

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION
ON PROPOSED AMENDMENTS TO THE GUIDELINES

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Chair, Practitioners Advisory Group

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Good Morning, my name is Natasha Sen, and on behalf of the Practitioners Advisory Group, I thank you for the opportunity to provide testimony to the Commission regarding three proposed amendments to the U.S. Sentencing Guidelines that the Commission is currently considering. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We appreciate the Commission's willingness to consider our positions on the Commission's proposed amendments to the Guidelines.

My testimony will address the PAG's positions on proposed amendments regarding: (1) motions for compassionate release; (2) the use of acquitted conduct in calculating a defendant's guidelines range; and (3) offenses where law enforcement or correctional officers sexually abuse individuals in their care, custody or supervision.

I. Proposed Amendment to U.S.S.G. §1B1.13, Compassionate Release

The PAG supports the Commission's proposed revisions to U.S. Sentencing Guideline §1B1.13. Specifically, the PAG endorses the proposal permitting individual defendants to file motions for sentence reductions directly with the district courts. This is consistent with the First Step Act and reflects Congress's intent to broaden the ability of individual defendants to file motions for sentence reductions. The PAG also supports the proposal to move the list of extraordinary and compelling reasons from the commentary into the text of the guideline itself, and to expand upon the criteria that courts may consider to be extraordinary and compelling.

The PAG favors the inclusion of health risks to a defendant as a basis for granting relief. We recently witnessed how unforeseen events, such as the COVID-19 pandemic, can quickly result in devastating consequences to communities, especially individuals in congregate settings such as jails and prisons. This guidance will allow courts in the future to quickly evaluate and consider risks to defendants' health that are currently unknowable and unpredictable, and which were not contemplated at the time of the original sentence.

During the COVID-19 pandemic, PAG members observed how defendants' ability to file motions for compassionate release ensured that these individuals were not punished more severely than what courts had intended at sentencing. Thus, a defendant who had served 49 months of a 120 month sentence was granted a reduction to a time-served sentence because he suffered from a chronic, degenerative kidney disorder. The court determined that the defendant's health was deteriorating and he was at risk of severe health consequences if he contracted COVID-19.¹ Similarly, a defendant who had served 51 months of an 84 month sentence was granted a motion for sentence reduction to time-served. The defendant suffered from acute asthma and chronic obstructive pulmonary disease, and the court found that the risks to his health if he were to contract COVID-19, along with the spread of COVID-19 cases at the facility where he was detained, supported his request for relief.²

¹ See *United States v. Rosario-Bautista*, No. 1:18-CR-009-ER-1 (Sept. 10, 2021 S.D.N.Y.).

² See *United States v. Harold Hill*, No. 1:16-CR-397-LTS-2 (Dec. 29, 2020 S.D.N.Y.).

The PAG endorses the Commission’s proposal to add two new categories to the list of circumstances that may constitute extraordinary and compelling reasons for relief: (1) defendants sexually assaulted or physically abused by BOP officers or employees; and (2) changes in the law that make a defendant’s sentence inequitable. If the Commission adopts the category for victims of sexual assault or physical abuse, the new §1B1.13(b)(4), the PAG recommends that the Commission consider expanding it in two ways. First, the PAG suggests that the guideline include serious psychological injury as a basis for relief. In our experience, clients who are sexual assault survivors can experience profound psychological injury that can be longer lasting and have more damaging impacts than the physical bodily trauma addressed by the proposed amendment. Second, the PAG recommends that the Commission not limit relief to assaults committed by BOP personnel, but include sexual and physical assaults committed by other inmates. While the perpetrators of these assaults may differ, the impact on an institutionalized individual can be no less traumatizing or deserving of relief. Given that BOP and other institutions are responsible for the custody and care of our clients, the PAG sees no principled distinction to limit relief based on the identity of the perpetrator.

The PAG believes that changes to the law, including non-retroactive changes, should be grounds for a sentence reduction, and we support the fifth category contained at the proposed §1B1.13(b)(5). An example of a change in the law that might warrant relief is contained in the First Step Act itself, which drastically reduces sentences where a defendant is convicted of multiple counts of 18 U.S.C. § 924(c). Thus, in a case before the First Step Act, a defendant was convicted of six § 924(c) charges and was sentenced to a mandatory minimum 130 year sentence. Under the First Step Act, this defendant’s sentence would be lowered by 100 years to 30 years.³

The PAG contends that this type of dramatic difference in a sentence, based on a change in the law, is an extraordinary and compelling reason that supports a sentence reduction. In addition, since the First Step Act, a significant body of law has developed that recognizes changes in the law as a ground for relief. Excluding this basis for relief will result in even more disparities in the application of the law for similarly situated individuals.

Finally, the PAG supports Option 3 as the “catch-all” provision in proposed §1B1.13(b)(6). This provision would allow district courts to consider any other reason, alone or in combination with the enumerated reasons, that supports relief based on extraordinary and compelling circumstances. Option 3 is consistent with the broad discretion that district courts have and should have in sentencing.⁴ As the pandemic demonstrated, such a provision is necessary to give courts the discretion they need to consider the unpredictable circumstances that may give rise to an extraordinary and compelling reason supporting a sentence reduction.

³ See *U.S. v. Rubalcava*, 26 F.4th 14, 29 (1st Cir. 2022) (J. Barron, concurring) (describing the defendant’s sentence for multiple § 924(c) convictions in *U.S. v. Rivera-Ruperto*, 852 F.3d 1 (1st Cir. 2017)).

⁴ See, e.g., *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).