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The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
Attention: Public Affairs – Priorities Comment
Via Email: pubaffairs@ussc.gov

Re: Proposed 2022–2023 Priorities, Compassionate Release Policy Statement

Dear Judge Reeves,

We write to share our perspective on the Commission's proposed priority to update the compassionate release policy statement (U.S.S.G. §1B1.13). We are a Clinical Professor of Law and two law students in the Federal Criminal Justice Clinic at the University of Chicago Law School.[1] The Clinic's faculty and students represent indigent clients in federal court and post-conviction proceedings, including compassionate release and clemency. The Clinic also engages in policy advocacy and systemic reform efforts.

The Commission should amend the compassionate release policy statement to give judges the same discretion the Bureau of Prisons (BOP) currently enjoys to determine extraordinary and compelling reasons for release beyond the enumerated categories. Our views are based on based on our experience litigating compassionate release motions in the Northern District of Illinois and the Seventh Circuit. Since the passage of the First Step Act of 2018, we have litigated numerous successful compassionate release motions that raise extraordinary and compelling reasons for release not captured by the existing policy statement, including the COVID-19 pandemic, extreme and unwarranted sentencing disparities, and changed circumstances that result in fundamentally unjust convictions and sentences.[2] Our released clients have gone on to reconnect with their children and families, contribute to their communities, and advocate for justice and sentencing reform.[3]

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[1] We submit these comments in our individual capacities, not on behalf of the Clinic.
[2] *See, e.g.*, *United States v. White*, 2021 WL 3418854, at *3 (N.D. Ill. Aug. 5, 2021); *United States v. Blitch*, No. 06-CR-586-2, slip op. (N.D. Ill. Apr. 13, 2022); *United States v. Hinojosa*, 2021 WL 170791 (N.D. Ill. Jan. 19, 2021).
[3] *See, e.g.*, Annie Sweeney & Jason Meisner, *'Like Seeing Color After Being Colorblind': After 12 Years in Prison for a Controversial Stash-house Conviction, Dwayne White Tastes Freedom*, CHI. TRIB. (Aug. 20, 2021), https://perma.cc/RAM3-XPGQ; *Second Chances Symposium*, FED. CRIM. JUST. CLINIC (Feb. 2022), https://perma.cc/N5RR-5E23 (Federal Criminal Justice Clinic client Dwayne White speaking out in support of second chances at the University of Chicago Law School's Second Chances Symposium).

The First Step Act changed federal compassionate release by allowing prisoners to bring motions directly to judges, rather than relying on the BOP to initiate a motion. The compassionate release statute allows judges to reduce a prison sentence if they find that there are "extraordinary and compelling" reasons for release, release is consistent with any "applicable" policy statements of the Sentencing Commission, and release comports with the 18 U.S.C. § 3553(a) sentencing factors.[4] Application Note 1 of U.S.S.G §1B1.13 enumerates three categories of extraordinary and compelling reasons: medical conditions, age, and family circumstances.[5] The Application Note also recognizes that there may be "[o]ther [r]easons" that are extraordinary and compelling and vests in the BOP substantial discretion to determine what those reasons can be.[6] But because the policy statement has not been updated since the First Step Act's passage (and applies only to BOP-initiated motions), every court of appeals but the Eleventh Circuit has determined that the current policy statement is inapplicable to defendant-initiated motions. District courts, therefore, have discretion to determine what constitutes extraordinary and compelling circumstances, within limits.[7]

The Commission should amend the compassionate release guideline to entrust judges with the same discretion as the BOP to decide what "[o]ther [r]easons" are extraordinary and compelling in an individual case. In passing the First Step Act, Congress recognized that having the BOP as gatekeeper over early release made compassionate release virtually unattainable. The BOP mismanaged the program and almost never made motions for release, even for dying prisoners.[8] The First Step Act's changes have moved the federal criminal system in the right direction. Judges have released people who were at high risk of death or serious illness from COVID-19[9] and those who face drastically lower sentences today based on changes in the law.[10]

Despite this progress, our Clinic's litigation demonstrates the need for a compassionate release policy statement that codifies judges' discretion to determine what "[o]ther"

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[4] 18 U.S.C. § 3582(c)(1)(A).
[5] U.S. SENT'G GUIDELINES MANUAL §1B1.13 app.1 (U.S. SENT'G COMM'N 2018).
[6] *See* U.S. SENT'G GUIDELINES MANUAL §1B1.13 app.1(D) (U.S. SENT'G COMM'N 2018) ("Other Reasons. —As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in the subdivisions (A) through (C).").
[7] *See, e.g.*, *United States v. Gunn*, 980 F.3d 1178, 1181 (7th Cir. 2020) ("District judges must operate under the statutory criteria—'extraordinary and compelling reasons'—subject to deferential appellate review.") (citation omitted).
[8] Christie Thompson, *Old, Sick and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018), https://perma.cc/4M3A-CXDT; *see also* Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, MARSHALL PROJECT (June 11, 2021), https://perma.cc/24RM-6MZ5.
[9] *See, e.g.*, *United States v. Morgan*, 2020 WL 6393007 (N.D. Ill. Nov. 2, 2020).
[10] *See, e.g.*, *United States v. Clausen*, 2020 WL 4260795 (E.D. Pa. July 24, 2020).

extraordinary and compelling reasons merit release. In 2009, our client Dwayne White—just 22 years old—was ensnared in the ATF's now-disavowed fake stash house sting operation.[11] The stings followed a standard playbook: A confidential informant would target a person for the operation, portraying himself as a drug courier with inside knowledge of the stash house.[12] The informant would then claim that a large quantity of drugs would be in the stash house. Even though these amounts were pulled out of thin air, they allowed prosecutors to charge astronomical mandatory minimums.[13] Of course, there were no drugs and no stash house—it was all a ruse.[14] In Chicago and around the country, these stings overwhelmingly targeted men of color, like Dwayne.[15]

Dwayne's involvement in the sting was limited. He was asked to participate at the last minute by the target of the operation—Leslie Mayfield—a man whom Dwayne looked up to like an older brother.[16] Leslie kept Dwayne in the dark about the details of his plan; the first time Dwayne heard the words "stash house robbery" was from the undercover agent immediately before his arrest.[17] Even so, prior to Dwayne's trial, the government filed a 21 U.S.C. § 851 sentencing enhancement that doubled the potential mandatory minimum sentence.[18] This enhancement—which could not be imposed today as a result of changes in the First Step Act—was based on a marijuana possession conviction from when Dwayne was 18 years old.[19] Dwayne was convicted and given the quantity of drugs fabricated by the confidential informant and the § 851 enhancement, the judge was bound to impose a 25-year sentence.[20]

Years after Dwayne's conviction, courts around the country lambasted stash house stings as "disreputable,"[21] "tawdry,"[22] and "outrageous."[23] Judge Jane Stranch, for example,

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[11] Sweeney & Meisner, *supra* note 3.
[12] *See* Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. L. REV. 987, 989–90 (2021).
[13] *Id.*
[14] *Id.*
[15] *Id.* at 990 ("Nationwide, federal law enforcement agencies have overwhelmingly targeted people of color to commit these fabricated crimes.").
[16] Sweeney & Meisner, *supra* note 2.
[17] Dwayne White's Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) at 4, *United States v. White*, No. 09-CR-687-4, Dkt. 372 (N.D. Ill. 7th Cir. Mar. 1, 2021).
[18] *Id.*
[19] *Id.* at 21.
[20] *Id.* at 4.
[21] *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part), *opinion vacated on reh'g en banc sub nom., United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014).
[22] *United States v. Conley*, 875 F.3d 391, 402 (7th Cir. 2017).
[23] *United States v. Conley*, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021).

emphasized, "I find the concept of these 'stash house sting' operations at odds with the pride we take in presenting American criminal justice as a system that treats defendants fairly and equally under the law."[24] In 2018, after race discrimination litigation in Chicago exposed the egregiousness of these operations, prosecutors offered unprecedented plea deals to all 43 individuals with pending cases, including Dwayne's co-defendant, Leslie Mayfield. All 43 men accepted the plea deals. The average sentence was *three years*—decades shorter than they would have spent in prison under the relevant mandatory minimum statutes.[25] Chicago prosecutors ultimately stopped charging stash house sting cases altogether.[26]

But Dwayne, sentenced nearly a decade prior, was unable to benefit from the government's disavowal and abandonment of the reverse stings. In 2018, when Congress passed the First Step Act, Dwayne got a new opportunity to challenge his 25-year sentence by filing a compassionate release motion. The judge granted Dwayne's motion, and concluded that there were several extraordinary and compelling reasons for release: (1) that Dwayne could not take advantage of favorable plea deals offered to other Chicago stash house defendants; (2) the large sentencing disparity between Dwayne and his co-defendant, Leslie, who received a 9.5-year sentence; and (3) that most of Dwayne's mandatory minimum sentence was "based solely on fictitious circumstances described by the undercover ATF agent."[27] Having found the other statutory requirements satisfied, the judge also found that release was consistent with § 3553(a)'s sentencing factors, including that Dwayne had a spotless prison record and a strong release plan.[28]

If the judge had been limited to §1B1.13's enumerated categories, Dwayne would still be behind bars. That result would be antithetical to what Congress intended when it created compassionate release decades ago—an intent that Congress affirmed with its recent changes to compassionate release. The Senate Judiciary Committee Report on the original compassionate release statute explained "that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances . . . [,] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long

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[24] *United States v. Flowers*, 712 F. App'x 492, 511 (6th Cir. 2017) (Stranch, J., concurring).
[25] *See* Christopher Blitch's Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) at Ex. M, *United States v. Blitch*, No. 06-CR-586-2, Dkt. 635 (N.D. Ill. May 10, 2021).
[26] Alison Siegler, *Racially Selective Law Enforcement Litigation in Federal Stash House Cases*, 26 THE CIRCUIT RIDER 45, 47 (2019); Jason Meisner, *Under Pressure by Judges, Prosecutors to Offer Plea Deals in Controversial Drug Stash House Cases*, CHI. TRIB. (Feb. 21, 2018), https://perma.cc/6VBF-EBCY.
[27] *United States v. White*, 2021 WL 3418854, at *3 (N.D. Ill. Aug. 5, 2021); *see also generally United States v. Blitch*, No. 06-CR-586-2, slip op. (N.D. Ill. Apr. 13, 2022) (granting compassionate release to a Chicago stash house client); *United States v. Conley*, No. 11-CR-0779-6, 2021 WL 825669 (N.D. Ill. Mar. 4, 2021) (same).
[28] *United States v. White*, 2021 WL 3418854, at *4–5 (N.D. Ill. Aug. 5, 2021).

sentence."[29] Providing judges with the same discretion afforded to the BOP would ensure that judges can continue to do that.

Today, compassionate release offers a needed—and administrable—avenue for justice in the federal criminal system. The Commission's own report demonstrates that judges mindfully exercise discretion on an individualized, case-by-case basis. In 2020, during the height of the COVID-19 pandemic, courts heard 7,014 motions for compassionate release and granted 1,805 reductions, just 25% of the total motions filed.[30] Approximately 70% of those grants cited COVID-19 as a reason for release.[31] Should the Commission update the policy statement to provide judges the same discretion as the BOP, judges would surely continue to evaluate motions thoughtfully and carefully, furthering Congress's intent.

Thank you for considering our views on the Commission's proposed priority to update the compassionate release policy statement. Please do not hesitate to contact Professor Zunkel with any questions or concerns.

Sincerely,

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[29] S. REP. NO. 98-225, at 55 (1984).
[30] COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC, U.S. SENT'G COMM'N at 50 (2022).
[31] *Id.* at 54.