10 is not, is not an appropriate mechanism for the
11 routine retroactive application of a change in
12 law. And then, and then have something else that
13 talks about this constellation and maybe it says,
14 maybe it doesn't say anything about changes in
15 law there.

16 It just says this is not the routine
17 mechanism for retroactivity or the other
18 corrections of legal errors or other things like
19 that.

20 MS. MASCOTT: I certainly think that
21 phrasing would be a fair way for the Commission
22 to frame things and frame this analysis and

1 comment on this issue in the guidelines, and will
2 be consistent with the Commission's role. I
3 think, I mean my recommendation would be if
4 you're going to go that route or try to just more
5 categorically address it, that there be still
6 some explanation though perhaps of why your
7 understanding and sense of your statutory
8 authority here suggests that these other
9 mechanisms don't routinely come within the
10 confines of extraordinary and compelling
11 circumstances simply because they've been dealt
12 elsewhere.

13 So in other words, you wouldn't be
14 trying to hamstring judges beyond what your
15 authority is. You would just be explaining your
16 understanding of your authority here.

17 And on that note, and going back even
18 to Commissioner Wong's earlier question I think
19 about the 2018 First Step Act changes, I mean
20 certainly if Congress had spoken there and
21 suggests that it, you know, agrees with the
22 notion of medical and health reasons being the

1 justification for reporting notification
2 requirements, I think that's a thumb on the scale
3 to suggest that Congress sort of has a
4 commensurate understanding of your authority with
5 what you've done previously.

6 But in line with what some others have
7 said here, I mean Congress also didn't explicitly
8 narrow extraordinary and compelling. So I don't
9 think you would necessarily have a reason to say.
10 I mean Congress didn't, in the First Step Act,
11 clearly say "and extraordinary and compelling
12 from this point forward is only going to be
13 limited to the precise reasons that the
14 Commission has previously stated."

15 So I don't think you'd want to go
16 quite that far. But regardless of how closely we
17 look at the 2018 Step Act, I don't think that the
18 current wording of (b)(5) or a number of the
19 options in (b)(6), you know, comes anywhere close
20 to something that seems like it's within the
21 instructions that Congress is giving the
22 Commission in 994(t) or the Step, or First Step

1 Act or anything else, because the First Step Act
2 clearly didn't broaden the authority.

3 And those provisions right now just
4 read like they're creating different standards
5 and different metrics and a different measuring
6 stick.

7 VICE CHAIR MURRAY: Meaning if you --
8 if Congress was intending to dramatically expand
9 the previous practice, you would expect a more
10 explicit statement?

11 MS. MASCOTT: Well they just didn't
12 change the standard from extraordinary and
13 compelling. They didn't address the substance of
14 the standard at all. So it doesn't give the
15 Commission any grounds to now say the standard
16 should be inequitable. I don't -- I mean --

17 MS. ZUNKEL: Can I just briefly
18 respond that? I think what 994(t) says is that
19 this Commission should be the one that describes
20 extraordinary and compelling reasons. So you
21 have the ability to describe an extraordinary and
22 compelling reason being changes in the law that

1 result in an inequitable sentence, with the
2 ultimate finding that a judge has to make is, you
3 know, is the decision consistent with the policy
4 statement? Are there extraordinary and
5 compelling reasons?

6 So I see you can define however you
7 want, and then ultimately, you know, the judge
8 uses his or her discretion to decide.

9 CHAIR REEVES: You've got another
10 question?

11 VICE CHAIR MURRAY: I have a question,
12 a drafting question on the catch-all. So I take
13 the point very much to heart that Option 1 does
14 not allow for these sort of strange one-offs, the
15 kind of unknown unknowns. And but I think there
16 are concerns with Option 3 in terms of leading to
17 disparity.

18 I mean our data from the last three-
19 ish years shows a lot of disparity in grant
20 rates, and just in sort of like in -- also
21 concerns in terms of flooding courts if there
22 isn't a lot of the standard. Do you all have

1 kind of drafting advice?

2 Is there a way to draft a catch-all
3 that captures one-offs, but doesn't open the
4 flood gates or you know, leave things so not
5 subject to guidance that there's huge
6 disparities? I mean I guess that's, maybe that's
7 squaring the circle. But if you have advice, I'm
8 all ears.

9 MS. ZUNKEL: I think it is difficult.
10 I think the reason why Option 3 is helpful is
11 because it in some ways is language that courts
12 have been using for the past four years, because
13 they've said even though the policy statement
14 isn't applicable, let's look at what the
15 framework was for the Bureau of Prisons and here
16 it is.

17 I think that we see in other areas of
18 sentencing law, for example, I think of like, you
19 know, when the guidelines were mandatory and
20 these 5K2.0 departures, where it was, you know,
21 an extraordinary situation that was taking,
22 taking the person out of the heartland of normal

1 cases. And you know, that's a little bit of a
2 squishy standard as well, but I think it allows
3 judges the discretion to --

4 My concern is being able to capture
5 the idiosyncratic circumstance with a lot of
6 other idiosyncratic circumstances. That's what I
7 think Mr. White's case really shows, is that
8 there were a number of different factors that the
9 judge looked at that and said that is
10 extraordinary and compelling, but it would not
11 fit in any of the enumerated categories.

12 So I think because this is an
13 iterative process between you the experts, the
14 Commission and the courts, and this like going
15 back and forth, that starting a little bit more
16 broadly, knowing that there is this a need to
17 revisit it, you can. I also come back to what
18 Ms. Barrett said about uniformity and concerns
19 about disparities.

20 I think that if people are rising to
21 the level of extraordinary and compelling
22 circumstances, plus meeting the 3553 factors,

1 that some disparities on the margins and how
2 judges are interpreting inequitable or, you know,
3 a change in the law is sort of a feature of this
4 system, and not a bug of it. It is in some ways
5 how we, how we, you know, how we approach
6 sentencing, and so I think that is kind of built
7 into the system.

8 MR. LARKIN: I was just going to say,
9 your question reminded me of two things. One was
10 Liechtenstein, the other was dominos. The
11 problem is any time you try to define a term,
12 there will always be a core meaning to it and a
13 peripheral meaning.

14 The problem is once you start getting
15 it applied by the hundreds of district court
16 judges out there, you'll then start seeing a game
17 of dominos or telephone, where each case looks a
18 lot like the one before, with maybe one or two
19 differences. You will ultimately get to a point
20 where there is no relationship to the core case.

21 The problem is you've now reached the
22 point where all you're doing is making an

1 arbitrary judgment, because this is not what the
2 core was like. And you can't avoid that with
3 language, which is a reason I think you shouldn't
4 start down that path.

5 CHAIR REEVES: Did you want to say
6 something? Oh, did you?

7 MS. ZUNKEL: No, thank you.

8 CHAIR REEVES: Mr. Larkin, I was
9 curious about your opening statement and what you
10 might have read about your belief that there may
11 be a parole system out there.

12 MR. LARKIN: Yeah.

13 CHAIR REEVES: Now one of the things
14 we've talked about early across other panels, the
15 floodgates being open, for example. Now that our
16 hearing is open, people listening to it all over
17 the world. Inmates probably listening to it now.
18 They may file motions. For the last 12 years, on
19 all these guilty pleas and every other criminal
20 conviction I've had, I've told them that parole
21 is not a possibility for you. So now an inmate
22 may -- I may be inundated, for example, with a

1 motion, a motion.

2 (Simultaneous speaking.)

3 MR. LARKIN: You can blame me.

4 CHAIR REEVES: No, no, I'm not going
5 to blame you, but again our courthouses are open.
6 Anyone can petition the court for any relief
7 whatsoever. We can't close it. So we have to
8 deal with what's filed. So I guess, I guess, you
9 know, so any compassionate relief I think I
10 mentioned earlier, no matter what the criteria
11 might be, people might file it even though they -
12 - even in their own minds they are ineligible for
13 it.

14 Just like the person who might now
15 file something that says look, I was confused
16 about -- I thought I didn't have a right to
17 parole. Now you need to withdraw my guilty plea,
18 blah blah blah. So we may be faced with that.
19 That's all I want to say.

20 But with that said, I think that
21 brings us -- oh, we got two minutes left. Okay.
22 So --

1 (Laughter.)

2 CHAIR REEVES: Any further question
3 from any of the Commissioners? I think we've had
4 a very productive day today, and I do want to
5 bring this first day to a close. On behalf of my
6 fellow Commissioners, I want to again thank our
7 panelists, our incredible staff, and all those
8 who have taken time to participate by listening,
9 by watching. I do admire those who came here.

10 The courts in general, as I tell
11 people back home, need our witnesses to what
12 happens in our democracy. Whether it's before
13 this agency or in our courtrooms or our city
14 council meetings. We need our witnesses and
15 concerned citizens. I want to remind people who
16 are watching and those who are here, we have
17 uploaded the testimony of each individual who's
18 testified today.

19 That testimony is quite revealing.
20 That testimony is quite insightful. It's well-
21 researched, it's thoughtful. It's just plain
22 good. It really is, and you know, to boil what

1 we've been talking about all today, in fact much
2 of that testimony is extraordinary and
3 compelling. It truly is.

4 I would encourage you to look at it.
5 I also would encourage you, and I'm not trying to
6 put more work on the Commissioners or the staff.
7 But the comment period is open until March 14th.
8 We ask is there language, Professor Zunkel, that
9 answers this question? You can supplement.

10 MS. ZUNKEL: We're on it.

11 CHAIR REEVES: All right, thank you.
12 In that regard, we will be back tomorrow morning
13 at 9:00 a.m. to receive testimony on our proposed
14 amendments regarding sexual abuse of a ward and
15 acquitted conduct. I look forward to seeing each
16 of you. I look forward to having all who want to
17 participate involved. So please tune me in,
18 please come. This hearing is now adjourned.
19 Thank you so much.

20 (Whereupon at 4:55 p.m., the above-
21 entitled matter went off the record.)
22

C E R T I F I C A T E

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In the matter of: Public Hearing

Before: U.S. Sentencing Commission

Date: 02-23-23

Place: Washington, DC

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