

**STATEMENT OF**

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NORTHERN DISTRICT OF OKLAHOMA  
UNITED STATES DEPARTMENT OF JUSTICE**

**BEFORE THE  
UNITED STATES SENTENCING COMMISSION**

**FOR A PUBLIC HEARING ON PROPOSED  
AMENDMENTS TO THE FEDERAL SENTENCING  
GUIDELINES CONCERNING COMPASSIONATE  
RELEASE.**

**PRESENTED  
FEBRUARY 15, 2023**

**I. Introduction**

Judge Reeves and members of the Sentencing Commission, thank you for the opportunity to testify before you regarding the proposed amendments to the United States Sentencing Guidelines in light of the First Step Act, particularly with regard to Compassionate Release.

**II. Amendments Concerning Compassionate Release in Light of the First Step Act.**

One of the main purposes of the Sentencing Reform Act of 1984 (“SRA”) was to decrease sentencing disparity of similar crimes throughout the federal system through the creation of the present United States Sentencing Commission which is tasked with devising and updating a system of mandatory sentences, and through the abolishment of federal parole.<sup>1</sup> Congress’s intent for a decrease in sentencing disparity is seen in the text of the Act mandating the Commission to “provide certainty and fairness in meeting the purposes of sentencing” and “avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>2</sup>

While the First Step Act made a *procedural* change by allowing a defendant to file a motion for Compassionate Release, the First Step Act did not make a *substantive* change to Compassionate Release, alter the purposes of the SRA and the Commission, or permit

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<sup>1</sup> S. Rep. No. 225, 98th Cong., 1st Sess. 37-39, 65, 161-62 (1983).

<sup>2</sup> 28 U.S.C. § 991(b)(1)(B).

the reinstatement of federal parole through a de facto compassionate release parole system.<sup>3</sup>

In response to the First Step Act, the Commission proposes several changes to the §1B1.13 Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A), otherwise known as Compassionate Release, one of which is amending §1B1.13 to account for the First Step Act allowing a defendant to file a motion.<sup>4</sup> I agree with the Commission's amendment accounting for the First Step Act's changes and movement of the current extraordinary and compelling reasons from Application Note 1(A) through (D) into guideline §1B1.13 itself. However, substantive amendments are unnecessary because the First Step Act only expanded the procedural mechanism to defendants. It did not alter the requirements for extraordinary and compelling reasons for early release.

### **III. Amendments Broadening the List of Extraordinary and Compelling Reasons for Compassionate Release.**

The proposed expansion of the extraordinary and compelling reasons may compromise the SRA's primary purpose of lowering sentencing disparity. For example, under option two of proposed Category Six<sup>5</sup>, what constitutes a change that would make a defendant's imprisonment inequitable? Can a self-induced change be the basis of the purported inequity? Under option three<sup>6</sup>, what constitutes an extraordinary and compelling reason

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<sup>3</sup> First Step Act of 2018 (First Step Act), Pub. L. 115-391, 132 Stat. 5194 (2018).

<sup>4</sup> U.S. Sentencing Comm'n, 88 Fed. Reg. 7180 at 7182 – 7185 (February 2, 2023) <https://www.federalregister.gov/documents/2023/02/02/2023-01346/sentencing-guidelines-for-united-states-courts>.

<sup>5</sup> *Id.* at 7184.

<sup>6</sup> *Id.*

strong enough for release other than those already listed? Each court may interpret the language in the proposed options for Category Six differently. Such variation may lead one court to release a defendant due to an extraordinary and compelling reason that another court may not find sufficient, reverting back to the sentencing disparities the SRA sought to eliminate. As noted by the Department of Justice in its September 12, 2022 comment letter, we have already seen sentencing disparities created by divergent interpretations and applications of the current guidelines during COVID-19.<sup>7</sup> For example, even though Congress explicitly stated changes to stacking of sentences under the First Step Act were not to be retroactive, the Tenth, Ninth, and Fourth Circuits permit these changes to be considered as extraordinary and compelling, while the Third, Sixth, Seventh, and Eleventh Circuits do not.<sup>8</sup>

The Commission proposes eight amendments that broaden the list of extraordinary and compelling reasons.<sup>9</sup> The first and second of the eight broadening amendments create new subcategories for “Medical Condition of the Defendant.” The first is for a defendant with a medical condition that requires long-term or specialized medical care and the second for

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<sup>7</sup> Letter to Judge Carlton W. Reeves, Acting Chair, U.S. Sentencing Commission, U.S. Department of Justice (September 12, 2022), 5, available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf>

<sup>8</sup> Compare *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021), *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022), and *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020) with *United States v. Andrews*, 12 F.4th 569 (3d Cir. 2021), *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021), *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021) and *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021).

<sup>9</sup> U.S. Sentencing Comm’n, 88 Fed. Reg. 7180 at 7182 – 7185.

a defendant at increased risk of infection that is housed in a facility enduring an ongoing infectious outbreak where such risk cannot be timely mitigated.<sup>10</sup> To the extent these proposed amendments are made because of the change by the First Step Act, I oppose them because the First Step Act merely made a procedural change. However, as we have all experienced the difficulties of outbreak mitigation and increased risks of those with medical conditions during the COVID-19 Pandemic, I am not opposed to the new subcategories under “Medical Conditions of Defendant.”

The third, fourth, and fifth of the eight broadening amendments concern the “Family Circumstances” category.<sup>11</sup> With these changes, the death or incapacitation of the caregiver of a defendant’s minor child would be broadened to any child regardless of age, and add new subcategories for the incapacitation of the defendant’s parent or close family member when the defendant is the only available caregiver.<sup>12</sup> I oppose these changes to a certain extent. The new amendments should be limited to when the defendant is the *only* living able caregiver of the child, spouse, parent, or family member, and it is in the best interest of the individual that the defendant be such caregiver instead of a nonrelative or the state. Just because the defendant is related to the individual does not mean it is in that individual’s best interest for the defendant to be their caregiver.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

For example, Eric James Reinbold filed a motion for Compassionate Release on October 30, 2020.<sup>13</sup> Reinbold cited COVID-19, its impact on his health and his family’s circumstances as reasons for release.<sup>14</sup> Importantly, he cited the hardship his wife was enduring due to her own mental health issues, essentially being a single parent, and the sole provider for their children.<sup>15</sup> The District Court of the District of Minnesota granted his Motion for Compassionate Release on March 18, 2021, citing his wife’s health conditions “incapacitat[ing] her” and “making it more difficult for her to sufficiently care for their children,” and Reinbold’s release would allow him to alleviate the family’s circumstances.<sup>16</sup> Roughly four months later on July 9, 2021, Reinbold stabbed his wife to death, and her body was found by her children.<sup>17</sup> If more restrictive language is adopted for these aforementioned amendments, then I would support their adoption but for now I oppose them as written.

The sixth of the eight broadening amendments proposes to create a new category for defendants who are victims of sexual abuse or physical abuse by any agent or contractor of the Bureau of Prisons (“BOP”).<sup>18</sup> I fear that creating this new category will incentivize false reports against BOP agents. Even when sexual relations between a BOP agent and

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<sup>13</sup> *United States v. Reinbold*, No. 19-cr-00040-JRT-LIB, Doc. 80.

<sup>14</sup> *Id.* at 7-9.

<sup>15</sup> *Id.* at 8-9.

<sup>16</sup> *United States v. Reinbold*, No. 19-cr-00040-JRT-LIB, Doc. 91, at 4.

<sup>17</sup> See Office of Minn. Attorney General Communication Convicting Reinbold (Sept. 30, 2022), available at

[https://www.ag.state.mn.us/Office/Communications/2022/09/30\\_Reinbold.asp](https://www.ag.state.mn.us/Office/Communications/2022/09/30_Reinbold.asp)

<sup>18</sup> U.S. Sentencing Comm’n, 88 Fed. Reg. 7180 at 7182 – 7185.

inmate is, for all intents and purposes, consensual between the two, it is still considered sexual assault. Would such a situation qualify for compassionate release? Inmates may already seek remedies through civil suits and criminal charges against the agent. To the extent the Commission seeks comment regarding a possible inmate on inmate equivalent of this amendment, I equally oppose it. Such a category would incentivize planned attacks orchestrated to be the basis of a compassionate release motion.

The seventh of the eight broadening amendments creates a new category for changes in the law making the sentence served by the defendant inequitable.<sup>19</sup> I oppose this amendment as written. As I noted earlier, we already see a circuit split on whether the changes to stacking under the First Step Act can qualify as extraordinary and compelling even though Congress explicitly stated retroactivity inapplicable. I would suggest, at a minimum, imposing a limitation when retroactive intent is stated. I also suggest limiting the applicability of such amendment to guideline changes covered by §1B1.10 to avoid tension between §1B1.10 and §1B1.13.

The last of the broadening amendments proposes three options to expand the scope of the provision currently in Application Note 1(D) of §1B1.13 and redesignate it in the guideline as “Other Circumstances.”<sup>20</sup> The first option provides that the category applies when “a defendant presents any other circumstances or a combination of circumstances similar in nature and consequence to any circumstances described” in the current and

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

proposed amendments. The second option proposes application when “[a]s a result of changes in the defendant’s circumstances or intervening events that occurred after the defendant’s sentence was imposed, it would be inequitable to continue the defendant’s imprisonment.”<sup>21</sup> The third option proposes application when the “defendant presents an extraordinary and compelling reason other than, or in connection with, the circumstances described in” the current and proposed amendments.<sup>22</sup> I, at most, can only support the first option which restricts circumstances to those similar to current categories. Restricting circumstances to those similar to the current and proposed categories would allow for a more uniform expectation of sentencing. Options two and three allow for a much broader interpretation as to what an applicable circumstance can be, ultimately circumventing the SRA’s purpose of more uniform sentencing and its abolishment of the federal parole system.

Further, any broadening of extraordinary and compelling reasons for Compassionate Release through these proposed amendments presents concerns through the eyes of a former prosecutor.

I echo the concerns raised by the Victims Advisory Group in its September 24, 2022 letter. After implementation of the First Step Act and in the wake of the COVID-19 Pandemic, the granting of Compassionate Release has increased twelvefold.<sup>23</sup> Statistics

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Letter to Judge Carlton Reeves, Acting Chair, U.S. Sentencing Commission, Victim Advisory Group (September 24, 2022), 3, available at



regarding recidivism of compassionate release inmates after the First Step Act and COVID-19 are scarce due to the novelty. However, The Department of Justice Bureau of Justice Statistics found 66% of all prisoners reoffend within three years of release and 82% reoffend within 10 years of release.<sup>24</sup>

While recidivism rates of Compassionate Release recipients are likely lower due to the age and health of the defendants, broadening the non-medical categories may allow individuals, who would have otherwise been serving their sentence, to reoffend upon early release. For example, Erin Reinbold murdered his wife, Michael Garrett murdered his original victim less than a year after his release because of his age and failing eyesight,<sup>25</sup> and Anthony Whitely continued selling narcotics after being granted compassionate release due to COVID-19 less than a year earlier.<sup>26</sup>

To protect the standardizing purpose of the SRA, to protect both current and future victims, and to lower recidivism rates, the extraordinary and compelling reasons should not be expanded. However, if the Commission chooses to do so, more precise language

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<https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/vag1.pdf>

<sup>24</sup> Bureau of Statistics, Recidivism of Prisoners: a 10-Year Follow-Up Period (2008-2018) (Sept. 2021), available at <https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-24-states-2008-10-year-follow-period-2008-2018>

<sup>25</sup> Nathan Baca and Becca Knier, 'Failed by the System' The Life and Death of DC Stalking Victim Sylvia Matthews (Feb. 28, 2022), available at <https://www.wusa9.com/article/news/investigations/sylvia-matthews-michael-garrett-stalking-murder-investigation/65-8342ecc3-84cb-43a5-af72-79dee8129e65>

<sup>26</sup> Department of Justice, Man Who Was Release from Prison Due to Pandemic Sent Back, available at <https://www.justice.gov/usao-ct/pr/man-who-was-released-prison-due-pandemic-sent-back-prison-violating-supervised-release>

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should be used to allow uniform application throughout all federal courts and prevent the recreation of sentencing disparities and a de facto compassionate release parole system Congress attempted to eliminate with the implementation of the SRA and the Commission.

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Thank you for the opportunity to share my views on this important issue. I look forward to answering your questions.