Testimony of Mary Price, General Counsel of FAMM
Before
The United States Sentencing Commission
Public Hearing on Compassionate Release
February 17, 2016

Thank you for inviting me to share the views of Families Against Mandatory Minimums on the subject of compassionate release. I have worked on this issue for nearly fifteen years, including through several amendment cycles that produced the current Policy Statement at § 1B1.13. We hear routinely from our members who struggle to understand and engage the compassionate release process and engage it to secure their or their loved ones' release. I have spoken and written a great deal about this issue and with Jamie Fellner of Human Rights Watch published a report in 2012, *The Answer is No: Too Little Compassion in U.S. Federal Prisons*.

When Congress authorized a federal court to reduce a prisoner's sentence for extraordinary and compelling circumstances, it assigned to the Sentencing Commission the task of setting out the reasons, criteria, and examples that would warrant a reduction.[1] Other than rehabilitation alone, Congress placed no limit on the definition of what circumstances would be considered sufficient. Simultaneously, Congress gave to the Bureau of Prisons the tasks of identifying qualified prisoners in light of the Commission's criteria and moving the sentencing court for a reduction in their sentences.[2] Finally, Congress assigned the sentencing court the job of evaluating the motion in light of the factors enunciated at 18 U.S.C. § 3553(a) and granting or denying it in its discretion.[3]

At the time, this division of labor must have seemed sensible. The Commission was already responsible for guiding judicial decision over a variety of sentencing decision and was armed with data to help it set out the conditions and criteria. The BOP was responsible for housing and monitoring all federal prisoners and could readily identify and alert the court to those who qualified. Finally, the court, with its in-depth knowledge of each person who had come before it for sentencing, would evaluate whether the prisoner should be released early in light of the purposes of sentencing and the factors in § 3553(a).

This last assignment was the most crucial. Even a prisoner who presents extraordinary and compelling circumstances may not be suited for early release. Congress committed that decision—whether to reduce a sentence --to the judge who is best suited to make that assessment. The court has already carefully considered this prisoner, knows whether the reason justifying reduction in sentence was reasonably foreseeable, and has the information at hand to

[1] *See* 28 U.S.C. § 994(t) (providing that "[t]he Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction . . . .").
[2] *See* 18 U.S.C. § 3582(c)(1)(A)(i).
[3] *Id*.

evaluate, among other § 3553(a) factors, the severity of the offense, impact of the release on the community, and whether the history and characteristics of the defendant militate against release.

Unfortunately the process has been subverted. The Bureau of Prisons has taken on all three responsibilities. It establishes its own criteria (a mish mash of considerations) despite the fact that the task was committed by Congress not to the BOP but to the Commission[4], identifies qualified prisoners using its criteria, and determines which prisoners deserve to be released. Absent the BOP motion, courts have no jurisdiction to grant a reduction in sentence.[5] Even though the BOP director's decision is a final agency action, it cannot be appealed to the federal courts because they have no independent jurisdiction to consider the BOP's refusal to bring § 3582 motions.[6]

The Bureau of Prisons has so much power because Congress assigned the responsibility for bringing the motion solely to that agency. While I have come to believe fervently that that decision was a mistake, it is the mistake we must live with for the time being.

But it is a state of affairs that makes the question you presented the public at the end of the issue for comment the most important question of all. You asked: should the Commission provide that the Director of the Bureau of Prisons not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in §1B1.13?

My answer is a resounding "yes."

This is because too often and for too long the BOP's answer to prisoners seeking compassionate release has been "no."

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[4] To be fair to the BOP, the Sentencing Commission did not get around to complying with the congressional mandate at § 994(t) until 2007, over twenty years later, and then only at the concerted urging of practitioners and advocates alarmed at the vacuum that had allowed the BOP to operate on its own. See, e.g. Mary Price, "The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. Section 3582(c)(1)(A), 13 Fed. Sent'g Rep. 3-4, 188, 190 (2001) (proposing compassionate release policy statement language for the Sentencing Guidelines); Letter from Julie Stewart and Mary Price to Diana Murphy (Aug. 1, 2003) (urging the Commission to adopt the compassionate release policy statement); Letter from James Felman and Barry Boss to Diana Murphy (July 31, 2003); Letter from Margaret C. Love to Diana Murphy (Aug. 1, 2003) (collecting earlier letters from the American Bar Association and the ABA Report to the ABA House of Delegates).

[5] *See, e.g., Engle v. United States*, 26 F. App'x 394, 397 (6th Cir. 2001) (district courts " lack jurisdiction to *sua sponte* grant compassionate release. . . ."); *United States v. Smart*, 129 F.3d 539, 541 (10th Cir. 1997); and *Cruz-Pagan v. Warden*, 2012 U.S. App LEXIS 16392, *2 (11th Cir. Aug. 7, 2012 (stating "without a motion from the Director, a precedential case, an authorizing statute, or an authorizing rule granting us subject-matter jurisdiction, we cannot modify his sentence).

[6] *See* 18 U.S.C. § 3582(c)(1)(A)(i); *see also Crowe v. United States*, 430 F. App'x 484, 485 (6th Cir. 2011); *Turner v. United States Parole Comm'n*, 810 F.2d 612, 615 (7th Cir. 1987); *Simmons v. Christensen*, 894 F.2d 1041, 1043 (9th Cir. 1990); *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991); *Taylor v. Hawk-Sawyer*, 39 F. App'x 615, 615 (D.C. Cir 2002).

I. The BOP fails to use its own authority while usurping that of the courts.

"Compassionate Release is conspicuous for its absence."[7]

The U.S. federal prison population has grown dramatically since 1980, from fewer than 25,000 federal prisoners to more than 210,000 in 2015.[8] According to the Office of the Inspector General of the Department of Justice (OIG), even as the prison population soared above and beyond rated capacity,[9] motions for compassionate release were rarely made. Between 2006 and 2011, the BOP Central Office approved fewer than two dozen requests on average each year.[10] It had little to work with, approving 68 percent of the scant 211 requests forwarded to it by wardens and regional directors; denying 18 percent, while another 28 prisoners (13 percent) died awaiting a decision by the Central Office.[11]

This state of affairs existed despite the fact that Congress had intended a strong judicial role in the decision about who should be granted a reduction in sentence for extraordinary and compelling circumstances. The legislative history of the Sentencing Reform Act (SRA), which provided for compassionate release from an otherwise final sentence, outlined the scope of changed circumstances that would justify a court grant of early release. It provided for "cases of severe illness, [or] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence."[12] It then noted that "[t]he Sentencing Reform Act . . . *provides for court determination*, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described."[13]

The Committee underscored its view of the court's central role later in its report:

> The value of the forms of "safety valves" contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of

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[7] FAMM & Human Rights Watch, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* at 2 (2012) (The Answer is No), *available at* https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons.

[8] Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return*, August 2015, at 8-9, available at http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return; U.S. Sentencing Commission, Quick Facts, Federal Offenders in Prison – January 2015, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOP.pdf.

[9] *See, e.g.*, U.S. Dep't of Justice, Office of the Inspector General, "Top Management Challenges" (demonstrating that since 2012, the overcrowded state of the Federal Bureau of Prisons has persisted among the ten top management challenges facing the Department of Justice), available at ' https://oig.justice.gov/challenges/.

[10] U.S. Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* at 72 (Apr. 2013) (OIG Compassionate Release Report), *available at* https://oig.justice.gov/reports/2013/e1306.pdf.

[11] *Id*.

[12] U.S. Senate Committee on the Judiciary, *Report on the Comprehensive Crime Control Act of 1983*, 98th Cong., 1st Sess., 1984, S. Rep. No. 225, p. 55.

[13] *Id*. (emphasis added).

> imprisonment for "extraordinary and compelling reasons" . . . . The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.[14]

Nonetheless, the BOP took an exceptionally narrow view of what constituted extraordinary and compelling reasons while taking an unwarrantedly expansive view of its own decision-making authority. It published regulations in 1994 that paid lip service to Congress's interest in other than end-of-life situations and that contemplated medical and non-medical grounds.[15] In practice and in its internal guidance to BOP staff, however, it limited grounds for early release to impending death and dire medical circumstances. For example, an internal memorandum from then BOP director Kathleen M. Hawk in 1994 revealed that the BOP would recommend release only in medical cases.

> The Bureau of Prisons has historically taken a conservative approach to filing a motion with the courts for the compassionate release of an inmate. . . . Until recently, our general guideline was to recommend release of an inmate only in cases of terminal illness when life expectancy was six months or less. Not many months ago we extended the time limit to a one year life expectancy. . . . As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy. Nevertheless, such cases may be extremely serious and debilitating. [16]

The memo laid out not only a crabbed view of what could be considered extraordinary and compelling circumstances – unsupported by the legislative history -- it also outlined the BOP's perception of its own role as extending well beyond the simple identification of which prisoners it considered to exhibit extraordinary and compelling circumstances. It directed wardens to "consider and balance" a set of factors extraneous to the criteria defining what is an extraordinary and compelling reason. The list bears a marked resemblance to factors the judge is directed to consider under 18 U.S.C. § 3553(a) when considering a motion for a reduction in sentenced from the BOP including:

- The criminal and personal history and characteristics of the inmate, including an assessment of whether the inmate is likely to participate in criminal activities if released (Does the inmate have other criminal convictions?);
- The age of the inmate (both current age and age at time of sentencing);

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[14] *Id*. at p. 121.
[15] 28 C.F.R. 571 (1994), Subpart G – Compassionate Release (Procedures for the Implementation of 18 U.S.C. § 3582(c)(1)(A) and 4205(g)).
[16] Memorandum from Kathleen M. Hawk, Director, Bureau of Prisons, to executive staff (July 22, 1994) (Hawk Memo)(included in the Appendix to The Answer is No) .

- The danger, if any, the inmate poses to the public if released (Does the inmate have a history of violence? Could the inmate still commit his/her prior offense even in his/her present condition?);
- The length of the inmate's sentence and the amount of time left to serve.[17]

Tellingly, the memo said these considerations were "not criteria . . . rather they are guidelines" and instructed that staff should not recommend compassionate release even if a prisoner met all of them; "instead, staff should rely on their correctional judgment" among other things in making recommendations.[18]

These additional "guidelines" reflected a bias in the BOP not only for limiting compassionate release to a few end-of-life and dire medical cases which was troubling enough. More disturbingly the BOP set itself up in the role of granting or denying reductions in sentence based on whether it believed the person did or did not deserve to be released. The BOP effectively hijacked the process and enforced its authority by withholding compassionate release motions, even for people who squarely had extraordinary and compelling reasons, if it felt for other reasons the prisoner should not be released. This bias has infected the process to this very day, undermining the judicial role by effectively usurping it.

Having established the framework, the BOP proceeded to build upon it. In 1998 a "Program Statement" (a BOP expression of federal regulation) established compassionate release procedures and described "program objectives" and "expected results." Among them was included the expectation that "[t]he public will be protected from undue risk by careful review of each compassionate release request."[19]

This was the state in which we found the program when, in 2004, a long-time member of FAMM fell victim to an aggressive form of cancer and we tried to secure him compassionate release. I had come to know Michael Mahoney when FAMM took up his cause for executive clemency at the end of Bill Clinton's presidency. Michael had been sentenced as an Armed Career Criminal in 1994. That title belied the innocuous nature of his offense. His career criminal status was based on three hand-to-hand drug transactions of personal use amounts over a three-week period ten years earlier. Those three sales resulted in three convictions in a single state proceeding.[20]

Years later, Michael opened a business and fearing he would be robbed while making night deposits of the proceeds, decided to purchase a firearm. He had been assured by the

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[17] *Id*. at 2
[18] *Id*. at 2.
[19] BOP, Program Statement 5050.46, "Compassionate Release: Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) & 4205(g)," Change Notice at 2, May 19, 1998. This is a salutary goal but I believe it is one that is best committed to the court considering a motion from the BOP.
[20] This account is taken from my article about Michael Mahoney, "A Case for Compassion," Fed. Sent'g Rep. 170 (2009).

lawyer/pawnshop owner from whom he bought the gun that his priors no longer counted as they were more than ten years old. This made sense to him as he had been able to secure a liquor license ten years after he had been released from jail.

Sometime later, Michael's gun was stolen and fearing it would be used to commit a crime, he reported the theft to authorities. He was arrested when he attempted to replace it.

Michael pled guilty to being a felon-in-possession and his sentence was to be enhanced to fifteen years based on the three priors. That he was not the "armed career criminal" that sentence was designed to incapacitate was obvious. Judge James D. Todd (W.D. Tenn.) was so disturbed at the prospect he continued the sentencing to conduct his own research in an effort to avoid imposing the sentence. There was not and ultimately Michael was sent away for fifteen years.

In spring of 2004, Michael was told he had terminal lymphoma and he made a request to prison authorities that they recommend a compassionate release motion. His doctors and the warden agreed and prison social workers put together a request and attached all the medical evidence. They worked with the family and health care providers to secure insurance and home care. I learned that many of the staff who knew Michael cared for him and believed he should go home to die.

The warden's recommendation was supported all the way to the Director's Office and was unopposed by the U.S. Attorney. Nonetheless, in late July 2004, the Director of the Bureau of Prisons refused to ask the U.S. Attorney to file a motion for reduction in sentence. I learned that he opposed it based on the nature and circumstances of Michael's 2004 conviction as an Armed Career Criminal.

Judge Todd learned of the denial and wrote immediately to the director indicating his receptivity to a motion under § 3582. He wrote that "Mr. Mahoney's sentence has troubled me since I sentenced him in 1994 . . . [as] one of those cases in which a well-intentioned and sound law resulted in an injustice." Aware that Michael was bedridden and in pain and near death, he suggested "a motion [for compassionate release] is the only way to mitigate in a very small way the harshness 18 U.S.C. § 924(e) has caused in this unusual and unfortunate case."

The Director never replied and Michael died soon thereafter.

Michael died alone in prison because the director of the BOP made a judgment that he should have left to the federal judge – whether the nature and circumstances of Michael's offense overcame the extraordinary and compelling reason for his release. The judge would have decided differently.

Michael's death and Judge Todd's valiant effort to convince the BOP that he should have died at home, combined with years of advocacy on behalf of prisoners since then who were denied despite their extraordinary and compelling reasons, have convinced me that until the BOP

stops usurping the court's role in role in compassionate release, prisoners that Congress intended for release will languish in prison. Among the reasons that have been cited over the years for denials of otherwise qualified prisoners are

- A man dying of prostate cancer, bedridden and suffering tumors throughout his digestive tract that caused him acute and disabling pain was because "[criminal] behaviors could be repeated even in your state of illness"[21];
- A man convicted of mail fraud and suffering cancer that had metastasized to his bones causing him constant pain, the BOP explained that while "[w]e are aware your prognosis is poor and you are getting progressively worse . . . . please be advised that your denial. . . was based on your crime and your ability to reoffend"[22];
- A prisoner sentenced to a mandatory minimum for providing drugs that resulted in three deaths from overdose, who was found to have an inoperable malignant brain tumor and was confined to a wheelchair, was denied due to "the severity of your crime and the fact that you have served only a small portion of your sentence . . . [and] the possibility of your ability to re-offend."[23]

The OIG reports on compassionate release and aging prisoners cited here do a terrific job of explaining some of the institutional problems with compassionate release, including a lack of clear standards that result in ad hoc decision making and confusion at every level of the Bureau of Prisons about who is eligible and how that must be demonstrated. But the OIG does not challenge the fundamental problem that prevents the program from being used as intended: the BOP arrogates to itself the decision of which prisoners with extraordinary and compelling reasons should be released. That decision belongs to the court.

The Commission can do much, I believe, to guide the Bureau of Prisons to an understanding of what constitutes extraordinary and compelling reasons. For example, in 2007 the Commission amended § 1B1.13 to describe several reasons that would warrant a reduction in sentence.[24] It included a provision for prisoners whose family member dies or becomes disabled to such an extent they can no longer care for the prisoner's minor child or children. Six years later, in 2013, the BOP expanded its own program statement, and among other things, included for the first time, a minor caregiver provision.[25]

I don't mean to minimize the importance of the Commission's guidance about what should be counted extraordinary and compelling reasons. That said, I have no illusions that even the perfect Policy Statement with the best criteria and examples will change the Bureau's

[21] See The Answer is No at 1.
[22] Id. at 6-7.
[23] Id. at 38-39.
[24] See USSG Appendix C, amendment 698 (amended effective Nov. 1, 2007).
[25] BOP Program Statement 5050.49, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) and 4205(g) (August 12, 2013) (P.S.5050.49).

approach.[26] I know that because the BOP has been routinely denying prisoners who meet the criteria currently included in § 1B1.13 since it was published. For example, we know of one case in which a federal prisoner learned her husband, the sole caregiver of their two minor children, was dying. She sought a reduction in sentence, citing § 1B1.13 so that she could raise her children. The BOP had not yet amended their program statement to include surviving caregivers as eligible for a reduction in sentence. The staff responsible for forwarding her request to the warden were ignorant of the guideline provision and returned her request to her several times saying she did not meet the criteria for a reduction in sentence.

She had the support of the warden and the U.S. Attorney did not oppose her release. Her church community stood ready to support her return. Her husband had died while she waited for a decision and their young children were placed with strangers. Finally, the Bureau of Prisons Director denied her request ten months after she began the process. We had expected that, were the Bureau to deny her request, it would do so because its own policy in 2012 did not contemplate surviving caregiver releases. That was not the stated reason. Instead, her petition was denied because her "past history raises concern as to whether she will be able to sustain the stresses of sole parenting and employment while remaining crime-free." [27] When the BOP's Program Statement was amended to bring it in line with § 1B1.13's surviving caregiver provision, it included the guidance that "[i]n reviewing these requests, BOP should assess . . . whether release of the inmate to care for the inmate's child is in the best interest of the child."[28]

That the BOP considered itself better suited than a federal judge to determine the best interest of minor children was breathtaking. This denial is perhaps the most extreme example I can find of a pervasive BOP perception of its role in the reduction in sentence process. While the BOP may have an opinion that it is better to leave very young children with strangers based on its assessment of the record, it should not have substituted its judgment for the court. Her sentencing judge had her entire record and bore the statutory responsibility of ensuring that release complies with the requirements of § 3553(a).

I support the Commission amending §1B1.13 by providing circumstances, criteria and examples. It should also remind the BOP of the limits Congress drew on the BOP's role along the lines proposed in the Issue for Comment. Therefore, the Commission should include in its Policy Statement that "The Director of the Bureau of Prisons should bring a motion under 18 U.S.C. § 3582 for any prisoner who meets any of the circumstances listed in USSG § 1B1.13 as 'extraordinary and compelling reasons'."

[26] One example of the disconnect is pointed out in the OIG Compassionate Release Report which stated, "We reviewed the [BOP] regulations and Program Statement and found they do not mention the Sentencing Guidelines." OIG Compassionate Release Report at 21.
[27] *See* The Answer is No at 13-14 (the story of Veronica Blain); *see also* OIG Compassionate Release Report at 22 (citing her case as one of the two denials of non-medically based requests for compassionate release).
[28] P.S. 5050.49 at 5.

II. **The list of extraordinary and compelling reasons in the Guidelines Manual should not closely track the criteria set forth by the Bureau of Prisons in its program statement**.

FAMM plans to submit more comprehensive comments on the specifics of amending the policy statement later in the public comment period. I do want to point out some initial and abiding concerns we have.

First of course, as I've pointed out, we disagree with the Bureau of Prisons criteria as they relate to matters extraneous to the underlying extraordinary and compelling reason for a reduction in sentence. We generally agree that the Commission should provide the courts specific guidance, including criteria and examples in light of the directive contained in 28 U.S.C. § 994(t) . We agree that the Commission should adopt the proposals in the OIG Aging Prisoners' Report. We think however, that the Commission should not and cannot enunciate every extraordinary and compelling circumstance for the reason that not all such circumstances can be anticipated. As such we appreciate the current provision in §1B1.13 that leaves open the possibility that the Director of the BOP might find an extraordinary and compelling reason "other than, or in combination with, the reasons described" in the section.

While there are many reasons why the current BOP Program Statement is a poor model on which to base an amended policy statement, I will mention a few of the most troubling ones.

Foreseeability. Presently, the BOP only authorizes reduction in sentence motions for extraordinary and compelling circumstances "which could not reasonably have been foreseen by the court at the time of sentencing." [29] I assume foreseeability is an issue because it is believed that if the court anticipated the development of an extraordinary and compelling reason, it could adjust the length of the sentence accordingly. The court may have foreseen that a defendant whose cancer was in remission could be later diagnosed with a recurrence of that cancer or its mutation or spread to other organs. There are several problems with the foreseeability screen.

First, judges have not had freedom to adjust a sentence for a foreseeable extraordinary and compelling reason. In the past, mandatory guidelines and today, mandatory minimums would prevent this judge from acting on her conviction that the sentence for such a prisoner might be shortened in the interest of accounting for an extraordinary and compelling reason.

For example until 2010 the guidelines counseled that "[p]hysical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall."[30] For many years, "not ordinary relevant" meant that a departure was disfavored and a judge could be reversed on appeal.

[29] P.S. 5050.49. This interesting formulation raises the question of how the BOP could possibly determine what was reasonably foreseeable to the sentencing court.
[30] USSG §5H1.4.

The guideline was amended in 2010 to allow for the possibility that "physical condition . . . may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guideline."[31]

Does that departure give judges enough leeway to address foreseeability of extraordinary and compelling reasons? We think not.

Meanwhile, mandatory minimums have no waiver provision for foreseeable medical or other conditions, so even if the judge though they see into the future, they could not account for it.

Moreover, foreseeability is not 20:20 and knowing that a condition may possibly change and then imposing a shorter sentence on that possibility is challenging at best. In my example of the cancer survivor above, what happens if the judge adjusts the sentence in anticipation of a recurrence of the cancer and gets it wrong and the cancer reappears and moves aggressively? Death is imminent but the prisoner is serving a sentence to which the judge departed to account for the potential return of the cancer but that sentence exceeds the prisoner's prognosis. It cannot be right that that judge may not reconsider her sentence.

What are the diagnostic limits of foreseeability? Does it anticipate every iteration of a medical condition, or the potential that an ailing spouse or caregiver may worsen, and deny relief when one of those potential events transpires because they were foreseeable at the time of sentencing. And how would the Commission square the ban on foreseeable conditions with the inevitability of aging?[32]

I urge you to avoid adopting the BOP's foreseeability condition.

Eighteen month prognosis requirement for prisoners with terminal conditions.

Presently, § 1B1.13 has no prognosis outer limit. It simply provides in the Application Notes that the prisoner be "suffering from a terminal illness."[33] We think this is the best approach and should not be disturbed.

Determining with precision how long a person has to live can be very difficult. Conditions may move quickly or proceed along predictable courses. We know of cases where prisoners had been determined to have terminal illnesses but who were kept incarcerated because a prognosis could not be stated.

The most dramatic example of flawed projections and their tragic results is found in the statistics of people who die in prison awaiting a decision about their compassionate release

[31] *See* USSG, Appendix C, amendment 739 (amended effective Nov. 1, 2010).
[32] *See* Margaret Colgate Love, Nonvoting Member of the Practitioners Advisory Group, "Testimony Before the United States Sentencing Commission" at 11 (Feb. 17, 2016) (PAG Testimony).
[33] USSG § 1B1.13, commentary n. (1)(A)(i).

motion. Between 2006 and 2011, 28 people being considered by the BOP Central Office died before a decision was made in their case.[34]

The prognosis problem can trap dying prisoners. For example, we worked with the lawyer of a prisoner who had been sentenced to 48 months for fraud. He had completed the institutional portion of the Residential Drug Abuse Program (RDAP) and was preparing to transfer to the Residential Reentry Center (RRC) for the final six months of RDAP. His twelve month credit had already been calculated. Before he entered the RRC he was diagnosed with stage IV gastric cancer. The RRC refused to take him due to his condition. The BOP rescinded the 12-month reduction in sentence that he had anticipated earning because he could not complete the RRC portion of his sentence. Trapped in this Catch-22, he then sought a reduction in sentence. The BOP refused, however, to bring a motion for compassionate release because it was unable to determine with sufficient certainty that he would die within 12 months (the prognosis window at the time).

The judge in his case held a hearing and urged the BOP to release him. "It seems to me," he said, "it's not in anybody's best interests, assuming [he] is as sick as he represents, to have him remain in prison. Obviously it would be very difficult for him. It would be a burden on the prison system and also an expense to the government, which it seems to me is not a good idea for anybody."

The BOP could not determine the prognosis and the judge was unable to act.[35]

<u>Onerous standards for caregiver reduction in sentence.</u>

We are struck by what appears to be onerous and extreme criteria for "Incapacitation of a Spouse or Registered Partner." The definition, or perhaps the requirement of "incapacitation" seems impossible to meet. The Program Statement defines "incapacitation" as meaning the spouse has, inter alia, "[s]uffered a serious injury, or a debilitating physical illness and the result of the injury or illness is that the spouse or registered partner is completely disabled, meaning that the spouse or registered partner cannot carry on any self-care and is totally confined to a bed or chair . . . ."[36]

We would argue that such complete incapacitation would require round-the-clock professional care. When a person is so debilitated that they need 24-hour care, then the prisoner cannot be released because the prisoner also has to demonstrate that he or she is the only available caregiver "meaning there is no other family member or adequate care option that is able to provide primary care. . . ."[37] This seems to be an impossible standard to meet given that the family member is likely in a medically supported environment. And, certainly we agree that

[34] OIG Compassionate Release Report at 72, tbl.2.
[35] This case is discussed in The Answer is No at 46-47.
[36] PS 5050.49 at 8.
[37] *Id.*

in such circumstances a prisoner should be released to support their loved one (even if that loved one is a nursing home or care facility or other supportive environment), that release should be permitted before the complete deterioration of their loved one.

We much prefer the formulation offered by the PAG that relies on Medicaid's functional eligibility criteria for long term care.[38]

III. Consider adopting recommendations made by the OIG in its report "The Impact of an Aging Inmate Population on the Federal Bureau of Prisons.

As part of the Obama Administration's Smart on Crime initiative, then-Attorney General Eric Holder announced the expansion of compassionate release to include prisoners who were 65 years and older and who met certain criteria. The objective of the expansion was to "reduce overcrowded institutions."[39] In his remarks, the Attorney General noted the phenomenal increase in the federal prison population and the overcrowding of prison facilities that went hand in hand with that increase. The program was to be expanded to include "prisoners seeking compassionate release for medical reasons" and "elderly inmates who did not commit violent crimes and who have served significant portions of their sentences." Releasing such prisoners, he said "is the smart thing to do . . . because it will enable us to use our limited resources to house those who pose the greatest threat."[40]

The BOP amended its policy statement to incorporate two new categories of elderly prisoners; those who were 65 or over, had served 50 percent of their sentence and suffered certain conditions and those who were 65 or older and had served 75 percent of their sentence.[41]

I began to hear from a number of elderly prisoners or their family members who struggled to understand why their loved ones' compassionate release requests based on medical conditions went unanswered though they otherwise appeared to meet the criteria. Requests made on behalf of prisoners, especially those who appeared to meet the criteria for elderly prisoners with medical conditions languished for months after leaving the institution.

Their reports were confirmed for me when the OIG report on aging prisoners found that, a year later, only two prisoners had been released under the new criteria on those two were released as elderly non-medical prisoners.[42]

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[38] PAG Testimony at 9.
[39] U.S. Dep't of Justice, Justice News, "Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates" (Aug. 12, 2013), *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations.
[40] *Id.*
[41] P.S. 5050.49.
[42] OIG Aging Report at 44-45.

It turns out that confusion about the new elderly provisions had strictly limited their use. Prison staff had trouble determining which prisoners 65 or older qualified for release. According to the OIG, "[t]he BOP's Assistant Director for Health Services and Medical Director, who told us he was not consulted on the development of the provisions, including the medical provisions, described the provisions as "vague."[43]

To resolve the latter confusion, in March 2015, the BOP issued additional guidance to staff that provided examples of the kinds of medical conditions and limitations that would render a prisoner eligible for the relief.[44]

Two months later, in May 2015, the OIG report on aging prisoners was released and shone a light on the serious problems facing prisoners growing old in the federal system. Physical infrastructure appropriate for aging prisoners is routinely lacking in BOP institutions, putting elderly prisoners at risk of injury and subjecting them to unnecessary pain and discomfort. Were elderly prisoners able to access a level of services and supports possible in the community, the need to consider early release for them would be perhaps less compelling. But overcrowding throughout the BOP means that aging and elderly prisoners confront significant challenges, adding levels of discomfort and danger to already difficult circumstances.

According to the Inspector General, elderly prisoners face significant challenges including:

- Lack of lower bunks. Prisoners required to climb to upper bunks experience pain, insecurity and are at increased danger of falling;[45]
- Delays in transfer or extended stays in Special Housing Units while awaiting transfer into general population at medically appropriate facilities;[46]
- Insufficient handicapped-accessible facilities, forcing prisoners with disabilities to navigate physically hostile environments, including facilities with too few accessible toilets or handicapped equipped cells;[47] and
- A lack of elevators, or working elevators, even to floors holding prisoners with disabilities, so that prisoners must navigate stairs with walkers.[48]

While prisoners cannot be guaranteed a life akin to one they would enjoy outside the prison walls, aging prisoners face special challenges, discomfort and dangers. They are put at risk when assigned a lower bunk that a younger prisoner covets, are subjected to indignities when forced to

[43] OIG Aging Report at 46.
[44] BOP, Operations Memorandum, "Reduction in Sentence (RIS) Criteria for Elderly Inmates With Medical Conditions (Mar. 25, 2015), *available at* https://www.bop.gov/policy/om/002_2015.pdf.
[45] OIG Aging Report at 24-25.
[46] *Id.* at 25-26.
[47] *Id.* at 27-28 (including a description of wheelchair-bound inmates waiting in line for the only handicapped accessible toilet because the rest of the toilet stalls are too narrow to accommodate them.).
[48] *Id.* at 28.

hobble to bathrooms not equipped to handle wheelchairs or walkers, and suffer isolation when assigned to the SHU incident to transfer to a medically appropriate facility. These are costs the prisoners should not bear and were not imposed as part of their punishment. Moreover, the court could not have anticipated or condoned these deprivations. Any consideration of extraordinary and compelling circumstances should reasonably include the environment these elderly prisoners are forced to endure.

Moreover, the other provision designed to release elderly prisoners also had its challenges. It describes a category of elderly prisoners without medical concerns who have served the greater of ten years or 75 percent of their sentences.[49] This too was confusing. Apparently one must serve both ten years and 75 percent of their sentence to qualify, meaning that only prisoners with especially severe sentences can be considered and those elderly prisoners who have served the majority of their shorter sentences may not. According to the OIG this provision "excludes almost half of the BOP's aging inmate population because many sentences are too short for the inmate to be eligible . . . ."[50]

Given that these conditions are endemic in the BOP and combine to create a hostile and unnecessarily challenging environment for aging prisoners, until the BOP can safely and humanely house aging prisoners, the Commission should consider making eligible all prisoners aged 50 and older who have served 50 percent of their sentence and especially those with physical, mental or emotional disabilities, potentially eligible for a reduction in sentence.[51]

IV. Conclusion

We look forward to providing more input as you consider amending § 1B1.13. I appreciate the opportunity to share these views and look forward to working with the Commission going forward.

[49] PS 5050.49.
[50] OIG Aging Report at 49
[51] We think an affirmative statement that a life sentence does not preclude compassionate release is in order. We tend to agree with the Practitioners' Advisory Group that aging prisoners with life sentences should be considered after having served a term of years. See Margaret Colgate Love, Testimony Before the United States Sentencing Commission at 8-9 (Feb. 17, 2016).