Statement of Marianne Mariano
Federal Public Defender for the Western District of New York
on Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Compassionate Release and Conditions of Supervision

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My name is Marianne Mariano and I am the Federal Public Defender in the Western District of New York, as well as a longstanding member of the Federal Defender Guideline Committee. I would like to thank the Commission for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Compassionate Release and Conditions of Supervision.

I. Conditions of Supervision

We appreciate the Commission's decision to review conditions of supervision and the interest in making the conditions easier for our clients to understand. However, we question the necessity of many of the standard conditions and are concerned about the overbreadth and ambiguity of some of the conditions.

A. The Commission Should Strictly Limit the Number of Standard Conditions in Favor of Individualized Special Conditions.

As a threshold matter, we believe the Commission should reduce and limit the number of standard conditions for several reasons, including: (1) A limited number of standard conditions is consistent with the statutory provisions at 18 U.S.C. §§ 3563(a) and 3583(d) which require that the court make specific findings when imposing conditions not mandated by statute; (2) There is no evidence the proposed list of standard conditions serves the purpose of "facilitat[ing] the reintegration of the defendant into the community"[1]; (3) An extensive list of standard conditions is counterproductive because it may increase re-incarceration and even the most technical of violations extends the term of imprisonment for the original offense[2]; and (4) A lengthy list of standard conditions has a disproportionately negative impact on the poor. Each of these reasons is discussed more fully below.

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[1] USSC, *Federal Offenders Sentenced to Supervised Release* 2, 10 (2010) (quoting *United States v. Vallejo*, 69 F.3d 992, 994 (9th Cir. 1995)).

[2] *Johnson v. United States*, 529 U.S. 694, 700 (2000) (holding that post-revocation penalties must be treated as part of the penalty for the original offense, particularly since a violation leading to imprisonment need not be criminal).

First, "standard" "one-size-fits-all" conditions that are not mandated by statute undermine the requirements in 18 U.S.C §§ 3563(a) and 3583(d), that the court make specific findings when imposing additional conditions of supervision. The statutory requirements include that any condition be "reasonably related" to specified § 3553(a) factors and that it "involve[] no greater deprivation of liberty than is reasonably necessary" to serve the purposes set forth in § 3553(a).[3] Because the standard conditions do not require such findings and ignore the need for consideration of the history and characteristics of the defendant, any standard condition not already mandated by the statute is contrary to the intent of Congress.

The Seventh Circuit has acknowledged the problem with "one-size-fits-all" conditions, noting that the "district judge is required to give a reason, consistent with the sentencing factors in section 3553(a), for every discretionary part of the sentence that the judge is imposing, including non-mandatory conditions of supervised release." *United States v. Bryant*, 754 F.3d 443, 444-45 (7th Cir. 2014) (judge failed to give reasons for imposing 13 standard conditions). *See also United States. v. Kappes*, 782 F.3d 828, 846 (7th Cir. 2015) (all discretionary conditions require findings; "sentencing judges rarely, if ever, should list a multitude of conditions without discussion"); *United States v. Thompson*, 777 F.3d 368, 379-80 (7th Cir. 2015) ("a condition of supervised release permitting the probation officer to visit at any time at home or elsewhere was 'too broad in the absence of any effort by the district court to explain why [it is] needed'").

Second, application of conditions not mandated by statute to each and every case is not supported by empirical evidence or current evidence-based practices. The Commission has acknowledged that "supervised release is primarily concerned with 'facilitat[ing] the reintegration of the defendant into the community,'" and that such facilitation is the reason behind standard conditions of release.[4] But we are not aware of any data showing either the existing or proposed standard conditions serve that purpose. Indeed, decades of research show the opposite: "overly supervising (by number of contacts, over-programming, or imposing

[3] For probation, the condition must be reasonably related to the "nature and circumstance of the offense and the history and characteristics of the defendant" and the four purposes of sentencing. 18 U.S.C. § 3563(b). For supervised release, the condition must be reasonably related to the same factors except for the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3583(d). For both probation and supervised release, the condition may involve "no greater deprivation of liberty than is reasonably necessary" to accomplish the specific statutory purposes. 18 U.S.C. § 3563(b) & § 3583(d).

[4] *Federal Offenders Sentenced to Supervised Release*, *supra* note 1.

unnecessary restrictions) low-risk [supervisees] is likely to produce worse outcomes than essentially leaving them alone."[5]

Another study found that probation officers spend too much time enforcing compliance with conditions of supervision rather than delivering needed services to the person under supervision. James Bonta, et al., *Exploring the Black Box of Community Supervision*, 47 J. Offender Rehabilitation 24 (2008). While the study did not examine federal probation, we see similar problems with far too many clients who need services, do not receive them, and are accused of technical violations of supervision, such as not reporting a change in residence[6] or employment, associating with persons with prior felonies even though the convictions may be old and the person may be a family member, and not reporting to probation as required (e.g., not submitting weekly job search reports that show five attempts to find work even though transportation may be lacking and the person does not have a driver's license, missing an appointment because of transportation problems, not filing written reports even though the person has a low educational level, or not filing a report via computer even though the person lacks computer access and technical skills). This "trail 'em, nail 'em, jail 'em" approach is counter-productive and perpetuates the "get tough" view of community supervision rather than focus on rehabilitation and reintegration.[7]

Setting aside the reality of how many standard conditions of supervision are used as enforcement mechanisms rather than to help the person reintegrate, "one-size-fits-all" conditions are not compatible with the approach that the U.S. Probation system has been trying to implement. According to the "evidence based practices" that the Office of Probation and Pretrial Services encourages local district offices to use, conditions of supervision should be directed toward the particular "criminogenic" needs and responsivity of the individual, while the intensity of supervision is based upon the individual's actuarial risk score.[8] If conditions of supervision

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[5] Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* 13 (2013), http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf.

[6] In one case, for example, a defender client was discharged from a halfway house because of a verbal argument with another resident. He wandered the streets looking for a place to live, found a homeless shelter, and then found employment with the help of a local police officer. The probation officer focused on preparing a technical violation because the individual was not living at the halfway house. When defense counsel suggested to the probation officer that he help the client find an alternative place to live, the probation officer responded: "So I should bend over backwards so this guy doesn't go back to federal prison?" Fortunately for the client, the police officer, working with a homeless outreach program, helped the client find temporary housing and eventually permanent housing.

[7] William D. Burrell, *Community Corrections Management: Issues and Strategies* 19-1 to 19-3 (2012).

[8] *See generally* National Institute of Corrections, *Annotated Bibliography: Evidence-Based Practices in the Criminal Justice System* (2013); Bradford Bogue et al., National Institute of Corrections,

are to be consistent with that approach, there should be few standard conditions. All conditions should be specifically targeted to the needs and responsivity of the individual who should be "directly involved in the creation of [the] supervision plan" rather than "treated as [a] passive participant[]." Faye Taxman, et al., National Institute of Corrections, *Tools of the Trade: A Guide to Incorporating Science into Practice* 15 (2006).

Third, extensive standard conditions of supervision are unnecessarily burdensome and increase, rather than decrease, the risk of re-incarceration for technical violations. Even if the conditions do not result in reported violations or revocation, they give probation officers enormous power over the lives of those under supervision. As aptly explained in a recent article about conditions of supervision: "probation systems have broad and at times surprising expectations for those under their control: probationers must be good people, in addition to being law-abiding people."[9] Rather than help reintegrate a person into the community, too many conditions can set him or her up to fail in many ways. For example, notification of risk and visitation requirements may interfere with a person's ability to maintain a job – another requirement of supervision. Defender experience also shows that technical violations lead to revocations even when there is no evidence of any criminal activity and the defendant is otherwise succeeding with reintegration.[10]

Fourth, the Commission should be mindful that many of the standard conditions of supervision unduly burden the poor. For example, poor people have more trouble than others finding work because of a lack of education and employment opportunities. They also have greater difficulty reporting on a regular basis because of problems with transportation,[11] limited access to computers, and lack of flexibility in their work schedules.[12] They also typically have

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Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention (2004).

[9] Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L.J. 291, 295 (2016).

[10] *See, e.g.*, *United States v. Poindexter*, 616 F. App'x 141 (5th Cir. 2015) (defendant sentenced to 24 months of imprisonment for technical violation even though he had a successful employment record); *United States v. Davis*, 606 F. Appx. 257 (5th Cir. 2015) (defendant, just two months short of completing three-year term of supervised release, was sentenced to one year and one day for failing to report to probation officer about change of residence after he became homeless involuntarily; neither probation officer nor prosecutor advocated for revocation); *see also* Brief of Appellant, *United States v. Davis*, 2015 WL 128364 (Jan. 5, 2015).

[11] Transportation problems include limited access to public transportation because of limited routes or schedules and the unavailability of personal vehicles because of the costs of insurance and vehicle maintenance.

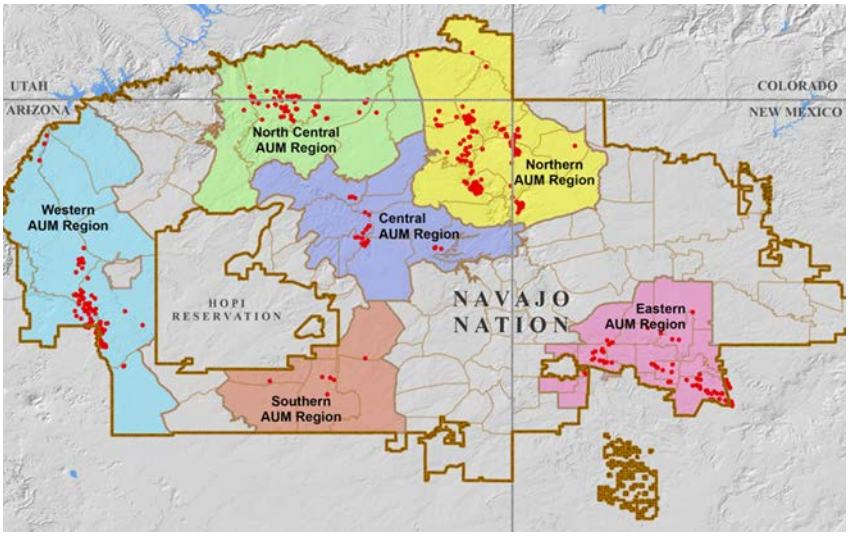
[12] Doherty, *supra* note 9, at 350.

limited housing options, which makes it hard for them to give advance notice of a move or to remember to do so within the requisite time period. And, because they often live in neighborhoods where others have been convicted of felony offenses, it is extremely difficult, if not impossible, to avoid communicating or interacting in any way with a person they know to have a felony conviction.

B. Additional Comments on Specific Conditions of Probation and Supervised Release

1. Knowingly Leaving the Federal Judicial District Without Permission

The prohibition on not leaving the district without permission should not be a standard condition because it is unrealistic to follow in many places where the boundaries of the district do not align with states and reservations or where the individual lives close to a district border. For example, the Navajo Nation is the largest and most populous Indian reservation in the United States, covering 14 million acres of land. As shown below, it covers areas in Arizona, Utah, and New Mexico.



Other Indian Reservations also span multiple states,[13] including:

- Ute Mountain Indian Reservation – Colorado, New Mexico, and Utah

[13] *List of Largest Indian Reservations in the United States*, https://en.wikipedia.org/wiki/List_of_largest_Indian_reservations_in_the_United_States.

- Standing Rock Indian Reservation and Lake Traverse Indian Reservation – South and North Dakota
- Pine Ridge Indian Reservation – South Dakota and Nebraska
- Zuni Indian Reservation – New Mexico and Arizona
- Northern Cheyenne Indian Reservation –Montana and South Dakota
- Colorado River Indian Reservation – Arizona and California
- Omaha Indian Reservation – Nebraska and Iowa.

Aside from Indian reservations, people who live near the borders of districts may find it extraordinarily difficult to carry out normal activities of life without sometimes leaving the district. In such cases, requiring an individual to obtain permission of a probation officer to walk across a street into a different district is unnecessarily punitive and "a greater deprivation of liberty than is reasonably necessary" for the purposes of probation or supervised release.[14] For example, a person living in Prince George's County, Maryland, near the District of Columbia, may easily cross over a district line just to go to a restaurant, grocery store, bank, or the doctor.[15] The same holds true for many other areas near a district border.

2. [Answering Truthfully] or [Being Truthful] When Responding to the Probation Officer's Questions

We appreciate the Commission's interest in protecting the Fifth Amendment right against self-incrimination, which is not sufficiently protected under the current language of the condition, i.e., "the defendant shall answer truthfully all inquiries by the probation officer." Under the current language, a person may be placed in the position of having to choose between answering the question truthfully and incriminating himself or not answering and face revocation. *See Thompson*, 777 F.3d at 378 (this provision "essentially asks for a waiver of the right not to be forced to incriminate himself"). *See also* Stephen Vance, *Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision*, 75

[14] 18 U.S.C. § 3583(d)(2).

[15] Looking at a map of the Capitol Heights area provides an example of the problem of needing to depend upon a probation officer's permission to carry on normal life activities. Southern and Eastern Avenues are the border between the District of Columbia and the District of Maryland. http://www.mapquest.com/us/md/capitol-heights-282040734.

Fed. Probation 33 (2011) (acknowledging the Fifth Amendment implications created by the current language in the condition).

The Ninth Circuit has found such language unconstitutional. In *United States v. Saechao*, 418 F.3d 1073 (9th Cir. 2005), the court addressed whether "a probationer who provides incriminating information to his probation officer in response to questions from that officer, and does so pursuant to a probation condition that requires him to 'promptly and truthfully answer all reasonable inquiries' from the officer or face revocation of his probation, is 'compelled' to give incriminating evidence within the meaning of the Fifth Amendment." *Id*. at 1075. The court concluded that because the condition required the probationer to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent,[16] the defendant's "admission of criminal conduct was compelled by a 'classic penalty situation' and the evidence obtained by the probation officer may not be used against him in a criminal proceeding."[17]

This problem with the "answer truthfully" language is not resolved by the Commission's proposed second bracketed option ["be truthful"]. The proposed language is not sufficiently clear, and would not adequately convey to the average supervisee that he or she need not answer every inquiry posed by the probation officer. In addition, to ensure that the condition does not involve a "greater deprivation of liberty than reasonably necessary,"[18] the permissible questions should be limited to those related to the conditions of supervision. Accordingly, we propose the following language: *The defendant must be truthful when responding to the questions asked by the probation officer regarding compliance with the conditions of supervision, but the defendant remains free to exercise the Fifth Amendment right against self-incrimination when the questions pose a "realistic threat of incrimination in a separate criminal proceeding." Minnesota v. Murphy*, 465 U.S. 420, 435, n.7 (1984). *See also United States v. Marvin*, No. 2:99-CR-148 (N.D. Ind. May 20, 2015) (inquiries by the probation officer directed to compliance with the conditions of the defendant's supervised release); *United States v. Kappes*, 782 F.3d 828, 850 (7th Cir. 2015) (ruling that defendant may request that the standard condition of answering "truthfully all inquiries by the probation officer" include language indicating that the condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination).

[16] *Saechao*, 418 F.3d at 1075 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 436 (1984)).

[17] *Id*. at 1075.

[18] 18 U.S.C. § 3583(d)(2); 18 U.S.C. § 3563(b).

3. Allowing the Probation Officer to Visit Anytime and Anywhere and Permitting Probation Officer to Seize Items in Plain View

This condition, like any non-mandatory condition, should require an explanation of why it is needed. *See Thompson*, 777 F.3d at 380 ("The second condition would allow the probation officer to 'visit' the defendant at 3:00 a.m. every morning and look around for contraband, and also allow him to follow the defendant everywhere, looking for contraband. Regardless of any possible constitutional concern, both conditions are too broad in the absence of any effort by the district court to explain why they are needed.").

4. Working Full Time, Finding Full-Time Employment, and Notification of Change in Employment

Even if the Commission rejects our position that all non-mandatory conditions should be "special conditions" directed at the particular needs of the individual, we encourage the Commission to make this one a special condition. Defenders often represent people who are unable to work for physical or mental health reasons or who will be elderly at the time of release. Making the employment condition a special rather than standard condition will allow individualized circumstances to be taken into account, including the area where the defendant is releasing to and other mechanisms of financial support.

Making employment a standard condition also gives probation officers too much discretion and overlooks that the availability of employment varies tremendously. In some areas, finding a job is near impossible and looking for a job is extraordinarily difficult. For example, the Navajo reservation has an unemployment rate of 42%[19] and little phone service or internet access that would help a person look for employment elsewhere. The ease of finding a job is also fundamentally different in metropolitan areas like Ames, Iowa or Fargo, North Dakota, where the unemployment rate is 1.9%, than it is in Yuma, Arizona or El Centro, California, where the unemployment rate is 20% or higher and over four times the general unemployment rate for the United States.[20]

And, of course, a sizable number of unemployed persons are those with criminal records and who lack job or employment skills. According to a New York Times/CBS News/Kaiser Family Foundation poll, "[m]en with criminal records account for about 34 percent of all

[19] http://navajobusiness.com/fastFacts/Overview.htm.

[20] The general unemployment rate for metropolitan areas in the United States is 4.8%. http://www.bls.gov/web/metro/laummtrk.htm.

nonworking men age 25 to 54."[21] While "ban the box" laws have been part of an effort to reduce barriers to employment for people with criminal records, only 19 states have adopted laws that require certain employers to remove conviction history questions from job applications.[22] The employment condition of supervision also fails to acknowledge how the ability to comply with the condition is related to social class. Poor people have a more difficult time finding steady employment than others who have had more educational and employment opportunities.[23]

5. Communicating or Interacting with Someone Convicted of a Felony or Engaged in Criminal Activity

While the Commission's proposed addition of the mens rea requirement is a positive change, the proposed prohibition is still overly broad and isolates individuals from their communities. The definition of "interact" is "to talk or do things with other people."[24] Does that mean that a person who rides a bus with another person he knows has a felony conviction is "interacting"? Is a person sitting in a bar prohibited from encouraging a friend to call a taxi rather than drive while intoxicated because the friend is about to engage in criminal activity?

We recognize that the overall purpose of this condition is to encourage the supervisee to avoid exposure to persons engaged in behaviors that may trigger further criminal involvement, but such restrictions are greater deprivations of liberty than necessary. For example, a person would violate the condition if he or she did not obtain prior approval to have a discussion with someone who had been convicted of a felony twenty years before and is now living a law-abiding life. Because chance encounters are a part of life that can lead to positive relationships, a broad prohibition on such communications is counter-productive. Such a prohibition is also nearly impossible to comply with because many of our clients have family members with prior convictions.[25]

To better capture the purpose of this condition and to ensure that it has no greater infringement on the individual's liberty interest than is reasonably necessary, we suggest the

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[21] Binyamin Appelbaum, *Out of Trouble, But Criminal Records Keep Men Out of Work*, N.Y. Times, Feb. 28, 2015, http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0.

[22] National Employment Law Project, *Ban the Box* 3-5 (2015), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

[23] Doherty, *supra* note 9, at 350.

[24] Merriam Webster, http://www.merriam-webster.com/dictionary/interact.

[25] Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* 11 (2013), http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf.

following wording from a recent case in the Northern District of Indiana: "*The defendant shall not knowingly remain in the presence of other individuals while such individuals are engaged in criminal activity*." *United States v. Marvin*, No. 2:99-CR-148 (N.D. Ind. May 20, 2015).

6. Requirement to Notify Probation Officer if Arrested or Has Any Official Contact with Law Enforcement Officer

The term "official contact" is vague. A person of reasonable and ordinary intelligence has no way of knowing the difference between "official" and "unofficial" contact. For example, if the defendant is briefly stopped by a traffic officer and then permitted to proceed on his or her way without even receiving a citation, is that official? If the officer stops the person and asks for identification and then frees the person, is that official? Because we do not know what the Commission intends by the term "official contact," we are not in a position to offer alternative wording.

7. Ownership, Possession, or Access to a Firearm, Ammunition, Destructive Device, or Dangerous Weapon

The addition of the term "access" to this condition makes it unduly restrictive. Unlike constructive possession, which at least requires that the individual have dominion and control over the item or the premises where it is located,[26] the term "access" simply means a "way of getting near" something.[27] As a result, a person could be held in violation of this condition and subject to revocation by visiting a person who owns a firearm and ammunition for legitimate purposes. For our clients who live in rural areas where hunting supplies food for many individuals, this is particularly problematic. To help ensure that this condition is reasonable, it should focus on possession of the firearm, ammunition, destructive device, or dangerous weapon.

8. Notification of Risk to Another Person or Organization

The reference to "risk" is too vague because the condition contains "no indication of … what 'risks' must be disclosed to which 'third parties.'" *Thompson*, 777 F.3d at 379. *See also United States v. Poulin*, 809 F.3d 924, 934 (7th Cir. 2016) (finding ambiguous and overbroad standard condition that "as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement").

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[26] *See United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007).

[27] Merriam-Webster, http://www.merriam-webster.com/dictionary/access.

It is particularly appropriate for this to be a special, rather than a standard, condition. *See United States v. Mike*, 632 F.3d 686, 698 (10th Cir. 2015) (third party notification condition vacated because court did not make necessary findings to support the condition). The Second Circuit has held that "[i]f the court believes such notification should be mandatory for certain types of employment but not others, the court may specify guidelines to direct the probation officer, but may not simply leave the issues of employer notification to the probation officer's unfettered discretion." *United States v. Peterson*, 248 F.3d 79, 85-86 (2d Cir 2001). To clarify the scope of the probation officer's discretion the condition should specify the nature of the offense and characteristics of the defendant that pose the risk. *See United States v. Nash*, 438 F.3d 1302, 1307 (11th Cir. 2006) (approving standard condition but noting how it must be related to specific circumstances that inform the probation officer about the nature of the risk); *United States v. Doe*, 79 F.3d 1309 (2d Cir. 1996) (order to require defendant who pled guilty to aiding and abetting filing of false income tax return to notify clients of conviction was not reasonably necessary to protect the public).

9. Condition That the Defendant May Not Use or Possess Alcohol

A condition that prohibits the possession of alcohol is overbroad and creates a situation where a person who does not drink alcohol could live in a home with someone who does, but nonetheless violate the condition. It also keeps a supervisee from "staying with any friend or relative who keeps even a bottle of wine in the house." Doherty, *supra* note 9, at 315.

The prohibition on alcohol possession also makes it impossible for a supervisee to comply with the condition even when not associating with anyone who drinks alcohol. Many products used in daily living contain alcohol, including laxatives, cold sore medication, non-prescription cough medicine, deodorant, mouth wash, hand sanitizer, cologne, deodorizer, toothpaste, soap, cleaning products, windshield wiper fluid, antifreeze, and makeup.[28]

10. Material Change in Economic Circumstances

The Commission seeks comment on whether the condition regarding changed economic circumstances should be a special rather than standard condition. For the reasons stated earlier in this testimony, we believe that it should be a special condition. As a standard condition, it encourages probation officers to be debt collectors and detracts from what should be the real

[28] Doherty, *supra* note 9, at 316. *See also* Savithiri Ratnapalan, *Alcohol in Household Products*, http://www.pedsforparents.com/general/103166/alcohol-in-household-products/; Soberlink, *Products Containing Alcohol*, https://www.soberlink.com/products-containing-alcohol/; SafeBee, *5 Products in Your House that Contain Alchohol*, http://www.safebee.com/home/5-products-your-house-contain-alcohol.

focus of supervision – to help the person reintegrate into society and live a law-abiding life. Because so many of our clients struggle to find housing, feed themselves, and pay off other debts, it is quite burdensome for them to monitor their budgets and determine whether their economic circumstances have changed enough to require notification to the probation officer.

II. Compassionate Release

Defenders are pleased that the Commission is revisiting the compassionate release guideline. We support the proposed amendment included in the testimony of the Practitioner's Advisory Group and agree with the reasons set forth in that testimony on why such changes are necessary. In our testimony, we wish to focus on two points: (1) Congress delegated to the Commission, not the Bureau of Prisons, the authority to define the "extraordinary and compelling reasons" that should trigger a motion for a reduction in sentence from the Bureau of Prisons; and (2) the Commission should encourage the Bureau of Prisons to reach out to defense counsel before deciding whether an inmate meets the criteria for compassionate release.

A. The Commission Should Adopt a Comprehensive Guideline Identifying the "Extraordinary and Compelling Reasons" that Warrant a Reduction in Sentence and Clarify that the Bureau of Prisons Should not Refuse to File a Motion if Those Criteria are Met.

We encourage the Commission to adopt a comprehensive guideline that defines "extraordinary and compelling" circumstances independent of the Bureau of Prisons' policy statement and that makes clear that BOP should file the motion for a sentence reduction if those criteria are met. For years, BOP has thwarted congressional intent by ignoring that the Commission has the exclusive authority to identify the "extraordinary and compelling reasons" warranting a motion. The Commission also has been lax in independently identifying the "extraordinary and compelling reasons" that warrant a motion for a sentence reduction and in making clear that the BOP should file the motion for a reduction when the criteria are met. Multiple reasons support a change of course.

First, the terms of the statute make clear that Congress did not intend to delegate exclusive authority to BOP in deciding what extraordinary and compelling reasons merit a motion for a reduced sentence. Congress gave the Commission an express role and it gave the judiciary the penultimate authority to determine whether a person should receive a reduced sentence. For the BOP to have absolute discretion in filing a motion effectively deprives the judiciary of the power to grant a reduction even though the person may meet the criteria set forth by the Commission.

Section 3582(c) of Title 18 permits a court to modify a term of imprisonment "upon motion of the Director of the Bureau of Prisons" when it finds that "extraordinary and

compelling reasons warrant such a reduction" or "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

Rather than explicitly define "extraordinary and compelling reasons" to guide BOP's decision on when it should file a motion under § 3582(c)(1)(A)(i), Congress delegated to the Sentencing Commission the responsibility of establishing policy statements for the sentence modification provisions of § 3582 and expressly directed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). Under this statutory scheme, Congress intended the Bureau of Prisons, the Sentencing Commission, and the courts to each play a role in determining whether a sentence should be modified. Congress delegated to the Commission the authority to define "extraordinary and compelling reasons" and set forth other policy statements on implementation of the statute. Congress gave BOP the responsibility of making the motion to the court when such extraordinary and compelling reasons were established. And in a case involving a defendant at least 70 years of age who served at least 30 years of a sentence under 18 U.S.C. § 3559(c), Congress gave BOP the responsibility of determining whether the defendant is a danger to the safety of any other person or the community, as provided under 18 U.S.C. § 3142(g). Lastly, it gave the courts the ultimate authority to decide whether to reduce the sentence.

Second, it should not be ignored that the current process – under which the BOP has coopted exclusive control – is not working. Indeed, the Office of the Inspector General concluded that the "BOP's compassionate release program could be more effective in assisting the BOP in managing its aging inmates."[29] Data from the Inspector General's report shows that the BOP Director approved a sentence reduction motion for only about one-third of inmates that Wardens recommended for relief.[30] Defenders also are aware of individuals who met the criteria for compassionate release, but BOP nonetheless declined to file a motion for a sentence reduction. One inmate, convicted of a non-violent offense, suffered from stage 4 cancer and other health issues. BOP refused to file a motion for reduction of sentence even though the judge signaled a willingness to grant a reduction. In another case, BOP rejected the request of a 68-

[29] Office of the Inspector General, U.S. Dep't of Justice, *The Impact of An Aging Inmate Population on the Federal Bureau of Prisons* 46 (2015).

[30] *Id*. at 45.

year-old man who was wheelchair bound and suffered from diabetes, cardiac disease, and vision problems.

Third, the Commission has previously amended the guidelines to direct government motions, such as when the Commission made clear that the government may not refuse to move for the third level reduction under USSG §3E1.1. The Commission should do the same with compassionate release. BOP's authority to make the motion for a reduction is "not a roving license to ignore the statutory text" but is instead a "direction to exercise discretion within defined statutory limits." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (quoted in *United States v. Divens*, 650 F.3d 343, 347 (4th Cir 2011) (remanding where government could not provide valid reason for refusing to move for additional reduction under §3E1.1(b))). Similar to what the Commission found in studying the Protect Act when it amended §3E1.1,[31] the history of the Sentencing Reform Act and 18 U.S.C. § 3582 shows no congressional intent to allow BOP to withhold a motion based on factors other than whether extraordinary and compelling reasons exist. Accordingly, the Commission should state in the guideline that the "Director of the Bureau of Prisons should 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."

Fourth, well-established principles of administrative law give the Commission good reason to act here as did in connection with §3E1.1. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843–844 (1984), BOP's construction of § 3582 is not entitled to deference because Congress spoke directly to which agency should define extraordinary and compelling reasons – the Sentencing Commission.[32] Because Congress did not leave a gap for BOP to fill[33] on the scope of extraordinary and compelling reasons, no weight need be given to the BOP's policy statement on compassionate release.[34]

Furthermore, even if it could be argued that Congress left a gap for BOP to fill, BOP's decision-making process on whether to file a motion is not entitled to deference because it is unreasonable for a variety of reasons. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2705 (2015) (even

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[31] USSG App. C, Amend. 775 (2013).

[32] If Congress meant to give BOP exclusive power over the substantive decision to file the motion, it did not need to delegate to the Commission the responsibility of defining extraordinary and compelling circumstances.

[33] *Lopez v. Davis*, 531 U.S. 230 (2001) (deference is owed an agency's interpretation under *Chevron* if Congress left a regulatory gap for the agency to fill and the agency's "interpretation is a reasonable construction of the statute").

[34] U.S. Dep't of Justice, Federal Bureau of Prisons, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g*) (2015) (*Program Statement*).

under a deferential standard "agencies must operate within the bounds of reasonable interpretation" and the "process by which it reaches [a] result must be logical and rational") (citations omitted). First, as described above, BOP's view that it has exclusive authority to decide whether to file a motion for reduction of sentence is inconsistent with the statutes. Second, the sparse number of individuals that BOP has identified as worthy of a reduction, notwithstanding criticism from the Office of Inspector General, shows that the process is not working as Congress intended. Third, BOP's policies have circumvented the statute's mandate that the Director of the Bureau of Prisons is responsible for filing the motion. Rather than permitting the Director of the Bureau of Prisons to exercise the authority to file the motion, BOP gives final authority to the Attorney General and Deputy Attorney General – the same authorities responsible for prosecutorial policies. 28 C.F.R. §571.62. Fourth, because BOP has relied on factors that Congress did not intend for it to consider in deciding whether a motion should be filed for a reduction in sentence, its policy statement on compassionate release and its resulting decisions are arbitrary and capricious.[35] For example, in 18 U.S.C. § 3582(c)(1)(A)(ii) (regarding a defendant age 70 or over who served at least 30 years in prison on a mandatory life sentence), Congress expressly stated that BOP should consider whether the defendant is a "danger to the safety of any other person or the community, as provided under section 3142(g)." Congress excluded that consideration from 18 U.S.C. § 3582(c)(1)(A)(i), yet BOP's policy statement requires it to evaluate the risk of whether the person may reoffend.[36] Fifth, it is not appropriate for the BOP to consider the views of the U.S. Attorney's Office in the district of conviction when it does nothing to collect information from others who have information relevant to the person's eligibility for release, including defense counsel.

Finally, assuming arguendo that BOP, and not the Commission, has absolute authority to identify the "extraordinary and compelling reasons" to support a sentence reduction and to decide whether to file a motion, the Commission's independent work on expanding §1B1.13 is essential. Even if not binding, the guidance on compassionate release would likely have an anchoring effect and play a significant role in BOP decisions on when to file a motion. *See, e.g.*, Office of the Inspector General, *supra* note 29, at 43 (noting that BOP's General Counsel acknowledged that the "medical provisions were based on the United States Sentencing Guideline (USSG) definition of the term 'extraordinary and compelling reasons.'").

[35] *Lopez*, 531 U.S. at 721 (under *Chevron*, the agency must interpret the statute "reasonably" and "in a manner that is not arbitrary or capricious").

[36] *Program Statement*, *supra* note 34, at 1.

B. BOP Should Be Encouraged to Solicit Information from Defense Counsel Before Declining to Seek a Sentence Reduction for an Inmate.

BOP currently collects information from the U.S. Attorney and the Office of Probation and Pretrial Services when making a decision on whether an individual meets the criteria for compassionate release. This fact-finding and decision-making process would be improved if BOP also involved defense counsel. Accordingly, we request that the Commission encourage BOP to obtain information from defense counsel of record or the Federal Defender Office in the district where the inmate was sentenced or where he or she will be released.[37] If BOP is unwilling to notify defense counsel before deciding whether a motion for reduction of sentence should be filed, then it should at least notify counsel when the decision is made to file the motion. Counsel could then make sure that the court has all relevant information and work with Probation and the U.S. Attorney's Office on the appropriate disposition.

In December 2013, BOP adopted an interim rule that provided for the General Counsel of BOP, when examining a request for compassionate release, to "solicit the opinion of the United States Attorney in the district in which the inmate was sentenced." 78 Fed. Reg. 73083-011 (Dec 5, 2013). It also made clear that "final decision authority is subject to the general supervision and direction of the Attorney General and Deputy Attorney General." *Id*. Those two provisions give prosecutors complete control over whether BOP should file a motion to reduce an inmate's sentence. In addition to involving the U.S. Attorney, the BOP program statement encourages Wardens to obtain documentation about the inmate with the assistance of the Office of Probation and Pretrial Services. Program Statement, *supra* note 34, at 7. If, after collecting information from prosecutors and probation officers, and reviewing victim comments, the General Counsel's Office of BOP denies the motion, the inmate has no administrative review remedy and is left without recourse. *Id*. at 13.

To make the process more fair and to ensure that BOP has all relevant information before deciding whether to file a motion for a sentence reduction, it would be beneficial for BOP to contact defense counsel of record or the Federal Defender Office in the district in which the inmate was sentenced or the district in which he or she will be released. Counsel could then help the inmate gather the extensive information that BOP requires when considering a request for sentence reduction, including the reasons for the request and "proposed release plans" (where the inmate will reside, how the inmate will support himself/herself). And if the basis for the request involves the inmate's health, counsel could assist the individual in obtaining information on where he or she will receive and pay for medical treatment. *See Program Statement*, *supra* note

[37] Appointment of counsel would be permitted under the same rationale that courts appoint counsel to screen cases to determine if individuals are eligible for relief under the retroactivity provision of 18 U.S.C. § 3582.

34, at 3. Counsel also could help with other information that BOP requires – e.g., death certificates, verifiable medical documentation of the incapacitation, birth certificates, adoption certificates, verification of paternity, documentation of custodial skills or obligations, the inmate's living arrangements before incarceration, and unresolved detainers. *Program Statement*, *supra* note 34, at 5. Such assistance is particularly important for indigent inmates who cannot afford private counsel and whose families often lack the resources to gather all of the information that BOP requires.

Defense counsel also could play a role in providing information to BOP that would help it determine the accuracy of information presented by the U.S. Attorneys' offices and victims. For example, when an inmate seeks release because of the incapacitation of his or her child's caregiver, BOP examines whether the inmate had "drugs, drug paraphernalia, firearms, or other dangerous substances in the home while caring for the child prior to incarceration." *Program Statement*, *supra* note 34, at 6. Because such information is not always in the PSR, any allegation, whether proven true or not, could be presented by a prosecutor as a reason to deny the request for BOP to file a motion. If defense counsel was involved, BOP would have more information to accurately determine the facts.

In sum, if BOP included defense counsel in its process, then it would obtain more accurate information about an individual's eligibility for compassionate release. This, in turn, would further the Congressional intent of § 3582(c), that individuals with truly extraordinary and compelling reasons receive a reduced sentence.