

Testimony of Mary Price, General Counsel of FAMM
Before
The United States Sentencing Commission
Public Hearing on Compassionate Release
February 23, 2023

Thank you for inviting me to share the views of FAMM¹ on the subject of compassionate release. FAMM is a 33-year-old non-profit, non-partisan organization advancing sentencing and corrections reform. Our membership includes currently and formerly incarcerated people, their loved ones, and diverse others concerned about the criminal justice system's impact on the lives and futures of those caught up in it. We work to elevate the voices of people whose lives have been altered by incarceration so that their experiences are taken into account by policy makers.

I have worked on federal compassionate release for more than 20 years and through every guideline amendment cycle addressing the issue, including the one that produced the current policy statement at §1B1.13. FAMM was closely involved in helping fashion the compassionate release reforms contained in the First Step Act of 2018 (FSA).² The FSA ended the BOP's control over determining what circumstances federal courts could consider for individuals seeking compassionate release. It promised to transform compassionate release practice.

It is one thing to pass good laws and quite another to make sure they work as intended. Prior to the FSA, the vast majority of federal judges had never seen a motion for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). This was because the Bureau of Prisons (BOP), which had exclusive authority to move for compassionate release under the statute, very rarely did so.³

Immediately following passage of the FSA, FAMM established the Compassionate Release Clearinghouse in collaboration with other organizations, incarcerated people, and the Federal Public Defenders. The Clearinghouse identified people who might qualify for a reduction in sentence and assist them in filing for one when their requests for compassionate release were ignored, denied, or not acted on by the BOP. To that end we recruited, trained, and supported pro bono lawyers to represent applicants.⁴ Today, the Clearinghouse supports people who meet criteria recognized by §1B1.13 as well as those serving excessive sentences, sexual abuse survivors, and others whose extraordinary and compelling reasons merit federal court consideration.

¹ Formerly known as Families Against Mandatory Minimums.

² First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

³ ³ See Off. of the Inspector Gen., U.S. Dep't of Just., the Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013), <https://oig.justice.gov/reports/2013/e1306.pdf>.

⁴ See Mary Price, The Compassionate Release Clearinghouse, COVID-19, and the Future of Criminal Justice, American Bar Association Criminal Justice Magazine, Vol 35, No. 3 at 37 (Fall 2020), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/fall/compassionate-release-clearinghouse-covid-19-future-criminal-justice/.

Our positions on the amendments you propose to adopt and the questions you pose are informed by our experience and work on compassionate release with and on behalf of our incarcerated members, their families, and loved ones.

In this statement I focus on what we consider three of the most important issues for which you solicit input.⁵ First, whether to recognize changes in law that render service of the sentence inequitable. Next, whether to identify individuals who have survived sexual abuse as eligible for reduction in sentence and if so, what they must demonstrate to qualify. Finally, how much discretion should the policy statement provide judges evaluating extraordinary and compelling reasons not identified in proposed part (b).

1. FAMM supports proposed (b) (5) Changes in Law – The defendant is serving a sentence that is inequitable in light of changes in the law

FAMM believes the Commission should and can identify changes in the law as among the extraordinary and compelling circumstances warranting compassionate release review. Doing so will authorize courts to consider and perhaps reduce some sentences that would no longer be imposed today. FAMM takes this position because of the impact of excessive sentences on incarcerated people serving terms now repudiated by Congress. Some have been fortunate enough to be released.⁶

One of those people is Tony Baker.

In May 1988, Tony Baker was sentenced to 45 years on his plea to three § 924(c) charges stemming from his participation in a number of armed robberies.⁷ The government had originally offered Mr. Baker a plea deal that would have resulted in a sentence of 25 years. He elected instead to go to trial because he contested some of the charges.⁸ Shortly after the government began putting on the case, Mr. Baker decided to plead guilty. But, by then, the 25-year deal was off the table. The prosecutor explained that “the cost of business” had gone up because Mr. Baker had gone to trial.

On March 5, 1998, the court sentenced Mr. Baker to 540 months. That consisted of 60 months for the first gun count and stacked additional 240 months apiece for the other two.

⁵ FAMM will submit comprehensive comments on the specifics of the proposed amendments later in the public comment period.

⁶ FAMM shared the stories of six other individuals who benefitted from such a reduction and you are hearing from one of them, Adam Clausen, today. *See* Letter from Mary Price and Shanna Rifkin to the Honorable Carlton W. Reeves, Attachment 1: Extraordinary and Compelling: the U.S. Sentencing Commission Should Preserve Second Chances (Aug. 2022), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm1.pdf>.

⁷ *United States v. Baker*, No. 97-cr-0176, Order at 2 (N.D. OK, July 26, 2022) (Baker Order).

⁸ *United States v. Baker*, No. 97-cr-0176, Def.’s Mot. to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A) at 2 (filed June 15, 2022).

The crimes were significant. The robbers had terrorized store employees using a sawed-off shotgun and even an AK-47 assault rifle, pointing the weapons at their victims' heads and threatening to shoot.⁹

But, Mr. Baker was the getaway driver and the government recognized that he had not threatened anyone with a gun. Nonetheless, he received a sentence five years longer than the leader of the group because he had elected to go to trial.¹⁰

Mr. Baker was 18 years old when he was sentenced to 45 years in federal prison. He had no criminal history. He was not due to be released until 2036.

By the time Mr. Baker sought compassionate relief he had served 24 years. Two of his three co-defendants had been released from prison. Mr. Baker argued in his motion that his extreme sentence was due to the imposition of a trial penalty, that it was wholly disproportionate to his decision to briefly proceed to trial and to the sentences imposed on his more culpable codefendants, that he was an adolescent at the time of the offense, and that he had already served substantially more than the sentence he would likely receive under the law today.¹¹

In his pro se motion, Mr. Baker described the crime of conviction and then offered a picture of the person he had grown up to be. The passage below from that motion reveals his sincerity, self-awareness, and the maturing impact of his rehabilitation. He wrote in the third person:

Years later, as he recounts these brazen acts, Baker could not help but lament over the losses manifest from his robbery participation: the loss of dignity and peace of the victims, the loss of community safety, the loss of his own innocence and foreseeable life. Baker hates what he did, but knows he cannot undo it. Twenty-four years in prison constantly apprises him of that fact.¹²

The court ordered Mr. Baker's compassionate release over the government's objection, finding that extraordinary and compelling reasons existed based on the combination of factors that Mr. Baker had described in his motion. The judge also found that Mr. Baker met the § 3553(a) factors and presented a thoughtful release plan.¹³ Mr. Baker got nearly twenty years of his life back.

a. Compassionate release under the First Step Act

The First Step Act was groundbreaking in many respects. In addition to transforming compassionate release, it signaled Congress's recognition that the war on crime had led to a systemic addiction to incarceration, with mandatory minimums for even first-time defendants

⁹ Baker Order at 2.

¹⁰ Baker Order at 3.

¹¹ Baker Order at 3-4.

¹² United States v. Baker, Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1) at 25 (filed Jan. 6, 2022).

¹³ Baker Order at 6-7.

that could routinely exceed expected life spans.¹⁴ The bill took a first step at dismantling some of the most egregious mandatory minimums. The FSA included changes to 18 U.S.C. § 924(c), which had required twenty-five-year mandatory consecutive sentences for second or subsequent § 924(c) convictions, even for people convicted under the statute for the first time. The Act reduced the twenty-five-year mandatory consecutive sentence for first offenders with multiple § 924 (c) convictions to five years.¹⁵ It also lessened the harshness of the severe recidivist enhancements in the drug-trafficking statute at 21 U.S.C. § 841(b). Those prosecution-invoked enhancements had added anywhere from a mandatory five years to life in prison on second or subsequent drug convictions.¹⁶ The First Step Act, however, did not make those reductions retroactive.

Shortly after passage of the First Step Act, visionary lawyers began exploring reduction in sentence opportunities for individuals serving extremely long sentences. These included sentences that would no longer be required given the changes to drug and gun mandatory minimums made by the FSA. Litigants first invited judges to find that the exiting policy statement did not apply to motions brought by defendants. They explained that the Commission's inability to maintain a quorum had prevented it from conforming the policy statement to § 403(b) of the FSA. They then presented the facts about incarcerated clients who were serving sentences decades or lifetimes longer than would be required under law today. Finally, they invited courts to agree that the marked disparity between the sentences their clients were serving and those imposed on similarly situated defendants sentenced after enactment of the FSA amounted to extraordinary and compelling reasons warranting consideration for a reduction in sentence.

All but one of the circuit courts that have considered the threshold issue of applicability have agreed that the Commission's inability to comport § 1B1.13 with the changes made by the FSA render the policy statement not applicable to defendant-filed motions.¹⁷

That is where relative agreement ends.

Looming large in the Commission's consideration is the deep fracture among the circuits.¹⁸ At the time of this writing, five circuits allow the use of non-retroactive changes made by the First Step Act.¹⁹ However, in all the circuits that ruled directly on this issue, a disparity in

¹⁴ See 164 Cong. Rec. S7762-63 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker) (“Since 1980 alone . . . [t]here has been an 800-percent increase in our prison population. This is because of failed policies by this body that created harsh sentencing, harsh mandatory minimum penalties [W]e have been spending more and more money actually hurting more Americans by putting them into a system that actually harms them more often than helps them . . .”).

¹⁵ *Supra* note 3 at 5222.

¹⁶ *Id.* at 5220.

¹⁷ *United States v. Bryant*, 996 F.3d 1243, 1257-59 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 583 (2021).

¹⁸ *United States v. Chen*, 48 F.4th 1092, 1096-97 (9th Cir. 2022) (collecting cases).

¹⁹ See *id.* at 1098; *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022); *United States v. Maumau*, 993 F.3d 831 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). The second circuit has not expressly ruled on this question, but the law in the second circuit does not prohibit these types of arguments, as does the law in other circuits. See *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020).

the sentence cannot be the sole ground supporting compassionate release but must be combined with other factors.²⁰

FAMM urges the Commission to address the matter head-on. The Supreme Court has repeatedly declined to resolve the issue, presumably agreeing with the government that the Sentencing Commission is best suited to adopt “a new policy statement that resolves the disagreement.”²¹

b. The Commission is authorized to identify changes in the law as among the extraordinary and compelling reasons warranting compassionate release.

The Sentencing Reform Act of 1984 (SRA) eliminated parole, slashed the award of good time credits, and authorized the creation of the U.S. Sentencing Commission. It secured determinate sentencing by forbidding anyone, including the judiciary, to revisit and revise a sentence once it had been finalized.²² Congress, however, tempered its fidelity to finality with several safety valves. One permits the sentencing court to consider reducing a sentence if the incarcerated individual presents “extraordinary and compelling reasons” warranting early release.²³ Congress directed the Commission to describe what should be considered extraordinary and compelling reasons for a sentence reduction, including criteria and specific examples.²⁴

The legislative history of the SRA’s compassionate release provision providing for relief from an otherwise final sentence, signaled the scope of changed circumstances that the Commission could identify to justify a court’s 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.*”²⁵

While that history is illuminating, “[t]he best evidence of Congress’s intent is the statutory text.”²⁶ The only limitation Congress imposed on the Commission was that it not identify “rehabilitation alone” as a qualifying circumstance.²⁷ Congress included no other limitations on the Commission’s work. That makes sense. In the SRA, Congress had eliminated parole which measured whether someone demonstrated rehabilitation.²⁸ Permitting

²⁰ See, e.g., *Ruvalcaba*, 26 F.34th at 28 (observing that the Fourth and Tenth circuit “concluded that there is enough play in the joints for a district court to consider the FSA’s non-retroactive changes in sentencing law (in combination with other factors) and find an extraordinary and compelling reason, in a particular case, without doing violence to Congress’s views on the prospective effect of the FSA’s amendments.”).

²¹ *Jarvis v. United States*, No. 21-568, Br. for the United States in Opp’n of Cert. at 17 (Dec. 2021).

²² Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1987, 1987–988.

²³ See 18 U.S.C. § 3582 (c)(1)(A)(i).

²⁴ 28 U.S.C. § 994(t).

²⁵ S. Rep. No. 225 at 55 (1984) (emphasis added).

²⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012).

²⁷ 28 U.S.C. § 994(t) (emphasis added).

²⁸ See *Tapia v. United States*, 564 U.S. 319 (citing legislative history and observing that the indeterminate federal sentencing system with parole was a “system [] premised on a faith in rehabilitation”); see also *Ruvalcaba*, 26 F.4th at 26 (recounting Congress’ edict that rehabilitation alone cannot be an extraordinary and compelling circumstance and noting that “[i]n abolishing federal parole, Congress recognized the need for a ‘safety valve’ with respect to situations in which a defendant’s circumstances had changed . . .”).

§ 3582(c)(1)(A) motions based solely on rehabilitation would raise the specter of parole, albeit in a new procedure. Instead, Congress envisioned § 3582 as allowing courts to address circumstances, other than rehabilitation alone, that may not have been appreciated, or may not have existed, when the sentence was imposed.

Congress could have limited the grounds for compassionate release in the statute, or directed the Commission to do so, and deliberately chose not to. Instead, it entrusted the Commission with the task of describing the grounds, without other limitations. Section 3582(c)'s construction supports this. In § 3582(c)(1), district courts are given discretion to determine extraordinary and compelling reasons. The Commission only advises on what “should” be considered²⁹ and courts need to ensure that reductions “are consistent with” the Commission’s applicable policy statements. In contrast, section 3582(c)(2) creates a sentence reduction scheme in which judges have less discretion, and where the Commission must define “in what circumstances and by what amount” sentences may be reduced.³⁰

The differences between sections (1) and (2) exemplify that Congress knew how to direct the Commission to constrain discretion exercised by district courts in sentencing reductions and that it opted for a more expansive role for courts under (c)(1).

In addition, when Congress turned to amending the compassionate release statute in 2018, it had an opportunity to limit the breadth of the Commission’s authority to describe what constitute extraordinary and compelling reasons. It did not. In fact, it widened the availability of compassionate release. That it also failed to provide retroactivity for all individuals sentenced prior to the changes to 18 U.S.C. § 924 (c) and 21 U.S.C. § 841 (b) does nothing to change Congress’s broad grant of authority to the Commission to describe what kinds of circumstances could be extraordinary and compelling reasons, including those very changes.

c. Using changes in the law as a basis for compassionate release is distinct from statutory retroactivity and also promotes equity and fairness in federal sentencing

As discussed above, describing extraordinary and compelling reasons is the Commission’s job. The circuits that have held that non-retroactive FSA changes cannot constitute extraordinary and compelling reasons rest that holding on a false equivalency. For one thing, those circuits were ruling in the absence of an applicable policy statement. Further, and as the Fourth Circuit pointed out, “there is a significant difference between automatic vacatur and resentencing of an entire class of sentences – with its avalanche of applications and inevitable resentencings – and allowing for the provision of individual relief in the most grievous cases.”³¹ The court added: “we see nothing inconsistent about Congress’s paired FSA judgments: that ‘not *all* defendants convicted under sec. 924(c) should receive new sentences,’ but that the courts should be empowered to ‘relieve *some* defendants of those sentences on a case-by-case basis.’”³²

²⁹ 28 U.S.C. § 994(t).

³⁰ 28 U.S.C. § 994(u); *see also Dorsey v. United States*, 567 U.S. 260 (2012).

³¹ *McCoy*, 981 F.3d at 286-87.

³² *Id.*

Accounting for the results of § 924(c) stacking or § 851 enhancements as a factor in identifying what constitute extraordinary and compelling reasons, and then making a separate, individualized determination of whether compassionate release is warranted, is different from treating relevant provisions of the FSA as retroactive.

That observation is reflected in practice. The courts that have considered motions for compassionate release under 18 U.S.C. § 3582 (c)(1)(A) behave very differently from those that consider whether to grant reductions for retroactive guideline amendments under § 3582 (c)(2). On three occasions when the Sentencing Commission lowered a guideline range and made that change retroactive, Commission data reveal grant rates well over 50 percent. The majority of denials rest on threshold ineligibility, rather than factors outlined in 18 U.S.C. § 3553(a) and/or public safety factors.

- In 2008, the Commission made the so-called “crack minus two” reduction retroactive in Amendment 713. Of the 25,736 motions under § 1B1.10, courts granted 16,511 or 64.2 percent. Courts denied the remaining 35 percent (9,225) and explained that 76.6 percent of those denials were due to the applicant’s ineligibility for the reduction and/or that the offense did not involve crack cocaine.³³
- In 2011, Amendment 750 made the crack cocaine reductions required by the Fair Sentencing Act retroactive. Courts granted more than 55 percent of the 13,990 motions and denied 44.6 percent of them. Nearly 72 percent of the denials cited ineligibility for §1B1.10 relief or that the offense did not involve crack cocaine.³⁴
- Finally, in 2014, the Commission lowered drug guideline sentences by two levels and made that change retroactive in Amendment 788. Courts granted 62.6 of the 50,988 “drugs minus two” motions. They denied 37.4 percent and cited ineligibility in nearly 64 percent of those denials.³⁵

In contrast, in an analysis of post-FSA compassionate release grants based on Commission data reports, judges granted only 16.2 percent of motions, denied reductions in sentence in 83.8 percent of cases, and cited public safety factors and/or failure to meet § 3553(a) considerations in over one third of those denials.³⁶

It is significant that judges considering motions for retroactivity granted the majority of cases. The majority of denials were based on finding the individual not eligible for relief. In

³³ United States Sentencing Comm’n, Preliminary Crack Cocaine Data Report, Tbl. 9 (June 2011), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/2007-crack-cocaine-amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf.

³⁴ United States Sentencing Comm’n, Final Crack Retroactivity Data Report, Fair Sentencing Act, Tbl. 9 (Dec. 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

³⁵ United States Sentencing Comm’n, 2014 Drug Guidelines Amendment Retroactivity Data Report, Tbl. 9 (May 2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20210511-Drug-Retro-Analysis.pdf>.

³⁶ United States Sentencing Comm’n, Compassionate Release Data Report Fiscal Years 2020 to 2022, Tbls. 11, 13 & 15 (Dec. 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

contrast, courts ruling on § 1B1.13 motions denied release in the vast majority of cases and the majority of those denials cited the failure to meet the sentencing factors in § 3553 (a) and/or public safety concerns. Courts do not approach compassionate release the same as retroactive guideline motions.

Allowing someone to seek compassionate release when the law has changed promotes fairness and faith in our federal criminal system. It also has proven successful. Mr. Baker was released this summer – roughly twenty years earlier than his original, now outdated sentence. And by all measures, he is excelling professionally and personally. After a six-month stint in transitional housing, he is now living in his own apartment. He received his temporary commercial learner permit and is about to test for his commercial driving license. He also completed over 140 hours in welding fundamentals. Additionally, he worked with a temp agency to get a job while he was finishing these licenses and certificates. Mr. Baker knows that having diverse skills will help keep him away from the trouble that got him in prison so many years ago. For the first time since he was 18 years old, Mr. Baker was able to spend Christmas at home. His relationship with his sister has deepened, and he was able to celebrate his niece’s 6th birthday – a niece he used to know only through the prison phone line, whose life he is now a part of.



The Commission should and can adopt proposed (b)(5). Judicial discretion allowed for the release before death of Adam Clausen, from whom you will hear, as well as Mr. Baker and others whose stories we brought you in our priorities letter earlier this year. In every case we highlight, a judge carefully considered the person before them. Those judges found that the extreme disparity between the sentence imposed on these individuals and that to which they would be exposed today was an extraordinary and compelling reason warranting consideration for a reduction in sentence. They then conducted the highly individualized analysis under §§ 3553 (a) before ruling. Had § 1B1.13 limited the judges’ discretion so that non-retroactive changes to the law was categorically forbidden, each of those individuals would still be behind bars. Given what we know of these individuals today, given what each of their judges saw in them, the idea that they would spend decades or the rest of their lives behind bars is unthinkable.

2. FAMM supports proposed (b)(4) -- Victim of Assault

We commend the Commission for considering adding an enumerated ground to address sexual abuse committed by a correctional officer or other employer or contractor of the Bureau of Prisons. As we related to you in October, survivors of sexual abuse who remain in custody are unable to heal.³⁷ There is no safe house for them. Counseling is unavailable or very rare. Survivors are unable to draw comfort from family and loved ones in a safe environment. Instead, they must deal with the trauma of their victimization watched over by corrections officials in a carceral setting that reminds them daily of the abuse they endured from people whose job was to protect, not molest, them. Healing cannot take place under such conditions.

After learning about the rampant sexual abuse of incarcerated women at Dublin FCI, FAMM took several steps. First, we wrote to the Deputy Attorney General, urging the Department to identify and direct the Bureau of Prisons to bring compassionate release motions for victims of the so-called “Dublin Rape Club” and others like them.³⁸ Then, we helped launch the Compassionate Release Clearinghouse Dublin Project to seek the release of people victimized in BOP facilities. We have recruited and support teams of pro bono lawyers who are representing Dublin survivors in compassionate release proceedings.³⁹ From this collaboration, we have learned a great deal about what victims have had to endure, the challenges their legal counsel routinely confront, and the lack of government action to support release. This informs our request that the Commission identify sexual abuse as an extraordinary and compelling reason warranting reduction of sentence.

As a preliminary matter, we want to note that the infliction of sexual harm takes many forms. While the proposed amendment identifies only victims of “sexual assault,” we encourage the Commission to consider not using that terminology. Federal criminal law and the guidelines commonly refer to “sexual abuse,” not “sexual assault.”⁴⁰ The Commission might consider consulting the National Institute of Justice discussion of “sexual violence” to help refine and define the different kinds of sexual wrongdoing that BOP victims are subjected to.⁴¹

³⁷ Letter from Mary Price & Shanna Rifkin to the Hon. Carlton W. Reeves at 3-4 (Oct. 17, 2022), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm2.pdf>.

³⁸ Letter from Kevin A. Ring to Lisa Monaco (May 9, 2022), <https://famm.org/wp-content/uploads/ltr-to-DAG-re-dublin.pdf>. FAMM sent an additional letter to the DAG urging the DOJ to use the tools at its disposal including compassionate release, Rule 35 motions, and U Visas, to provide relief to individuals who had been abused while under the care and custody of the Bureau of Prisons. Letter from Kevin A. Ring to Lisa Monaco (Aug. 8, 2022) (on file with FAMM).

³⁹ While we have focused our Clearinghouse on Dublin survivors, we know that sexual abuse of incarcerated people extends beyond Dublin, is not new, and is widespread. United States Senate, Rep. of the Permanent Subcomm. on Investigations, Sexual Abuse of Female Inmates in Federal Prisons at 1 (Dec. 13, 2022) (Staff Report), <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf>.

⁴⁰ See, e.g., USSG §§ 2A3.1 through 3.3.

⁴¹ National Institute of Justice, Overview of Rape and Sexual Violence (October 25, 2010), <https://nij.ojp.gov/topics/articles/overview-rape-and-sexual-violence#noteReferrer1>.

The Commission should identify sexual abuse as a ground for reduction in sentence in light of the failure to protect victims or advance the release of survivors and in light of BOP's abysmal history of bringing reduction in sentence motions.

We believe that the Department of Justice is committed to addressing sexual violence in BOP facilities. For example, prosecutions have resulted in the convictions of five Dublin perpetrators and we understand more indictments are to follow. Many survivors are cooperating with the Criminal and/or Civil Rights Division in the investigation, prosecution, and/or sentencing of perpetrators. The Department created a task force to examine the situation at Dublin and other locations. That body recommended, among other things, that the BOP and federal prosecutors consider sentence reductions or U-Visa certifications on an individualized basis and that the BOP should address the use of compassionate release for people who have endured sexual assault by BOP personnel.⁴² The BOP is looking into whether and how it can use compassionate release and a continuing Advisory Group is tasked with assessing "how BOP and prosecutors are addressing the applicability of compassionate release in these circumstances on a case-by-case basis."⁴³

To our knowledge, however, no steps have been taken by officials to identify or advance the release of people abused by corrections personnel. Instead, the victims used to advance government cases remain incarcerated, or in some cases, have been deported, without any indication that their experiences and contributions are of any import beyond how they will be useful to the government. Their cooperation has been essential to securing prosecutions and long sentences, and yet they are left behind bars, often facing brutal retaliation for their cooperation, in a setting that only exacerbates their trauma.

Lawyers working with the Dublin Clearinghouse relate that clients who have been transferred from Dublin are also subject to harassment and retaliation from BOP personnel when they are identified as having arrived from Dublin. Furthermore, BOP staff frustrate counsels' efforts to exhaust administrative procedures that are a prerequisite to filing a motion in court. They do so by ignoring, refusing or delaying requests for legal visits; neglecting or denying counsels' requests for medical, correctional, and mental health records; and alarmingly, stationing corrections' personnel close to clients on legal calls, thus hindering the confidentiality necessary to such calls, not to mention intimidating the women who must relate disturbing details of trauma in front of corrections officers, some perhaps colleagues of abusers or abusers themselves.

And, as far as we can tell, the BOP has declined to exercise its prerogative under Application Note D of §1B1.13 to identify and seek reductions in sentence for survivors.

⁴² Working Group of Dep't of Just. Components, *Report and Recommendations Concerning the Dep't of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 21-22 (Nov.2, 2022) (Working Group Report), https://www.justice.gov/d9/pages/attachments/2022/11/03/2022.11.02_bop_sexual_misconduct_working_group_report.pdf.

⁴³ *Id.*

We are concerned that the DOJ is focused more on prosecutions and longer sentences than on removing victims from toxic surroundings and helping them heal. In its September 2022 priorities letter, the Criminal Division urged a number of changes that would increase penalties for sexual abuse crimes perpetrated by corrections or other law enforcement officers.⁴⁴ The letter justifies these recommendations by pointing to the goals of holding perpetrators accountable, considering victim vulnerability, and maintaining public trust in and accountability of the corrections system.⁴⁵ We think that vulnerable victims and the public trust would also be served by supporting the release of survivors.

While we do not yet know the Department's position on (b)(5), we fear the DOJ will view the appropriateness of sentence reductions (and presumably compassionate release) through the lens used by prosecutors rather than from the standpoint of the survivors. For example, the Working Group explained that it "takes seriously the trauma that victims of sexual misconduct suffer, and . . . recognize[s] the ongoing harm that victims may experience while in custody."⁴⁶ But, at least with respect to Rule 35 motions, the message seems to be that any action on behalf of survivors whose information is being used is likely to "undermine victim credibility and thus" the case. The report continues that "such [Rule 35] motions are likely best suited (and have a better chance on the merits) after a case or investigation is completed."⁴⁷ This may be small comfort, given the paucity of criminal cases and the backlog of complaints of sexual abuse pending at the BOP.⁴⁸

Moreover, while we are encouraged that the BOP has been told to look into compassionate release motions on behalf of sexual abuse survivors, we are not confident that the BOP will act on their behalf for two reasons.

First, because the BOP appears not to believe survivors. The Department's Inspector General raised an alarm last year in a memorandum about the BOP's approach to allegations of staff misconduct made by incarcerated people. He relayed that the BOP had explained, in response to an inquiry about a disciplinary action related to staff sexual misconduct, that the BOP

will not rely on inmate testimony to make administrative misconduct findings and take administrative action against BOP employees, unless there is evidence aside from inmate testimony that independently establishes the misconduct, such as a video capturing the act of misconduct, conclusive forensic evidence, or an admission from the subject.⁴⁹

⁴⁴ See letter from Kenneth A. Polite, Jr. & Jonathan J. Wroblewski to the Honorable Carlton W. Reeves at 21-24.

⁴⁵ *Id.* at 24.

⁴⁶ Working Group Report at 22.

⁴⁷ *Id.*

⁴⁸ Staff Report at 1.

⁴⁹ Michael E. Horowitz, Inspector General, Dep't of Just., Management Advisory Memorandum, 23-001, *Notification of Concerns Regarding the Federal Bureau of Prisons' (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees* at 1 (Oct. 2022), <https://oig.justice.gov/sites/default/files/reports/23-001.pdf>.

If the BOP does not believe individuals who claim that BOP personnel have abused them for the purposes of misconduct proceedings, without an admission or video or conclusive forensic evidence, we think it is highly unlikely the agency will rely on such accounts in order to file compassionate release motions on their behalf.

The BOP's compassionate release history also supports our skepticism that BOP will sponsor compassionate release motions for survivors.

It was the agency's abject failure to use compassionate release on behalf of aging, incapacitated, and dying individuals that led directly to the reform in the FSA that eliminated the BOP's exclusive control over compassionate release motions. And this reform in the FSA was inspired by the Commission. In 2016, the Commission had amended §1B1.13, changing some of the criteria. It also updated the commentary to direct a pointed message to the BOP. It urged the BOP to bring reduction in sentence motions whenever an individual met the criteria so that courts could exercise their discretion as Congress intended. When a bipartisan group of senators checked in on BOP progress the following year, they learned that between January 2014 and 2018, the BOP had denied 2,405 compassionate release requests and approved only 306. In that time, 81 people had died waiting for the BOP to rule on their requests. Tellingly, the BOP planned no changes to its compassionate release criteria in light of the Commission's policy statement.⁵⁰

Congress had heard enough. One month after receiving the DOJ's response, a bipartisan group led by Sens. Schatz (D-HI) and Mike Lee (R-UT) introduced the GRACE Act that was adopted as part of the FSA.⁵¹

We have even more recent evidence of BOP's intransigence.

Between FY 2020 and FY 2022, the BOP brought only 1 percent of the 4,491 successful motions for compassionate release.⁵² These were the pandemic years and COVID had ravaged prisons nationwide, including the federal system. Thousands of people contracted COVID in the federal system, 303 of whom died due to complications from the virus, but the BOP brought only 45 motions for compassionate release in those three years.⁵³ Our Compassionate Release Clearinghouse COVID-19 Project provided lawyers for several hundred applicants, many of whom were denied by wardens and/or the Central Office of the BOP, despite the grave danger

⁵⁰ Letter from Stephen E. Boyd to the Hon. Brian Schatz (Jan. 16, 2018) (on file with the author). In fact, the BOP has never aligned its internal compassionate release criteria with the Commission's policy statements. After the Commission published the second iteration of §1B1.13 in 2007, the BOP did not change its internal program statement and explained that §1B1.13 was not binding on the BOP and anyway, the Department of Justice would simply refuse to bring motions under the more expansive guideline framework. See Human Rights Watch & FAMM, *The Answer is No: Too Little Compassionate Release in U.S. Prisons*, 27, ns. 53 and 54 (October 2012). <https://fammm.org/wp-content/uploads/The-Answer-is-No-compassionate-release.pdf>.

⁵¹ S-247, 115th Congress (2018).

⁵² U.S. Sentencing Comm'n, *Compassionate Release Data Report*, Tbl 5 (Dec. 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

⁵³ Federal Bureau of Prisons, *COVID-19 Cases* (last visited Feb. 14, 2023), <https://www.bop.gov/coronavirus/>.

those individuals faced due to underlying medical conditions rendering them vulnerable to death or serious complications should they contract COVID.

We cannot be confident that the BOP, which has never demonstrated true interest in its role with respect to compassionate release, will extend itself to seek the release of the survivors of sexual abuse by BOP personnel.

The Commission must act to ensure that such survivors have a way to be heard in the court. It should do this by identifying the harm perpetrated on them as constituting an extraordinary and compelling reason.

3. Other Circumstances. – The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through (5).

FAMM supports providing courts with discretion to identify other circumstances and favors Option 3. It mirrors the current breadth of discretion provided the BOP and ensures that courts can both take into account circumstances similar to those contemplated in Option 1 without that option’s limitations, as well as those that may not fit neatly into Option 2.

We discourage the Commission for adopting Option 1, given the language limiting other circumstances to those similar in nature and consequence to any described in preceding sections of section (b). We appreciate that this option would give judges confidence that they need not be strictly bound by the enumerated reasons. That said, Option 1 would prevent courts from crediting extraordinary and compelling reasons that were not similar in nature and consequence to the circumstances described above.

We recognize that this set of proposals the Commission has put forward to expand §1B1.13 is very comprehensive. It is perhaps difficult to imagine situations not covered by the proposed changes. But they will crop up. If the pandemic taught us anything, it is that the Commission cannot anticipate every extraordinary and compelling reason.

Furthermore, Option 1 would likely invite opposition from some prosecutors. They could argue that the circumstances defendants rely on are not similar in nature and consequence to the enumerated ones. As we related before, the government spent precious months early in the pandemic opposing compassionate release motions for people who were vulnerable to serious illness or death should they contract COVID due to underlying medical conditions. Nonetheless, courts considered and ruled on compassionate release cases brought by people in danger of serious illness or death should they contract COVID-19, relying on Part D authority.⁵⁴

⁵⁴ See, e.g., *United States v. Mayhew*, No. 3:18-cr-00123 (W.D. Ky Feb. 2, 2021) (disregarding the government’s argument that defendant’s health circumstances were “under control at the BOP” and finding instead that “[t]he issue before the Court . . . is whether [defendant’s] shortness of breath caused by having only one lung and her susceptibility to pneumonia, which cannot be ‘fixed’ or ‘controlled,’ places her at such an increased risk of severe complications from COVID-19 that it amounts to an extraordinary circumstance warranting release Using the Sixth Circuit’s standard of discretion as set forth in *Jones*, the Court finds that [defendant] has shown an extraordinary and compelling reason to reduce her sentence.”).

It was not until May 2020 that the Department sent a memorandum to the U.S. Attorneys stating that COVID vulnerability could be considered a medical ground under § 1B1.13 note 1(A) Medical Conditions of the Defendant.⁵⁵

FAMM sees no reason to limit courts' discretion to recognize the rare occurrence. This discretion has existed for BOP, but it is judges who have proven themselves capable of delineating those circumstances that are truly extraordinary and compelling. For example, Option 1, and perhaps Option 2, would not have helped Gwen Levi, from whom you will hear. She was released to home confinement under the CARES Act and then returned to prison based on a technical violation. The judge who ruled in her compassionate release case was not bound by the policy statement and was able to draw on broad discretion to consider whether her very unique circumstances rose to the level of extraordinary and compelling.⁵⁶

4. Conclusion

Thank you again for inviting FAMM to testify and for considering our views. We look forward to supplementing this statement and working with the Commission on compassionate release.

⁵⁵ See, e.g., *United States v. Wright*, 8:17cr00388-TDC, ECF 50, *Supplemental Response* (D. Md. May 19, 2020) (The Government now supplements [its] response in light of intervening Department of Justice guidance. Based on that guidance, the Government concedes that the defendant's Type I diabetes, and perhaps other of her medical conditions, constitute 'extraordinary and compelling circumstances' during the current pandemic, even if these conditions in ordinary times would not allow compassionate release.)

⁵⁶ *United States v. Levi*, No. 04-235, ECF 2085, *Memorandum Opinion*, (D. Md. July 6, 2021).