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October 7, 2021

Honorable Charles R. Breyer
Acting Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Defender Comment Pursuant to 28 U.S.C. § 994(o)

Dear Judge Breyer:

The Federal Public and Community Defenders submit this letter pursuant to our obligation under 28 U.S.C. § 994(o) to comment at least annually on the work of the Commission. We focus this year's comments on USSG §1B1.13—a policy statement that will likely be a priority once the Commission regains a quorum necessary to amend its policy statements and guidelines.[1]

In the First Step Act of 2018, Congress sought to "increase[e] the use and transparency of compassionate release" by amending 18 U.S.C. § 3582(c)(1)(A) to ensure that courts are the arbiters of compassionate release motions.[2] Prior to the First Step Act, courts were authorized to grant compassionate release only upon the rare motion brought by Bureau of Prisons (BOP).[3] Now, courts have the power to grant relief on a defendant's request if BOP fails to file a motion on the defendant's behalf.[4] But USSG §1B1.13, the policy statement addressing § 3582(c)(1)(A)

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[1] *See* 28 U.S.C. § 994(a)(1) – (2).

[2] Pub. L. No. 115-391, tit. VI, § 603(b), 132 Stat. 5194, 2239 (2018) ("First Step Act").

[3] *See* 18 U.S.C. § 3582(c)(1)(A) (2002) ("[T]he court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment."). *See also, e.g.*, *United States v. Brooker*, 976 F.3d 228, 231-232 (2d Cir. 2020) (describing BOP's use of compassionate release as "sparing[ ], to say the least").

[4] *See* First Step Act, *supra* note 2 (codified at 18 U.S.C. § 3582(c)(1)(A)).

motions, predates the passage of the First Step Act and "by its own terms" applies only to BOP-filed motions.[5]

When it is time to amend §1B1.13 to reflect the First Step Act, we urge the Commission to continue to recognize—as Congress and the Supreme Court do—that extraordinary and compelling reasons are, by definition, extraordinary and cannot be reduced to a finite list. Section 1B1.13 should remain a general policy statement that "describe[s] those characteristic or significant qualities or features that typically constitute 'extraordinary and compelling reasons'"[6] to guide, not bind, the courts in resolving compassionate release motions.

Congress never intended "to afford the Sentencing Commission with the exclusive authority to define the phrase 'extraordinary and compelling reasons.'"[7] Rather, Congress instructed the Commission to issue a "general policy statement[ ]" to "describe" what should be considered extraordinary and compelling, set forth "criteria" BOP and the courts should apply, and provide "examples" that meet that criteria.[8] Indeed, aside from "rehabilitation[,] alone," Congress placed no restriction on what could be deemed an extraordinary and compelling reason warranting a reduction in sentence under § 3582(c)(1)(A).[9]

Legislative history of the Sentencing Reform Act further confirms that Congress wanted the courts to retain discretion to assess whether extraordinary and compelling circumstances warrant a sentence reduction. Describing § 3582(c)(1)(A)

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[5] *United States v. Brooker*, 976 F.3d at 236 (citing USSG §1B1.13 & cmt. n. 4). *See also United States v. Andrews*, --- F.4th ---, 2021 WL 3852617, at *3 (3d Cir. Aug. 30, 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180-81 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020). *But see United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021).

[6] *McGee*, 992 F.3d at 1045.

[7] *Id.*

[8] 28 U.S.C. § 991(a)(2)(C); 28 U.S.C. § 994(t).

[9] 28 U.S.C. § 994(t). *See also Gunn*, 980 F.3d at 1180 (recognizing that while § 3582(c)(1)(A) requires any sentence reduction to be consistent with applicable policy statements issued by the Sentencing Commission, "'[c]onsistent with' differs from 'authorized by'").

as a "safety-valve" which would apply "regardless of the length of sentence," Congress anticipated it to be used not only in cases of terminal illness, but for "other" extraordinary and compelling reasons that justify a sentence reduction.[10] This "safety-valve" would "permit[ ] later review of sentences in particularly compelling situations" and "keep[ ] the sentencing power in the judiciary where it belongs."[11]

The Supreme Court similarly understands that § 3582(c)(1)(A) cannot be reduced to categories. In *Setser v. United States*, the Supreme Court identified § 3582(c)(1)(A) as a relief mechanism to use when, for example, a district court's "failure to anticipate developments that take place after the first sentencing. . . produces unfairness to the defendant."[12] Since developments in the law or in a case are necessarily unanticipated, the scope of what constitutes an extraordinary and compelling reason cannot be preemptively constrained.

Like Congress and the Supreme Court, this Commission has consistently recognized that extraordinary and compelling reasons cannot be exhaustively enumerated. Since 2007,[13] the Commission has set forth examples of extraordinary and compelling reasons while acknowledging that "extraordinary and compelling reason[s] other than, or in combination with," those examples may also exist.[14] And the Commission has understood that "[t]he court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of

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[10] S. Rep. No. 98-225 at 55-56, 121 (1983), *as reprinted in*, 1984 U.S.C.C.A.N. 3182, 3238-39, 3304.

[11] *Id.* at 121.

[12] *Setser v. United States*, 566 U.S. 231, 242-243 (2012) (marks and citation omitted). *See also* Response from Court-Assigned Amicus Curiae to the Petition for Rehearing *En Banc* at 14-15, *United States v. Surratt*, No. 14-6851 (4th Cir. Nov. 4, 2015), ECF No. 81 (arguing § 3582(c)(1)(A) is preferred mechanism to correct sentencing error and not 28 U.S.C. § 2255's savings clause); Supplemental Brief for Court-Assigned Amicus Curiae on Rehearing *En Banc* at 55-56, *United States v. Surratt*, No. 14-6851 (4th Cir. Feb. 23, 2016), ECF No. 110 (same).

[13] USSG §1B1.13 was originally promulgated in 2006. At that time, the Commission gave full discretion to BOP to determine whether "a particular case warrants a reduction for extraordinary and compelling reasons." USSG App. C, Amend. 683 (Nov. 1, 2006).

[14] USSG App. C, Amend. 698 (Nov. 1, 2007); Amend. 799 (Nov. 1, 2016).

reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth" by the Commission.[15]

This longstanding position should not change simply because courts are now authorized to review compassionate release motions filed directly by individuals and not only the few brought by BOP. Indeed, § 3582(c)(1)(A) incorporates its own guardrail to ensure relief is not freely given: if extraordinary and compelling reasons are present, "courts still must consider and weigh the factors laid out in Section 3553(a)."[16] Even without an applicable policy statement, courts have been judicious in granting compassionate release. Commission data indicate that despite the influx of individual-filed § 3582(c)(1)(A) motions due to the COVID-19 pandemic, over 82 percent of these motions have been denied.[17]

When the time comes to amend §1B1.13, we urge the Commission to stay its course: provide the statutorily authorized guidance on extraordinary and compelling reasons and continue to recognize that courts are in a "unique position"[18] to consider this guidance and determine whether sufficient reasons exist to warrant a sentence reduction.

Very truly yours,
/s/ Michael Caruso
Michael Caruso
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

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[15] USSG §1B1.13 cmt. n. 4.

[16] *Long*, 997 F.3d at 356-57 ("So even without the policy statement, courts will still consider the anticipated effect of compassionate release on crime and public safety for defendant-filed motions as part of their weighing of relevant considerations.").

[17] *See* USSC, *U.S. Sentencing Commission Compassionate Release Data Report* tbl. 1 (Sept. 2021), https://bit.ly/3ASsnq6.

[18] USSG §1B1.13 cmt. n. 4.

cc:

Jonathan J. Wroblewski, Commissioner *Ex Officio*
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