UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING

THURSDAY
FEBRUARY 23, 2023

The United States Sentencing Commission met in the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle N.E., Washington, DC 20002 at 9:00 a.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT:

CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA MATE, Vice Chair
CLARIA MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio

ALSO PRESENT:

KENNETH P. COHEN, Staff Director
KATHLEEN C. GRILLI, General Counsel
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9:04 a.m.

CHAIR REEVES: Good morning. I'm Carlton W. Reeves, the Chair of the United States Sentencing Commission, and I welcome you, I welcome every one of you, to our first public hearing of my tenure as chair. I thank each of you for joining us, whether you are in this room with us or attending via livestream.

I have the honor of opening this hearing with my fellow commissioners. To my left we have Vice Chair Claire Murray, Vice Chair Laura Mate, and Commissioner Candice Wong. To my right, we have Vice Chair Luis Felipe Restrepo, Commissioner Claria Horn Boom, and ex-officio Commissioner Jonathan Wroblewski.

Due to circumstances beyond his control, Commissioner John Gleason is not here, but he's certainly here in spirit. We're also joined by Commission employees, some of whom are in this room, many of whom who are not. No matter where they're working right now, each one
of our employees played an essential role in making this day possible.

This commission may have lack of quorum of commissioners for years, yet it has never lacked people who care about our mission and the pursuit of fairness in our criminal justice system. I speak on behalf of all of our commissioners when I say to every person in our agency, what you do is important.

What you do is seen and appreciated by all of us. Without you, our work cannot get done. Please, ladies and gentlemen, join me in acknowledging, in recognizing and showing appreciation for our employees of the Commission.

(Applause.)

CHAIR REEVES: Finally, I want to thank those who are providing us with comments on our proposed amendments to the sentencing guidelines.

Today and tomorrow, we will be hearing from an esteemed group of individuals providing us with testimony in person. The discussion
today will focus on the proposed amendment on compassionate release. Tomorrow's hearings is dedicated to two topics: the proposed amendment on sex abuse of a ward, and the proposed amendment on acquitted conduct. Today and tomorrow, I promise that your extensive journeys and preparations will be worth it.

When you speak to the Commission, you will be heard, yet there are many commenters who are not here today, nor will they be here tomorrow. Many of them gave us their thoughts through our new online portal. You can find it at www.ussc.gov. It is simple, it is easy and it is effective. I urge anyone who cares about our work to submit a comment through the portal before March 14th, before our March 14th deadline.

When you speak to the Commission, again, you will be heard. So far, we have received over 1,500 comments. Some are from federal judges. Some are from Senators. About 90 percent are from currently incarcerated
people. It does not matter if you sit in the halls of Congress or at the desk of a prison library. When you speak to the Commission, you will be heard.

Let me explain why. Congress gave the Commission what it called extraordinary powers and responsibilities to improve the fairness and effectiveness of federal criminal justice as a whole. To make sure those powers were used by policymakers of the highest quality, Congress created rules to ensure Commissioners reflected a diversity of backgrounds.

Looking beside me, it is clear that those procedures have worked. We were nominated and confirmed in an overwhelmingly bipartisan spirit. As you can see, some of us are men. Most of us are women. We're black, white, Asian, and Latino. Some were born into citizenship, and one of my good friends here applied for and earned citizenship. Some of us have been prosecutors. Some of us have served as public defenders.
We are from Iowa, Kentucky, Maryland, New Jersey and New York. One of us is from the home of the NFC championship team. I had it written here that they might have been the Super Bowl champions, but from Philadelphia. But one of us -- and people from Mississippi know I'm going to put it in, but one of us is from the home of two of those players on that championship team, Yazoo City, Mississippi.

While we recognize and celebrate our diversity, we acknowledge its limits. I think of an observation Commissioner Boom made in last month's meeting about the gaps in our knowledge and the need for us to fill those gaps with expertise and data.

The more I thought about Commissioner Boom's remark, the more I find myself in agreement with it. We Commissioners have seen the criminal justice system as attorneys, policymakers, and advocates. Some of us have had family members and close friends who have suffered as victims. But we have not seen the
criminal justice system as doctors, as correctional employees, as public health professionals, as academics, as scientists, and we certainly have not felt the criminal justice system as an incarcerated person.

I think about the gaps in our knowledge as they apply to the amendments we will be discussing today. As commissioners, we have overseen prison officials, but we have not been their wards. We have acquitted others of conduct, but we have never been acquitted. We've never stood before a judge and a jury, praying that the system has worked as promised. We've granted compassionate release from federal prison, but we have never had to apply for it.

Congress recognized our limited perspectives by telling us to do our work by examining a wide range, a wide spectrum of views. It has told us to amend guidelines in consideration of the comments and the data we receive.

And Congress has told us to create
federal sentencing policy that reflects the advancement in knowledge of human behavior as it relates to our criminal justice process. As chair, I take these duties seriously, and so do my colleagues. Doing justice, searching for truth demands nothing less. The Commission's policies need to reflect not just our perspectives, but your research, your data, your experiences.

And so, when you speak to the Commission, you will be heard because you must be heard. We commissioners have a great deal of listening to do. Today, we will be taking testimony on proposed amendments regarding compassionate release. Tomorrow, we will be taking testimony on proposed amendments on sexual abuse of a ward and acquitted conduct, and we will have a second set of hearings on March 7th and 8th to receive testimony on our proposed -- on the proposed amendments.

Panelists, you will each have five minutes to speak. We've read your written
submissions. Your time will begin when the light turns green. You have one minute left when it turns yellow, and no time left when it turns red. If I cut you off, please understand. I'm not being rude, as we have so much to cover today and tomorrow and such a limited time to hear from everyone.

For our audio system to work, you'll need to speak closely into the microphones. Although we're working on making sure that the mic is never hot, you as citizens and anybody else should always assume a mic is hot. Again, assume it's hot because you know we want to hear from you, and again, you will be heard at all times when you speak to the mic.

So, when all panelists are done speaking, commissioners may ask questions. I'm sure we will ask questions. So, thank you, ladies and gentlemen, for joining us today and I -- and on behalf of every Commissioner here, we look forward to a very productive hearing.

Now, let me introduce the first panel,
a panel of one. It is -- it will come from the executive branch's perspective on compassionate release. That perspective will be presented by Robert Parker, Chief of the Appellate Section in the Criminal Division at the Department of Justice.

In that role, Mr. Parker oversees the section's appeals work and serves as a principal advisor to the Department leadership on criminal law issues. Mr. Parker has previously worked as an assistant to the Solicitor General and served as attorney advisor in the Office of Legal Counsel. Mr. Parker, we're ready when you are, sir.

Panel I: Executive Branch Perspective

MR. PARKER: Thank you, Chair Reeves, and thank you to the Commission for inviting me to speak today.

Compassionate release is a complicated issue. It requires the Commission to strike a careful balance that respects the finality of criminal judgments, ensures consistency, and
addresses the interests of defendants, prosecutors, victims, courts, and the public, all while remaining faithful to the limits Congress has placed on this extraordinary form of relief.

Many of the Commission's compassionate release proposals strike the right balance, and we support them. We agree that compassionate release may be warranted in response to a public health emergency. Indeed, during the COVID-19 pandemic, we supported release for many defendants at risk of severe medical complications for the disease, particularly before effective vaccines were available to mitigate that risk.

We agree that family caregiving responsibilities should extend beyond those currently listed to include, for example, care of parents and incapacitated adult children. We agree that compassionate release should be available for certain victims of physical or sexual abuse in prison, as long as that misconduct has been independently established so
that compassionate release hearings do not become mini-trials before an investigation is complete.

And we agree the district courts should be permitted to identify additional extraordinary and compelling reasons similar to those expressly listed. As the pandemic showed, we often can't predict what extraordinary and compelling circumstances may arise in the future.

We have some minor suggestions on several of these proposals with the goal of providing more clarity to courts and litigants. These suggestions are set forth in our letter, and I'm happy to answer questions about them.

All of these proposals have a few things in common. They relate to extraordinary factual circumstances arising while the prisoner is incarcerated that are unique to the life of the prisoner and that present a compelling case for compassion despite the criminal judgment. Those limits are consistent with the text and history of Congress' authorization of this narrow form of relief and with almost four decades of
practice, including by this Commission.

Some of the other proposals before you today would greatly expand compassionate release in ways that Congress did not intend. We oppose these proposals, and we urge the Commission not to adopt them.

First, non-retroactive changes in law are not extraordinary and compelling reasons for compassionate release. Applying a change in law prospectively is typical, not extraordinary, and although Courts of Appeals disagree on the meaning of extraordinary and compelling, they all agree that the expansion proposed here, which would make non-retroactive changes in law a stand-alone reason for compassionate release, is foreclosed by the Sentencing Reform Act.

Second, the proposal catch-alls not tied to existing grounds for compassionate release do not provide sufficient guidance to courts. As written, they could be applied to effectively make compassionate release a substitute for collateral review or even a new
form of parole. The Courts of Appeals have
widely held that such an expansion is not
authorized.

But even if such dramatic expansions
of compassionate release were permitted by
statute, there are several reasons not to go down
that path. Using compassionate release to reduce
sentences based on non-retroactive changes in
law, disagreements with mandatory minimum
punishments, disquiet over the length of a
lawfully imposed sentence, or alleged errors in a
conviction or sentence would severely undermine
the principles of finality and consistency that
are the hallmarks of the Sentencing Reform Act.

There are no limits on when and how
often a defendant can move for compassionate
release. Throwing open the door to compassionate
release on grounds far beyond traditional limits
will likely result in a flood of motions, and
even if most are denied, the burden on courts and
the justice system will be enormous.

It also will create an intolerable
burden on victims. As you will hear from other
witnesses today, courts should not grant release
to prisoners without hearing from the victims of
their crimes. We strongly urge the Commission to
protect the interests of victims in its policy
statement and have proposed language to do so.

None of this is to say that equity in
the criminal justice system does not favor
applying some changes in law retroactively or
empowering courts to revisit some lengthy
sentences. The Department stands ready to work
with Congress in addressing those issues through
appropriate legislation, but the Commission's
policy statement is not the right mechanism to do
so.

I welcome the Commission's questions.

CHAIR REEVES: Mr. Parker, thank you.
You have set the example.

(Laughter.)

CHAIR REEVES: I'll turn it over to
any Commissioner who has any question of Mr.
Parker.
VICE CHAIR RESTREPO: Good morning,
Mr. Parker.

MR. PARKER: Morning.

VICE CHAIR RESTREPO: So, with respect to the victims, right, I think everybody on this panel agrees that that's a paramount concern. What is the Department's policy -- is there a Department policy with respect to notifying victims when a compassionate release motion is filed in their particular case?

MR. PARKER: So, the Attorney General recently issued new guidelines for addressing victim issues, and I think, fairly read, those guidelines would cover notification to victims in these circumstances.

We certainly do our best to ensure that victims are aware of what is happening, assuming that the victims want to be notified. Remember, sometimes being reminded of the crime is itself a victimization, and so some would prefer not to be.

I think the larger issue here, though,
is that for -- to this point. There has been no explicit recognition in the Commission's policy statement of those interests, and that is very important to have that.

One reason it's important to have that is, as we have seen in some cases, the government sometimes does not even know that a compassionate release motion is filed. Many of these are filed pro se. There have been instances where courts have acted on them without even waiting for the government to weigh in, including granting them.

And so, I do think it's very important, for those reasons, that the Commission address this in its policy statement.

VICE CHAIR RESTREPO: Thank you.

VICE CHAIR MURRAY: Do you think there are any limits on our ability to impose procedural requirements on courts? Clearly, we can set substantive criteria under 994(t). If we wanted to -- your victim notification policy is a procedural requirement.

If we wanted to say you have to have
a hearing, you have to notify the government and, you know. An extreme would be you have to have the AG sign off on any catch-all reasons. Are there limits on what we can do procedurally?

MR. PARKER: I don't know. I mean, Commissioner Murray, I think that there may be some, but I don't think that it would encompass something like this. Ensuring that victims' interests are respected during the process, I think, is part and parcel of defining the extraordinary and compelling reasons and then providing the framework in which they can be considered.

We don't have a position on whether more granular procedural requirements such as, you know, like timing requirements or page limits or things like that could be addressed in the Commission's policy statement. Perhaps they could, but I think that this one would clearly fit within what the Commission can and should do.

VICE CHAIR MURRAY: One of the most critical functions for the Commission is to
resolve circuit splits, and there's obviously a
very real circuit split here between a number of
circuits, I believe it's four on one side and
five on the other, as to whether non-retroactive
statutory changes are recognizable under
compassionate release.

There are some comments that we've
received that indicate that a change in law
proposal, such as proposed in (b)(5), would
result in splits. Do you agree with that and, if
not, why not?

MR. PARKER: No, I don't agree with
that because the courts that have held that
changes in law do not -- are not cognizable bases
for compassionate release, and that is the
majority of the Courts of Appeals at this point.
They have done so based on an interpretation of
the term "extraordinary and compelling" in the
statute.

And so, if this court -- I'm sorry, if
this Commission were to determine that changes in
law were a basis for finding extraordinary and
compelling circumstances, it would not change the law in those circuits because of course, the Commission cannot override the plain meaning of Congress' text, and so I think the circuit conflict would simply be perpetuated.

The way that the Commission can resolve the circuit conflict is by making clear that changes in law are not a basis for granting this form of relief. We think that is not only consistent with the text of the statute, it's also quite consistent with the entire history of this provision, which has been addressed not only in the legislative history of the Sentencing Reform Act, but also in subsequent legislative history of amendments to the compassionate release provision.

All of that history indicates that Congress had in mind the sorts of circumstances that are currently reflected in the policy statement: terminal illness, advanced age, things of that sort. It does not indicate -- and I would note also they are unusual circumstances
that arise after the sentencing. They're not just things that were known at sentencing and already taken into account or potential errors in the conviction.

All of that, I think, suggests that the appropriate course is to not include a changes in law provision, but the fact that not including that would resolve the circuit conflict, as the Supreme Court often defers to the Commission to do, I think is simply an added reason to do it.

VICE CHAIR MURRAY: Why doesn't Brand X militate the other way? Doesn't 994(t) entrust us to interpret extraordinary and compelling? Is your argument predicated on the idea that there is no ambiguity in extraordinary and compelling?

MR. PARKER: Well, it is that extraordinary and compelling clearly means something other than ordinary circumstances like the fact that a change in law applies prospectively. There may be some disagreement that can be had about whether a particular
factual circumstance is extraordinary and compelling, whether a particular illness may be, something of that sort. But the ordinary operation of the criminal law I don't think can be extraordinary and compelling.

I would note that every Court of Appeals has so held. Even the Courts of Appeals that allow this factor to be considered as part of a totality analysis recognize that it is not extraordinary and compelling standing alone, and that, I think, simply underscores the limits on what the Commission can do and what Congress enacted.

VICE CHAIR RESTREPO: What's the Department's position? I don't know if you can speak to the Department --

CHAIR REEVES: Oh no, no, no, no. Go ahead. I'm not trying to interfere. I just want to make sure the Commission's always speaking loudly into the microphone. We're having a conversation with Mr. Parker and that person standing against the wall back there. So, just
make sure we're always speaking loudly into the mic, so that we can all -- so that everyone can hear you.

VICE CHAIR RESTREPO: So, you said that standing alone, retroactive changes can't justify compassionate release. What if it's coupled with other factors, much like rehabilitation alone cannot constitute the basis for compassionate release? What if it's coupled with other factors?

MR. PARKER: Well, that is the position that some Courts of Appeals have taken, and there is some surface appeal to it.

As the other Courts of Appeals that have looked at this have explained, however, it suffers from a logical fallacy. It suggests that you can take a legally impermissible reason, couple it up with some factual circumstances that are themselves insufficient, and somehow yield, at the end of the day, an extraordinary and compelling reason. We don't think that that's the appropriate way that this should be applied.
I would also note, though, that this is not how it has actually been handled in practice. When you look at the cases that have relied on non-retroactive changes in the law -- and for these purposes, we are generally talking about the first step as non-retroactive changes to 924(c) sentencing and to recidivist drug sentencing.

The courts that have relied on that, typically, the analysis is very, very heavily weighted toward a disagreement with the decision not to make those changes retroactive. Almost all of the reasons given for the grant of compassionate release rely heavily on that, and then often marry up post-sentencing rehabilitation as the additional reason.

Occasionally, there will be other reasons cited, but oftentimes those are themselves related to the sentencing issue, the non-retroactive sentencing issue. One example is the relative youth of the offender, which has resulted in him serving a longer sentence. Of
course, the youth of the offender is known at the
time of sentencing. It's already taken into
account in the sentencing judgment to the extent
it can be. And so, we think that the way that
courts are applying this demonstrates why this is
difficult.

One other thing that I would just note
before I conclude on that point is it in many
ways perpetuates the types of disparities and
creates new disparities that it is at least
stated the purpose is to resolve. It is very
difficult to understand how one defendant can go
into one court, and a judge can look at the fact
that a non-retroactive change in law exists and
shave decades, potentially, off the defendant's
sentence.

And another sentence, maybe -- or I'm sorry,
another defendant, maybe a co-defendant or a
similarly situated one, goes before a different
judge who says "I don't think that that is
extraordinary and compelling. It's pretty
ordinary to me," and no relief.
That in itself is a very troubling
disparity, one that the Sentencing Reform Act was
enacted to avoid. And I think, in deciding not
to make these changes retroactive, Congress made
a considered judgment that it did not want those
types of disparities to exist.

COMMISSIONER HORN BOOM: Good morning.

MR. PARKER: Good morning.

COMMISSIONER HORN BOOM: So, as far as
non-retroactive changes in the law, the
Department's position is clear that that would
not in and of itself qualify as extraordinary and
compelling reasons.

What is the Department's position on
whether non-retroactive changes in the law could
be considered under the 3553(a) factors? So,
sort of in the second step that courts must
undertake in determining whether or not a
sentence reduction under the statute is
appropriate?

MR. PARKER: Judge Boom, the answer is
we believe that it is appropriate to consider
them under the 3553(a) factors, and that reflects the ordinary two-step analysis that you will see in all of these cases.

You will have a threshold determination of eligibility, which is meant to be a very narrow category of offenders. But then, once that has been determined, once it has been determined that the prisoner is within that category, the court is largely unfettered in the kinds of information that it can consider in determining whether release is warranted.

Let me give you just an example of how this is likely to play out in practice. Let's say you have a defendant with a terminal illness, and he qualifies for compassionate release as a result. The court -- it is entirely within the court's power at the subsequent sentence modification stage to say this defendant has a terminal illness. It would be in the public interest to allow him to receive end of life care at home and not in the prison.

There has been a change in law. Other
defendants, if he were sentenced today, would be
out already and able to receive that care at
home, and it makes no sense to treat him
differently for that purpose, and so he is
entitled to this.

What we disagree with, as I've pointed
out in my answers to some of the other questions,
is the idea that that change in law itself can be
the extraordinary and compelling reason that
warrants release.

VICE CHAIR MATE: Good morning. I
want to switch gears a little bit from the new
law to the provision regarding victims of sexual
assault and physical abuse, and the Department's
suggestion to the Commission to require an
additional independent finding before a court can
grant compassionate release.

Can you give us some information on
how long it's taking the Bureau of Prisons to
conduct these investigations into these kind of
allegations? So if we're requiring an
independent finding such as that, about how long
are we looking at for that to --

MR. PARKER: Thank you Commissioner

Mate. I'm not, I don't have an answer for you specifically. Obviously every case is different. The Deputy Attorney General, as I think the Commission is aware, convened a working group to address these issues. Its report was issued in November of 2022, and one of its recommendations was to prioritize and speed up the process of investigating and if necessary prosecuting these.

That is very recent, and so I don't know that I have much that I can share statistically with you. What I can say is that although the Department is thoroughly committed to providing timely justice in every one of these cases, sometimes the investigations can take time, because not every allegation that is raised is entirely clear-cut.

And oftentimes, these sorts of -- these sorts of crimes occur in circumstances where they may be difficult to -- it may be difficult to determine exactly what has happened
to whom and by whom. The reason that we think it is so important to have an independent determination before the compassionate release determination is made is because otherwise compassionate release hearings become mini-trials on that very question.

That can impede the government's ability to conduct a thorough and appropriate investigation. I think it's also important to note that while there is a victim who has alleged serious misconduct, there is also an accused, who has a right to present a defense.

And moreover, we're not just worried about improper grants of compassionate release due to, you know, an insufficient factual record when the compassionate release is sought; we're also concerned about improper denials, because it is quite likely that if a, you know, a compassionate release motion is considered too soon and there just isn't enough evidence, a court may deny it and say I don't see enough evidence that this actually happened.
Such a judicial finding could significantly complicate the government's ability to bring criminal charges. It could significantly complicate BOP's ability to pursue administrative remedies internally. And so for all those reasons, we think it is critical that there be some independent determination, not just a criminal conviction. It can also be an administrative finding of liability or a civil finding of liability. But there has to be something before the compassionate release hearing.

COMMISSIONER HORN: So some commentators have used the example in support of Options 2 and 3, that give courts very broad discretion in fashioning, you know, additional grounds for extraordinary and compelling reasons that in the current policy statement, as written, the Bureau of Prisons has essentially unfettered discretion in determining any other circumstance that might warrant extraordinary and compelling reasons for release.
What is the Department's response to that, in that you know, your position is Options 2 and 3, you know, essentially provide too much discretion and not enough guidelines for or guardrails maybe I should say for courts. But the current policy statement as written, you know, essentially gives that unfettered discretion really to the Bureau of Prisons. Now I know they didn't exercise that discretion, but what is your counter to that argument?

MR. PARKER: Well, so as explained in our testimony, we support the adoption of the Option 1 catch-all, which would place authority in the courts to do so. The only, the only caveat is that the court's discretion to identify additional extraordinary and compelling reasons is appropriately in our view linked to the other enumerated reasons that we have already been discussing, minus the change in law, which we oppose.

VICE CHAIR MATE: Right. But the Bureau of Prisons, the policy statement as
currently written does not have those guardrails.

MR. PARKER: That's right. I mean historically, the Bureau of Prisons has interpreted this provision narrowly to include the sorts of things that are currently reflected in the policy statement. So terminal illness, advanced age, that sort of thing. So I mean I don't see any likelihood that the Bureau of Prisons would change its view to expansively interpret extraordinary and compelling circumstances.

I think that's why it has this kind of BOP-focused catch-all has made sense to this point. But now that, now that prisoners are able to bring compassionate release motions on their own, I think it makes sense to have a catch-all that places some discretion in the hands of the courts, because BOP may not be involved to consider whether additional, extraordinary and compelling circumstances are warranted, as long as there are limits on that that are consistent with the other enumerated circumstances.
VICE CHAIR MATE: I guess my question is, you know, do you believe that the policy statement as currently written really exceeds the authority of the Commission? I understand that the Bureau of Prisons does not exercise, you know, really did not exercise the discretion that -- I mean if you just read the words, right, it looks like it's pretty unfettered discretion to fashion other extraordinary and compelling reasons.

And so, you know, do you believe that that also has probably exceeded the Commission's authority?

MR. PARKER: Well, I wouldn't say that it exceeded the Commission's authority, only because I don't think it possible to read that portion of the existing policy statement in a vacuum. I think it has to be read on connection with the existing regulations and program statements and other things that BOP has issued governing this.

That reflects, I think, an appropriate
dialogue between the Department and the
Commission, and of course Congress for the first
step back, had made BOP the gatekeeper for these
sorts of motions. As a result, I don't -- I
would hesitate to say that it exceeds the
Commission's authority.

But that's only because there are
other sources of law and other limitations that
cabin what that means.

CHAIR REEVES: Returning to this issue
of instances where one has been accused of
misconduct, on the job correctional officer being
a basis for that, you indicated that, you know,
there's an administrative process that one might
go through through BOP. But how does that
process interface with -- suppose it's criminal
conduct that also is handled a referral to the
U.S. Attorney's Office, going before a grand
jury, doing all that, and the administrative
process that might or might not be occurring.

Does the administrative process shut
off or yield to whatever might be handled, what
might be occurring on the criminal side? And how does that portend with any sort of delay or any sort of, you know, just how long the process may take?

And secondly, when you say that the administration process should been through, is that the process where that administrative decision is finally concluded, or at the final stage, because obviously I think the BOP has a process where there may be a finding, and a person can appeal that finding, and when does it become final I guess?

MR. PARKER: So thank you Judge Reeves. I am not sure that I can answer the first part of your question definitively, simply because I do not know as a practical matter what prosecutors might do if there is a pending administrative process. I would have to take that back, but we could certainly get that information for you.

CHAIR REEVES: I guess the question is, what does BOP do when they --
MR. PARKER: Right.

CHAIR REEVES: When they learn that there's a criminal investigation going on? Do they stop the administrative process?

MR. PARKER: So I think that -- the answer is I don't know, and I will find out for you. I can tell you that federal prosecutors take this very seriously, and they are aggressive in pursuing these cases when it is warranted, including by criminal charges.

In answer to your second question, I think that it would be appropriate to await the outcome of the appeal process. Again, I can't tell you exactly how long that will take because I imagine it changes by case to case. Certainly I think a finding of no, that there has not been abuse by an initial, in an initial administrative hearing.

If the prisoner appeals that, we should await to see that. If there is a finding of abuse and I honestly don't know what the appeal possibility might be administratively, but
I think that that would be a much, a much more compelling circumstance in which we think compassionate release may be authorized.

CHAIR REEVES: Thank you.

VICE CHAIR MURRAY: And how are these administrative proceedings initiated? So particularly in the case of prisoner on prisoner violence. Is there kind of initiation as of right? How does, who makes the decision whether there will be --

MR. PARKER: I'm sorry. I may have missed the second part.

VICE CHAIR MURRAY: How are these investigations that would lead to an administrative decision initiated? So particularly in the case of punitive prisoner on prisoner violence, as opposed to employee on prisoner violence? Are they always initiated when there is a complaint? Is there kind of an initiation as of right or is it only sometimes?

MR. PARKER: I know that they can be initiated by a complaint. I would have to -- I
will ask whether it is possible for them to be
initiated in other ways, and we can provide that
information to the Commission as well. I'm just
not sure if there may be other circumstances in
which they can be -- the administrative process
can be activated.

CHAIR REEVES: Mr. Parker, thank you
so much. You made this seem so easy for us, and
for everybody else who comes behind you I think.
Thank you so much for your testimony.

MR. PARKER: Thank you. It was a
pleasure being here.

CHAIR REEVES: All right.

(Pause.)

CHAIR REEVES: Ladies and gentlemen,
our second panel consists of three attorneys,
whose practices provide us with unique
perspectives on compassionate release. First, we
have Kelly Barrett, who is the first assistant
federal defender in the Connecticut Office of the
Federal Defender. She co-teaches a challenging
mass incarceration clinic and the Mental Health
Justice Clinic at Yale Law School.

Ms. Barrett also serves on the Connecticut District Court's Support Court team, which assists people under federal pre-trial and post-conviction supervision who struggle with substance abuse.

Next, we will have Natasha Sen, a criminal defense attorney who represents participants in federal drug court in Vermont. She has previously served as a federal and state public defender in that state. Ms. Sen chairs the Commission's Practitioners Advisory Group and is a member of the Second Circuit's Criminal Justice Act Advisory Panel.

Finally, we have Joshua Matz, a partner at Kaplan, Hecker and Fink LLP, whose practice spans a multitude of areas, including constitutional and civil rights law. His work has addressed criminal justice reform, the interpretation of the First Step Act and the separation of powers.

Mr. Matz has written extensively on
constitutional issues with Harvard Law Professor Lawrence Tribe. We will first hear from Ms. Barrett and then from Ms. Sen, and finally from Mr. Matz. Ms. Barrett, we're ready for you.

Panel II: Practitioners' Perspective

MS. BARRETT: Thank you. Thank you for giving me the opportunity to testify on behalf of federal, public and community defenders. Section 3582(c)(1)(A) is not a compassionate release statute. Everyone uses that phrase "sometimes" as a convenient shorthand, but like the Second Circuit said in Brooker, the term "compassionate release" is a misnomer.

Many states, including mine, have actual compassionate release statutes. They are about state prisoners with medical issues.

3582(c)(1)(A) is different. Although the BOP for decades treated it like compassionate release, it is about sentence reductions for extraordinary and compelling reasons. A court can grant a motion without releasing anyone; it can just
reduce the sentence, and nothing is off limits in
the extraordinary and compelling analysis other
than rehabilitation alone.

Congress did not even take
rehabilitation off the table, just rehabilitation
alone. Defenders appreciate that the proposed
policy statement does not categorically take
anything off the table either. It would allow
courts to consider the entire constellation of
circumstances impacting a sentence, not just a
proscribed subset.

You are the policymaking authority for
3582(c)(1)(A), and this is the right policy. I
know legal objections have been raised against a
proposed (b)(5) and (b)(6), and defenders will
address those in our comments. You will see that
we have no doubt that the Commission can
promulgate the policy statement that you've
proposed, and ultimately you will have to decide
what is the best policy.

As a defender who has represented
dozens of clients seeking reduction in sentence,
what I am focused on is how that policy would play out for real people. Real people like Vincent Clark, a man who received a reduction in sentence, who graduated from our reentry court just yesterday. Unfortunately, I could not be at his graduation because I was traveling here, but I am so happy for him.

He is thriving. In addition to graduating from reentry court, he is working 50 hours a week, got his own apartment and is taking care of his children. It is the best he's ever done in his life. He was released in January 2021 about a year and a half early, and he told me that it was getting the sentence reduction that empowered him to thrive as never before.

It meant so much to him that the court would look into his case and into who he had become so long after sentencing. Vincent's case is a great illustration of the holistic analysis the judges in my district use, and the proposed policy statement would allow. In Vincent's case, there were multiple extraordinary and compelling
circumstances. High end COVID risk, the
harshness of his sentence as compared to co-
defendants, and the fact that his sentence was
based on what even the DOJ now agrees is an
unwarranted disparity between crack and powder
cocaine.

We cannot know whether the court would
have granted relief if Vincent had presented just
one or some of those circumstances. But the
court did not have to go through an artificial
process of separating them out. It considered
the entire constellation of circumstances,
factually and legal, and found that relief was
appropriate.

A high percentage of the people that
we have represented on reductions in sentence
have benefitted from our reentry, and they are
doing just astoundingly well. One example,
Nelson, served 24 years in prison. He
participated in a restorative justice-based
program at Otisville that was transformational.
Later, he developed serious health issues and
while at Brooklyn MDC was assaulted by a fellow inmate.

Thankfully, our court granted his reduction in sentence, and within weeks he was getting life-saving cancer treatment at Yale New Haven Hospital. There’s not a doubt in my mind that he would have died in prison if our court did not release him. At his reentry court graduation his judge came and spoke about how glad he was that he made that decision.

Now in addition to graduating from reentry court, Nelson is mentoring others, and he was home to take care of his wife when she suffered a debilitating brain aneurysm recently.

Another man we represented, Hector, was sentenced to life in prison. He turned his life around when he met Chaplain Pat Patterson, who told him God will forgive your sins, but nowhere in the good book does it say that you will not be punished for them, and he was punished. He served 30 years in prison.

At his reduction in sentence hearing,
Hector made an impassioned demonstration of remorse, and the victim's family did not object to his reduction in sentence. The court reduced his sentence to 30 years, and when he graduated reentry court she said that she was very glad that she made the decision to release him, and later at a reentry reunion embraced him with a hug.

This is something worth emphasizing, how judges have been grateful in the past few years that they finally have the discretion to do the things in cases that cried out for relief, and in my experience our judges have gotten it right.

The proposed policy statements appropriately expand the enumerated categories and also grant courts discretion to recognize idiosyncratic circumstances. Thank you.

CHAIR REEVES: Thank you, Ms. Barrett.

Ms. Sen.

MS. SEN: Good morning. My name is Natasha Sen, and on behalf of Practitioners
Advisory Group I thank you for the opportunity to provide testimony on this proposed amendment. The PAG is a group of private practitioners who represent individuals and organizations who are charged under the federal criminal laws, and we strive to provide our perspective on these proposed amendments, all of them. But today, of course, I will focused on our compassionate release proposals.

We certainly appreciate the Commission's willingness to consider our positions as it purposes to amend this particular guideline. My testimony this morning will highlight the PAG position, and the PAG will follow this with more detailed, extensive written comments in its March submission.

The PAG supports the Commission's proposed revisions to U.S. Sentencing Guideline 1(b)(1).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 it reflects Congress' intention to broaden the ability of individual defendants to seek relief.

The PAG also supports the Commission's 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've recently witnessed in the course of the pandemic how quickly devastating consequences can occur to individuals, particularly those who are housed in congregant settings like jails and prisons.

This guidance will allow courts in the future to quickly evaluate and consider risks to a defendant's health that are currently unknowable and unpredictable, and which were not contemplated at the time of the original sentence. PAG members have multitudes of stories
about their clients who were granted motions for 
compassionate release.

I will highlight only two of them from 
my colleague Susan Walsh, who practices in the 
Southern District of New York. She had 
represented a client who had been sentenced to 
120 months, and was subject to deportation. Her 
client was suffering from a degenerative kidney 
disorder and the court found, when he filed his 
compassionate release motion, that his condition 
was actually deteriorating because he was not 
obtaining treatment in the BOP.

Combined with the deteriorating kidney 
disorder, it also made him at much higher risk of 
severe consequences should he contract COVID-19. 
In that case, he served 49 months of a sentence 
and the court reduced that sentence to time 
served and allowed him to be released.

Similarly, Ms. Walsh represented a 
defendant who had served 51 months of an 84 month 
sentence. This client suffered chronic asthma 
and chronic obstructive pulmonary disease. His
sentence too was reduced to time served, because again the court was able to find that based on the specific risks on that defendant's health, it imposed a severe risk of higher consequences should he contract COVID-19 in prison.

In fact in that case, the court found that there were cases of COVID-19 that were spreading in the prison.

The PAG also endorses the Commission's proposal to add two new categories to the list of circumstances that may constitute extraordinary and compelling relief. Defendants who are sexually assaulted or physically abused by BOP officers or employees and 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 PAG also 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, our
clients who are sexual assault survivors can experience profound psychological injury that can be longer-lasting and more harmful than the physical trauma that this amendment clearly contemplates.

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 be different, the impact on an institutionalized individual can be no less traumatizing or deserving of relief.

Given that the BOP is entrusted with the care of our clients, the PAG sees no principle distinction to limit relief based on the identity of the perpetrator. The PAG too believes that changes in the law including -- I apologize. Thank you very much for the opportunity to speak to the Commission.

CHAIR REEVES: I'm sure you'll follow up with -- you'll deal with that when we get your questions (sic). Mr. Matz. I apologize for
that, Ms. Sen.

MR. MATZ: I'm sorry to cut in. Thank you so much for inviting me to testify and for the opportunity to submit a comment with my colleagues at Kaplan, Hecker and Fink.

My focus is comparatively narrow and speaks directly to the question that Judge Boom highlighted earlier, and the sole question that I addressed in my comment and that I would propose to address today is whether proposed section 1(b)(1)(13)(b)(6) exceeds the Commission's legal authority under 28 U.S.C. 994(t).

As demonstrated in my comment, which provides a more comprehensive, textualist and structural analysis, all three proposed versions of (b)(6) comply with that statutory requirement. This conclusion rests on two premises: an interpretation of Section 994(t) and an interpretation of the three proposed versions of (b)(6), and I'll address those each in turn.

Starting with the statute, Section 994(t) directs the Commission to "describe what
shall be considered extraordinary and compelling reasons for a sentence reduction," sorry, "including the criteria to be applied and a list of specific examples." This raises a question. How precisely must the Commission describe the criteria to be applied in that list of specific examples?

In my mind that's really a question of degree. On one extreme, the Commission might simply say to courts you figure out what extraordinary and compelling reasons are, and it may believe that it has satisfied its statutory obligation by delegating to the courts the obligation to figure that out.

On the opposite extreme, a much more restrictive view of the statute, the Commission may conclude that in order to satisfy its statutory obligation it must essentially strip courts of any discretion by offering highly explicit criteria and examples, along with a finely articulated framework meant to govern every case that may arise.
In my view, not to sound like Goldilocks, a more moderate reading of the statute is most sound as a matter of textualist interpretation, as confirmed by attention to structure, history, judicial precedent and prior Commission practice.

For the reasons given in our comment, the Commission must provide meaningful criteria and specific examples, but it can properly leave a measure of reasoned judgment and discretion to courts in identifying case by case where extraordinary and compelling reasons exist.

The Commission's general policy statement must therefore offer meaningful guidance about the characteristic or significant qualities of what ought to satisfy the standard, but it need not attempt a comprehensive or preclusive reckoning.

As set forth in more detail in my statement, the conclusion follows most directly from the plain language of the statute, which notably includes an obligation to "describe" what
"should qualify," to do so while "including criteria" and to address reasons that are "extraordinary and compelling," a term that by its sort of definition defies ordinary expectation.

Every one of those words connotes breadth rather than narrowness, and so while the Commission must provide something in its description, it need not provide a comprehensive understanding, and a thorough survey of judicial precedent reveals powerful support and no contrary authority for this interpretation, which squares with both consistent Commission practices since 2007, as well as the structure, purpose and history of the operative statutory provision.

The key question then is whether each of the proposed versions of (b)(6) satisfies that standard. In my view they do, and I would focus on Options 1 and 3, because that's what everyone else appears to have focused on in their comments, although we address Option 2 in our comments as well.
Option 1 refers to circumstances or combinations thereof "similar in nature and gravity to the other enumerated provisions." By its terms, the option provides meaningful guidance to courts, one of whose core functions, particularly in the sentencing context, is reasoning by analogy and comparison to other specific legal and factual settings.

This is the basis on which I believe the Justice Department advocated that position earlier today. Option 3 does not include any such express reference. It instead refers to other extraordinary and compelling reasons than the ones the Commission has elsewhere enumerated. Despite this breadth, however, any reasonable interpreter, especially one guided as I was by Justice Scalia's authoritative Handbook of Legal Interpretation, would understand that this provision covers only reasons of equal gravity to the other sections of section 1(b)(1)(13)(b).

This follows from the whole text canon, which makes clear that the proposed
(b)(6)(3) would be read and disciplined by reference to the rest of the structure of the statutory section, of the guideline rather, and it also follows from the adduced and generous principle, which makes clear that when there is a list of enumerated things and then a broader catch-all at the end, the catch-all by necessity refers to things of a similar kind as those that came before it.

I would conclude with just one thought. I realize that I'm about to hit time, which is that in my view many of the arguments that have been advanced for why Option 1 provides more specificity than Option 3 are in fact mistaken.

I think the reference in Option 3 to offenses of a similar nature as those that are otherwise enumerated may cause some confusion, and that Option 3 may in fact be preferable and more clear in operation than Option 1 is, and I'm happy to address that if the Commission has any questions about it.
CHAIR REEVES: Thank you Mr. Matz, and I turn it over to my colleagues.

VICE CHAIR RESTREPO: Ms. Barrett, in your papers you refer to the medical care issue and suggest that we change the language, so to speak, and instead of "adequate" you suggest that the language would be "timely or effective."

From a boots on the ground perspective, how would that work? Who's going to determine whether it's timely and effective?

MS. BARRETT: That would be determined by the district court judge. This is something that our courts have done routinely in Connecticut. One example was the recent case of my client, Delaina Cruz (phonetic), who was suffering from MS.

She had been receiving care while in the State Department of Correction, but when she started her sentence in the BOP, she was seeing medical. It's not that she wasn't being seen, but they weren't doing anything to effectively treat the MS.
She called me regularly just crying in pain. They were assigning her to top bunks, even though she was supposed to be assigned to bottom bunks. She wasn't receiving adequate medical infusions to treat the MS. So that was an example where one could have seen it as providing adequate treatment, in a sense that a medical was seeing her. But it wasn't effective to treat the MS, and our judge and in fact even the prosecutor in that case didn't object.

We've had other instances where clients were suffering from dental problems, dental, severe gum infections. They were being seen by medical. Thankfully our judge released, in the case of Tylon Vaughn, released him and shortly after being released it was determined that the infectious matter was seeping into his heart, and he just barely received treatment in time.

So I think our judges have been making these decisions for years, and are handling it very well based on the records we've submitted
and the pleadings of both parties.

VICE CHAIR RESTREPO: Thank you.

CHAIR REEVES: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you Mr. Chairman, and thank you all for your testimony today. Mr. Matz, I just want to ask you one question. First of all, thank you for submitting your testimony. I found it very, very helpful. I read your testimony as saying that Options 2 and 3 on the surface don't appear to provide the necessary guidance, but that you feel they're okay, 2 and 3, because you read into them interpretive canons that the enumerated list limits the catch-all.

If I'm right on that, why at this stage where we haven't actually promulgated anything, why don't we actually say that in Option 3, rather than leave that to judges to interpret based on knowledge of Justice Scalia's book and these interpretive canons. Why not just say it?
MR. MATZ: It's a great book. I do recommend it. Look, I think the Commission might well conclude that that is more prudent path. My sort of focus on my comment is whether the proposed options satisfy the applicable statutory requirement. I believe that they do, for the reasons given in my comment.

As to the question of whether the Commission may nonetheless conclude that it's worth clarifying a little bit more, that would be perfectly reasonable. But I would note one important point, and this is a part of the Justice Department's testimony that I struggled with in listening to it earlier, right.

Option 1 refers to circumstances that are similar and sort of nature and consequence to the other enumerated circumstance. But in practice, and this is what I would find confusing about it, right, the other enumerated categories, the ones that you would expect to see are going to see, are going to be medical circumstances, age of the defendant, family circumstances of the
defendant.

It would seem to me awfully peculiar to say that you can only also count other circumstances similar in nature to those if -- but if by that what you mean is that their nature also relates to medical or family circumstances or age-related reasons. It would be really weird for the Commission to say with respect to these kinds of issues, here is really what we're talking about, and to be fairly precise about it, and then for the catch-all to potentially be limited to only versions of the same thing, if you see what I mean.

And so that the concern I would have is that the reference in proposed Option 1 to offenses, to circumstances of the same nature is that in some respect what you want to capture is circumstances of a different nature that are equally extraordinary and compelling, right.

Circumstances of a medical nature are addressed by the policy statement. Circumstances about the family circumstances of that nature are
addressed. So you want to capture circumstances of a different nature but similar gravity. In my respect, in my view that's why Option 1 may actually end up being a bit confusing, if the Justice Department's view is accepted.

The representative from the Justice Department seems to suggest that Option 1 would only capture things of the same nature as the other categories. That could be actually very confusing in practice. So it would make more sense in my view to adhere to something like Option C, but potentially to say other extraordinary and compelling reasons of equal gravity or equal significance as the other options.

But there is just inherently some element of judicial discretion there. In my mind, the question is whether that judicial discretion is adequately structured and guided by reference and analogy to the other more specifically enumerated categories, and as a matter of the Commission's statutory authority.
I believe the proposed version is, but that it may well be reasonable to seek to add a bit more clarification.

COMMISSIONER WROBLEWSKI: Can I just ask one quick follow-up, and I believe the word that the Commission has used in its proposed amendment is similar, and the language that you quote from Justice Scalia's book is where general words follow an enumeration of two or more things. They apply only to things, and this is the operative word, "of the same general kind or class specifically mentioned."

I understand the words are different, similar, same kind or class, but we're getting at the same thing. Am I correct?

MR. MATZ: That may be right. I mean with respect to Option 1, that's where you're referring to the use of the word "similar," which does not appear in Option 3. It says "similar in nature and consequence." That may capture the same idea. I think it will likely result in litigation and confusion around how similar it
has to be.

Does it have to be of the same kind?

What is similar to a medical issue or what is similar to an age-related issue frankly is something that as a practicing lawyer I would find somewhat perplexing to litigate. I look at the examples that the federal defenders gave in their submission at pages 11 to 14, where they describe a wide range of circumstances in which courts have found extraordinary and compelling reasons since 2018.

It's not obvious to me that many of those decisions which struck me as correct would be similar in nature to a family-related circumstance. If what the Commission really wants to capture is sort of similar and extraordinariness and compellingness, in some ways similar in gravity, similar in sort of the — how unusual and momentous and important they are, I think there are better words for that than those given in Option 1, which I frankly think will cause confusion in practice, and that I
think Option 3 is closer to it.

But if the Commission were inclined to add a few words there to convey the point more precisely, I defer to the policy experts. But as a matter of legal authorization that would make perfect sense in my mind.

VICE CHAIR MURRAY: Can I ask another follow-up? And thank you for your submission. I also found that very helpful.

But I understand your reading in Section 3 in terms of ejusdem generis, but obviously some other very thoughtful witnesses have read the provision differently, including you know, the Criminal Law Committee, which is a group of judges read it, as I think their words were just repeating the statutory text without adding anything.

Am I right that if Section 3 meant that, if it meant repeating the statutory text and delegating to judges, you would think it was not legal?

MR. MATZ: I would think it was not
The answer -- so that I hope you don't mind me -- so in 2006, the Commission did a version of that. The original 2006 policy statement was just a restatement of extraordinary and compelling circumstances in a vacuum, and everyone at the time, as I understand it, believed that was not kosher, and that it was bad policy and that it probably wasn't consistent with the authorization.

So if the whole policy statement was just that, then I do not believe that would comply with the statutory obligation.

VICE CHAIR MURRAY: Well, let me make a statement. So you have the -- say you have the policy statement as proposed but with catch-all 3, and say we made it very explicit that catch-all 3 should be interpreted the way many of the other witnesses have interpreted it, we said, you know, no inferences should be drawn from any of the rest of the list. This is just a delegation to the courts to determine what extraordinary and compelling is. And you would think that that did
not satisfy our obligations under 994(t)?

MR. MATZ: Probably. It would certainly be a much harder question. But I don't think that's how many -- I mean with respect to other folks who may have read it that way, I don't think that's a reasonable way to interpret it. First of all, it could potentially raise superfluity concerns, because there would be a question about what work the other enumerated provisions are doing.

If you then have a catch-all that says "but not regarding those, you can do anything you want." So I don't think that would be a natural reading of (b)(6), even if just read in the way that you're describing. But I do think that any sort of ordinary interpreter would look at it by reference to the earlier provisions.

That's what the Justice Department I took to be referring to earlier, in saying that it believes Option 1 -- it did not object to the statutory basis for any of the options, and it thought Option 1 would sort of have that
reference to the other things as well.

   I'd also point out that in practice, right, in looking at how courts have interpreted extraordinary and compelling in recent years, it's hardly been a free for all. And so I think there have been some understanding that the sort of the language on the page has a meaningful disciplining effect.

   VICE CHAIR MURRAY: And then my other question is, I apologize for asking a second --

   CHAIR REEVES: No, no, go ahead.

   VICE CHAIR MURRAY: But is it your sense that given your reading of Option 3, if we were to amend Option 3 to say those reasons should be, using your words, similar in gravity and kind to the enumerated reasons, that it would not change the meaning of the provision?

   MR. MATZ: I don't think it would change it. I think it would maybe make a bit more explicit what I believe any interpreter would sort of otherwise arrive at, which is that this appears as part of a whole provision. You
look at it as part of the statutory plan within
the provision. You don't just think, you know,
you don't just sort of read it in a vacuum.

And so those words of a similar kind
versus of a similar gravity, I'm sure that other
folks that are in the trenches much more would
have strong views about what the implications of
specific word choice would be. But I think
something of that nature could be perfectly
reasonable to clarify just a little bit what I
think would otherwise be readily apparent, which
is this isn't meant to capture things of a
different kind, or of much less gravity than what
is otherwise captured by the enumerated
provisions.

VICE CHAIR MURRAY: That's all.

COMMISSIONER WONG: Ms. Barrett, in
your written testimony, you had raised an
interesting concern about Option 2. You said
that the phrase "changes in defendant's
circumstances and intervening events" did not
have established meaning, and so they presented
litigation, uncharted litigation territory.

I'm curious if you think the same
might be said or the same pitfalls might be said
as to changes in law, and that phrase.

MS. BARRETT: In terms of the proposal
for (b)(5)?

COMMISSIONER WONG: Whether there is
an established meaning yes, to whether change in
law constitutes. For instance, is it only
statutory changes, or do you think there could be
litigation over whether that extends to a Supreme
Court decision or a Court of Appeals decision or
a specific district judge decision? Would it
need to be in circuit? Would it need to be out
of circuit?

Have you seen any kind -- do you
believe that changes in law provides an
established meaning?

MS. BARRETT: We think it does provide
an established meaning. We don't think it needs
to be further clarified. Our judges have been
considering a number of factors using their
discretion, and I think that that's keeping the modification, sentence modification within the judiciary, consistent with the way sentencing is done.

It's something that judges are used to doing in the process of individualized sentencing determinations and individualized modification decisions. And so I don't think that it will present confusion.

COMMISSIONER WONG: And does that establish meaning then, that judges have been applying? Does that extend to case law and not just statutory changes, and if so at what level?

MS. BARRETT: I think that it can. It's not -- with the changes in law, it's not that every change in law is going to require automatic relief. That's the essence of it needing to be extraordinary and compelling, and that's the essence of why it needs to be an individualized determination in each case by the specific judge.

Who is in the best position to
determine that, since that is the judge that
presided at sentencing, knows the history and
circumstances of the case, the nature and
circumstances of the offense and so forth. And
so every change in law will not be extraordinary
and compelling. Every change in law for each
person will not render the same degree of
extraordinariness or compellingness.

And so in that sense, it's an
individual determination based on the
circumstances in front of the judge.

COMMISSIONER WONG: Do you think there
is an established understanding that changes in
law extend to case law, changes in case law? I
understand as applied to the facts, every judge
has to exercise their discretion, make an
individualized determination as to whether that
constitutes sufficient extraordinary and
compelling reasons.

But is there an established meaning or
understanding as to whether changes in law extend
to case law, changes in case law?
MS. BARRETT: I think it is. I don't see an issue with that. It hasn't not been an issue for our judges. I certainly think that's something we can address more in our written comment.

VICE CHAIR MATE: Ms. Barrett, I have a question going back to the medical issues for just a second, and the Department's proposal to add a requirement of an independent finding in a separate proceeding before a court can grant relief.

This is for you too Ms. Sen, in terms of the practical effects of that. Do you have any thoughts on the practical effects and access to relief without additional requirement?

MS. BARRETT: Yes, we would disagree with that. One of the driving forces behind the First Step Act was to take the administrative delay out of the hands of the Bureau of Prisons, which was extremely slow to act for many, many years. Our judges have had no problem analyzing medical issues.
We've had no problem -- we have a very orderly process in Connecticut. I've never experienced a situation described by the Department of Justice where a judge will rule without giving the other side an opportunity to respond.

We have hearings. We provide records. Everyone has an opportunity to be heard including victims. So there doesn't need to be a separate administrative proceeding. The whole purpose of the First Step Act is to avoid that, and I don't think that would be Congress' intent, and I think it would be significantly problematic given the administrative delays.

With regard to the administrative process that is required, which is that we contact the warden and allow the Bureau of Prisons to respond or wait 30 days, I would just note even with regard to that baseline administrative hurdle, I almost never receive a response from the warden, and it's usually the case that 30 days passes and then we're able to
proceed. So I don't think that that would be helpful.

MS. SEN: I would take the same position. In our experience, district court judges are very well versed and skilled in how to handle this kind of evidence. And so they can make determinations. They have been making these kinds of determinations in all kinds of cases every day across this country.

In every federal court, a sentencing judge is considering exactly these kinds of records to determine what happened, whether or not, what the extent of the injury was.

So we feel very strongly that there does not need to be some kind of separate finding through either a criminal case, which could take forever, depending on the district, an administrative hearing, and one of the concerns with the administrative hearing is that here, given the context of the proposal, this would be a proceeding by the BOP regarding one of its own employees.
I don't see, given I think the PAG's position would be, given the history of how BOP has considered these kinds of issues, we would be very reluctant to place in the hands of an administrative proceeding and the BOP, you know, to wait for that finding. As the Department of Justice explained just before, that proceeding would require potentially the completion of appeals.

That too could take forever, and I think what's the important point here is that the whole purpose, as we read it, of this statute and of this guideline is to allow courts to act quickly. The reason that we're seeking extraordinary and compelling relief is because there is an extraordinary and compelling reason why a client is at risk in remaining incarcerated.

And so to bog that down through a separate proceeding would really defeat somewhat the purpose of allowing these proceedings to move forward.
COMMISSIONER HORN BOOM: I have a question. First, thanks to each of you for your excellent and thoughtful written submissions, and my question can be addressed to any one of you. What about the argument for those who are advocating for a more narrow list of amendments to this particular guideline provision, what about the argument that Congress in revising the statute under the First Step Act, only made procedural changes.

That is the, you know, the statute was rocking along, that not much was happening because the Bureau of Prisons was not exercising its authority to file such motions. And so the only thing, the only change that Congress made was a procedural change, and so what justifies the wholesale revision of the substance essentially of the guidelines in response to that procedural change?

And again, my question can be answered to -- directed to any one of you.

MR. MATZ: I'm happy to take a very
short initial stab at it, which is -- which is
the Commission always has the authority to review
and revise any guideline that it sort of
considers in need of such attendance,
particularly when there are circuit splits that
now exist as to some of these issues that didn't
previously exist, and that the Commission is
potentially in a position to revise, to address
and resolve.

The Supreme Court has denied many cert
petitions presenting some of these issues
precisely based on its apparent expectation that
the Commission will do that job. You know and
beyond that, I'd sort of maybe note the obvious
point, that the substance may be in need of some
revision when in the prior world, the substance
was almost non-existent because the Agency
charged with actually operationalizing it
essentially didn't do its job.

And so in a world in which there are
now defendant-filed motions that are going to be
going to courts, where there's hardly any
meaningful body of practice or precedent from the
Bureau of Prisons as an entity that previously
could have sought to define what extraordinary
and compelling reasons are, it would probably be
of great value to everybody involved for there to
be a revisitation of this, both in light of
lessons learned from the last several years and
in light of the failure of the Bureau of Prisons
to bring the provision to life in a way that
would offer the kind of guidance, that I would
assume everyone involved in the system might now
find beneficial.

COMMISSIONER HORN BOOM: All right.

CHAIR REEVES: Anyone else wish to
weigh in?

MS. BARRETT: Yes, thank you. I agree
with Attorney Metz. I think in addition to the
fact that the Bureau of Prisons failed to act for
so many years, the fact that the Congress passed
the First Step Act indicates that there was an
intention by Congress to increase the use of
reduction in sentence.
And in addition, over the years there have been gaps in time in which the Commission had not promulgated specific a policy statement. So in that sense, this is an evolving process, and the way that the Commission, the guidance interacts with what's actually happening on the ground and in courts I think is important.

Given Congress' intent to expand the use of reduction in sentence through the passage of the First Step Act, I think it's appropriate to reconsider the evolution of the Commission's policy and why this policy is so important. So I think in a sense, I mean there's always been a catch-all since the Commission has promulgated policy.

So the broad statement was always there, but I think the Commission's policymaking power is meant to interact with the way the law and changes in the law are evolving.

MS. SEN: I would also agree with those two positions, and just state that the purpose of the First Step Act was to broaden the
availability of this relief to individual defendants. I think that by just reading it as a procedural issue doesn't do justice to what Congress' purpose was in passing it, and I think that's fairly clear in the legislative history.

VICE CHAIR MATE: The criminal --

CHAIR REEVES: Vice Chair Mate and then Commissioner Wong.

VICE CHAIR MATE: I have one question. There have been some comments and concerns raised about changes in the law and the broader catch-all provision generating unwarranted disparity in the system. I know Ms. Barrett, I remember you mentioning Mr. Vincent and the relief in that case addressing unwarranted disparity between crack versus powder cocaine.

So I guess I'm curious whether kind of -- you think these new laws and a broad catch-all generates unwarranted disparity, or provides some relief from unwarranted disparity? And I mentioned Mr. Vincent particularly, but either one or the other.
MS. BARRETT: Sure. I can take a stab at addressing that. I think the disparities issues that's been raised is a bit of a red herring. I think that I would have five responses to that. 3582(c)(1)(A) actually remedies disparities. It's not, it's not a problem; it's a solution.

Secondly, we have to remember that the statute also requires judges to consider the 3553 factors, and one of those factors is preventing unwarranted sentence disparities. So that's an additional guardrail built into the statute.

Thirdly, if we're talking about only cases where extraordinary and compelling circumstances are met, so by definition we're talking about an extraordinary circumstance. And so by definition, if there's a disparity it's likely to be warranted, rather than unwarranted.

Fourth, we should not be aiming for uniformity. Sentencing is not a uniform process, modification is not a uniform process. It's a highly individualized process. In my experience,
unwarranted uniformity is more of a problem than warranted disparity. I think what was particularly inspiring to me was Chief Judge Katzman's words in the Second Circuit decision in Davis, in which he wrote that he doubts that in an effort to avoid unwarranted disparities, that it would be consistent with the First Step Act to "level down," that is to withhold opportunity for the greater whole.

In other words, just because some courts have denied opportunities, that's not a reason for deny for all people. Instead, we should be looking to level up and create opportunity for the greater whole. So I don't see it as a problem. I see it as the solution to a problem.

MR. MATZ: And maybe just one very quick point on that, which is you know, appellate review is meant to serve an important function there, and there would be appellate review of how district courts are doing this, and the Commission is not a potted plant. I mean the
entire structure of how the Commission, as I understand it, is meant to operate is in part in dialogue with sentencing courts.

So the Commission would remain in a position to observe trends in sentencing at the district court and appellate level, and to approve or disapprove trends that in the Commission's view improperly exacerbate disparity or reflect confusion over the appropriate application of its standards.

CHAIR REEVES: Thank you. That wraps up this second panel. We've all done real well, I think, in sticking with our time constraints. I know that there will be supplemental submissions and we welcome that. So thank you again to this panel. We're now going to take about a 15 minute break, and we'll resume testimony in about that time, about, in about 15 minutes. So please walk around, make yourself comfortable and we will be in recess.

(Whereupon at 10:33 a.m., the above-entitled matter went off the record and resumed)
at 10:53 a.m.)

CHAIR REEVES: Thank you all so much. That was a real great couple of panels, and an introduction of who we are. We're about to start our next panel, and I'll just remind the Commissioners through this break, I understand that the people standing on the wall, I want to make it look like this place is packed.

The people standing along the wall are having a little difficulty hearing us. So please, make sure you're broadcasting through the microphone and just keep your voice up. We do want to talk to these people before us, but we want to make sure that they in the back hear us. So as we get ready for our third panel, our third group, these people will provide us with perspectives from law enforcement professionals.

Our first panelist is Steve Wasserman, who serves as the president of the National Association of Assistant United States Attorneys. The Association represents more than 6,000 federal prosecutors and civil attorneys across
the country. I emphasize "civil" because people -- I was a civil AUSA, and people tend to overlook that there's a civil division in the U.S. Attorney's Office.

Mr. Wasserman also serves as an Assistant United States Attorney in the District of Columbia, where he has spent the last 13 years prosecuting violent and drug-related crimes.

Our second panelist is Brenda Goss Andrews, who serves as the national president of NOBLE, the National Organization of Black Law Enforcement Executives. NOBLE represents over 3,000 members, including chief executive officers and command level law enforcement officials from federal, state, county, municipal law enforcement agencies. Ms. Andrews has previously served as chair of the NOBLE National Civil Rights Committee, and as a deputy chief in the Detroit Police Department.

Our third panelist is Chief Kathy Lester, who is here representing the Major Cities Chiefs Association. The Association is composed
of nearly 80 leaders of law enforcement agencies from the largest cities in the United States and Canada. Chief Lester currently leads the Sacramento Police Department, which she has served in a wide range of roles for nearly 30 years.

We will first hear from Mr. Wasserman, then Ms. Andrews and finally Chief Lester. Mr. Wasserman, we're ready for you sir.

Panel III: Law Enforcement Perspective

MR. WASSERMAN: Good morning, Commissioners. My name is Steven Wasserman and I am currently an Assistant U.S. Attorney in Washington, D.C. I'm here today in my capacity as president of the National Association of Assistant U.S. Attorneys, that represent over 6,400 AUSAs working around the country.

I want to make it clear that today my statements are made on behalf of NAAUSA and are not made on behalf of the Department of Justice or the United States Attorney's Office. AUSAs are committed to defending the innocent and
prosecuting the guilty through our federal criminal justice system. The system relies on public trust to succeed.

The U.S. sentencing guidelines foster this trust by promoting the predictable and fair application of the law. While individualized determinations are necessary, the guidelines are designed to encourage a degree of uniformity among similarly situated offenders.

This uniformity ensures offenders across the country, regardless of which district they are prosecuted in, can understand their sentence and know that their sentence is fair compared to similarly situated offenders.

The comments we present today are rooted in furthering this uniformity and fostering public trust in the justice system.

I'll begin with the proposal for Section 1B1.13-5 and 6 before moving to the other sections.

First, NAAUSA opposes the proposal for Section 1B1.13-5. This policy undermines the role of Congress and the rule of law. Federal law
mandates the statute expressly provide for retroactive sentencing adjustments. It is the role of Congress to decide if the sentence can be adjusted by a change in the law, not the Sentencing Commission.

Further, the Supreme Court has repeatedly recognized that retroactive resentencing based on changes in the law is not the norm. As the Court has made clear, the rule of law requires finality, predictability and certainty. The proposal directly contravenes these established principles.

Similarly, given that certain provisions of the First Step Act were specifically not made retroactive, the proposed amendment raises serious concerns related to the separation of powers. Sentencing Commission is not a legislative body made up of members directly accountable to voters. Thus, by effectively adding a retroactivity provision into the law, this proposal impermissibly encroaches on Congress' legislative authority.
This amendment is also in direct tension with Section 1(b)1.10, which makes clear under what circumstances and to what extent a reduction in term based on an amended guideline may be granted. The U.S. Sentencing Commission has not adequately researched the impact on public safety the pandemic's unprecedented expansion of compassionate release has had.

Further expanding access to compassionate release without this data would be both irresponsible and dangerous. We highly encourage the Commission to wait and make a data-driven decision before expanding access to compassionate release. NAAUSA urges the Commission to reject the proposal for Section 1B1.13-5.

Second, NAAUSA opposes -- supports, excuse me, Option 1 for subsection 6, without the inclusion of subparagraphs (4) and (5), which NAAUSA opposes. Option 1 properly limits the scope of additional circumstances to those "similar in nature and consequence" to the other
listed paragraphs. This provides judges a clear benchmark for assessing unique circumstances.

Option 2 and 3 lack clarity and permit subjectivity. Under Options 2 and 3, the judge is provided wide latitude to consider circumstances outside the guidelines. This undermines the uniform, predictable and fair application of the law.

If a judge can justify circumstances based on their view of what is inequitable, for example under Option 2, or extraordinary and compelling as under Option 3, then there is nothing preventing a judge from accepting a circumstance far outside what's been traditionally and historically accepted under the guidelines, and therefore potentially improper.

The preceding paragraphs would essentially serve no use at all. NAAUSA urges the Commission to adopt Option 1 for Section 1B1.13-6.

Next, NAAUSA has concerns regarding the proposed amendment to Section 1B1.13-(b)(1)
(c) and (d). Lessons from the COVID-19 pandemic warrant against qualifying broad and ill-defined medical circumstances as extraordinary and compelling reasons for a reduction in sentences. During the COVID-19 pandemic, AUSAs received a significant and burdensome volume of medical compassionate release requests, most of which were denied.

These requests placed AUSAs in the unfamiliar position of making medical determinations about inmates. The proposed amendment amplifies these concerns. Unlike COVID-19 compassionate release, which was meant to be limited to COVID-related risk factors, the proposed amendment is far more expansive. Yet AUSAs are not trained nor skilled in interpreting BOP medical records.

Both attorneys and judges may be inadvertent misled by faulty science or incomplete records.

CHAIR REEVES: Thank you Mr. Wasserman. We'll move on to the next when the
red light comes on.

MR. WASSERMAN: Okay.

CHAIR REEVES: I apologize.

MR. WASSERMAN: No, no, no. Thank you. I appreciate it.


MS. GOSS ANDREWS: Thank you. To the Commission chair, Judge Carlton Reeves and the Commission, I bring you greetings on behalf of the executive board, members and constituents of the National Organization of Black Law Enforcement Executives.

My name is Brenda Goss Andrews, and I am the president of NOBLE. NOBLE serves as the conscious of law enforcement by being committed to justice by action. Our organization was founded in 1976 in Washington, D.C. by a group of African-American executives.

In full transparency, our organization supported the Formerly Incarcerated, Reenter Society, Transform Safely Transitioning Every
Person, shortened to First Step Act of 2018.

NOBLE felt that the First Step Act struck a balance between maintaining public safety while improving reentry, rehabilitation, workforce training programs and sentencing.

It is NOBLE's continued hope that the First Step Act will strengthen bipartisan efforts in reforming the nation's criminal justice system ensure equity in the administration of justice.

Our organization joins many law enforcement leaders in the belief that America can reduce incarceration levels while also reducing crime.

To this aim, we applaud the efforts of this body in amending several policies to ensure the implementation and execution of the First Step Act. NOBLE's testimony reflects in response to the U.S. Sentencing Commission changes in policy Section 1B1.13 concerning compassionate release. We support the revision to the policy statement that reflects that 18 U.S.C. Section 3582(c)(1)(A) was amended by the First Step Act, authorizing a defendant to file a motion seeking
a sentence reduction.

We further support the proposed amendment that revises the list of extraordinary and compelling reasons. We support subsection (b) that lists the following subcategories: terminal illness, the inability to provide self care due to suffering from a physical or mental condition, functional impairment or age-related deterioration; the defendant suffers from a long-term medical condition and cannot receive timely or adequate specialized medical care; the defendant is negatively impacted by ongoing outbreaks of infectious disease or ongoing public health emergency due to the resident correctional facility or the exposure to said disease, such as we saw in COVID.

NOBLE supports the proposed amendment that revises the list of extraordinary and compelling reasons. We support subsection (b) that lists the following subcategories: family circumstances, the death or incapacitation of the caregiver, the incapacitation of the defendant's
spouse or registered partner, incapacitation of
the defendant's parent, where the defendant is
only caregiver for this person, and other things
dealing with family members.

Noble supports the proposed amendment
that revises the list of extraordinary and
compelling reasons, subsection (b) that adds two
new categories, victim of assault, defendant is
seriously injured due to sexual assault or
physical abuse by an employee or a contractor of
the Bureau of Prisons, and changes in law;
defendant's sentence is inequitable due to
changes in the law.

Additionally and lastly, Noble
supports the proposed amendment, the three
options that revises the provision currently
found in application note 1(d) of Section 1B1.13,
which includes the very three options. The
overall support by Noble for U.S. Sentencing
Commission changes to the policy center on our
support for the First Step Act.

However, this support is also based on
historical data that suggests that a high quality compassionate release program can expand the pool of eligible candidates, while reducing overcrowding in the federal prison centers. Lastly, the court will assess whether the circumstances exist, whether the defendant is a danger to society, or if a reduction is warranted.

On behalf of the law enforcement leaders of NOBLE, I thank you for supporting law enforcement in your mission to maintain public safety. Our members stand ready to meet the needs of our committee and nation. Thank you again for this opportunity to provide testimony.

CHAIR REEVES: Thank you, Ms. Goss Andrews. Ms. Lester.

CHIEF LESTER: Thank you. Judge Reeves and distinguished members of the Commission, thank you very much for the opportunity to participate in today's hearing. I currently serve as the Chief of Police in Sacramento, California, and it is also my honor
to testify on behalf of my Major Cities' Chiefs Association colleagues.

My testimony will provide a local law enforcement perspective on the Commission's proposed compassionate release amendment. The MCCA supports compassionate release as long as it focuses on providing relief to non-violent offenders who do not represent a threat to public safety. However, the MCCA is concerned that the proposed amendment is too broad and lacks sufficient guardrails.

The proposed amendment would add a new subcategory of medical circumstances under which an offender can be granted compassionate release. This criteria is very similar to what was used to justify the early release of thousands of offenders throughout the COVID-19 pandemic. MCCA members have seen firsthand how these factors have resulted in the early release of offenders who represent a threat to public safety.

For example, in one major city more than ten percent of the offenders granted
compassionate release recidivated within months. The MCCA is concerned that the proposed amendment is making the same mistakes made during the pandemic by over-expanding eligibility for relief via broad and subjective criteria.

The Sentencing Commission needs to further specify what constitutes the "extraordinary and compelling reasons" required for compassionate release under this new subcategory to address this issue. Another portion of the proposed amendment would make offenders "serving a sentence that is inequitable in light of changes in the law" eligible for compassionate release.

The MCCA believes this provision should be removed from the final amendment, as it runs contrary to Congressional intent. Furthermore, compassionate release is not the appropriate method to address potential sentence reductions due to a change in the law. While Congress has enacted legislation to revise criminal penalties and statutes, it does not
always make these changes retroactive.

Although the Sentencing Commission has the authority to determine what constitutes extraordinary and compelling circumstances that warrant compassionate release, Congress has historically addressed retroactivity as part of sentencing reform legislation. Considering this precedent a change in the law, unless there is an explicit retroactivity prohibition, should not be considered extraordinary and compelling circumstances.

The MCCA also strongly believes that no person should live in fear or be subjected to sexual assault or physical abuse while in the custody of BOP. However, the provision of the proposed amendment that would make individuals who are victims eligible for compassionate release is misguided.

Instead of granting compassionate release to someone who's been adjudicated guilty based on the evidence by a jury of their peers because they were a victim of sexual or physical
abuse, the focus should be on preventing these actions from occurring in the first place, as required by the Prison Rape Elimination Act and existing BOP policy.

If BOP can eliminate or significantly reduce these crimes in their facilities, this portion of the proposed amendment is no longer necessary. While BOP should also do everything in its power to deescalate conflicts with inmates, situations may arise that require the use of force. Under the proposed amendment, this would likely result in a compassionate release petition being filed after any physical confrontation between BOP personnel and an inmate.

This will only be exacerbated if the amendment is expanded to include individuals whom other individuals in BOP custody victimize. Over the past few years, communities nationwide have struggled with increasing violent crime rates. According to MCCA data, in 2022 homicides were up approximately 42.6 percent, and aggravated
assaults were up 34.5 percent compared to 2019.

MCCA members have reported that a lack of accountability within the criminal justice system is contributing to this trend. The MCCA is concerned that the overly-broad nature of the proposed amendment will significantly expand the universe of individuals who receive compassionate release, contributing to the perception that the criminal justice system is not holding people accountable.

As the Sentencing Commission finalizes the compassionate release amendment, it must ensure that the updated policies are balanced and do not jeopardize public safety. For example, there must be a risk assessment that at a minimum accounts for the crimes committed, criminal history and proclivity to reoffend prior to granting any individual compassionate release. The MCCA strongly recommends that such an assessment be part of any effort to implement the Commission's updated guidance.

In closing, while the MCCA does not
oppose compassionate release, it is concerned
that portions of the Sentencing Commission's
proposed amendment are too broad, lack sufficient
guardrails and will be challenging to implement.
Thank you again for the opportunity to testify,
and I look forward to any questions you may have.

CHAIR REEVES: Thank you so much,
Chief Lester. Now I'll turn to my colleagues
here to ask questions of anyone on the panel.

COMMISSIONER WROBLEWSKI: You know I'm
not shy.

CHAIR REEVES: I know.

COMMISSIONER WROBLEWSKI: Chief
Lester, thank you. Thank you all for coming and
for your testimony today. Chief Lester, you
talked about the experiences during the pandemic.
Were amongst your membership, is there or have
you identified best practices, because as you
say, you support compassionate release. You
think what the Commission has proposed is too
broad. Is there some jurisdiction or
jurisdictions that you think are models that
this Commission should follow?

CHIEF LESTER: I can't point to a specific jurisdiction, but I think there are guidelines in place that are open to consideration for compassionate release. I think what most of the agencies represented by MCCA would be looking for would be more of an individualized risk assessment.

I know we certainly talk about disparities and the challenges with overly-broad risk assessments. But to do something very specific and to use professionals, which are best practices, to include at a minimum social scientists, mental health professionals, some legal experts to really create the proper risk assessment, so you can achieve the goals, which would be to, you know, reduce populations but also to ensure public safety.

COMMISSIONER WROBLEWSKI: Are you familiar -- one follow up. Are you familiar, Chief Lester, with the various risk assessment tools that are in place in the federal system,
because there actually are a number of them. The First Step Act required the Justice Department to create a risk assessment tool, which is used to evaluate every prisoner on an annual basis. And then of course the courts also have different risk assessment tools, and I'm curious if you think that those are sufficient, if they need to be adjusted in any way, what your feelings are on those?

CHIEF LESTER: No, and I am not familiar with the specific ones. I think our concern would be the fact that there is a provision that we really see as overly broad and for a variety of reasons you could find reasons to release individuals without going through a proper assessment. So while there may be some in place, I think that's our concern, that you would see an increase in petitions and overly-broad interpretations of the factors that are required to be considered.

CHAIR REEVES: I have a question for you, Mr. Wasserman. You indicated about the --
and I may have interrupted you before you finished, but I think you were talking about the criminal AUSAs basically responsible for reviewing medical records and things of that sort, you know. It would sort of a new area for them when they receive any of these compassionate release requests.

But each U.S. Attorney's Office, I think, represents medical institutions, either military base hospitals, VAs or public health services or public health centers, and they're all covered by the FTCA. So therefore when those entities are sued, there are AUSAs who defend those entities.

Why couldn't the U.S. Attorney Offices sort of have civil AUSAs partner with the criminal AUSAs in these areas where there is a need to review medical records and that might overly burden the criminal side of the office?

MR. WASSERMAN: (off mic) Thanks for the question. I think the challenge, and perhaps -- as I was saying, perhaps the distinction on
the civil side is that often those assessments
are done in coordination with say an expert, a
doctor. That in my experience really isn't
 occurring in the compassionate release context.

So while civil AUSAs certainly, you
know, could assist in that, I'm not sure that
even civil AUSAs possess the knowledge to
evaluate these medical records and make a
presentation to the court without the assistance
of an expert. Just the pure numbers of petitions
or motions that we will get, I think, will so
overwhelm most offices' abilities to handle that,
based at least on what's contemplated in the
proposed guidelines.

What I was going to suggest, and I
didn't get a chance to finish, was that any
request for a medically motivated compassionate
release motion be accompanied by a medical
opinion by two independent doctors. We address
this in the criminal context oftentimes in
competency situations, where we actually do have
an expert appointed by the court and in some
cases the offender is sent to a medical facility run by BOP to be assessed by an expert.

So those situations have, you know, actual medical experts that are evaluating the medical documentation. I'm not a doctor, none of my colleagues are doctors. So I mean I can look at medical records but, you know, my ability to parse those out and perhaps probably the judge's ability to parse those out are going to be limited without some additional help.

CHAIR REEVES: And to follow up with respect to the inmates obtaining the expert reports of two independent physicians, how would you propose that they do that, because they're inmates who generally defined by the accounts that they have there that, you know, might be subject to being taken for fines and restitution. So very little money left to hire experts.

MR. WASSERMAN: Understood, and I think that would be something that the court and the government would probably need to address, you know. What mechanism is used to see that an
inmate can in fact get that independent medical assessment, I think, needs to be addressed by the courts, by the government. I'm not, you know, suggesting a particular procedure, but I'm also not suggesting that the inmate procure those independent assessments themselves and pay for those themselves.

CHAIR REEVES: Okay, thank you Mr. Wasserman.

VICE CHAIR RESTREPO: Are you suggesting that the inmate should be sent to FCI Butner and get two independent evaluations at Butner before they can pursue a compassionate release motion?

MR. WASSERMAN: No.

VICE CHAIR RESTREPO: What is, so what is -- going back to Judge Reeves' question, how realistic is it for these inmates to get two independent medical professionals to support the compassionate release motion?

MR. WASSERMAN: Well, let me correct that. I'm not suggesting a particular procedure.
I'm suggesting a way for the government and the judge to evaluate an inmate's medical claims. As of now under the current procedure, it's BOP medical records and it's evaluated by the AUSA and the judge.

In my opinion, that's not sufficient, particularly when we're talking about compassionate release, a sufficient basis to make an assessment. In some circumstances it might be, you know. There may not be much debate about whether somebody's terminally ill, but as the broader that you make these medical circumstances, the more nuanced the assessment, the medical assessment is going to need to be or will be.

So how that is affected, whether it's by sending an inmate to a medical facility, a BOP-run medical facility or making the inmate available for examination by an independent doctor, you know, I'll leave that to the policymakers.

CHAIR REEVES: Vice Chair Mate.
VICE CHAIR MATE: This is a question for you, Chief Lester. Thank you very much for your testimony. I really appreciate it. Going to the public safety point in connection with the medical releases, I was curious the example you gave where there was the -- I think you said about ten percent recidivism. Is that in a jurisdiction where as part of the release decision the court was making an individualized assessment of the situation on top of the medical reason?

So for example under our statute, the court is required to go through the 3553(a) factors, including considering risk to the public and public safety issues. Did that happen in this jurisdiction?

CHIEF LESTER: This is a large jurisdiction. I can't speak to the specifics, but what we saw in this jurisdiction I think was common throughout the country in which decisions had to be made very quickly, to try and protect the safety of inmates. This was really during
the COVID pandemic.

   And I think that's probably where our challenge is with this. If you read Section (d)(1) and (2), they're just very overly-broad criteria under similar circumstances that we saw during COVID. The example that I was referring to was one of our larger agencies, and what had happened was the agency was given a list of 1,760 inmates. They were asked to recommend individuals for release.

   I don't know specifically what those recommendations were based on. But based on that analysis, they determined that only about five percent of the inmates, they felt, didn't represent a threat to public safety. What happened was 1,400 of those 1,760 inmates were released and 135, approximately ten percent of the individuals were rearrested 236 times within a month of being released.

   And then later in 2020, that same agency was provided with a list of 1,100 -- I'm sorry 1,125 individuals who had been granted
early release, and within a month of being
released, more than 200, approximately 18
percent, were arrested again. I think that
speaking to some of the other witness testimony,
it would be difficult to know exactly the impacts
on public safety that COVID and these early
releases had, and perhaps it was because some of
the individualized risk assessments or factors
hadn't been, you know, hadn't been made
consistent.

I think that's why, one of the big
reasons that we're here to speak on this issue,
to ask for that. Thank you.

VICE CHAIR RESTREPO: Chief Lester,
those numbers, do they reflect state prisoners,
county prisoners or federal prisoners?

CHIEF LESTER: State, sir.

(Pause.)

CHAIR REEVES: All this dead silence,
no questions. Well, I do have another one,
particularly for Mr. Wasserman. In light of what
we heard earlier from the Department of Justice
and maybe some of the other witnesses, about victim notification. I presume NAAUSA is in favor of that.

Have you all thought about how that notification might occur? Who would be responsible for the notification? I know on the mandatory victim witness side, on the front end the U.S. Attorney's Office is responsible for notifying any victim. Will that operate similarly on the compassionate release side in your view?

MR. WASSERMAN: I don't see why it couldn't. I have to confess. I don't know what the mechanism currently is within the Department or the U.S. Attorney's Office for how that notification goes out, but I mean our office's notification system is somewhat automated, meaning a hearing is set and a victim receives a letter with that information.

So I don't see a reason why that process or mechanism wouldn't work as it relates to compassionate release.
CHAIR REEVES: Do you know the other thing, maybe some other witnesses might be able to tell us, but do we know, as a percentage of federal criminal crimes, how many by percentage, what's the breakdown of ones that might actually have victims, versus you know, the gun cases? You might not have the victim is the United States, or for the drug cases, the victim is the United States.

So do we know as a percentage how many crimes that are charged and prosecuted by the federal government actually have victims, the robbery cases, the other type? Do we know that?

MR. WASSERMAN: I couldn't tell you the percentage. I think it would be not an insignificant amount, because obviously in white collar cases, fraud cases, you know, you can sometimes have hundreds if not thousands of victims. Obviously, you know, a good chunk of the cases are narcotics cases that, you know, may not have a specific victim, although certain, in certain instances they might.
That's not an insignificant amount of cases that we prosecute federally, and then of course you have the more traditional violent crime cases, which are probably a smaller percentage overall of federal prosecutions. But again, I think the number of victims that would need to be notified is not insignificant. I don't know. I don't know how helpful that is as a data point, but --

CHAIR REEVES: Thank you, Mr. Wasserman.

VICE CHAIR MURRAY: Mr. Wasserman, could you talk a little bit about resources? So what, and I'm sure this is hard to quantify, but what share of resources are going into compassionate release motions now versus at the height of COVID? One thing that's been hard for me, at least, to get a handle on is how that resource allotment will change with a new policy statement?

So on the one hand you could say, you know, for two-three years there's been no policy
statement, and so maybe things have been as wide
open as they could be, you know, leaving aside
catch-all 3. On the other hand maybe, you know,
many districts formally act in the shadow of the
policy statement. They say that the old policy
statement is persuasive, so maybe things are more
narrow.

Could you give us your best assessment
of, and I realize it's hard to predict the
future, where the quantity of motions is kind of
heading?

MR. WASSERMAN: Well, you know, given
the proposed amendments and I think, you know,
more than likely some degree of expansion that is
going to occur, there's going to be, I think, a
significant increase in those motions. You know,
the -- we have the COVID-19 pandemic that gave us
at least some indication of what would happen
when, you know, it's expanded significantly, and
I mean I can tell you, for my -- for me alone, I
had, I think, about seven compassionate release
motions that I had to deal with myself from the
start of the pandemic through the end of 2020.

So and we have a fairly large office and a section that typically is devoted to handling those types of motions. Given the number, the volume, it had to be handled by folks all over the office. I think that the proposed amendments run the risk of overwhelming many U.S. Attorney's Offices with these motions.

The one, I suppose, mitigating factor during COVID was that at least there was a period of time where a lot of districts were not in trial, were not able to do as many of the investigations that they typically would do because of the shutdown. So that may have allowed for a little bit more flexibility to handle the volume.

But we still struggled, and my concern is now that we're sort of back to a normal court schedule, that we will be overwhelmed without additional resources. Obviously that takes away from our ability as AUSAs to investigate new cases, to handle those as they come in.
VICE CHAIR MURRAY: One thing the Justice Department had raised that I forgot to ask them about is the idea of putting the burden on the defendant to establish familial or familial-like relationship. Is that something that you think is feasible and would be helpful in terms of workload?

MR. WASSERMAN: You know, I did not --
I was not familiar or did not, was not made aware of the specific suggestions by the Department on that particular guideline. I know from our standpoint, we have concerns about our ability to really verify the legitimacy of sort of non-traditional familial relationships.
I mean, and I think in our full testimony I discussed what type of investigations the U.S. Attorney's Offices would need to do verify that, you know, a sort of outside the immediate family type relationship was being asserted as one of these relationships.

Interviewing the defendant, the defendant's family, the defendant's friends,
perhaps the individual who is alleged to be, have
the relationship, employers. You can see how,
you know, you can really kind of go down a rabbit
hole in trying to verify the legitimacy of those
relationships, and the amount of time and
resources that it would take.

So you know, we would, I think,
encourage the Commission to try to narrow that
scope of relationships to more traditional,
traditionally recognized relationships. Whether
it's grandparents, uncles, you know. Again, I'm
not making specific suggestions. But I think the
further out you go from traditional familial
relationships, the harder and harder it gets for
the government and ultimately the court to verify
the legitimacy of those claims.

VICE CHAIR MURRAY: Thanks.

CHAIR REEVES: Well look. It appears
that this is a panel where we have not many
questions. So thank you. If there's anything
you wish to add, because you do have a minute or
two. If there's anything anyone wishes to add,
you may. Yes ma'am.

CHIEF LESTER: Your Honor, do you mind if I just add one follow-up statement. So there's a federal sentencing snapshot about compassionate release trends. It was published as part of the Public Affairs Office. It goes back to 2020. We did see nationally a big increase in the number of, you know, compassionate release requests by defendants. Of the ones that were granted, according to the data in 2020, about 96 percent were filed by the defendant.

Reasons given, 72 percent of those were COVID health concerns and 28 percent were other reasons. It goes on to say that offender's age, the length of the original sentence imposed and the amount of time already served by the offender emerged as the central factors that impacted the likelihood an offender would be granted relief.

Of note, it does appear that there are disparities across the country in high and low
grant rates. For example, in the First Circuit
48 percent were granted, and in the Fifth
Circuit, only 15 percent were granted. So I just
want to say thank you very much for taking on
this issue, and looking to further enhance the
guidelines. I really do believe that they're
necessary for uniformity and consistency across
the country. So thank you.

CHAIR REEVES: You're welcome. All
right.

MR. WASSERMAN: I would just echo a
lot of what Major Cities Chiefs Association said,
and I would just encourage the Commission to
recall that, you know, even at the federal level,
recidivism rates are north of 50 percent.

So the risk assessment tools while,
you know, incorporated I think within the
compassionate release guidelines as they
currently are drafted and obviously in the
3553(a) factors that all judges consider, we're
still not great at predicting recidivism. I
think that needs to be factored in as you expand
what's historically been considered compassionate release eligible folks that, you know, generally I think everybody agreed were pretty unlikely to recidivate.

Terminally ill people, elderly people, people with serious family health issues or caregiving issues. The more you expand that, the greater likelihood I think you're going to have of those folks recidivating. So I'd just ask you to consider that.

CHAIR REEVES: Thank you. That concludes this panel. I appreciate your comments and like we've told everyone else, you're free to supplement your testimony. I do encourage it. I'm talking to the public now. I do encourage you to go to our website, where you can read the testimony of these witnesses. They'll always be there for access and continue to look to our website for our information concerning these hearings, our work and all the rest of our hearings that we have coming up. Thank you so much to this panel.
(Pause.)

CHAIR REEVES: Our fourth panel is a panel of one. He'll provide us the perspective from the judiciary. Here to provide that perspective is the Honorable Randolph D. Moss, who serves as a federal district judge in the District Court of the District of Columbia.

Judge Moss is with us today in his capacity as Chair of the Judicial Conference's Committee on Criminal Law. He also serves as the liaison representative from the Administrative Conference for the United States. Judge Moss has previously served as a Deputy Assistant Attorney General, acting Assistant Attorney General, and Assistant Attorney General in the Office of Legal Counsel.

Judge Moss as always, it's good to see you, and we look forward to hearing from you, and we're ready to hear from you sir.

JUDGE MOSS: All right. Well likewise, Chairman Reeves, and good morning to you and good morning to members of the Sentencing
Commission. I should start off by saying how pleased I am and how pleased the Criminal Law Committee is to have a quorum of the Sentencing Commission. We know the many difficult issues that you face, and I don't think we -- okay, thanks.

We don't envy you the amount of work that lies ahead and the difficult decisions that you need to make. I am here today to speak on behalf of the Criminal Law Committee of the Judicial Conference. I think that with respect to the notion of speaking on behalf of the judiciary, Judge Reeves, I think you know like I do that you can count up the number of judges in the country and that's how many opinions there are of the judiciary.

So but I have cleared my comments through the Criminal Law Committee, and so I can represent the views of the Criminal Law Committee today. Usually, Chairman Reeves, we're privileged to have the chair of the Sentencing Commission, who appears before the Criminal Law
Committee and updates us on our Newark, and this is the first time during my tenure that the tables have turned, and I get the opportunity to appear before you, and I'm honored to be here and I thank you for having me.

My comments, as you know, are directed at the amendment to Section 1B1.13 on the reduction in term of imprisonment under 18 U.S.C. Section 3582(c)(1)(A). As you all know quite well, Congress enacted the First Step Act in 2018 and in relevant part amended 18 U.S.C. Section 3582 to allow individuals convicted of federal crimes, who have exhausted their remedies, to seek sentence reductions by filing motions for compassionate release and that, as you know, is a significant change since under prior law only the Director of the Bureau of Prisons could file that type of motion.

The combination of that new process and the pandemic resulted in a truly dramatic increase in the number of compassionate release motions filed in federal district courts across
the country. Federal courts went from fewer than 50 compassionate release motions per month on average before the pandemic, to as many as 2,000 per month during the height of the pandemic. And between 2021 and March 2022, we averaged 427, between 427 and 565 compassionate release motions per month.

The numbers now are down, perhaps in response to one of the questions that was raised earlier. But I think they're still above the pre-First Step Act numbers at this point in time. And as you know, these motions can be extremely demanding.

At times, they require urgent attention. The judges of us, I think in all remember at the height of the pandemic, being up very late at night and feeling as though they had to turn to the compassionate release motions before anything else because lives were at stake.

And we were placed in the position in which we had to make complex medical and public health decisions in addition to have to weigh or
re-weigh the 3553(a) factors. So the motions not always but frequently are very demand. They're obviously important, but they do command a great deal of resources and they often result in -- they come to the front of the queue in ways that other things that we often can't turn to quite as quickly because of them.

Compassionate release litigation has also occupied the appellate courts, and has resulted in circuit splits on important issues. We hope that by revisiting the policy statement now, the Commission can put at least some of those issues to rest and provide additional guidance to the courts and litigants.

The present amendments raise a host of policy issues, and I think you've heard from other panels respecting the policy issues. The Criminal Law Committee's comments, however, focus on issues relating only to the administration of the judicial system. We'll leave it to others to comment on the important policy questions that you're considering.
I won't repeat everything that's in our written comments, and instead will just mention a handful of themes and a few issues that may warrant further attention. At the most general level, the Criminal Law Committee urges the Commission to adopt clear standards that will hopefully avoid or minimize inconsistent application, circuit splits and uncertainty.

But we understand that compassionate release is not always a one-size-fits-all proposition. But where possible, having clear standards will certainly be helpful to the courts. Judge Reeves made this point when he expressed the hope that the proposed changes will bring "greater clarity to the federal courts, and more uniform application of the compassionate release across the country, and the Criminal Law Committee joins in that hope.

To some of the specifics, we note that the proposed amendment would move the existing commentary on extraordinary and compelling reasons to the main text of Section 1B1.13(b) and
the Criminal Law Committee supports that proposal, and we think that we'll avoid uncertainty regarding the status of the list of reasons.

With respect to the expanded medical provision, I just want to flag a couple of questions that I hope you all will consider. The proposal to expand the category of medical conditions to include conditions that require long-term or specialized care that is not being provided by a prison in a timely or adequate manner, raises at least a couple of questions.

First, it would be useful to have guidance on how if at all courts should take into consideration other mechanisms that might address a particular medical crisis, such as the use of prison furloughs under 18 U.S.C. Section 3622(a), particularly where a medical crisis perhaps requires specialized care, but it's short-term in nature.

Second, it would helpful to have guidance on how if at all or to take into
consideration other remedies for deficient medical care that might address concerns in a more systemic manner. If the Bureau of Prisons is incapable of providing certain types of medical care, one question that would arise is is that an issue that needs to be addressed under the Eighth Amendment or in some other manner, and how courts should consider or think about those issues when considering a compassionate release motion.

The bracketed proposal to add a category for defendants who have been the victims of sexual assault or physical abuse committed by correctional officers or, in the alternative, by others and other inmates raises a similar set of questions.

The Criminal Law Committee of course strongly supports any and all efforts to protect those who are assaulted in prison from further abuse, and we recognize the extreme trauma that can result from prison assaults.

If the Commission decides to adopt
this proposal, courts would benefit from specific
guidance on a range of questions. Let me just
give you a couple of examples. First, when would
such a motion be ripe for consideration and on
what type of record? Should courts wait for any
criminal or administrative investigation to be
complete before considering a motion? Should
courts consider other factors such as whether the
assailant has been fired or criminally charged or
convicted, and how should courts assess and
measure the extent of the trauma or injury caused
by the attack?

The bracketed proposal to add a
category for defendants serving sentences that
are inequitable in light of changes in the law
also raises a series of questions concerning how
the Commission anticipates the courts will and
should implement such a rule, if it's adopted.
How would such a category apply, for example,
when Congress adopts changes in the law that
either decides not to make it retroactive or
simply doesn't decide retroactivity?
What would qualify as a change in the law? Would the new category apply, for example, to changes in rules or procedures that make it more difficult for the government to obtain convictions in similar cases? Would it apply to changes in the law that relate to prior convictions that formed part of the defendant's criminal history, but not -- but don't go directly to the conviction at issue?

And again, if the Commission decides to adopt the proposal, the court would benefit from whatever clarity -- courts would benefit from whatever clarity you could offer on those issues.

So we've highlighted a number of other issues for your consideration in our written comments, and I won't try your patience by repeating what's in our comments today, particularly when I'm the only one that stands between you and the lunch break.

But I do want to thank you again for working on this important issue. We knew this
was an issue of highest priority when a new Commission was formed, and we appreciate the speed and the attention that you've given to this important issue. I think the courts will benefit from whatever guidance you can provide to us. I would be happy to answer any questions to the extent that I can.

CHAIR REEVES: You sit in the enviable position of not being able to defer to anybody else now.

MR. MOSS: Yes sir.

CHAIR REEVES: So all questions will be directed to you, Judge.

MR. MOSS: Wow. I'll do my best.

CHAIR REEVES: Okay, thank you.

VICE CHAIR MURRAY: I'm not sure you are aware, some of the proposals of your other -- your co-witnesses have made about ways to make the compassionate release determination less resource-intensive, but at the risk of sort of hitting with them on the fly, I'd be really interested in your thoughts on them.
So the Department of Justice suggested that perhaps in the case of an assault victim, that those compassionate release motions should not go forward until there had been an adjudication already, so that the court will be presented with an already-adjudicated incident. NAAUSA suggested that in the case of medical, potential medical release that they -- that the defendant be required to produce two independent medical assessments about whether, about how dire their situation is.

The Department, the Justice Department recommended that the defendant be -- have the burden of establishing family relationships. I think we've fleshed out maybe some issues with some of those, but just from an administration of justice perspective, I'd be interested in your thoughts on how much juice there is in terms of if it's worth the squeeze.

MR. MOSS: Well, I will, I will qualify this by first saying that we're at the point now where it would be probably my personal
views as a judge, since it's nothing I've discussed with any of my colleagues at this point, and I don't want to get involved in any substantive policy disputes.

But with respect to judicial resources, I mean those of us who were judges and district court judges in particular during the pandemic, saw how demanding those motions were. But they were also very important, and we did the best we could. I do think that in general, we were of the view that more information on medical issues was helpful.

There was a process I think along the way where we worked with the Bureau of Prisons through the Criminal Law Committee, to ensure that the medical records at least were provided to judges or to the Justice Department, so the Justice Department could then provide it to the judges when we're facing -- when we were facing compassionate release motions.

And you know, I think we all have these experiences of sitting there and feeling as
though we were a little bit out of our depth in acting as doctors, in trying to decide whether a particular score on a kidney test meant that somebody had severe kidney disease or mild or moderate kidney disease, and how that affected the risk that was posed by the pandemic.

So I think more information is better than less information, and in general, you know, being a judge the more information you can get to make difficult decisions, the better off you are. I don't have a view on whether -- who the burden should be on or whether it means two reports versus one report, and I think that quite frankly those issues may vary depending on the circumstances as to what is needed.

I think one of the comments made during one of the earlier panels at the earlier panel was, you know, if someone is terminally ill from cancer, you probably don't need two reports to make that type of assessment.

COMMISSIONER HORN BOOM: Judge Moss, thank you for your submission and your work on
the Committee. In speaking informally just with other district court colleagues, I have had some interesting discussions. No one has advocated that compassionate release should be more expansive or less expansive, but rather that the Commission just needs to bring clarity, to give us the tools and the guidelines that we need to make these important decisions.

I really appreciate the practical perspective that the submission from the CLC provides in really raising some sort of nuts and bolts concerns that district court judges across the country, I think, are facing in trying to grapple with these decisions and some of the proposed amendments.

I think, you know, one question that I have is, you know, does the Committee have concerns with, and I think that is expressed in particular, you know, what are the provisions that bring you concern as far as judicial resources in addressing the various proposed amendments? What are the ones that, you know,
you would flag as potentially inviting, you know, just an amount of motions that might be simply really difficult or challenging for the courts to be able to sift through?

MR. MOSS: Well, I think that ends up to my mind circling back to the question of clarity, because if there truly are extraordinary and compelling reasons for somebody's early release and if the 3553(a) factors are satisfied, you know. We were hired to do a job and we're going to do the job that we have to do.

I think the concern though is to the extent that there is lack of clarity, it can invite a deluge of motions that don't satisfy most standards, those type, those standards. Just as one example, and I think this is a reasonable example, is with the question of changes in the law that render the original decision inequitable. One could imagine a circumstance in which you have somebody, a defendant, who every week files a new compassionate release motion.
I think we've all had cases involving serial litigants that even where the motions that we face may not ultimately be well taken, they occupy an enormous amount of judicial resources sifting through those motions and explaining why it's not well taken. If you're getting a motion every week, there's a new decision that somebody who's incarcerated thinks shows that there's been a change in the law in some way that now tilts the field somewhat more in that defendant's favor.

You can imagine a real deluge in litigation resulting from something like that, and that's just an example. I don't mean to be commenting on the substance of the proposals, as much commenting on the benefit of having some clarity of what it means to be a change in the law that rises to the level that the Commission thinks would warrants a court's consideration.

COMMISSIONER HORN BOOM: I may have missed it in the materials, but has the CLC taken a position on repetitive filings that, you know,
should there be a limit on the number of
compassionate release motions that an offender
can file?

MR. MOSS: So the only thing that we
as a Committee have said about that was in our
comments is we did note with respect to the
bracketed proposal on inequitable sentences in
light of developments in the law, that this issue
that I just mentioned with respect to the risk of
serial filing. We haven't taken a position with
respect to whether in other respects there should
be some limit.

CHAIR REEVES: Commissioner Wong.

COMMISSIONER WONG: Judge Moss, Judge
Moss, thank you for being here. I note that, you
know, the D.C. Circuit actually is sort of on the
more restrictive end of the circuits when it
comes to changes in law and whether compassionate
release motions can be filed based on non-
retroactive changes.

I'm just curious whether based on data
or anecdotally you and your colleagues actually
feel like you've been, you've seen lots of a
deluge or be less inundated from perhaps
colleagues in other circuits as a result of that?

MR. MOSS: Well I think the opinion
you're talking about came down in the past six
months or so, after the number of cases was a
little bit more on the decline. So I'm not sure
I can give you an empirical judgment about what
the effect of that would be.

But the other thing I would say about
the question of considering changes in the law,
changes in circumstances that may have rendered
the original sentence inequitable in some way, is
I think you have to think about it in two ways or
from two perspectives. There's the first
question about whether you just clear the first
hurdle of whether this is an extraordinary and
compelling circumstance.

But then there's the question of just
applying 3553(a) factors, and I think those are
very different to my mind considerations. I
don't want to certainly get crossways with the
D.C. Circuit.

I can't recall quite frankly offhand whether the D.C. Circuit opinion draws that distinction between that initial hurdle of whether someone who's shown some circumstance that is extraordinary and compelling, and then what you can consider in applying 3553(a) factors.

COMMISSIONER WROBLEWSKI: Judge, can I jump in?

CHAIR REEVES: Yes.

COMMISSIONER WROBLEWSKI: Thank you Judge Moss for being here. Thank you for the testimony. I know what it's like to herd cats to get to one piece of paper, so we appreciate that.

MR. MOSS: It's always good to see you.

COMMISSIONER WROBLEWSKI: Yeah. So I especially appreciated the comments on the enumerated provisions, but I want to talk a little bit about the catch-all.

MR. MOSS: Yes.
COMMISSIONER WROBLEWSKI: Because I think we all share the goal of creating a clear standard. We also all recognize that there are some things we can't anticipate, which leaves us in this conundrum about the catch-all. But I think there are two particular challenges that I want to ask you about.

One is what I've heard from witnesses so far and also from district court judges, is there seems to be a little bit of a disconnect between the way compassionate release is laid out in 1B1.13. Here are these factors, 1, 2, 3. If you meet this one check, you're past -- you're past the gate and then we go to 3553(a).

I don't know if you heard the defense panel earlier today, but they talked about a totality analysis, they talked about a constellation of circumstances.

How do we capture that, because it seems to me again a little bit of a disconnect between the way district court judges actually evaluate a particular defendant, and whether
there are extraordinary and compelling circumstances, and the way it's written out, which suggests okay, do you meet this one, do you meet that one, do you meet that one?

So that's question number one, and then I've got to give you the second question too. The second question --

MR. MOSS: That way I can decide which one I want to answer.

COMMISSIONER WROBLEWSKI: Yeah. The second part of the problem is once we decide that, there is this question of again words from an earlier panel, the gravity, the consequence. It's not just your run of the mill case; it's something that really, I don't know, breaks your heart. It does something more than, and so we have to capture that concept too.

So it seems we have to capture two concepts that we're really struggling to do, and I wonder if you have any suggestions on how to do it, the constellation of circumstances, and how do we capture the circumstances that meet the
MR. MOSS: Right. Well I, as usual, I think you put your finger on the most difficult issue, and it's an issue that we struggled with in thinking about our comments because ordinarily, I think the Criminal Law Committee would take the view that maximizing judicial discretion is a good idea, and let judges figure out in each individual case what they think the right thing to do is, and we'll get to a just result by doing that.

But as you can see in our comments, there's a tension here which you put your finger, which is we need guidance in doing that, and having clarity in the process is essential. So this is an unusual circumstance for us, in which we're not coming in and simply saying give the judges as much discretion as you can and we'll figure out the right thing to do. We're saying we need discretion to deal with the unusual circumstance, the unanticipated circumstance. We recognize that, and not everything is
anticipated.

I mean who thought about the pandemic? My suspicion is is that when the original policy statement was drafted, there wasn't a lot of discussion about potential pandemics and how they might affect prisons. But there is a need for that clarity, you know. I'm glad that you all have to make those decisions rather than I do as to how you strike that balance.

At the end of the day, I do think that there is some balancing, though, that is inherent in the overall structure of the statute to start with, which is you first consider compelling and extraordinary circumstances. But then the court has to decide whether release is warranted in light of the 3553(a) factors, and I think at that stage in the process, courts can and I think they did during the pandemic weigh circumstances.

You know yeah, somebody who has just another six months left incarcerated on their sentence and they have a very grave illness, that if they get COVID there's a good chance that
they're going to die, versus the case in which
somebody's been sentenced to 30 years in prison
and they're five years into their sentence, and
it was, you know, a truly heinous crime that they
committed.

There is a significant risk that
person faces, and I do think that the judiciary,
in addressing the cases even under the old
guidelines or the lack of guidelines previously,
did engage in that weighing as part of the
3553(a) considerations.

But I agree with you, that's a hard
question and I'm not sure I have for you today
any great answers as to how to strike that
balance, other than the fact that we do really
value clarity and it will help us to have
clarity.

CHAIR REEVES: May I ask this question
with respect from a district judge's perspective?
Even with all the clarity we might have, that
will not stop a prisoner from filing something.

Our courthouses are always open to
receive petitions from anyone and sometimes
prisoners file motions that they are not entitled
to file. For example, a motion to set aside
their guilty plea or a motion -- or to appeal
their conviction, when they've waived it through
their guilty plea.

I mean so even with all the clarity
one might -- that we may give them, that really
might not impact the number of cases that are
actually filed that's going to get, have to get
the attention of a judge, right?

MR. MOSS: Well you know I think I
agree in part. I think that it probably will
help some. But there always will be filings that
are not well taken, and you're absolutely right.
The courthouses are open and people are entitled
to file it, and what one person might think is a
filing that's not well taken, someone else might
disagree with them thinking it is well taken.

So I agree with that proposition, and
I think there will always be filings that judges
think are not well taken. In fact, we wouldn't --
there wouldn't be any need for us if every case was one in which relief was granted, so that you need a judge to make those decisions.

But I do think it probably would have some effect on the burden on courts and the number of filings, but it also would have some benefit -- the clarity would have additional benefits even beyond the number of filings. It would make it easier for the district judges to address the cases when they do come in the door. It would minimize circuit splits and the uncertainty that comes with circuit splits, and it would minimize inconsistencies around the country.

I know that that's one of the missions of the -- of the Sentencing Commission is to do your best to promote consistency around the country, and I think having clear standards is something that is more likely to promote consistency in decisions around the country as well.

CHAIR REEVES: Thank you, Judge Moss.
You're off the hot seat now because --

MR. MOSS: Lunch time.

CHAIR REEVES: --we're about to go to lunch. Ladies and gentlemen, we're going to break for lunch. We will resume testimony in a little bit over an hour. We will come back here at 1:15 with our next panel. Please make sure you're seated and ready to hear that next panel at 1:15. Thank you all so much for all your attention.

MR. MOSS: And thank you.

CHAIR REEVES: All right.

(Whereupon at 12:08 p.m., the above-entitled matter went off the record.)

CHAIR REEVES: Thank you all. I hope everyone had a good lunch, maybe not so good where you ate too much and you might fall asleep. I don't think you'll fall asleep on this testimony, however. But again, thank you for joining us. We're prepared to have our fifth panel, and our fifth group of panelists will provide us another unique perspective from a
diverse range of advocates, citizens and communities.

Our first panel is Mary Price, who serves as general counsel of FAMM, a national non-profit advocacy organization that focuses on criminal justice reform. Ms. Price is the founder of the Compassionate Release Clearinghouse, which recruits, trains and supports attorneys to provide pro bono representation to people in federal prison seeking compassionate release.

Ms. Price also serves as a special advisor to the American Bar Association's Criminal Justice Section, and as a member of the National Association of Criminal Defense Lawyers First Step Implementation Task Force.

Our second panelist is Alan Vinegrad, who serves on the board of the Center for Justice and Human Dignity. The Center aims to reduce prison incarceration while improving prison conditions. Mr. Vinegrad is a former United States attorney for the Eastern District of New
York and currently works as a senior counsel in Covington and Burling's white collar defense and trial practice group.

Our third panelist is Kelly Surdis. Ms. Surdis is the sister of Jason Burgeson, who was shot and killed in 2000 during a carjacking. Ms. Surdis has recently provided a victim impact statement advocating against a compassionate release motion filed by one of the men who killed her brother.

Ms. Surdis has testified on behalf of victims before the Rhode Island Senate, and previously spearheaded a letter-writing campaign focuses on the federal Department of Justice.

Our fourth panelist is Janiene Mallory. Ms. Mallory is the sister of Monica Johnson, who was murdered two decades ago. Ms. Mallory provided a victim impact statement advocating against compassionate release for the man who killed her sister. Ms. Mallory is a victim's rights advocate, a registered nurse, a mother of three and the wife of the man who
previously served time in prison.

We will first hear from Ms. Price, then from Mr. Vinegrad, then Ms. Surdis and finally Ms. Mallory. Ms. Price, we're ready to hear you. Make sure your microphone is on.

Panel V: Community Perspectives

MS. PRICE: All right, I'll try again. Can you hear me?

CHAIR REEVES: Yes. You might want to move it up a little bit.

MS. PRICE: Yeah, how about that?

CHAIR REEVES: Yeah, yeah. Just always speak up.

MS. PRICE: All right, I shall. Thanks for the advice.

CHAIR REEVES: All right.

MS. PRICE: I want to say first of all speaking for FAMM, that I'm here to tell you that we think it's splendid that the Sentencing Commission has proposed to add (b)(5), defining changes in the law that would render a sentence inequitable, and an extraordinary and compelling
reason.

This is an important decision that you're posed to make, and I know that you're examining this position with help from experts and stakeholders, and from a variety of different angles. I want to ask you to look at it through another lens, and that's a lens that is shown by previous Commissions that have taken on important questions, and done work that has influenced sentencing law and policies in ways that reach beyond the outer-most limits of what the guidelines can do.

So using the tools that it has, the Commission with data, reports and amendments to the guidelines, earlier Commissions have been incubators of reforms, bringing to life reforms that might have taken decades longer or maybe even never happened at all. So you have the chance to follow in those footsteps.

I want to talk about two examples of Commissions that have generated work that has then led beyond the guidelines themselves. So
first of all, due to work by earlier Commissions, Congress right now is considering equalizing the penalties between crack and powder cocaine. U.S. Attorney's Offices have been instructed to align crack and powder charging. I don't think the state of affairs would have existed without earlier Commissions' work.

In late 2007, then-Commission Chair Judge Ricardo Hinojosa summed up generations of Commission history very simply by opening a hearing on whether to make the so-called Crack Minus Two amendment retroactive. He said "Federal sentencing policy has been an issue that the Commission has worked on for a long time, promulgated amendments before that have not gone into effect, as well as sent their statements in or reports to Congress at least four times on the issue.

"We've promulgated the Crack Minus Two amendment, which the Commission felt was a very small step. In the end, Congress is the one that can have the solution to the problem." So the
Commission had done all that they could do with
respect to crack cocaine.

Three years later, the Department of
Justice testified on behalf of parity, and
shortly after that Congress passed the Fair
Sentencing Act, dramatically lessening the
disparity between crack and powder cocaine. In
2018, Congress made the Fair Sentencing Act
retroactive. None of that would have happened
without leadership shown by the Commission, doing
what it could do within the limits of its
authority.

In another example, we can draw a
straight line from the Commission's work in
compassionate release in 2016 to the First Step
Act changes in 2018. As you know in 2016, the
Bureau of Prisons was firmly in control of
compassionate release, and there were very few
motions. The Commission very well knew that the
Bureau of Prisons had hijacked judicial authority
or the judicial role in compassionate release,
denying even people who were terminally ill for
reasons that Congress had committed to the courts, such as safety of the community or seriousness of the offense of conviction.

So when the Commission amended the policy statement in 2016, it included this remarkable message directed at the Bureau of Prisons. It said stay in your lane. Bring the motions if they comply with the guideline, and let judges do their job. And the following year, the group of Senators asked the Bureau of Prisons had it increased compassionate release in light of this guidance from the Commission, and while later the Department of Justice came back and essentially the answer was no, that there had not been much of an increase.

So at that point the Senators heard enough and they drafted the Grace Act, which became incorporated in the First Step Act, and which is the authority that we're talking about today. The amendments that were made took control away from the Bureau of Prisons or gave it to -- or at least control with the Bureau of
Prisons.

So it was a game-changer, and I don't think it would have been possible without the work that the Commission did in 2016. So I think that Commission has both the authority and the duty adopt (b)(5) and resolve the conflict. Absolutely the other voices are telling you that giving judges the tools to consider sentences that can no longer be imposed state and that are inequitable is not your job.

That's something that belongs to the political branches. But the Commission was set up to do just this: Congress created the Commission, a politically neutral expert body, situated above the fray to address some interesting and challenging issues like this. And it's important. Several hundred people are, have been released by judges exercising this authority who would have lingered for decades or died in prison. You're going to be hearing from some of those people later on today.

Their freedom was possible because
judges wisely exercised discretion that we are asking you to preserve. So embrace this job, know that if you do, you're going to stand on the shoulders of Commissions, frankly those from the earliest years, who have addressed themselves to important issues with creativity and forthrightness.

They helped forge reforms that our system benefits from today. And you also have the benefit of several years of litigation, of judges actually making these rulings. So you're not writing either on a clean slate or wondering about what the impact is going to be on the system.

I want to close with the words of then-Commissioner now Justice Ketanji Brown-Jackson, when she explained -- may I? Okay, thank you. Justice Jackson when she explained the Commission's decision to make the Fair Sentencing Act changes retroactive without limitations urged by the Department.

Her words apply with equal force
today. I believe that the Commission has no choice but to make this right. Our failure to do so would harm not only those serving sentences pursuant to the prior penalty, but all who believe in equal application of the law and the fundamental fairness of our criminal justice system.

CHAIR REEVES: Thank you Ms. Price.

Mr. Vinegrad.

MR. VINEGRAD: Chairman Reeves and members of the Commission, I'm Alan Vinegrad. I'm a lawyer with Covington and Burling, and I'm here today on behalf of the Aleph Institute and the Center for Justice and Human Dignity, two not-for-profit organizations committed to helping bring about a better, fairer and smarter criminal justice system for all.

In a previous life, I was a member of the Department of Justice for 12 years. Aleph and the Center enthusiastically support the Commission's proposed amendments to 1B1.13. Those amendments are a long-awaited, thoughtful,
carefully crafted and measured response to
Congress' directive in the Sentencing Reform Act
that this Commission delineate the circumstances
in which persons in federal custody may be
released or have their sentences reduced for
extraordinary and compelling reasons.

The amendments provide reasonable
elements of when a defendant's medical condition
or family circumstances may constitute an
extraordinary and compelling reason for sentence
reduction or release.

The medical condition amendments
appropriately take account of serious medical
conditions, as well as situations similar to the
one that we have endured for the last three
years, due to the COVID-19 pandemic, where a
defendant's health and indeed their life can be
put in jeopardy if they remain in prison.

The family circumstances amendments
correctly recognize that a defendant's adult
children or parents or other close family
members, just like their minor children or spouse
or partner, may require care that only the
defendant can provide if released from prison.
The amendments correctly reflect that imprisoned
victims of sexual assault or physical abuse by
corrections employees or contractors, the very
people who are obligated to ensure their safety,
present an extraordinary and compelling
circumstance that may warrant their release.

The amendments provide potential
relief for the inequity that arises when a
defendant is serving a longer, sometimes much
longer sentence than would otherwise be the case
if they were sentenced today for the same
conduct. We believe that this amendment is
authorized by the discretion given to this
Commission under the Sentencing Reform Act to
describe what constitutes an extraordinary and
compelling reason.

It is consistent with the discretion
given to judges to take all facts into account in
making sentencing-related decisions, unless
prohibited by law from doing so. And 3582(c)
contains no such prohibition other than the rehabilitation alone provision. And importantly, this amendment is the right thing to do, to enable judges to address individual cases of manifest sentencing injustice, consistent with the legislative history of the compassionate release statute.

The amendments correctly preserve the discretion of a judge to find that other, unspecified circumstances may, in an individual case, qualify as an extraordinary and compelling reason justifying a sentence reduction or release. If the COVID pandemic proved anything, it's that we can't always anticipate every extraordinary circumstance that might justify extraordinary relief.

One final point. To those concerned about the proposed expansion of compassionate release criteria, it bears emphasis that those changes will not guarantee the release of a single defendant, not one.

A judge must still find, based on
credible and reliable evidence, that the reasons for release are in fact extraordinary and compelling in that particular case, that the defendant is not a danger to the community, and that lowering the defendant's sentence is consistent with the 3553(a) factors, including their criminal history, the nature of their offense, the need for just punishment, the need to protect the public and other statutory factors.

These are not empty words. In the last three years of the more 23,000 compassionate release motions that were denied, 3553(a) was the reason for the denial in over 12,000 of them, and protection of the public was the reason for the denial in over 3,000 of them. What that suggests is that judges can be trusted to make these decisions and to make them conscientiously, just like they do every day for a whole host of other potentially life-altering matters. Thank you.

CHAIR REEVES: Thank you, Mr. Vinegrad. Ms. Surdis.
MS. SURDIS: Thank you. While preparing my verbal testimony for today, I wondered how I could possibly fit 23 years of lost grief, heartache and pain into a five minute limit. Here lies my attempt. My brother was 20 years old and his girlfriend 21 years old, when they were both carjacked, kidnaped and shot execution style in the head by five men that did not know them.

Their bodies were left hugging one another covered in blood, with not one of the five men having a shred of guilt or remorse as they drove away in my brother's truck. Carl Jung stated that I am not what happened to me, that I am who I choose to become. Well I'll tell you that I stand here before you today, not as a victim but as a warrior who has been placed into this role over and over again.

I have now been through three compassionate release motions in the last several years, and going through this process for the families of victims of violent crimes, just one
single time is too much. The ultimate goal, one
would hope during sentencing of violent criminals
would be the enactment of a fair, just and final
sentence.

Fair sentencing offers punishment to
criminals, but it also provides families a peace
of mind and an ability to enter into a healing
phase of their lives. However, these
compassionate release motions, filed years after
the fact, repeatedly drag the victims right back
to the initial day of the crime and revictimize
all over again, forcing victims and families to
pick up the sword to fight.

I will tell you that this wears away
at our souls. I believe the weight of this
burden was a considerable factor in my own
father's death in 2018, and in addition, 21 years
ago I was six months pregnant with my daughter
when I had to testify on the stand for one of the
defendants. Today, she sits behind us in the
audience, all these years later still enduring
the same nightmare with me, still fighting.
How would her life be different if only her uncle had not been murdered?

Compassionate release motions for violent criminals should be handled differently than for that of non-violent criminals. I understand that there may be some extraordinary and compelling circumstances for non-violent offenders to be released.

However, I ask of you that in cases of murder, violent crime, kidnapping and sexual assault, that no compassionate release motions should allow to be filed or granted. It must be taken into the consideration the nature of the crime and the previous backgrounds of offenders. In our case, all five men that murdered my brother and his girlfriend had previous records, 41 pages of previous records and four out of five were out on probation on the night of my brother's murder.

I speak today for the families that have unfortunately had the offenders in their cases released, and according to your most recent
data report, last year 87 murderers, ten kidnapers and over 1,000 offenders with robbery and firearms charges in the federal system were released. In my opinion, that number is 1,097 too many.

There is a 64 percent recidivism according to your data report, that violent offenders will reoffend. That means that at those percentages, 700 percent of those that were released -- I'm sorry, 700 of those criminals that were released last year will reoffend.

I ask of you to consider that there must be protection built into these amendments for victims and families that have been affected by these crimes, yet may not still be able to stand up and fight, attend hearings and write letters, pleading to keep violent criminals in jail.

If there are no family members left to give statements in relation to violent crimes, does this somehow lessen the original crime? It is extremely difficult for those of us that are
left in the wake of destruction which criminals
have created, to have to worry about the
possibility of violent offenders getting out of
jail on superfluous compassionate release
motions, and two of mine that I have been through
were superfluous.

    All of us warriors who are still
standing here after tragic events at the hands of
another have all been given life sentences.
We've all been given a terminal illness that from
which we cannot escape, and there is no
extraordinary or compelling circumstance which we
can present in order to evade the hell that we
have been handed.

    In closing, I ask of you to have
compassionate consideration for all the victims
and their families. Allow us to heal and allow
us to move forward. Allow us to put behind us
the worry of violent criminals being released
through the First Step Act. Thank you.

    CHAIR REEVES: Thank you. Thank you,
MS. MALLORY: Good afternoon Commission. My name is Janiene, and like Ms. Surdis I am the victim of -- well, the family member of a victim of violent crime. I also can speak from the other side of the aisle also. I have a family history of my parents and brother and even my husband being incarcerated, and having learned lessons about being a citizen of the world and following the rules and the law, and learning from being incarcerated.

So I do believe that compassion should be granted to some people that learned their lessons or are victims of their circumstances, and are led to lives that aren't worthy of, you know, being free at that time.

But these people served their time, come home and do well. I just ask, like Ms. Surdis said, that when you guys consider the changes in the compassionate act release, I do believe that judges do have reason and can make decisions.

But I do think violent criminals
should be excluded from being considered for compassionate release, for they have not considered the family members, they have not considered -- they don't -- while they're committing their acts of crimes, they're not thinking about hold us -- I'm not able to hold my sister's hand. She was not able to walk her daughter down the aisle. She was not able to be at her son's graduation.

I just ask that when these criminals are considered, that they are excluded from being even given any compassion, because they didn't consider the consequences of their actions. I wrote a long statement and I may have rambled, because I myself have been through areas where I felt people should have showed compassion for my mother or for me, but we made it.

But these people who commit violent crimes, they should not be considered in any type of compassion because the consequences -- they know the consequences of their actions, and they shouldn't be considered to -- be allowed to be
free and roam the streets, because being a
citizen of the community, it's a right and you
have to follow the rules. Sorry I'm not --
that's all I have to say.

CHAIR REEVES: Thank you Ms. Mallory.

I turn now to my fellow Commissioners. Any
questions from the members of this panel?

(Pause.)

COMMISSIONER WROBLEWSKI: So thank you
all for being here and to Ms. Surdis and Ms.
Mallory, thank you for your courage to come here
and to share your stories with us. If you could
just also let us know, I'm curious, the
interaction you had with the court when the
compassionate release motions were filed, whether
you were satisfied with that.

I understand your position that you
don't think that violent offenders should even be
eligible, but I'm curious about that. We have
proposed some language that would require victims
to be notified whenever there is -- whenever the
court is considering compassionate release and to
be heard.

So I'm just curious first about your experience, and if you have any thoughts on this particular addition.

MS. SURDIS: Well thank you for asking. I have a lot. So one of the defendants that filed for compassionate release in my brother's case, he did have a terminal illness, okay. He was -- he had a brain tumor, he had less than six months to live, and he filed in 2020.

We were notified on Friday before Memorial Day weekend, and our statement had to be in North Carolina by Tuesday in order to be considered as a valuable input on whether or not he should be released.

So when we got the mail on Friday, I immediately talked to my brother's friends and my family. We all wrote letters like within two hours, and I had to overnight that to Butner, the prison in Butner in North Carolina and make sure that it was, you know, heard.
In addition to that, you know, we made a phone calls where we actually spoke to that inmate's advocate at the prison, where we left a lot of messages. But I do think that the victim notification is flawed unfortunately. I've seen it at the state level because one of the defendants of the five is at the state level, and I've seen it in the federal level.

The other two people who filed were at the federal level, and that's when I mentioned this superfluous motions. One of them has sleep apnea and he thinks he should be able to get out. 18 million Americans have sleep apnea, and he filed as that was his motion on why he thinks he should be able to get out.

Another one wanted to be able to help his family members pay bills. Maybe he should have thought of that before he was encouraging murder. But you know, that's just one of the things about this becoming so broad, is that you know, violent offenders can file for these crazy reasons that really are not, you know, in
alignment I think with what you all have intended.

I do believe that, you know, they should have some, you know, compassion for certain people, but maybe not victims and families -- well, violent crimes excluded.

MS. MALLORY: We were notified -- I think we had a timely response when Mister, I don't even know, Ronald was offered compassionate release. We were offered the judge's statement, which you know when I read it, it was kind of to me out of line, that he tried to make a reason. I do respect the judge's reasonings, and I'm glad he did consider our statements in his determination.

We had time, but I do think that the victims should be notified. I think that they should be notified timely, but they shouldn't be also asked to relive it. I just think that there should be some exclusionary circumstances because each time that you have to relive going through it like when we were asked to write the victim
impact statements again, it was like going
through it all over again.

The night that my sister was killed,
not only was my sister at the place where the
gunmen shot up the entire club and killed
multiple people, but my brother was there. My
other sister was there. My sister-in-law was
there, my aunt was there. It was multiple people
and they walked out together that could have died
at that same moment.

So reliving that, it brought tears to
my eyes and thinking about her two children, and
she was also pregnant at the time, her two
children being left motherless, me being left
sisterless and my brother being left without his
wife. So it's like it was a lot. So reliving
that to write the letter was too much.

I think there should just be some
exclusions and like she said, I think I'm a nurse
also. I've watched people die. I've held
people's hands die. I don't think that if you
kill my sister, my mother, my brother, you don't
deserve to have anyone hold your hand while you die. You can die right in jail and the nurse can hold your hand, and it's the same difference, because you should have considered that when you kill somebody's sister, mother, son, daughter. Sorry.

CHAIR REEVES: May I follow up and just ask a question about that notice for each of you. Do you -- did that communication come -- do you recall if communication requesting your input came from the court or did it come from the U.S. Attorney's Office, because I assume you all had dealt with the victim witness coordinator before trial or before the -- before the conclusion of the first, of the initial case?

But when the person is seeking compassionate release, do you know how you received notice or who was requesting?

MS. SURDIS: So as in my case, I mean my case is probably different than a lot because I had five defendants in our case. One of them was a direct letter from the Bureau of Prisons,
Mr. Warden Scarantino I believe was his name, and he was the one who told us that we had to -- had until Tuesday, the 26th, to respond with the written testimony.

We had not heard other than that. I am registered in the victim notification system, so that I should be getting automatic emails on movement on the case for all the defendants. That was not the case, and then with another one, we did two of the other ones, which one of the appeals was just denied last week. Those all came from the U.S. Attorney General's Office in Rhode Island. So it was two separate methods.

CHAIR REEVES: And that would have been some persons possibly had been convicted on state charges? You said the U.S. Attorneys.

MS. SURDIS: The United -- so the United States Attorney General, because this case happened in Rhode Island, the United States Attorney General's Office in Rhode Island had been the people to prosecute that case. There was also one defendant who went to state trial,
but that was separate. I didn't kind of include that in this, but yes.

So the victim's advocate did reach out to us from the federal level, to tell us about the compassionate release motions for the other two defendants that were the ones I said superfluous, yeah.

CHAIR REEVES: Okay, thank you. And Ms. Mallory?

MS. MALLORY: The prosecutor notified us. We're not -- we're not on the list of notification of when the criminal is moved around. She found us and notified us, and she was the prosecutor on the case. I guess she was just -- she had compassion and she notified us.

CHAIR REEVES: Thank you.

Vice Chair Restrepo: If I can just follow upon the same line of questioning? How can the system be improved in terms of reaching out to victims and what sort of information should be communicated to the victims? Should a compassionate release motion even be considered?
MS. SURDIS: Well, I mean I think that's a tough question to answer, because I feel like every victim's family in violent cases may have a different answer to that. It's multifaceted. You know, I really wanted to be involved in every step of the process, so for me I really wanted to know when somebody was filing.

But you know, for my parents, you know, it was very difficult, you know. Just the other week the one at the state level, he decided he wanted a new trial. It's 23 years later, and now he had to get, you know, file a motion where we had to go to court two weeks ago and see him, where he gets to file an appeal and try to get a new trial.

My mother was pretty much suicidal. She was screaming into the phone. She didn't want to deal with this anymore. This is 23 years of torture for us. So I mean I'll fight til the day they're all gone, or my daughter, who's behind me, will hopefully continue the fight after I'm gone. But you know, I do think that
you should at least be given the option to speak
or be heard.

But like I said, what if I was dead
and no one was there to still fight. Like you
know, how does that, how does that weigh in the
court's opinion if there's no one there to speak
for the victim's family? Did that answer your
question?

VICE CHAIR RESTREPO: It did, it did.

I know that everybody's different, but it sounds
like you'd like more information rather than less
information?

MS. SURDIS: Yes, and I was a little
disheartened at, you know, finding some of the
updates on my own. I have somebody who's a
reporter, and he would call me and say hey, did
you know that so and so did this, and I would say
what?

I had no idea because I wasn't
notified. I wish that I would have been
notified. I just think there's a lot of moving
parts. You guys probably don't have enough
people to act in the victim advocacy roles, you
know, and everything boils down to money.

            But if you had more people that were
victim's advocates that could really, you know,
reach out and perhaps reduce their case load,
that would be maybe one way to make the system
more efficient, at least from the victim's family
standpoint.

            MS. MALLORY:  I don't actually know
the process, so to speak on how it could be
improved. It worked for us. It worked for our
family, but I believe from the prosecutor being
passionate about the situation. So I don't have
any.

            MR. VINEGRAD:  Can I answer a question
not put to me?

            CHAIR REEVES:  Sure Mr. Vinegrad.

            MR. VINEGRAD:  I mean I think the
victim notification proposal makes sense.
There's an argument that it's already required
under 3771, but I have no problem with the
Commission making that clear. But two
suggestions in light of the comments that we've heard. First, have some provision for reasonable advance notice of whatever proceeding is going to take place, so that people are not in the position of doing a Memorial Day scramble like Ms. Surdis was in her case.

And number two, you could have what I'd call an opt-out provision, where victims could choose in advance, you know, at the time of the underlying original case, whether they do or don't want to be notified of future proceedings, because there may be people, unlike perhaps Ms. Surdis, who just don't want to hear about it and don't want to be notified about it and can make the decision that they don't want to have any indication or prompt to have to relive the experience.

So you could have an opt out provision like class action potential plaintiffs do all the time.

CHAIR REEVES: Thank you.

COMMISSIONER HORN BOOM: I have a
question. First thank you to each of our panelists for your submissions. We all appreciate it very much. My question is directed to Ms. Mallory. You're a nurse I understand from the submission, and are you a nurse in a state or federal prison?

MS. MALLORY: No. I'm actually a nurse. I'm a travel nurse actually, but I've worked at multiple different hospitals, and the one hospital where I've actually had the opportunity to interact with prisoners, murderers and violent murderers, I worked at Augusta University Medical Center for six months.

They I guess have the contract for -- I don't know if it's the state or the federal prisoners, because when you walk in, they're patients, they're not prisoners. But you do know and we do find out information about them, and you try not to look it up because it's very difficult when you're on the other side of that, to take of those.

COMMISSIONER HORN BOOM: Okay. I took
it, so that thank you for that explanation. I thought you must be within one of the prison systems, and so I was going to ask you about another proposed amendment that we had concerning, you know, defendants who may be at -- who are at increased risk of suffering a severe medical complication or death, as a result -- oh no, I'm sorry.

My question is about not the outbreak but for those who are suffering from a medical condition that requires long term or special medical care, and without timely and adequate medical care, they might deteriorate even further that the Bureau of Prisons' medical facilities is not providing. So I will -- I can retract my questions, because you might not have anything to add to that.

But I thought that you had worked within a Bureau of Prisons or state sort of prison hospital, and I wanted to get your thoughts on timely and adequate medical care and expansion under that ground.
MS. MALLORY: I do know for the state of Georgia we have the medical prison, but once the care escalates beyond the -- I think it's a 600, 600 correctional facility for medically needed inmates. It's either three to six. It's in Augusta. Anyway, but once they can't care for them, they come to our hospital. Then the regular state prisoners come also.

So once they are not able to be cared for at the medical hospital or the infirmary, I don't know what you guys call it there, they come to the hospital and sometimes they're there for three months, six months and sometimes they wind up in nursing homes. But they come with two guards.

COMMISSIONER HORN BOOM: Okay, and any reflections on, you know, do you feel like that procedure is working for the folks who need that care, or should there be changes to that?

MS. MALLORY: I think it works, but I think the set up is pretty expensive. And I mean not to not be compassionate, but they send two
prison guards and most of the time these
patients, by the time they come to us, aren't
even able to get up out the bed.

COMMISSIONER HORN BOOM: Thank you.

VICE CHAIR MURRAY: Thank you all for
your testimony, and thank you in particular to
Ms. Mallory and Ms. Surdis. I know how hard it
must be for both of you to be here. It's another
revictimization. My question is Ms. Vinegrad
and Ms. Price.

I think both of you spoke about the
sort of explicit exclusion from the grounds for
compassionate release for rehabilitation standing
alone, which is the only sort of explicit
exclusion. I was wondering if either of you
think that there are any implicit or structural
exclusions? Are there -- is there anything that
is, assuming it is grave enough, outside of
bounds?

I'm thinking of like things that would
be grounds for a second or successive habeas
petition; things that could be seen on direct
appeal; things like policy disagreements with mandatory minimums. You can imagine like a situation where a judge sentenced someone as an initial matter, and said gosh, I'm bound by the law to sentence you to 25 years. In fact, I think you should be in prison for three years.

And then that person came back after ten years, and they said well I still -- I hold my same position. I think you will have grounds for compassionate release. Do you think anything is off, is sort of structurally out of bounds?

MS. PRICE: I'm not sure I can speak to structurally out of bounds. But I think one of the ways that your proposal has been characterized is that standing alone, a change in the law is sufficient to warrant consideration for compassionate release. That's not what you said. What you said, or at least what the proposal says is a change in the law that would rendered continued service of the sentence inequitable.

I think the second part of that
carries not structural limitation. I'm not sure I'm going to be able to answer that question; I want to think about it a little bit. But I don't think we've paid enough attention to your inclusion of that limiting principle, that we've had now three years, I think, of judges grappling with this issue of whether or not a change in the law should be considered.

They've mostly come down, I think, on the side as one of a number of circumstances. But I really like the formulation that you propose, that inequitable, while not necessarily having -- I mean I want to think a little bit about how we would, how we would work with that equitable, and we should keep this conversation going.

But I do think that it is a real limiting principle. I know that judges, when they're looking at these cases, are thinking about equity and not just a change in the law. If it was just a change in the law, that's retroactivity and that's not what you're
considering doing. So I think that yeah, I mean I'll stop there. But I want to think a little bit more about your question and maybe come back in our comments about the structural limitations. Thank you.

MR. VINEGRAD: Yeah, a few quick points. I mean I can envision situations where, and I think this is what you may have been getting at, where you know, somebody files a 3582(c) motion, but when you see it and you read it it is in fact a 2255, or it is in fact an appeal of their conviction, or you know, the chair's example before of, you know, wanting to withdraw the plea and that's an extraordinary and compelling reason.

I can see courts creating, you know, a body of law, as courts do every day, saying no, that's not the function of the compassionate release provision. You know, the courts that have upheld reliance upon this factor I think have all made clear that it's part of all of the individual facts and circumstances of the case,
before they can determine whether or not there
are extraordinary and compelling reasons for
release.

    And so I think that, you know, it may
dissipate if not eliminate entirely any potential
tension, structural or otherwise, with other
provisions dealing with non-retroactivity. And
then, you know, as I said before, you've got what
I think the popular word these days is
"guardrails," we used to call limiting
principles.

    But guardrails, you know, such as
3553(a), such as danger to the community, which
frankly would address the situation of the
defendants in Ms. Surdis' case and cases like
those, people with extensive criminal records.
That's exactly what courts have routinely denied
these motions on that ground.

    But at the end of the day, I think
this issue is, you know, special in a sense that
Congress has very clearly on this particular
issue told the Commission you're the ones who are
given the authority and the responsibility to
tell us what does or does not qualify. And so
absent some direct prohibition like the
rehabilitation alone provision, it's within the
Commission's discretion to determine how to
articulate that for courts around the country.

COMMISSIONER WROBLEWSKI: I'd like to
follow -- go ahead, Candice.

COMMISSIONER WONG: Mr. Vinegrad, can
I just follow up on the 2255 discussion. So you
had said just now that you could see courts
holding that compassionate release should not be
a substitute for a 2255 motion. Is that
something that you think the Commission should or
should not clarify, and just more generally, how
do you see the interplay of compassionate release
and 2255, which as you all know have, you know,
is a very carefully crafted scheme in terms of
the procedural mechanisms, time limits, various
limitations that are there?

How do we avoid compassionate release
being an end run around all those limitations?
MR. VINEGRAD: Right, yeah. I mean a couple of points. One, you know, there are probably some easy examples. When I say 2255, you know, the grounds are potentially endless. So just to take an easy one, you know. If it's 2255 based on ineffective assistance of counsel, and that's it, and that's you know, put in the form of a compassionate release motion.

I could see, you know, an area for guidance, where the Commission would say we're not intending 1B1.13 to be a substitute for issues in which there's already legally prescribed avenues for potential relief.

I might take this up further in the comments that we submit by March 14th, because I think, you know, there may be further clarifications that the Commission could provide in the way of commentary by suggesting those go in the policy statement itself, that would give guidance, as you often do, about what you contemplate, by what this provision would allow or what it would not allow.
I think by and large, many of the compassionate release motions that have been granted within circuits that authorize it, aren't granting them intentioned with the kind of structural, I keep using that word, issue that that was identified earlier, the sort of what I call more purely on the grounds of some extraordinary and compelling circumstance developing, you know, later in time that doesn't have some other prescribed remedy, but nevertheless justifies relief.

CHAIR REEVES: Yes, Ms. Price.

MS. PRICE: Thank you. The other thing I think that structurally delineates those two situations is that the statutes are very different. I mean the statute governing 2255 guards finality, right? There are procedural bars that are super-important, and it gets to the question of constitutional legal error.

I'm not a constitutional or a habeas scholar, but it seems that that's a very different thing than 3582(c)(1)(A), which was a
way to carve out an exception to finality, to say that there are extraordinary and compelling reasons when we get to go back and visit something, and Commission, you'll describe what those are and help define those.

So I think, I think that there's a limiting principle just built into the nature and the structure of those two authorities, to revisit sentences, that may be useful to sort of sorting out this question.

COMMISSIONER HORN BOOM: I guess just to follow up on that, but when that change is simply a non-retroactive change in the law, how do you reconcile that with the procedures that are, you know, the clear guardrails and procedures that are outlined under 2255?

MS. PRICE: Again, I'll refer back to the proposal, which is not simply changes in the law, but changes in the law that would render the continued service of the sentence inequity. I think that that's really important and bears, you know, bears maybe a little bit more conversation
and definition. It's not, it's not an illegal sentence. It's not a sentence that's being imposed contrary to the Constitution or to the law.

It's a perfectly legal sentence that was imposed appropriately at the time it was imposed, but for a reason that's intervened, in this case a change in the law as you proposed, that is significant enough that in looking at that individual sentence, in light of all the other factors. But in looking at that sentence, it has rendered the sentence inequitable, that it is unjust to continue to keep this person incarcerated.

I don't know that we can put a lot of simple boxes around that. Judges have been grappling with this for the last few years, and I think examining those reasons, examining their decisions to understand how they have found their way to understanding what is or isn't inequitable. To the extent that they've, that they've articulated inequity as a principle, it
would be probably useful for us to look at.

Thank you.

CHAIR REEVES: Thank you. I'm breaking my own rule right now, because the victim stuff is so very important to the Commissioners and to all the policymakers. So I'm wondering if, if there were a rule that required a court considering a compassionate release motion to make sure they consider or either be required to consider what the victims might have submitted or what the trial court might have relied upon from the victims during the sentencing?

And if a victim, you know, that that -- you start out from that sort of form, that a compassionate release court must at least look at that. And that stays where it is unless, as a default provision, and I think that Mr. Vinegrad sort of mentioned sort of an opt out provision, unless the victim submitted something different from what they or opposite from what they submitted. Then a court has to at least, from a
starting point, consider what was -- what a
victim may have submitted at the time of the
sentencing.

Would that soften? I mean would that
help at all, if there were a rule that required
the judges to do that?

MS. SURDIS: I think, I do think that
would assist. I think that would help, yes. You
know, one of the defendants in the case, you
know, he was ordered by the judge to apologize to
the families at sentencing and he refused. But
then he decided later that he wanted to apologize
20 years later, 23 years later.

Unfortunately, you know, I think that
-- I don't know. I just think that it's just not
fair for us to have to keep going through it, and
if you're, if you're not of the mind set to stay
and abide by the laws when they are created to
not be a public health risk and go out and murder
people, then you should then not be able to
decide 20 years later that you're sorry, or that
you want to file one of these motions because
you're sick of being in prison or you have sleep
apnea or you're tired.

You know, four out of the five in our
case pled guilty. So they pled guilty, but yet
they were still allowed to file a compassionate
release motion years later. So I don't know if
that's something else that should be considered.

CHAIR REEVES: Okay. Ms. Mallory, Ms.
Surdis especially, thank you for your testimony.
Mr. Vinegrad and Ms. Price, thank you for your
testimony and just thank you. We appreciate you
coming forward.

(Pause.)

CHAIR REEVES: Thank you for your
continued. Our sixth panel today will provide us
with perspectives from two of the Commission's
advisory groups. The first panelist is Ms. Jill
Bushaw, who serves as chair of our Probation
Officers Advisory Group. Ms. Bushaw serves as
Deputy Chief United States Probation Officer from
the Northern District of Iowa.

In the Probation Office, she has
previously served as a sentencing guidelines specialist, and as a supervisory and assistant deputy chief overseeing the Presentence Investigations Unit.

The second panelist is Professor Mary Graw Leary, who serves as chair of our Victims Advisory Group. Professor Leary is the senior associate dean for Academic Affairs and a professor of law at the Catholic University of America.

Professor Leary has previously worked in a range of positions in our criminal justice system, including as an assistant United States attorney for the District of Columbia as the Director of the National Center for Prosecution and Child Abuse, and as a director in the National Center for Missing and Exploited Children's Office of Legal Counsel. Ms. Bushaw, we're ready to hear from you. Thank you.

Panel VI: Advisory Group Perspectives

MS. BUSHAW: Thank you, and good afternoon. It is an honor to appear before you
all today on behalf of the Probation Officers
Advisory Group.

You've heard testimony already today
from a variety of perspectives, the legal
perspective, law enforcement, concerned citizens.
Because of our role in the system today, the
probation officer's perspective will largely
focus on applicability issues with regards to
these proposed amendments.

As you are all well aware, the First
Step Act gave 1B1.13 renewed significance. The
first defendant-filed motion that I became aware
of involved a female inmate with terminal breast
cancer that had metastasized in the bone. Her
request for compassionate release to the BOP and
her subsequent appeals were denied.

The basis for the denial was that her
medical illness did not have an end of life
trajectory of 18 months or less. However, 1B1.13
didn't require a specific prognosis of life
expectancy, only that the defendant be suffering
from a terminal illness.
This is a case that prior to the First Step Act wouldn't have even been brought before the court. It is cases such as this that confirm POAG's support for 1B1.13 being amended to authorize defendants to directly file motions for compassionate release. POAG imagines the weight judges feel when deciding what sentence to impose, and how that weight would be compounded when it is a matter of deciding whether or not a sentence should be amended based upon dire health and life circumstances.

Therefore, it is essential that 1B1.13 provide guidance and parameters to assist with that difficult determination, yet empowers and entrusts our courts with the necessary discretion, as they make an individual assessment of each compassionate release motion. POAG believes the amendment under subsection (b)(1)(3) helps achieve this goal by expanding the types of medical issues to conditions that require long term or specialized care.

The current proposed amendments are
issue-driven in light of the events that have occurred over the last several years. POAG commends the Commission for including the language under (b)(1)(d), which captures the heart of the issue presented by ongoing concerns with COVID-19, but is also broad enough to address any similar health crisis in the future.

This amendment will put the Bureau of Prisons in a better position to address any future medical emergencies and to protect those who are in their custody.

With regard to subsection (b)(3) pertaining to family circumstances, POAG also supports that amendment as the proposed changes are comparable to the types of circumstances that already qualify as a factor, and commends that this subsection was expanded to individuals who are similar in kind to that of an immediate family member.

The next amendment at 1B1.13(b)(4) pertaining to a new category that includes inmates who are victims of sexual assault and
physical abuse. The commonality of this new provision with the other compassionate release criteria is that all of them have to do a changed circumstances.

Being a victim of sexual and physical abuse is a changed circumstance. The recent investigation into the BOP's handling of this issue is both incredibly tragic and disappointing. POAG is hopeful that the current circumstances are just a representation of this moment in time, and that the BOP implements the proposed reforms to the extent that there isn't a need for a Chapter 1 of the guidelines to provide for an amended sentence due to sexual and physical abuse by correctional officers.

POAG therefore determines that this issue might be best addressed by the BOP rather than referring to the court. However, POAG also recommended Option 3 pertaining to subsection (b)(6), which would provide the court the discretion to rely on this as a compassionate release factor in cases where they believe it
would be appropriate.

And finally and perhaps most significantly is the impact of the proposed amendment to include changes to the law as a factor under 1B1.13(b)(5). POAG recognizes the changes in the law would be hard to ignore, when the impact of the sentence is known.

At times when reviewing a case that is on supervised release, it serves as a reminder of the significant difference between a sentence that was imposed years ago, compared to the lower sentence that is presently imposed for the same offense, when it appears the only difference between those two is the date on their judgment.

However, POAG believes it is important to the integrity of our system that the already-existing statutory provisions that address changes in the law be the vehicle for addressing those issues, rather than duplicating those types of provisions by including them into the structure of compassionate release. Thank you for your time and for your attention to this
important matter.

CHAIR REEVES: Thank you, thank you.

Professor Leary.

MS. GRAW LEARY: The Victim Advisory Group thanks the Commission for this opportunity
to -- sorry.

CHAIR REEVES: Mic.

MS. GRAW LEARY: I'm a lawyer. I'm
used to speaking loudly. Thank you. The Victim Advisory Group thanks the Commission for this
opportunity to speak regarding the proposed amendments of extraordinary and compelling
relief, and wants to express its real
appreciation for the Commission weighing these
really complex issues at a complex time.

As stated in our written testimony,
our group is a group of professionals from across the country who work with victims survivors in a
variety of capacities, including prosecutors,
advocates and private attorneys. We met several
times to go over these provisions. I must say
that as a group, we reached the conclusion that
when we look at it as a package, we have grave
concerns about the proposed amendment.

Our specific objections are laid out
in our written testimony, but we want to speak
more generally as to the package as a whole. We
also began our -- have a threshold comment that
we acknowledge that some of the goals of the
proposed amendments and what the offenders are
litigating are valid goals. But we simply
conclude that extraordinary and compassionate
release is not the appropriate vehicle through
which they should be achieved.

And as some courts have called it,
this can create what they've referred to as a
discretionary parole system, which is in direct
contradiction to the legal framework of our
sentencing programs, as well as the current
Victims Rights Act.

I would like to first talk a little
bit about the victim experience and then talk
about some of our legal concerns. The previous
witnesses obviously replace anything that this
Committee could say about the victim experience.
But I just wanted to echo some of their points.
What our members tell us is that the victim survivors that they work with go through a period where they have certainty.

They sit in a courtroom, and after being traumatized as victims of crime, traumatized to go through a trial, if they're fortunate enough to have their cases investigated and prosecuted, have a verdict which they may or may not be happy with, finally get a chance at the sentencing to address the court about the impact that this has had on them, leave that courtroom with certainty.

Many of them tell my members, our members, that this is the first tangible, solid thing that has happened to giving them some control over their life in the previous years, whether they're victims, survivors or family members of crime victims. And then years later, they experience the reopening of wounds to discover only that the offender in their case has
been released or, if they're fortunate enough, as you've previously heard, they might get notice of a potential hearing, where they have to go through the excruciating decision of how much energy they have again to reopen those wounds.

Except this time if they do it, they don't do it with the scaffolding of support that's available to them during a current prosecution as victim survivors. This broadening of extraordinary and compelling release provision would put thousands of victim survivors through this experience after the criminal justice system has promised them quite the opposite.

And it's not just the victim survivor experience that matters, but this is in violation of their legal rights, their right to protection, their right to timely notice of court proceedings involving release, their right to be present, to be heard, and most importantly to be treated with fairness and respect for their dignity.

The proposals taken as a whole reintroduce uncertainty, sentencing disparities
and unfairness. Not only does this violate the Criminal Victims Rights Act, but it raises concerns about the Sentencing Reform Act, and in this instance I refer to page three of your sentencing guidelines, where in your own sentencing guidelines the introduction reads "Congress first sought honesty in sentencing.

It sought to avoid the confusion and the implicit deception that arose out of a pre-guideline system. The practice usually resulted in a substantial reduction in sentence, and secondly, Congress sought uniformity in sentencing."

The other legal concerns that we have are laid out in our written, our written comments, but they do involve the very -- the procedural purpose of the First Step Act as it relates to this provision, as well as the very purpose of extraordinary and compelling relief.

But we do propose that at a minimum change, that as a minimum change to the guidelines that the guidelines include a
requirement for a hearing before any offender is released, that require the victim to be present - not require the victim to be the present, allow the victim to be able to present, and if not present, the court make a finding that proceeding with the victim is justified, either because they or counsel received notice and waived their right, or efforts were made to notify the victim and their counsel, and neither could be located.

If the court is not satisfied, the hearing must be postponed and if satisfied, the court must consider a prior victim impact statement and cannot infer absence means acquiesce. I apologize. I didn't see the red light, Your Honor. Thank you.

CHAIR REEVES: That's fine. Thank you for your opening. Open it up for our Commissioners. Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: I really want one of you to jump in first next time. Thank you both for testifying. I really appreciate it. I have one question for each of
you. First for Miss, is it Bushaw? I'm sorry.

        MS. BUSHAW: Yes.

        COMMISSIONER WROBLEWSKI: Okay, thank you again for being here. Could you tell us how different probation offices around the country are involved when a compassionate release motion is filed, in terms of fact-finding? So one of the concerns that the Criminal Law Committee laid out and that we've heard is these motions require fact-finding.

        Whether it's an illness or whether it's a family member. Are probation officers involved in that in some districts, in all districts and so forth, and how is that going? What concerns do you have about that?

        And for Professor Leary, there are currently in many, many states there are parole systems where offenders have an opportunity for release. Are there any best practices in terms of working with victims in those parole states that you could point to again as a model that the Commission might be able to follow? You know
that we've proposed some language about notification and so forth, but I'm curious about that. So those are my questions, thank you.

MS. BUSHAW: Okay. With regard to probation officer involvement at the compassionate release stage, it's actually up to this very little. We ordinarily -- ordinarily the compassionate release motions are between the BOP and the courts, and then oftentimes we wouldn't be aware of the case until it was on the verge of being granted, and then we would have them on supervised release and we would need to be involved at that point in terms of verifying the residence and developing a release plan and what-not.

But in terms of just applying the eligibility criteria, probation largely hasn't been involved in that. However, if the proposed amendment regarding changes in the law is imposed, I envision that that will then mean that probation office would be involved at that stage, because the court would -- and sometimes does ask
if this case was resentenced today, what will be
the impact?

And that isn't easy to do. As you can
imagine, when you look at all the different
changes that we've had over the years, there's
guideline impact, statutory impact. Burglary
used to be a predicate offense. The recency
points under criminal history would need to be
addressed.

There's a lot to figuring out what the
sentence would have been today compared to -- and
you can't even answer that question sometimes,
especially if, you know, the statutory provisions
changed and somebody who was a career offender at
the original sentencing and because the statutory
period has changed, the career offender offense
level changes.

Well, the court may not have addressed
some of the underlying objections because it
didn't matter. So it's just really hard to
figure that out. So at this point, we haven't
been involved very much. But if this has
changed, I envision we'll be involved quite a bit
in the future, trying to determine the impact of
the change to the law.

MS. GRAW LEARY: Thank you for the
question. I can tell you that in our dialogue
with our group, a few of our members coming from
different states, and I can get you the exact
provisions, talked about how in their local
jurisdictions, these proceedings are not allowed
to proceed unless the victim survivor is there or
there is an affirmative filing, as I've indicated
in our proposal, and that's what generated from
our proposal is the state experiences.

Secondly, we talked about not having,
I believe that Your Honor was referencing this,
not an opt in notification decision, but of
course an opt out provision is important. I
would say some of the challenges here, and I
think you alluded to it in the last panel, is not
every victim witness survivor is the same, of
course, and they're not the same throughout all
of these years.
And so that is a real challenge for the notification aspects, and of course it depends what type of crime it is as well. As this Commission well knows, a victim of child sexual abuse material could receive notices at such a voluminous level that those are harmful for victim survivors of even the notice. But what decisions when they're 17 and 18, 19 made for them by their parents not where they are a few years later really depends. So in that notification piece, it's a very complex area.

I would say what are not good practices, if I could give a couple of -- extend my answer a little bit, and that is what you've heard before. The short time frame, the short time frame or many of my colleagues or allied professionals report struggling with a court to even let the victim witness survivor speak or address the court, or when the victim survivor is not there, looking out at a courtroom, seeing a completely assembled one side of the courtroom, which of course the offender has the opportunity
to do.

The overstrapped prosecutors office can't even locate the victim survivor, and the conclusion the court and some colleagues have reported some courts seem to draw is acquiescence from that imbalance, when in fact it couldn't be and often is either self-preservation, as you heard from our previous panel, or an inability notwithstanding all of the reaches of the prosecutor's office to find folks.

VICE CHAIR RESTREPO: I have a question for Officer Bushaw. It's my understanding that in the ordinary course of things, when somebody's released from the Bureau of Prisons to their community to go to a halfway house or a step-down unit, and when somebody's released on compassionate release there is no step down. They go straight home. How does that impact the work of the probation officer assigned to those cases?

MS. BUSHAW: So there would be an option for a halfway house if the court added
that condition as part of the granting compassionate release, but the chances of a halfway house accepting someone with severe medical issues are probably very slim, because they also aren't able to care for those issues.

Sometimes they're put on location monitoring if they have severe medical issues, and so that takes an incredible amount of resources from our officers to maintain their schedules every single day, especially if they have a lot of medical appointments and taking the equipment on or off. But beyond that, it's just another case on our caseload. We don't have a lot of compassionate release cases historically.

Even prior to the First Step Act, I could only remember a few, and we also haven't had several since the First Step Act was signed. So it's pretty limited, but with these changes, that definitely could expand that and then that would impact the workload of our office.

COMMISSIONER HORN BOOM: Are you done?

VICE CHAIR RESTREPO: Yes.
COMMISSIONER HORN BOOM: All right.

Following up on Commissioner Wroblewski's question concerning sort of the probation office's involvement with motions for compassionate release, I was a little bit surprised that, you know, you said so far probation offices have not been significantly involved.

In every compassionate release case that I analyzed where I actually granted it, I worked really closely with the probation office to discern what types of conditions should be placed on those folks after release for a period of supervised release essentially.

But I'd like for you, along those -- along that vein, to comment on, you know, how you do think, not just with the changes in the law proposed amendment, but specifically the family circumstances and the significant medical, which I think is (b)(3), and then the significant medical issues that aren't being adequately or timely provided.
Because you know, as a sitting DJ looking at these motions, under the family circumstances, the first place I will turn is to the probation office and, you know, find a probation officer and say, you know, I'm going to need you to run down who is -- is this person who is like a family member to this defendant truly like a family member for this offender?

Or what kind of relationship did the offender have with, you know, his or her child prior to being incarcerated, such that is this the appropriate caregiver if that, you know, child is now incapacitated? Similarly, I'll turn to the probation office to say what were the medical, you know, what was the medical conditions that offender may have been suffering from while, you know, at the time that they were incarcerated and so on.

And so I guess I'd just like to get your perspective on the probation office's role in that, you know, resources and how you would be able to approach those requests, because I can
assure you, I don't know where else I would turn on those fact-finding questions other than the probation office?

MS. BUSHAW: Yes, and that is our role, and I should clarify. In the few cases that we've seen in the past, the judge reached out to us before granting that compassionate release motion, because we're part of the process of getting it ready, conditions, verifying the residence, verifying what their medical needs are and what-not.

So we are involved in that. But I was just mainly referring to just whether or not it should be granted, yes or no. We haven't weighed in on that level. But yes, that would be something that we would be involved with. If this gets expanded, then we are going to be involved with that even more.

When I read this, it just reminded me of the importance of a thorough investigation at the sentencing stage, and making sure their relationships are thoroughly described, their
medical issues just aren't referenced. They're referenced and verified so the court has that, because it may not seem relevant at the time of sentencing, but it comes more relevant later on, and then the court has a better historical perspective of this defendant, and then they can refer back to that and then just add to that.

So that makes the compassionate release investigation a little bit easier if we've done a really, really good job at the sentencing stage of providing those types of information.

VICE CHAIR MATE: Can I ask a quick follow-up to that question or to her question about kind of the investigation you're doing. I remember in kind of early COVID days, there were some issues I heard from probation about getting the medical records necessary to help with the supervision, and getting that all set up appropriately, and getting those medical records from BOP.

Has that issue been addressed? Like
are you all getting the medical information you
need to assist in the supervision on those cases?

   MS. BUSHAW: I don't know that I have
   enough specific information to know if we're
   getting really good medical information from the
   Bureau of Prisons. But I know that we would give
   it our best effort, and sometimes we have to go
directly to medical facilities. The hard part of
that is the releases and getting in contact with
someone who can sign the release and then get it
back to us in a decent amount of time, and then
we have to send a records request and then wait
for the records to come back before the judge can
proceed.

   So that's a hurdle at the
compassionate release stage, and it's also a
hurdle at the sentencing stage. It's just really
getting those records and they matter. They, you
know, up to that point it's a self-reported
diagnosis, and sometimes what you see in the
medical records is a little different than what
they've indicated their medical issues are, so it
really matters. But it's just a -- it's a slow process.

COMMISSIONER WONG: Can I follow up on that? When you just said that verifying medical needs is something that probation officers assist with. What does that -- what does entail and how complicated is that in practice? Can you give us just like a practical window into that? There's a reported diagnosis. You obtain records. Do you sort of opine or recommend to the judge that you have confirmed that the characterization is accurate or what's that verification entail?

MS. BUSHAW: It's fairly straightforward. It's a matter of releasing, getting the records. But you know, sometimes the records are hundreds of pages and medical terminology that isn't always easy to interpret. But we would just probably share the actual records with the court.

If we were approached by our district court judge to say I have this motion pending; I need more research, I need more records. That
would fall on us, and we would take care of requesting those, unless it was a matter that the district court required the defense or the government to obtain and submit those as part of a court record.

But otherwise, it's just a matter of getting the release signed and submitting the records request to the medical facility.

CHAIR REEVES: Any further questions of this panel? Great.

VICE CHAIR MURRAY: Question for Ms. Leary, Professor Leary. We heard a request from the last panel to sort of carve out certain violent offenders from compassionate release eligibility, and I wonder if that, in your view and from what you've heard from your members, if that was more salient with respect to some of the proposed reasons for compassionate release than others?

I'm thinking that there's several harms that a victim experiences. One is the, is just the fact of having to live through the whole
thing again with you through the process of
compassionate release motion. But another is,
and that would probably pertain equally to all
the factors.

But another is fear of the perpetrator
going out and perhaps reoffending, and that
would maybe pertain more to some, some factors
than others, probably the terminally ill or
medically released, or elderly offender would be
less salient. So I wonder if you had any
thoughts on that.

MS. GRAW LEARY: Sure. I think our
thoughts are on the way that this would, the
provision was originally written prior to the
amendment doesn't raise a lot of those concerns,
because it was so narrow and it was extraordinary
and compelling, and it does reflect the
legislative history which talks about terminal
illness, etcetera.

So in those instances, you're exactly
right. A victim of violent crime is not only
less concerned about personal safety when we're
talking about some extreme circumstances, but
also it's going to be much more rare, it's going
to be extraordinary that this would happen. With
these amendments and so with the broadening of
some of that medical language, that is not the
case anymore, right?

It is not -- it is both broadened in
number and broadened in what will qualify and
trigger. And as was eloquently said by the
previous panel, these are motions that are made
with people with very lengthy sentences two,
three years in. Their victim survivors are not
anticipating any of this at all.

With regard to personal safety, one
additional point if I may is just to say a lot of
times or I should say my colleagues report
several victim survivors who have been the
victims of violent crime really just focusing on
personal safety at that point, because in their
mind they just have to move, right?

That's their primary goal, not to
participate in a hearing or anything like that,
because they didn't see this coming at all, and
they've got very limited bandwidth and that's
their priority.

CHAIR REEVES: I hear no more
questions from the Commissioners. We will take
a brief recess, right, at this point for about 15
minutes. So please be returned to your seats.
Thank you Professor Leary, thank you Ms. Bushaw
for your testimony.

(Whereupon at 2:35 p.m., the above-
titled matter went off the record and resumed
at 2:50 p.m.)

CHAIR REEVES: We have a special guest
back there. We want to make sure that that
person is all settled down and happy. All right.
Our seventh group of panelists will provide us
with a perspective of formerly incarcerated
individuals. Our first panelist is Dwayne White.
Mr. White was previously sentenced to 25 years in
federal prison as part of false stash house
prosecutions in Illinois.

Mr. White served more than 11 years in
prison, until he was granted compassionate release in 2011, with the court citing the "injustice and unfairness" of his "prosecution and resultant sentence." Mr. White currently lives in Zion, Illinois raising his daughter, Deara, working at a medical supply company and participating in a local gun violence prevention initiative.

Our second panelist is Derrell Gaulden. Mr. Gaulden was previously sentenced to a term of over 30 years in prison, which included stacked five year terms for a Section 924(c) firearms offense. After serving 23 years of his sentence, Mr. Gaulden was granted compassionate release with the court citing the "remarkable rehabilitation" and the Bureau of Prison's failure to effectively treat his serious medical conditions.

Since his release, Mr. Gaulden has gotten married and launched his own trucking company, trucking business.

Our third panelist is Adam Clausen.
Mr. Clausen was previously sentenced to a term of over 200 years in federal prison. After serving more than 20 years of that term, a judge granted Mr. Clausen's motion for a compassionate release, citing a "remarkable record of rehabilitation" and an off the chart sentence, as described by the judge.

Since his release, Mr. Clausen has gotten married, become a father and served as an advocate for criminal justice and corrections reform. Our fourth panelist is Ms. Gwen Levi, Levy, excuse me. Levi, I'm sorry, I'm sorry. Levi like the jeans.

Ms. Levi was previously sentenced to a term of over 30 years in federal prison. Her term was shortened thanks to a Sentencing Commission amendment. Later, after serving more than ten years in prison, Ms. Levi was granted compassionate release with the court citing her age and medical conditions. Today, she serves as an advocate for criminal justice reform and on behalf of incarcerated people.
Our fifth panelist is Mr. Brant Brim. Mr. Brim was sentenced to life in federal prison, in part due to prior drug convictions used to enhance his statutory maximum penalties. After serving more than 25 years in prison, a court granted Mr. Brim's motion for compassionate release with a motion citing his rehabilitation, the need to care for his elderly mother and the changes in law reflected in the First Step Act.

Today, Mr. Brim cares for his mother, spends time with his children and grandchildren, and works to reduce community violence in South Los Angeles. We will first hear from Mr. White, then from Mr. Gaulden, then Mr. Clausen, then Ms. Levi and finally from Mr. Brim. Mr. White, we're ready to hear from you sir.

Panel VII: Formerly Incarcerated Individuals

MR. WHITE: Thank you for this incredible opportunity to speak to you about compassionate release.

Thank you for this incredible opportunity to speak to about compassionate
release. My name is Dwayne White. I am 35 years old and I live in a suburb north of Chicago, Illinois. I work night shift from 5:00 p.m. to 5:00 a.m., four nights weekly at a medical supply company. When I'm not working, my favorite activity is loving by my family.

At 22 years old, I was sentenced to a 25 year mandatory minimum, due to federal law enforcement's fake stash house sting operation. Two weeks after my arrest, I learned that my then-girlfriend was expecting. My 12 year-old daughter Deara is my guiding light and has transformed my life.

I remember landing in Chicago after my release and going to baggage claim, where my family would be waiting to meet me. I gave my daughter Deara the biggest hug. It was the first time I had ever seen or hugged her in the real world. For 11-1/2 years of her life, all of our visits had been behind bars.

Compassionate release changed my life in every way. It's hard to even put into words.
I believe our justice system was built on mercy, and every person is a person with hopes and dreams, even the people behind bars. I believe courts should take mercy on people when there are changed circumstances. Second chances should not be frowned upon.

My changes was best seen when I was outside. It's impossible to show how much you've changed in prison while still in prison, and people can dramatically change while inside. I also used my freedom to help others. I work for the Gun Violence Prevention Program to teach young people how to value their life and freedom, and my ability to change is clear, and everyone deserves a chance to show you how they've fixed their life.

Since my release, I've had the chance to focus on my life and what's important to me, and family has always been at the top of that list. My mom always instilled in us the importance of strong family ties and respecting and loving each other. I love to get food and
try new restaurants with Deara, as well as watching her cheerlead at basketball games weekly.

I communicate with my brothers and sisters every day. It's important to me because family is all that you have. I find it incredibly spiritually and personally fulfilling to maintain such strong family ties. Christmas of 2021 was a perfect example of my newfound happiness. My older brother and I were both incarcerated at the beginning of that year. Neither of us was supposed to see that Christmas.

We both won our appeals and the two of us getting out of prison meant all of my brothers and sisters could be under the same roof in my mom's house. We were completely happy and had an amazing time. Do I think I'm a productive member of society? Yes, I do. I work at a medical supply company. My mother has a rare condition that sometimes happens to long-term diabetics.

One night recently she was in a lot of pain and the strongest woman I have ever met told
me she couldn't take it anymore. Thankfully, I was there to call the ambulance. We had no idea what was going on until the hospital visit, and the nurse told me the products used on my mom came straight from my warehouse. I was grateful and it was a full circle moment.

Compassionate release offers so many opportunities. I'm proud of the progress I made while inside for my future. It's not easy to change while in prison, but I did, and so have many others. I maintained a relationship with my daughter. I wrote books. I also had a lot of time to think about my future and goals. I'm also going to classes for my commercial driver's license.

Change brings unforeseen and amazing opportunities. Building back my career and my family and my life is my focus. I so appreciate the opportunity that I've been given to do so. Compassionate release changes the lives of many. Compassionate release is not just about releasing prisoners; it's about judges having the ability
to answer prayers of little girls and boys who
want their parents released.

    It's about judges having the ability
to answer the prayers of parents who have
incarcerated children. I believe the lack of
parental structure and guidance is definitely the
leading cause of young children being led astray
and following the wrong path. This leads to a
dark cycle of souls trapped in the system.

While at the Gun Violence Prevention
Program, I work to inspire the youth who come
from where I do, by showing them how life on the
streets is not the way. My story of change is a
huge inspiration to those who have brothers and
sisters still on the inside or facing the
streets, and I sincerely hope that more lives can
be changed through judges granting compassionate
release.

    Please know that not only can people
change, but the system should take mercy on them
when they have changed due to extreme
circumstances. Thank you very much.
CHAIR REEVES: Thank you, Mr. White.

Mr. Gaulden.

MR. GAULDEN: Good afternoon.

CHAIR REEVES: Make sure your green light is on.

MR. GAULDEN: Good afternoon.

CHAIR REEVES: There you go.

MR. GAULDEN: All right. My name is Derrell Gaulden. I was granted compassionate release July 19th of 2022, me and my twin brother, by a Chief Judge Jay Randal of the Southern District of Georgia. I'd like to thank him and thank the United States Sentencing Commission for the opportunity to speak today.

I was young, my father was in the military. We got to do a lot of moving around, and when he got out of the military we came back to south Georgia, right, in 1987. That's right about the time of the crack epidemic that landed me and my twin brother in a spot where we could make a lot of money real fast, and that's what we decided to do.
In 1998, my brother and I were indicted by the federal government. We decided we were not going to do any testifying, so that got me and him both 30 plus years. It put my mom in bad health and it sent me and him both to different prisons, because identical twins can't be in the same prison. So I got to spend the first 26 years of my life every day with him, and then for 23 years I didn't get to see him.

My lawyer and Mr. Judge Randal Hall got both of us released the same day on compassionate release. As I wrote to my lawyer one time before, I've been dedicated to change since the beginning of my sentence. It's not, it wasn't towards when they were saying compassionate release or the CARES Act.

I wanted to change that first week that I got sent to a penitentiary and it's like wow, this is not where I'm supposed to be. So that's what I did. Every college course I could take, I jumped on it. The drug class, they said you've got to -- you're volunteering, but you
don't do drugs and to send your PSI. I wanted to know different things and I said that it's not just smoking the drugs, it's selling drugs is an addiction. I did that in '99, and every college course they came up with, I wanted to take.

I did that. I wrote my brother just about once a month or so to keep, make sure he was on the right page, okay. My father died from seizure complications when he was 44. I have seizures real bad too, and it happened right at 44. I wasn't getting the medical attention and they was just loaded me up on medications. I was in a coma for over a month, and I got back out, couldn't even walk. I was in a wheelchair for months, and I bounced back from that and like I said, I didn't let that hold me down. I kept on going.

Every legal thing that was coming up, the 18 to 1, I was denied that. So I was still sentencing at 100 to 1. Compassionate release came out, my lawyer put it in and they granted us both compassionate release. I was thankful not
to die in prison behind the seizures and being stuck in a cell where if you have one, it's nobody in there to keep you from choking on your tongue.

My brother, he has seizures but he also has sarcoids or something like that, okay. I got out. My probation officer gave me all kind of instructions of hey go to this clinic right here. I'm not on blood pressure, heart meds or anything. I take less seizure meds now, and that gives me the complications behind taking the seizure meds. I don't even have those most of the time now because they reduced it.

I've only had one seizure since I've been out. Me and my wife, I've gotten married, we started a business. We're signed up for Savannah Tech for a CDL class. I think we start March the 27th. Everything's positive, going in the right direction. It was because of compassionate release.

I've been rehabilitated way before this. I've left a lot of friends that took
college courses with me, helped me with learning accounting and so many different things, and they've exhausted all their remedies in the courts. I think that compassionate release will be able to help them too. Thank you.

CHAIR REEVES: Thank you. Mr. Clausen.

MR. CLAUSEN: Commissioners, good afternoon. I appreciate the opportunity to be able to hear, to be able to speak with each of you today, to offer a different perspective, because I've been listening in on the hearings all day, and initially what I intended to talk about has changed a little bit.

I want you to remember two things when you think back and recall my five minute testimony. I want you to look at me and see the face of exactly what everyone who has come before in opposition of compassionate release, of expanding it, of making sure that someone like me has the opportunity to be here today.

I'm a repeat violent offender. I was
sentenced to over 200 years in prison. There was
no reason for me to hold on to any shred of hope. 
What you hear over there, that's my son. That's
the potential. He would not be here if I were
not here today, if people did not believe in me
and grant me the opportunity to be here.

Now what it took for me to be here
today, that list of extraordinary and compelling
achievements, in addition to a change in the law,
that 924(c) law which everyone agrees was unjust,
it was not made retroactive. Therefore, I had no
opportunity for recourse in the courts.
Compassionate release gave me that vehicle, gave
me that means.

The list of extraordinary and
compelling achievements, I don't think you can
comprehend the challenges, the adversity that
each of us up here had to endure and overcome
simply living through those circumstances. The
state of incarceration in this country is not
meant to rehabilitate. What we accomplished is
truly extraordinary. What I am asking the
Commission to please, to please do is to set a standard, to set a high standard for those on the inside to aspire to, that will instill hope where there is currently little more than despair.

Likewise, by setting that same standard, you send a clear message to the judiciary to give them the confidence to rule in a case like mine where to be honest, few judges in this country would take a chance on someone like me. To look at my criminal record, that would be the immediate disqualification, regardless of what I accomplished on the inside, the number of lives that I was able to positively impact.

It took great courage on the course of my judge, Judge Gerald Pappert, to grant my compassionate release. It also took great compassion by Assistant U.S. Attorney Bob Zalzmer (phonetic), to not only not oppose that release, that sentence, but to make the statement that he would not appeal, that the government would not appeal my sentence.
What that did was it allowed my sentence unfettered discretion, which the reality is that very, very rarely happens with judges today. Their rulings are left open to scrutiny, as we've seen with so many compassionate release cases. So I'm asking you, Commissioners, to please set that standard, to have that courage to do the difficult thing, where the easy course would have been to deny my motion, where the easy course would be to set those restrictions and limitations that limit the number of individuals who are able to receive relief.

I would not be here without the relentless pursuit of justice by my attorney, Shon Hopwood, who because of his lived experience is an advocate like no other. I am forever grateful to have people like him who believe in me, who built the relationships necessary with the U.S. Attorney's Office and with the judiciary, that allowed me to be here today.

The second thing I want you to remember is the face of my young son, because he
represents the potential that resides all across this country in our prisons. Given the opportunity, they too can do incredible things on this side. Thank you.

CHAIR REEVES: Thank you, Mr. Clausen.

Ms. Levi.

MS. LEVI: First of all, I want to thank you for this opportunity to come before you. I was sentenced originally to 400 months. Okay. I was sentenced originally to 400 months, and I knew at that time that I would have to make some drastic changes in my life, in my mind, in my mind set.

I began to, as many of us did, take all the classes, all the programs, do all the things that I could do to try to make sure that I would, if given an opportunity because I felt that I would get an opportunity to come home, that I would not die in prison. So therefore I started doing all the things that I could to so-called rehabilitate myself.

But it wasn't so much to rehabilitate
myself, as to transform my mind set, to transform my heart, and I believe I did that. I started working with programs dealing with seniors organizations, met with the American Disabilities Unit, got wheelchair ramps and this put in places that there weren't none, and doing all the things that I thought I should be doing.

    Each time I tried to, one of the laws or one of the amendments that you all made I applied for. Denied, denied, denied. In 2016 and 2015, my daughter died of lung cancer. Three months later, I was diagnosed with lung cancer. Six months later, I was classified as Stage 3 and possible terminal.

    I was transferred from out of a state prison where I had been sent in a transfer agreement with the Federal Bureau of Prisons and the Department of Corrections of Maryland. After nine years of being there, close home to my family, got sent to Carswell, Texas to a federal medical facility, and witnessed compassionate release in reality.
Nine days after I was there, three women had a memorial service. Two had received compassionate release and the Federal Bureau of Prisons had not let them out. One was waiting for compassionate release and passed, and all three passed away.

I went back up to my room and I said Lord, you can have compassionate release. I don't want to die. I don't want to be terminal. I don't want to die, I don't want to go home to my momma, who was still living. I don't want to go home to my momma. Please, please, I will find another way. I will stay here until you show me another way. I do not want to go home on compassionate release and die on my momma.

Three months later, I got my prognosis, cancer-free and I began another search, another commitment to do all the things I could do, to make sure that I would be a useful person inside if I didn't get out. But I knew inside some way there was going to be a way for me to get out.
And fortunately, the First Step Act came into play. It reduced my 400 month sentence to 292 months. A year and a half later, after getting that reduction, I put in for the CARES Act and was granted the CARES Act in June 2020. Because of my behavior inside and my capacity to maybe get sick from COVID and the support of my warden, I was granted that CARES Act.

But guess what? My warden recommended it, but it was turned down. I ended up writing my warden and saying please, please, I'll never forget it. You have been granted by the Justice Department discretion to select people who in your facility that you think could be useful citizens, could be rehabilitated and go back into society and be useful.

Please, use that discretion and send me home to my momma. Nine days later, my compassionate release, I'm sorry, my CARES Act denial was reassessed and I was sent home under the CARES Act. Going home, I didn't have computer literacy, I didn't have computer skills.
I knew once I got home, I got sent from the halfway house, the very next day I was put on home confinement.

No programming, no except for the programming that I was fortunate to have done while I was inside. Because of COVID, I couldn't go back to the halfway house. I was left to my own to figure out how to navigate the telephone. I couldn't put any job applications because everywhere I went they said you had to do it online. So I asked could I come back over to the halfway house to take some computer classes, which they had about 100 computers sitting in there.

No, sorry, can't come back. I said what do you mean? Fortunately, I had some organizations that I had learned about while I was inside. FAMM was one of them. Maryland Justice Project is another one. They were local organizations, national organizations that I had begun to like talk to and lobby with and work with when I got out on that compassionate
release.

One of them decided we're going to start a free computer class. I went to that class, a free computer training class. They, I got permission from my parole officer, I got permission from the halfway house, started the classes. First Saturday, second Saturday, third Saturday they decided to call me and for four hours they couldn't get me because I turned my phone off.

I'm in class. We can't have on our phone on in class. They started calling me at eleven o'clock and at one o'clock I got out of class, and from one o'clock to three o'clock I saw the messages as soon as I got out and I started calling them. I didn't reach them until three o'clock, and at three o'clock I was told that I had been -- was being remanded back to the halfway house. I was to call them, it was a Saturday evening. I was to call them every two hours until they told me to come in.

So Saturday night, ten o'clock, I
called. That was going to be my last call for
the night. I told them, I said okay, I'll talk
to you in the morning. She says no, you're going
to call me at twelve o'clock and two o'clock in
the morning, 2:00 a.m. and 4:00 a.m., which I
did. My son, when I told him that, he drove from
Virginia and came and slept at the bottom of my
bed to make sure that I made those calls.

But to no avail. Monday morning I was
told that later on that day, at 2:29, to report
to the halfway house and pack a bag. My mom
wasn't home, I hadn't told her about what was
going on because I didn't want to worry here,
because I figured that okay, Monday morning it
will be straightened out. But guess what? It
wasn't. I got remanded back to prison. I got
sent from Baltimore to D.C. Jail to await the
marshals to pick me back up.

I had been deemed an escapee, because
for four hours -- even after they got the
information, even after they saw the pictures of
me being in class, I still was violated and sent
back. It wasn't until organizations like FAMM and those organizations that I said that I had been volunteering with and had been helping other people, it wasn't until those organizations, my family, my sons, my mother made a public outcry about what was happening to me, that my judge looked at that and realized that after what they told them what I was doing and what was going on.

She looked at it and said she had discretion, and she looked and said yes, Ms. Levi doesn't deserve to go back and be in prison until she's 93 years old and granted me compassionate release, and that's why I'm here.

I want to make sure that you all understand that there are going to be some extenuating circumstances that don't go into the law, don't go -- and there's going to have to be judges who can use their discretion to look into these situations like mine that was not a clear violation, but I was sent back.

There are judges that had that compassion and all I'm saying is please, with
this amendment, allow those judges to be able to use that discretion, so that people like me can come back home and not be threatened and sent back to prison. Most of us come home, we're getting jobs, we're opening families. Yet things that we're doing positive, the amount of people who came home under the CARES Act, the recidivism rate is I think zero point something percent.

Please allow the judges to use that compassionate release to give them that ounce of freedom that they can deserve. I would say --

CHAIR REEVES: Thank you. Ms. Levi, I'm so sorry.

MS. LEVI: I've got to say this.

CHAIR REEVES: I'm so sorry.

MS. LEVI: I got released from my probation yesterday on my way here. I got to tell you this.

CHAIR REEVES: Thank you. I'm so sorry.

MS. LEVI: It's okay.

CHAIR REEVES: We want to hear from
Mr. Brim too.

MS. LEVI: I know.

CHAIR REEVES: And we want to be able
to ask you all questions, so but thank you.
Thank you so much. Mr. Brim.

MR. BRIM: Thank you, thank you.
Thank you for taking the time to hear from me
today. My name is Bryant Brim. I served 26
years of a life sentence for a non-violent drug
offense.

I was granted compassionate release
almost exactly two years ago today. When I went
into custody, I tried to focus, stay positive,
stay out of trouble, stay hard, work hard and did
everything that was asked of me. I kept
believing that some day I would get a chance to
go back to my family.

My family is what I want to talk about
today. When you go into custody, your family
does the time with you. My wife Sheila Hyde Brim
(phonic) has taken care of our children by
herself. She moved family, she moved our family
forward. My six kids grew up, graduated, started
ew jobs and their own families. All of my
children and grandchildren didn't abandon me.

We exchanged letters and they came to
visit. I took life skill courses to help me
better myself, a better father and a grandfather.
My family is everything to me and they continue
to give me hope. My family is also part of why I
was released. While inside, my mother Ruth Brim,
who I call mommy, got sickened. She had a heart
disease and started having strokes and seizures
that left her partially blind and partially
paralyzed.

My brother E tried to take care of
her, but he is a serious alcoholic and oftentimes
left my mom alone for hours, even days at a time.
You can't imagine how scared I was in prison when
I called my mother and the phone would just ring
and ring and ring. For nearly nine years, I was
separated in prison knowing she was sick and
alone at home, and I couldn't care for her unless
I was released.
Now that I am out, my family is my life. My being out of prison have meant all the difference to mommy. She is a different person. Every morning now I get up and head over to her house. I bring her breakfast each morning. I even switched her over to decaffeinated coffee, because it's better for her heart. But don't tell her.

CHAIR REEVES: She can hear you.

MR. BRIM: We sit and talk and she tell me stories about my dad and about the old days in the neighborhood. A lot of days she has appointments and I drive her wherever she need to go. On our way home, I always take her out to eat as a special lunch. We drive around the neighborhood and she tells me about the things that have changed. She spent so much time in the house, but she really enjoy these drives.

My mother's doctor tells me she really turned around since I'm out. Before, she wasn't always taking her medication. Now I make sure she take everything consistently. Before, she
wasn't staying hydrated, but I sit with her and make sure she sips on water. Before when my brother was around, he would bring her Kentucky Fried Chicken to eat, because that's what she said, she said she wanted.

But now I make sure she eat healthier. I even set up systems for my friends and family in the neighborhood to make sure I have a backup in case I am caught up at work or other things in an emergency. It feel good to know she is on the right, stable path. One of mommy doctors, Dr. Tyeesha Jones, give me a big hug the other day, thanking me for what I have done to turn her around.

You can see from the pictures I submitted with my written statement, it's like she's a whole new person. I'm not saying this because I think I deserve praise for what I've done for my mom. Mommy gave me everything and now I get to give her this.

I'm saying this because compassionate release didn't just change my life, it changed
hers too. My brother E, who was my mother's caretaker while I was in prison, now he is in prison. If I hadn't been released, I really don't know what would have happened to my mom.

Now that I'm out, I also get to be part of my children and grandchildren's life too. My daughter calls and says there's an event at the elementary school or my granddaughter is having a volleyball game and I am there. I try my best to show up every time I'm invited. Of course, I am doing other things too. I am working. I am attending therapy to try to work on myself. I volunteer and giving back to my community, and I try to stay up on what's going on in the law and help others who are left behind.

That's why I am so grateful to be able to talk to you today. At the age of 35, the justice system was ready to lock me up and throw away the key. I am so grateful for compassionate release, and I am grateful that I have time, that the time came before the judge who allowed to
consider everything about me, he considered the
way the law looks different now on life sentence
for drug offense, and considered the fact that my
mom needed a caretaker.

I had worked hard in prison to make
myself a better person, and I want to end this by
saying I believe that compassionate release
shouldn't be for only an ill prisoner to have up
to 18 months to live, and I feel that's a burden
on his family. You're coming out and you've got
six months. They only let you out at 18 months.
I ain't never seen nobody get out that have 18
months to live. Six months, 30 days, 90 days.
That's a burden.

Well, we can be a person like me and
be helpful. I'm helpful to my community. I work
with LAPD, the Watts Task Force. That's it,
yeah.

CHAIR REEVES: Thank you, Mr. Brim.
Thank you all, gentlemen and Ms. Levi. Any
questions from any Commissioners?
VICE CHAIR RESTREPO: I want to
congratulate all of you on what you've
accomplished since you were released from
custody. It's very impressive. I have two
questions for Mr. Clausen. Mr. Clausen, during
your testimony now, you referenced a standard we
should set that will inspire people. Could you
tell me what that, what you meant by the
standard, what it would look like?

The other question I have for you with
respect to victims. There were clearly victims
in your case. One of the victims was beaten, I
think pistol whipped. How does that factor into
the compassionate release equation, and how
should judges consider the impact these crimes
has on victims, particularly victims of violent
crime?

MR. CLAUSEN: A very good question,
and I'd like to begin by me answering the second
aspect first. Victims of crimes, I make very
clear I have deep regrets for all of the crimes
that I committed, for all of the persons harmed,
and it weighed heavy on me daily throughout the
course of my incarceration.

It was always a matter of have I done enough time to serve the interests of justice, and have I done enough to give back, to balance out the scales of what I had taken from others. Believe me, that weighed heavy and at some point I felt after 20 years, that hopefully those scales had at least been balanced, that I had given back. I had positively impacted more lives than I had harmed, and I would hope that 20 years was sufficient to serve the interests of justice for those persons who were harmed.

I do want to add that I believe most professionals within the U.S. criminal justice system at this point have become desensitized to the amount of time that we give out. You've heard the terms served, the terms that were given to each of us up here. Those sentences are extreme, and it's -- if you have never served one day in prison, you do not know what it means to endure those hardships.

So for those accomplishments that each
of us had on the inside, simply programming goes
gainst social norms, to have the encourage to do
that, to try and improve yourself under those
conditions. I would hope that the Commission
could set a standard, as I said, where
programming, where the significance of
participating in the few programs that do exist,
that you recognize the significance of such,
because it's not easy. It's not easy to do those
things on the inside.

And as far as a standard, that it be
just clear enough so that we have a guidepost.
Those of us on the inside, especially individuals
who are serving 924(c) sentences, where there's
little to no hope. By creating a mechanism that
instills hope, you can change the culture of the
entire prison system.

Let me just be clear. By creating
this mechanism, having that shred of hope changes
everything. I was one of the few that believed I
would at some point get a second chance, that I
had people, family that believed in me. That
allowed me to hold on to hope. I watched many others who are not that fortunate.

So I ask that that standard be set, that it not be the accomplishments that I had because that would be unrealistic. I had to do things that had never been done before, never in Bureau of Prisons history. That's not a standard others can live up to. So that it be realistic, and that judges have the discretion to credit, to give credit where that credit is due, where the scales have been balanced, where it is truly equitable and just.

VICE CHAIR RESTREPO: Thank you.

CHAIR REEVES: Vice Chair Mate.

VICE CHAIR MATE: I want to echo the congratulations to all of you. I really appreciate you taking the time to travel here and share your experiences with us and submitting your written testimonies. All been very helpful and we really appreciate it.

I think every one of you, maybe I missed one, mentioned programming in -- oh,
sorry. Mentioned programming in prison as being helpful. I'm also wondering, are there certain things since you have left prison that have helped you succeed, because every one of you has been successful since leaving prison, succeed in the community? That can go to any one of you if there's anyone who wants to start on that.

MS. LEVI: For me, family first of course. I have four sons and my mom's 95 and she's active and engaging and strong, just she's awesome. But not just family but community. If I didn't have the community support when I came home, I wouldn't have known how to navigate the new Baltimore.

I wouldn't have known the good places to go. I might have, I might have reverted back to the old places that I knew, but I didn't even have to because I -- the organizations, those non-profit organizations, those mayoral programs, those reentry programs, they work.

We need more of them; of course we need more of them. But the few that were there,
I was able to take advantage of and like I said,
I got my computer skills. I still don't know how

to navigate that phone too well but, you know,
I'm learning.

But it was organizations. It was not
the Federal Bureau of Prisons that did reentry.

It was organizations that I went to, University
of Maryland, organizations that I went to get
training, to get learning, to learn how to become
an advocate. I now go down to Annapolis,
Maryland and lobby for bills.

We've got -- oh man. The last two
years we've done some remarkable things in
Maryland. I lobbied all last year for voters
rights for formerly incarcerated, men and women.

Me and a couple of other ladies traveled all
around the state with my probation officer's
permission, and we registered 1,100 formerly
incarcerated people to vote, you know.

There are opportunities and those
opportunities have to be put in place. So I'm
hoping that after you finish with the
compassionate release, jump on reentry and do some stuff there.

(Laughter.)

MR. CLAUSEN: I would just add to that --

MS. LEVI: Put programs out there for us.

MR. CLAUSEN: I think you have a panel here of individuals who would all volunteer to help, especially with the Bureau of Prisons, in making a more robust offering, because clearly you can see from our experiences what worked for us could work for others, and I would love that opportunity to work with the Bureau to help develop that.

MR. BRIM: And I'd like to add something on that. Like in my situation, I had a life sentence with no possibility of parole, no good time. But I took programs consistently in prison to better myself because with my family I believed that I was coming home, with all my motions getting denied, motion after motion, and
my mom got real sick and compassionate release
would help me get out.

But the programs like she said, Ms. Gwen, we get programs like to better ourselves,
prepare ourselves for the streets is the only street for other programs, not the BOP. But I took every program. If you check my record, two-three times, and didn't get no good times and wasn't getting no -- I couldn't get no release because I didn't have no release date. So that's all I wanted to say on that.

COMMISSIONER HORN BOOM: I just want to say thanks to each and every one of you. I have such deep respect for your rehabilitation efforts, both within the Bureau of Prisons and what you're doing for your communities and your families upon release.

You know, one of the defining themes it seems in each of your submissions to the Commission is that you immediately had hope and decided in your own mind that you, you know, were some day going to emerge from the Bureau of
Prisons' custody and be free.

I guess my question is, you know, what do you attribute that hope to and are there additional programs or resources within the Bureau of Prisons that could be strengthened to give others that kind of hope? I mean in addition to some of the things that we're considering. So if there's anyone who hasn't addressed a question, maybe Mr. White, you could start, and then if anyone else wants to chime in.

MR. WHITE: One of the programs that I feel really helped me, that I feel would benefit more people if it would be strengthened was the Men of Influence Program.

For the first three and a half years of my prison sentence, I was incarcerated in USP Leavenworth in Kansas. There is a program there called Men of Influence. I went to six other penitentiaries after USP Leavenworth and neither one of those prisons had the Men of Influence Program.

And what the Men of Influence Program
is a program of incarcerated individuals, of course, who have all done time, and in my case each one of those men had been incarcerated for pretty much longer than I had been alive. They helped change my mind set. I wanted to change a lot of things, but I didn't know better so I didn't know how to think better.

The Men of Influence Program really helped me. So if you could strengthen that and get that into more prisons, I'm 100 percent positive it will benefit more people just like did me.

COMMISSIONER HORN BOOM: Thank you. Anyone else?

COMMISSIONER WROBLEWSKI: I know we're out of time, but I just want to, in addition to thanking all of you for being here and for having the courage to tell your stories, I just want to also thank the families who have been supporting you all of those years and have kept you going through all of this, and here supporting you. We see you too, and we really appreciate you being
here.

CHAIR REEVES: Thank you for your extraordinary courage, your extraordinary optimism. Don't know how anyone could be facing a 200 year sentence, knowing that they would die if they were to complete it, could have any hope or optimism. You all are an extraordinary group of people. Thank you so much for sharing your stories, and we'll take it under consideration along with all that we have heard today. Thank you so very much.

VOICES: Thank you.

(Applause.)

(Pause.)

CHAIR REEVES: We are now preparing for our final panel today, our eighth panel. I thank you all for staying with us and I'm sure this testimony too will be very beneficial to us. This eighth panel will provide us with an array of academic perspectives.

Our first panelist is Professor Erica Zunkel, who serves as a clinical Professor of Law
at the University of Chicago Law School. In her work, as associate director of the School's Federal Criminal Justice Clinic, Professor Zunkel supervises students representing people charged with federal offenses and incarcerated people seeking compassionate release and clemency.

Professor Zunkel has previously served as a trial attorney at the Federal Defenders of San Diego, Incorporated.

Our second panelist is Mr. Paul J. Larkin, who serves as the John Robert Victoria Rumple Senior Legal Research Fellow at the Heritage Foundation. During his service at the Department of Justice, Mr. Larkin worked as an assistant to the Solicitor General and as an attorney in the Criminal Division's Organized Crime and Racketeering Section.

He has also served as counsel to the Senate Judiciary Committee, and as the acting director of the Environmental Protection Agency's Criminal Investigation Division.

Our third panelist is Professor Andrea
Harris, who serves as an adjunct professor at the University of Virginia School of Law. In that role, Professor Harris runs the Federal Sentence Reduction Clinic, which has assisted in the drafting and filing of dozens of compassionate release motions in recent years.

Professor Harris has also spent decades working as a public defender in the federal and state systems, and currently serves as an assistant federal public defender in the Western District of Virginia.

Our fourth panelist is Professor Caitlin J. Taylor, who serves as an Associate Professor at LaSalle University. Professor Taylor's research investigates the collateral consequences of mass incarceration and the experiences of people released, released from the criminal legal system.

Professor Taylor teaches courses on Corrections, Criminal Justice, Ethics and Statistics in LaSalle's Department of Sociology and Criminal Justice.
Our fifth panelist is Professor Jennifer Mascott, who serves as an Assistant Professor of Law at George Mason University's Antonin Scalia Law School. Professor Mascott serves as the co-executive director of the C. Boyden Gray Center for the Study of Administrative State, and as a public member of the Administrative Conference of the United States.

She has also served as Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel, and as an Associate Deputy Attorney General. We will first hear from Professor Zunkel, then from Mr. Larkin, then Professor Harris, Professor Taylor and finally Professor Mascott. Professor Zunkel, we're ready for you.

Panel VIII: Academic Perspectives

MS. ZUNKEL: Honorable Chair Reeves, Vice Chairs and Commissioners, thank you for giving me the opportunity to testify today. The previous panel, which included my incredible
client, Dwayne White, is a really important reminder of what's at stake today.

Some of the witnesses have urged this Commission to narrow its proposals significantly, including the Department of Justice, which recommends throwing out the (b)(5) proposal altogether, and adopting Option 1 for the catch-all category. I want to be very clear about what the real world consequences of those recommendations would be.

They would mean that Dwayne, Adam, Bryant and Gwen would still be behind bars rather than testifying before you today. Their freedom is a direct result of judges having the ability to consider changes in the law and other unenumerated, extraordinary and compelling reasons.

I first want to talk about the importance of proposal (b)(5) through the lens of Dwayne's case. Dwayne, as you heard, was convicted in connection with the government's stash house reverse sting tactic. After he was
sentenced, the tide turned dramatically on stash house stings, and the government ceased the practice.

But Dwayne was left behind in prison with no recourse to recognize his changed circumstances. After the First Step Act, my students and I filed a motion that raised several reasons for Dwayne's release, including his 851 enhancement that could not be imposed today, severe sentencing disparities and the government's disavowal of the stash house operations.

After we filed, the Seventh Circuit decided that one of the reasons we raised, non-retroactive sentencing changes was categorically barred from the judge's consideration. The judge released Dwayne anyway, because he recognized Dwayne's situation for what it was, extraordinary and compelling, without considering the changes in law.

(b)(5) would provide clear guidance to judges that cases like Dwayne's involving changes
in the law that render the ultimate sentence
inequitable are extraordinary and compelling. Of
course it also gives judges the discretion to
conclude the opposite and deny the motion. Under
the Department's recommendation, Dwayne could not
bring a motion under (b)(5).

With no (b)(5) and with Option 1 as
the catch-all, I don't think Dwayne would have
much success convincing a judge that his case is
similar in nature or consequence to any of the
enumerated categories. That means Dwayne would
still be behind bars rather than making his
family and his community stronger. There seems
to be widespread agreement that the Commission
has the authority, the legal authority to
promulgate (b)(5).

The Commission also has the duty to do
so. Without a clear resolution, the circuit
split that we see will become more entrenched,
contrary to the Commission's charge of promoting
uniformity and avoiding unwarranted sentencing
disparities. (b)(5) hits the reset button. The
Supreme Court has confirmed the power of an agency like the Commission to define ambiguous terms in the face of conflicting case law like we see.

Under the Brand X doctrine, after the Commission defines those terms, courts then "review the agency's construction on a blank slate." The Commission's (b)(5) proposal correctly resolves the circuit split by honoring the plain text of 3582 and 994(t). The beauty of the Commission's proposal is that it adds an important narrowing mechanism.

It is not enough there to just be changes in the law. Those changes must make the sentence inequitable. That will allow judges to filter out the run of the mill case from the truly extraordinary ones like Dwayne's. But I noticed that several written statements don't even mention that important narrowing mechanism, including the Department's, which mischaracterizes the proposal as permitting reductions "based on the mere fact that
sentencing law has changed."

Moving to the catch-all category,
Option 3 mirrors the policy statement's current language and is the best choice because it provides flexibility. We should heed the lesson of the COVID pandemic, so we're not taking ourselves down the line from going too narrow today. Option 1, especially with no (b)(5), would leave judges powerless to address unique situations that we cannot possibly predict today.

I was going to end today by talking about data and administrability but I decided to scrap that, because I want to speak to this from a human perspective.

I kind of can't believe that I'm saying this, but I've been a federal criminal defense attorney for almost 20 years, and through that time I've seen a lot of things that are sad, that feel unjust. I've seen families broken, I've seen people broken, and I've been around long enough to see laws change and us have a different understanding of what's harsh and how
things can be different today.

And when I see the laws change, I think back to conversations I've had with prosecutors and judges, who bemoan having to impose long mandatory minimum sentences, or prosecutors that told me they wish their hands weren't tied and that they could do something to help.

Seeing the expansion of compassionate release has given me hope. It gives me hope to see our system make a little bit of space to recognize we don't always get it right the first time around. People change, circumstances change, laws change. Let's let compassionate release do what it was always supposed to do, and recognize when those changes are extraordinary and compelling.

We know that there are other Dwaynes, Adams, Bryants and Gwens who are still behind bars. They deserve a shot at justice, and our system will be better for it if they have that shot. Thank you.
CHAIR REEVES: Thank you, Professor Zunkel. Mr. Larkin.

MR. LARKIN: The question is not whether some of our sentencing laws are unduly harsh. They are. The question is not whether there are people in prison who should be released. They should. The question instead is who is responsible for making that judgment, and in particular whether when Congress passed the First Step Act it radically changed the nature of confinement and release that had been adopted throughout our history, applied by the executive branch through commutation and parole, and ultimately culminating in the Sentencing Reform Act of 1984.

Statutory interpretation is a holistic endeavor. So let's look at the whole of the First Step Act, not just for words that are in the current statute. If you look and it's printed at pages eight to ten of my written statement, you will see that the full text of what was before Congress and what the members of
Congress therefore voted on, is brimming with references to the historic problem of how do you deal with a prisoner who is knocking on heaven's door.

Traditionally, before the Sentencing Reform Act came into being, the President would commute someone's sentence just like a governor would, or someone could be granted parole. Congress tried to eliminate parole in the Sentencing Reform Act, and for a brief period I think it did, although believe it or not, I think parole is back in effect though I'm the only person I think in western civilization who holds that view.

What Congress did not do was change the authority given by statute to the Attorney General and the BOP director to decide where a prisoner should be housed. Nor did it change the statutes giving those two parties the authority to decide what medical care is appropriate. Nor did Congress give the district courts or this Commission the authority to answer the myriad
practical problems that result if you follow
through and apply, you know, generally all of the
new provisions that you want to add to sentencing
guidelines or policy statements or whatever.

Reading the statute to deal with the
traditional problem not only is consistent with
what Congress wanted to do, which was allow
prisoners to go to court and make their own case,
without giving the BOP the ability to strangle
their claim in the crib, but not create the
myriad other practical problems that result from
all this.

Those are problems that Congress
should resolve. Maybe Congress should do
something about a second look. It's not an
unreasonable position to think that people can
change, particularly when you consider the length
of some of the sentences that we impose. But
that is Congress' responsibility. It is not the
responsibility of district courts and it's not
the responsibility of this Commission.

Four words, extraordinary and
compelling reasons, is not an adequate justification for the various different reforms you would like to see done. They are beyond the authority of this Commission. The Commission should tell Congress to do that. The Commission should tell the President to do that. But the Commission shouldn't tell district courts to go ahead and do all this, because there's nothing in the statute that tells them how, and anything you say is extra-statutory.

The result of all that will be the same disparities that Congress sought to address when it passed the original Sentencing Reform Act. Thank you.

CHAIR REEVES: Thank you. Professor Harris.

MS. HARRIS: Good afternoon Mr. Chairman and Commissioners. Thank you for inviting me to speak to the Commission in my role as an adjunct professor of the Federal Criminal Sentence Reduction Clinic at the University of Virginia School of Law, on the very important
topic of compassionate release.

I understand that there may be a
couple of UVA Law grads on the Commission, so
this makes the honor even, even greater. When
Congress passed the Sentencing Reform Act of
1984, it specifically built several safety valves
for modification of an otherwise final sentence
into the statute.

The legislative history states that
the first safety valve, found in Section
3582(c)(1)(A), applies regardless of the length
of sentence to the unusual case in which a
defendant's circumstances are so changed that it
would be inequitable to continue the confinement
of the prisoner. Congress emphasized that the
value of this safety valve lies in the fact that
it assures the availability of specific review
and the reduction of the term of imprisonment for
extraordinary and compelling reasons.

This provision keeps the sentencing
power in the judiciary where it belongs, yet
permits later review of sentences in particularly
compelling situations. Congress' expansion of 3582(c)(1)(A) to allow inmates to directly file motions for sentence reduction now allows for the original intent of this provision to be fully realized.

Over the last three years, students in the UVA Sentence Reduction Clinic have worked on a variety of Section 3582(c)(1)(A) motions based on extraordinary and compelling reasons falling within several categories proposed for addition to the policy statement in 1B1.13, and I would like to highlight a few of the proposed amendments that fill gaps in the current version of the policy statement.

First, with regard to proposed amendment (b)(1)(C) relating to the need for long-term or specialized care, this proposal fills a gap in the current policy statement, which provides that extraordinary and compelling reasons exist in the case of illnesses or other physical or mental conditions from which a person is not likely or not expected to recover.
It is equally important to include a provision that covers a situation where a person may recover if -- from the serious health condition they are facing if they simply received specialized medical care in a timely manner. As Mr. Crowe's case, which is cited in my written testimony demonstrates, he was in danger of losing a limb if he did not get specialized care, and his case would have fallen squarely within the ambit of this new proposed condition.

But I think one of the beauties of this condition or of this provision is that it may be needed only rarely if the BOP is able to provide timely and necessary medical care. But it is critically important in the cases in which the BOP is either unable or unwilling to provide such care.

Second, proposed amendment (b)(4) relating to victims of assaults also fills a gap in the current policy statement. The unfortunate reality is that inmates are sometimes subjected to physical and sexual abuse at the hands of BOP
employees or contractors, or at the hands of
other inmates. It is appropriate to include both
categories of assault as an extraordinary and
compelling reason in 1B1.13.

In addition, the Commission's
definition of serious bodily injury is too
limiting, and will prevent many inmates who are
suffering from physical or mental harm that
doesn't meet that very strict standard of serious
bodily injury from receiving relief, even though
their circumstances are so changed that it would
be inequitable to continue to confine them.

Third, proposed amendment (b)(5)
daddresses a gap in the current policy by allowing
district courts to consider cases where the
individual is serving a sentence that is
inequitable in light of changes to or
clarifications of, in the case of 924(c)
provisions, of the law. This Commission has been
presented with many examples of individuals who
are serving extraordinarily long sentences
including life, for crimes for which they would
not receive that sentence today.

I outline two such cases in my written testimony. Antonio Williams received a mandatory life sentence at age 22, but would not face any sentencing enhancements today. In reducing his sentence, the district court judge stated that he found his circumstances to be extraordinary and compelling at the time he had to impose that life sentence back in 2013, but that they were even more extraordinary and compelling today in light of Congress' expressed intent that that type of mandatory life sentence doesn't fit the crime.

His co-defendant, Alfonco Britton, also received a mandatory life sentence after trial, but today would only face a mandatory sentence of 25 years. In both of these cases, the district court found that the gross disparity between the sentences that they received and the ones Congress now believes to be an appropriate penalty, constitute an extraordinary and compelling reason.

Importantly, this disparity did not
create an automatic right to a sentence reduction, and the court went on to evaluate in each case whether the Section 3553(a) factors supported the court's exercise of discretion in reducing the sentence. Giving the courts the option to consider changes in the law is in keeping with the Congressional intent that Section 3582(c)(1)(A) provide a safety valve in unusual cases where it would be inequitable to continue to allow the current sentence to stand.

Thank you.

CHAIR REEVES: Thank you, Professor.

Professor Taylor.

MS. TAYLOR: Good afternoon, Commissioners. Thank you for the opportunity to offer public comment on the proposed amendment. I'm honored to be here as the sole social scientist on this very impressive panel of legal scholars, so thank you very much. It's with great enthusiasm that I would like to detail my support for the expanded use of compassionate release.
First, I would like to offer my support for the proposed amendment's Family Circumstances section, which appropriately acknowledges the invaluable roles of people incarcerated as parents to their own children and caretakers to elderly loved ones. Some scholars have pointed out that parental separation from children due to mass incarceration has not been on the scale in American society since chattel slavery.

We have decades of scientific evidence that confirms the negative impacts of parental incarceration on children's health and well-being, and future involvement in the criminal legal system. The incarceration of any family member also diminishes the family's financial status and harms family members' psychological well-being.

While an individual's crime may negatively impact their community, removing that individual from their community and their families also removes all of the positive impacts
that individual may have as a parent, caregiver, member of a local religious group, community volunteer and so forth.

In considering the significant racial and ethnic disparity in the federal prison system, we know that these negative family and community impacts disproportionately impact black and Hispanic Americans. As such, the proposed amendments expansion of the family circumstances that would qualify for compassionate release is certainly a commendable step in the right direction.

However, with all of the scholarly evidence we have on the negative impacts of incarceration on families, I would like to suggest that the Commission also consider further expanding the eligibility criteria in this section to include not only circumstances in which an incarcerated individual is the only available caregiver or parent, but also circumstances in which there is substantial evidence that the incarcerated individual plays a
particularly unique or valuable role in their families.

Second, I would like to offer my support to the proposed amendment's victim of assault section, which would grant compassionate release eligibility to incarcerated individuals who have experienced serious bodily injury as a result of sexual or physical abuse from a corrections officer or other BOP employee. We have a solid body of evidence that confirms the negative impacts of victimization during incarceration on future psychological distress, as well as increases in recidivism.

The potential use of compassionate release to increase access to physical and mental health treatment in their community, away from the environment in which someone was victimized, may help to mitigate the negative effects of victimization on future outcomes.

However, these negative effects exist regardless of whether the person was victimized by a BOP employee or by someone else.
incarcerated. As such, expanding this category to include victimization from others who are incarcerated may be worthy of consideration.

I'd like to conclude with a bit of a bolder perspective to consider. The Sentencing Reform Act grants the U.S. Sentencing Commission authority to determine what should qualify as extraordinary and compelling reasons to justify compassionate release. What more extraordinary and compelling reason for compassionate release exists than our nation's current status of mass incarceration, which has historically and geographically unprecedented.

No society ever in time, ever on the planet, ever in human history has locked up people like we have in this country in recent decades. So that alone, in my opinion, calls for a massive reimagining of how we define extraordinary and compelling. Thank you again for this opportunity and your thoughtful action on these reforms.

CHAIR REEVES: Thank you, Professor
Taylor. Professor Mascott.

MS. MASCOTT: Thank you so much Chairman and Commissioners for inviting me to be here this afternoon. I teach right in the areas of Constitutional interpretation of the separation of powers at Scalia Law School, and today I'm here speaking in my -- with my personal views as an academic, and don't represent my institution officially.

I'm going to comment on the Commissioners' request for analysis of proposed paragraphs (b)(5) and (b)(6) in particular, on factual and legal changes occurring after original imprisonment and conviction, and as a number of my colleagues have noted in written statements, of course in Section 994(t), the Commission's of course given the power and the authority and responsibility to evaluate extraordinary and compelling circumstances that would justify sentence reductions.

But I think in contrast to how some of the other written statements describe that role
as having responsibility to define extraordinary and compelling, that standard of course has an objective plain meaning already in the statutory terms. Context fills out a little bit more perhaps the approach the Commission should take in evaluating it, and I think instead the way to conceive of 994(t) under its terms is the Commission having a responsibility to explain, as it has in the current policy guidelines and in a number of proposals here, specific factual circumstances that would measure up to extraordinary and compelling reasons to modify a sentence.

And in fact 994(t), it also gives instructions to give specific examples and criteria to use. I think that perhaps raises some concerns with the way that (b)(5) and several of the options in (b)(6) currently are worded and framed. For example, in (b)(5) and Option 2, that reference legal changes and factual changes after imprisonment, the Commission's proposals currently as written seem
to impose a new standard of something that's inequitable.

That's obviously its own broad term, meaning unfair, unjust, and seems to be establishing a different separate new standard that not necessarily -- that doesn't necessarily rise to the level of something that's extraordinary and compelling.

So unless the Commission were able to explain or justify how every sentencing difference or factual difference rises to -- that's inequitable rises to the level of extraordinary and compelling, I think it transgresses the Commission's authority to change that standard rather than relying on Congress to do so.

The other problem perhaps with those proposals is that in contrast to a number of other paragraphs listed previously, they also don't list specific examples and criteria. I think a similar problem perhaps arises also with the way Option 1 is currently worded, because it
would allow the defendant to present any other circumstance or combination of circumstances, and it's similar to the previously worded ones in paragraphs 1 through 3.

But again, unless that we're having to make those circumstances rise to the level of extraordinary and compelling, it again could shift the comparative point to the Commission's own guidelines rather than the statutory text itself. And then with Option 3, just referencing extraordinary and compelling circumstances, that might almost be tautological.

I mean to the extent that you think a commentary 1(d) currently is fine, that doesn't really make that much of a change. But I guess querying how necessary it is if it doesn't again list the specific examples about the other circumstances that might rise to the extraordinary and compelling.

You study that for a minute on the meaning of the statutory terms themselves.

Obviously as a number of folks have referenced,
there is a circuit split on conclusions about the level of the Commission's authority under the statutory text here. But the plain meaning of the terms themselves, as a couple of the opinions have pointed out, most recently the Sixth Circuit sitting en banc and also the D.C. Circuit it's quite -- according to its plain meaning, is a very high standard, meaning unusual, far from common, having little or no precedent, such circumstances, and it's not clear, in fact far from clear that sentencing changes would always measure up to that standard, as some of those opinions point out.

And then if we look even further to the statutory context, of course the default instruction in 3582(c) is that the court may not modify sentences but for these exceptions, which I think is a call to the Commission and to courts to look very specifically and precisely at what the limits are on the range of authority to modify sentences for extraordinary and compelling reasons.
And then even looking at the First Step Act's enactment in 2018, as a number of opinions and other folks here pointed out, Congress took the opportunity there to modify some of the compassionate release provisions, but imposed really procedural changes or reporting and notification requirements and didn't change the actual substantive standard. And in fact looking at the reporting notification provisions that they put in place, it seems that they reflect a lot of the medical and health reasons that the Commission had already pointed out in the previous version of the guidelines, suggesting that those kinds of circumstances are what Congress continues to have in mind as extraordinary and compelling, as opposed to some of the sentencing changes that are dealt with in other portions of statutory schemes, but explicitly identified by Congress as reasons for sentencing modifications here.

So with that in mind, I'm happy to of course answer questions, and thank you again for
the opportunity.

CHAIR REEVES: Thank you all. I'll now turn to my fellow Commissioners. Jonathan Wroblewski, you've been first every time.

COMMISSIONER WROBLEWSKI: I'm always, I'm always ready. Thank you all for being here, and thank you for your testimony. I want to especially call out Professor Taylor. There's nothing like a bold proposal, and I really appreciate it. I've been known to make some of them, so thank you for that. But my question actually goes to Professor Zunkel. I was struck by two things that you said.

First of all on the (b)(5) proposal, you said this is not for the run-of-the-mill retroactive application, and you were surprised that that's not obvious from the words. The words talk about changes in law, and then it has this what I think is a pretty opaque word, called the inequitable word.

Why shouldn't we be more explicit
about that? Why don't we just say this is not for the routine retroactive application? So that's number one. The second thing I was struck by is Dwayne White, your client, despite the fact that in the Seventh Circuit changes in law are not considered extraordinary and compelling, he was granted compassionate release.

It seems to me from listening to his story and frankly the four others who were on the previous panel, it's because as Ms. Barrett, who testified hours and hours ago from the public defender's office, it was because of a constellation of circumstances related to their lives, the people's lives aren't just oh, the law changed and that's it. He spent years in prison and did all kinds of programming. He described a lot of that. He was committed to his family, all kinds of other things, a constellation of circumstances.

Again, why don't we say that? Would you be okay if we said both of those things out loud, that this is not for, a workaround for
retroactivity. It's not meant as a workaround for habeas, but it's meant for extraordinary circumstances beyond the few enumerated provisions, looking at a constellation of circumstances, whatever the words will figure out that meet some very high standard of gravity, extraordinariness. I'm not sure what the words are.

But that's what we're looking for and we should authorize judges and tell me, rather than doing all the opaqueness of, you know, you can do anything you want or, you know, changes in the law, but as long as it's inequitable. You know, why not be clearer?

MS. ZUNKEL: Well, I think that that raises a number of good questions. I do think that it gets to the heart of why judges are so good and well-equipped to do this kind of inquiry, and why I think that the (b)(5) proposal does provide some guidance for district judges.

So what courts have been struggling with in this interim period is people coming with
changes in the law and saying this change in the
law means I should get compassionate release. I
think what we see, if you look in the district
court's opinions, district court opinions where
judges are granting based on changes in the law,
it's a very, as you say, individualized inquiry.

It's often not just the change in law,
and that's why I do support and in my written
statement I talk a lot about a totality of
circumstances. I think judges need discretion to
be able to do that, which is why I think having
(b)(5), having inequitable as an anchoring point,
judges can look and see what are other reasons
that in this interim period judges have granted
compassionate release?

I think in some ways, the body of law
that we have right now can be very instructive.
It's what's so interesting about what we're doing
is we have had this laboratory essentially for
the past four years, and we're seeing what are
judges struggling with? Where are they granting?
So I think the totality of circumstances is
important, and that's why I don't think that Option 1 really captures the judge's ability to consider a wide range of reasons, and why I think Option 3, which is the current language, is appropriate.

VICE CHAIR MATE: I have a follow-up question about the laboratory, and this is maybe -- I think this is for Professor Zunkel and Harris and the laboratory of the Seventh Circuit and the First Circuit.

You know, we currently have a circuit split on different factors that may or may not be able to be considered, and there are some circuits that have said more factors rise to the level of extraordinary and compelling, and some circuits that say less of them do. Have we seen in the circuits that allow more an unmanageable number of cases?

MR. CLAUSEN: So I guess I'll answer that, since I'm in one of those circuits. I'm in the Fourth Circuit, and I -- it would be my position that no, we haven't seen an unmanageable
number of cases. Now very early on in the pandemic, I think we were all across the country feeling a little bit of an unmanageable number of cases because there were so many COVID, you know, medical-based motions.

And so for a while, it felt like that's all we were doing. But you know, the pandemic is hopefully waning, on its last legs and vaccines came out. And so after that, you know, the number of cases that has, from my experience, gone down significantly, and the courts seem able to manage the caseload.

Now some, some motions kind of linger for a while after they've been filed. But one of the things I also wanted to point out, so there's a recent case in the Fourth Circuit that came out, U.S. v. Ferguson, that kind of addresses the you can't use compassionate release as an end run around 2255, and that's a case that specifically talks about, I think, the defendant in that case raised the issue of well actually his original 30 year sentence was invalid because they didn't
indict him for the silencer in his indictment.

So he threw that in his compassionate release motion, and the Fourth Circuit very quickly considered that and said no, you can't -- this 3582 isn't the proper vehicle for those kinds of motions that are really properly a 2255 motion. So I think the, you know, we started to see the courts addressing those kinds of things, and I think that demonstrates that 3582 is manageable and that courts know how to, you know, keep their decisions to the areas that the statute allows.

MS. ZUNKEL: I can certainly speak to the two part thing in a district or in a circuit, where compassionate release has been narrowed considerably. I think the important thing to think about is there is a difference between categorically saying that cannot be an extraordinary -- something cannot be an extraordinary and compelling reason for release, like a non-retroactive sentencing change, and permitting it with these guardrails around
(b)(5).

So it is inequitable? That's a higher standard. That's going to force judges to look at that constellation of factors, look about, you know, the circumstances in which the sentence was imposed. I can tell you in Dwayne White's case, as I mentioned, after we filed the motion, the Seventh Circuit came down with its Stafford decision, which said, you know, district court judge, you can't consider that at all.

Reading between the lines in the judges' opinion, I think that that would have been a compelling part of that constellation of factors, the fact that Dwayne's sentence would ten years lower today and he would likely already be out, in addition to all of the other things that the judge, you know, concluded.

COMMISSIONER HORN BOOM: I have question for Mr. Larkin. You mentioned that, you know, perhaps this idea or notion of a second look is a consideration that we should, we should take, although I think you disagree that, you
know, it's Congress' job and not the courts or the Commission. I think that's certainly a fair and debatable point.

But what do you believe that second look should look like? What would be the parameters of that, setting aside, you know, who is the appropriate body to determine, to make the ultimate decision? You know, we heard from the panel before of the formerly incarcerated folks, and what I found really interesting and compelling from each of them was that they each had some kind of hope, even with some of them who really should have had no hope, and that that was --

It appeared to be really the impetus for them to program and rehabilitate themselves. And so, you know, this idea of a carrot if every inmate had this carrot, like maybe regardless of my original sentence, there is this possibility somewhere down the road, whether that's after 20 years there's a second look or 25 years, whatever that is.
So I'm just curious. Set aside, you know, which body should be the body that ultimately makes that decision. What would that -- what do you think that second look should look like?

MR. LARKIN: Well, it should probably look like what you would look, have looked at a prisoner if you were doing it honestly, to see if he should be released on parole. Or if he should be awarded good time credits or earned time credits, and I personally think the latter is probably better and certainly more politically sellable, if that's a relevant factor.

COMMISSIONER HORN BOOM: Good time credits?

MR. LARKIN: That's right, good or earned time. It's better because you're making -- you're putting the decision in the hands of the people who are closest to the inmates, who are able to make that sort of judgment. What you could do is expand the availability of good or earned time credits.
I mean even if you look at it just from a political perspective, prosecutors hate the notion of eliminating mandatory minimums? Why, because it's a great hammer, right? And they all -- any time somebody wants to eliminate mandatory minimums, they say oh no, we need this to get pleas, etcetera, etcetera, etcetera.

Okay fine. That, you know, as whatever benefit that argument should have, it doesn't carry over into the back end when you're deciding whether somebody should get credit for what he or she has done in prison, either to learn how to read and write, for example, which is not often -- not always the case, or taken other steps in order to improve his or her character.

So you would want to make decisions like what we did, to some extent, if we were being honest about parole, rather than just using parole as a way of releasing people because you had caps on the number of people that you could confine, all that sort of stuff. You wouldn't
want to call it parole, because then it would never sell politically because you would make it look like you're just trying resurrect and once-buried program.

So you have to work at it through the political system, with an eye towards coming from the back end expanding the amount of good time available, to the point where you could even expand the good time so that it would cut into a mandatory minimum. I mean that would be my recommendation, because then the prosecutors can't say oh, you're taking away my ability to get guilty pleas.

You're saying no, we're giving the Bureau of Prisons the authority to decide after X years, and that's a purely arbitrary judgment. 10, 15, 20, whatever. After X years, we're going to decide whether we should now look at this, and give the person credit that would normally be deemed good time or earned time, but credit in that format.

The problem is if you try to do that
now, either you the Commission or judges as
judges, there are, you know, have a bazillion
questions that have to be answered that will only
be answered arbitrarily. Now legislators are
entitled to act arbitrarily, but agencies are
not. And you know, what's the standard of
review? Just simple things like that.

Who gets to appeal? Does the
defendant get to appeal or the offender rather
and the government? So what's the standard of
review on appeal? How many times can you seek
release? What happens if you apply for clemency
and the President turns you down? What effect if
any should that have?

Should the President say, you know,
this is a close case. We want others, you know,
the White House to take a look at it. Personally
I think we have a big problem we've suffered
under is presidents have not aggressively used
their pardon and commutation power. I think
that's a tragedy, because I think there are
people that should be released, and people who
should be exonerated.

    Now no president is going to get elected or reelected based on what he does with pardon clause authority. There are too many other things out there. I'm not Pollyanna-ish about this stuff, okay. I understand. But as a theoretical and practical way of solving it, the best way to look at it, I think, is go from the back to the front.

    Yeah, I think we should eliminate mandatory minimums, but you know, that ain't gonna happen. I think some of the sentences are too long. I think we should disassociate the weight of drugs from the length of the sentence. That ain't gonna happen either.

    But if you come at it from the back end, you can get a long way towards where you want by adding to the credits that people can get, and essentially give yourself an argument that this is not something prosecutors, the Justice Department, U.S. Attorneys should be able to argue about.
We're not changing the charging authority. We're not changing the sentence the district court can impose. We're letting the Bureau of Prisons make these judgments. That's how I think you should do this. But when you said "we" when you're asking the question, I agree with you that the "we" is not y'all, and it's not district courts. That's a judgment only Congress can make.

But you know it's their job to do that, and the President's job to use his commutation power if Congress won't do it. So tell them they need to do that, both of them. Thank you.

COMMISSIONER WONG: Just to shift gears a little bit.

CHAIR REEVES: Commissioner, go ahead.

COMMISSIONER WONG: What's interesting is throughout this panel and throughout the whole day, everyone keeps coming back to what did Congress intend, you know, with the First Step Act with respect to compassionate release. Did
they envisions the proposals that we have here? 
Would this go beyond that, and we've heard all 
different takes on whether Congress merely meant 
to procedurally expand it and did not intend to 
broaden the substantive scope, and others who say 
it was intended. 

I guess my question for all of you is 
to what extent should we be giving weight to the 
backdrop against which Congress was legislating 
in the First Step Act, which was three and a half 
decades in which I don't think there's any 
dispute that the understanding of extraordinary 
and compelling for that three and a half decades 
was associated with a much more narrow criteria 
associated with terminal illness and extreme 
familial circumstances? Is that, you know. 

MR. LARKIN: I think that's what's 
going on here. The Bureau of Prisons didn't 
exercise the authority properly? Why? Because 
it's not something that people at the BOP get 
rewarded for, okay? You have an incentive system 
set up in the law to get people to do things, and
in the government you create incentives to get people to do things.

They were so afraid that you would release somebody and then he would commit some horrific crime, that they wouldn't exercise this. Or they didn't see it as a priority and they have limited amount of hours in the day to do the things they want to do. So they didn't push these things, and the result was you had people die who the warden had said should be released, but the BOP in Washington didn't act on the request.

That's what this whole matter is about. What's why when you look at the portion of the statute I quoted at pages eight to ten of my submission. It's focused, it's brimming with a discussion of how are we going to deal with this problem of people not getting released, so they can cross the River Styx at home, in the company of friends, or at least as a free person?

That's what's going on. They're not talking about whether somebody got raped by a
prison guard. They're not talking about whether
there is a terrible disease that is infecting
everyone in prison, which also is infecting
everyone outside the prison. None of that.

And they weren't talking about well,
let's just create this general, you know, all
around, you know, release mechanism if you find
something is really extraordinary. I mean the
judge hasn't been born who can't write a
grammatically correct opinion in any case, saying
that the facts here are, you know, pretty
extraordinary and compelling, and if he can't,
then he hasn't gotten assistance from the lawyer
trying to make that argument.

I mean that's what Congress was
dealing with. Let the prisoner go to the judge
and say they told me I've got six months to live.
They told me that I've got Lou Gehrig's disease.
I'm going to be dead in 12 months. Let that
person go to the judge and the judge turn to the
AUSA and say factually is he right, and if he is,
why are we here?
You do that often enough and AUSAs will tell the BOP let these people out. That's what this is about. This is not an effort by Congress to create some new way of revising the Attorney General's and the BOP directors' authority to manage their prisons, to manage health care. It's all about making sure that people can get released if they're dying. That's what was going on.

CHAIR REEVES: I suspect there's some disagreement on this panel.

MS. ZUNKEL: Can I jump in?

MR. LARKIN: I'm shocked. I really am.

(Laughter.)

CHAIR REEVES: So I'm not taking over your question, but I do if there's anyone on the panel who has a different view.

MS. ZUNKEL: I do have a different view. I think it's important to look. The changes to 3582 were titled "Increasing the Transparency and the Use of Compassionate
Release." So it was clearly on Congress' mind that compassionate release, 3582, needed to be -- they want to be used more and they want it to be more transparent.

The fundamental change was saying that federal judges should do this job, not the Bureau of Prisons. The backdrop of that is, you know, as Mr. Larkin says, the Bureau of Prisons wasn't doing the job. For decades we had the culture of 3582 keyed to medical reasons and family circumstances, and there wasn't a lot of opportunity to develop I mean anything else, because the Bureau of Prisons just wasn't making these motions, even in categories that clearly fit within.

The Bureau of Prisons has had the discretion under the catch-all category all this time, I think, to define other reasons that are not medical, that are not family circumstances. The catch-all says they can be different. They just didn't do it. But when we look back, look at what Congress said in the First Step Act by
putting judges in charge and saying increase the use, increase the transparency, we also have to look back at the original statute.

I will tell you when I was a federal defender and in my criminal defense career, I never handled compassionate release. I never handled 3582 motions because we weren't involved in that process.

So I think there's some relearning or learning that all of us have to do about what this mechanism is about. As I've gone in and looked at it in litigating these motions, it's not called compassionate release like Ms. Barrett talked about. It's not called medical compassionate release or geriatric release.

It's an exception to finality for sentencing reduction, where there are extraordinary and compelling reasons. That's what the statute says. Then it says you, the expert agency, you decide, you describe extraordinary and compelling reasons. The only reason we are taking off the table is
rehabilitation alone, and I think that that was because it was done at the same time as parole was abolished.

Everything else is on the table. So I look at the First Step Act being significant for the reasons I stated, but I also think it's very important to go back and read 994(t) and 3582.

MR. CLAUSEN: I would just add, you know, I don't disagree that you know, the fact that BOP wasn't really filing any motions is what prompted Congress to have the conversation and amend, you know, start the process to amend the statute. I think what Congress doesn't say is oftentimes just as important as what they do say.

And what they did in the First Step Act was they just added to 3582(c)(1)(A). They added the ability for a defendant and inmate to bring a motion directly. They didn't take anything away from the statute. They didn't take anything away from the Commission's authority to describe what constitutes extraordinary and
compelling.

They have, they had the ability to do that. They had the ability to limit it, you know. Defendants can file these motions, but only on the current grounds that currently exist. They didn't do that. They left it to the Commission to decide what are the appropriate grounds and, you know, part of the Commission's authority is to constantly revise and review and look at changes in the law.

I mean a lot has changed since 2006, when the policy 1B1.13 was first enacted. But a lot has changed since, you know, 1984 when the Sentencing Reform Act was passed to begin with, and the provisions was included. So I would suggest that what Congress didn't say with regard to the changes to 3582(c)(1)(A) is just as important as the change that they did make, and it left the discretion with this Commission to decide what are the extraordinary and compelling, or describe what the circumstances might look like.
CHAIR REEVES: Vice Chair Murray, I think you had a question.

VICE CHAIR MURRAY: Thanks to this panel. This has been a great conversation. I appreciated your submissions. I think one of the things that comes up a lot in our commentators, both in the case law and today, in terms of concerns about Option 3 of the catch-all and sometimes about (b)(5) as this sort of elephants and mouse holes point, right. So what Congress did was change who could file and add some provisions about notice for terminal illness.

And are we sort of circumventing all these very reticulated schemes that Congress had, you know, in terms of habeas, 8th amendment litigation, direct appeal, making things retroactive themselves. I mean it's hard to imagine to me a 924(c) stacking case, where there's not, you know, equitable issues, right? Like I don't know what that case looks like, so I'm going to stack 924(c)'s and then, you know, that doesn't count as having a difference in
equity.

But I wonder, you made me think of this Professor Harris when you brought up the Ferguson case. What would you all think in terms of like practicalities and maybe in terms of concerns about separation of powers, of us carving out some of those issues? So saying, taking some things off the table.

So taking things that would be cognizable under habeas if there were not procedural issues, or things that were cognizable under direct appeal, carving those out. I'd be interested in your thoughts. Thanks.

MS. ZUNKEL: I think when I read the Judicial Conference's submission, I think they do raise some of sort of the nuts and bolts of how would this work, and I think that those questions and concerns are real, and you guys have to grapple with them.

And I think it's trying to find the right balance of too much narrowing and we being, you know, some pathways open. I think it would
be reasonable to list some examples of things, changes in the law that you think are primarily, you know, centrally sort of animating (b)(5). I think, you know, I think, you know, I think that that would provide some guidance.

I think the other question, and this sort of animates all of this, is overlap. If there's some overlap with other remedies, how much of a problem is that? Because 3582 is saying this is -- this is an explicit exception to sentence finality, and it serves a different purpose than habeas.

In habeas, what you're trying to do is vindicate a right. Your sentence is illegal or your conviction is illegal, and this is -- this is different. This isn't coming and saying automatically reverse my conviction or automatically reverse my sentence to send me back to start over again. It's saying these issues make my situation extraordinary and compelling under changes in the law. It's framed with inequitable.
That gets me in the door if I can show the extraordinary and compelling reason, and then the question is, is the sentencing reduction appropriate, not wiping anything off the books. I provided some examples in my written testimony, where I do think that there's -- people have been talking a lot about compassionate release in terms of well, people are just getting out right away, or there's an automatic reduction to time served.

I think what we see is that judges are very thoughtfully considering those issues, and seeing 3582 as a sentencing modification vehicle, and saying I think a 12 month reduction is appropriate but not time served. So I see, I see the fact that there might be some overlap with other remedies as not, not a problem on the whole, and I think like Professor Harris said, district court judges can use their -- all of the experience that they have to say the reasons that are being raised really do, like in the Ferguson case, feel like an end run around habeas.
Or if it's another situation like I described in my written testimony with my client, Christopher Blitch, where he had diligently pursued habeas for years pro se. His district court judge acknowledged that he had a meritorious issue that they judge acknowledged I think I overlooked it, gave him a certificate of appealability and the Seventh Circuit said we -- there may be an issue here, but we're procedurally barred.

That to me would be an example of yes, there was an avenue to habeas, but I think, you know, while 3582 is cognizing these extraordinary and compelling circumstances, habeas is very concerned with deference and finality. So there are two different I think purposes underlying the statutes.

MS. MASCOTT: Vice Chair Murray, are you proposing that the guidelines would have additional provisions that actually say categorically certain types of legal changes don't rise to the level of extraordinary and
compelling?

I certainly think that if you were to make the case that there are other statutes and other provisions that make certain changes and deal with certain issues, that the Commission could make a case for saying that these types of changes in isolation can't as a statutory level rise to the level of extraordinary and compelling, because Congress clearly dealt with them, dealt with them elsewhere?

It sounds like also what the colleagues are saying here is that there's actually not -- making that kind of change or note in the guidelines wouldn't actually necessarily even mean that anybody who'd been here today wouldn't have gotten relief, because you could say in isolation these things don't measure up.

That in and of itself could provide a fair amount of guidance certainly, I think.

COMMISSIONER WROBLEWSKI: Let me draw an analogy to the relationship between Section
1983 and the federal habeas statute for state prisoners. You can't use a 1983 action to challenge your conviction. You can only do that under the habeas statute. Why? The habeas statute is designed to nullify the judgment that allows the state to hold you in custody at all.

Similarly, 2255 allows someone to challenge the federal government's ability to hold somebody in custody at all. So you can't use the sentencing guideline provision to nullify what 2255 is going at, just like you can't use 1983 to nullify what 2241 and 2242 and the others are designed to deal with.

You have to accommodate the existing statutes, to make sure that you don't use this other mechanism as a way of undermining all the other ways of looking at it. So if there's another way of -- another statute that's relevant here yes, those other statutes should and have to be considered.

COMMISSIONER WROBLEWSKI: Ms. Mascott can I -- Professor Mascott, can I ask a question
just to follow up what you said before? So Section 994(a)(2) authorizes the Commission to make general policy statements regarding the appropriate use, that's through statutory words, the appropriate use of 3582.

So rather than saying it's not extraordinary and compelling, could the Commission write a policy statement that would say 3582(c) and all the other little subsections, is not, is not an appropriate mechanism for the routine retroactive application of a change in law. And then, and then have something else that talks about this constellation and maybe it says, maybe it doesn't say anything about changes in law there.

It just says this is not the routine mechanism for retroactivity or the other corrections of legal errors or other things like that.

MS. MASCOTT: I certainly think that phrasing would be a fair way for the Commission to frame things and frame this analysis and
comment on this issue in the guidelines, and will be consistent with the Commission's role. I think, I mean my recommendation would be if you're going to go that route or try to just more categorically address it, that there be still some explanation though perhaps of why your understanding and sense of your statutory authority here suggests that these other mechanisms don't routinely come within the confines of extraordinary and compelling circumstances simply because they've been dealt elsewhere.

So in other words, you wouldn't be trying to hamstring judges beyond what your authority is. You would just be explaining your understanding of your authority here.

And on that note, and going back even to Commissioner Wong's earlier question I think about the 2018 First Step Act changes, I mean certainly if Congress had spoken there and suggests that it, you know, agrees with the notion of medical and health reasons being the
justification for reporting notification
requirements, I think that's a thumb on the scale
to suggest that Congress sort of has a
commensurate understanding of your authority with
what you've done previously.

But in line with what some others have
said here, I mean Congress also didn't explicitly
narrow extraordinary and compelling. So I don't
think you would necessarily have a reason to say.
I mean Congress didn't, in the First Step Act,
clearly say "and extraordinary and compelling
from this point forward is only going to be
limited to the precise reasons that the
Commission has previously stated."

So I don't think you'd want to go
quite that far. But regardless of how closely we
look at the 2018 Step Act, I don't think that the
current wording of (b)(5) or a number of the
options in (b)(6), you know, comes anywhere close
to something that seems like it's within the
instructions that Congress is giving the
Commission in 994(t) or the Step, or First Step
Act or anything else, because the First Step Act clearly didn't broaden the authority.

And those provisions right now just read like they're creating different standards and different metrics and a different measuring stick.

VICE CHAIR MURRAY: Meaning if you -- if Congress was intending to dramatically expand the previous practice, you would expect a more explicit statement?

MS. MASCOTT: Well they just didn't change the standard from extraordinary and compelling. They didn't address the substance of the standard at all. So it doesn't give the Commission any grounds to now say the standard should be inequitable. I don't -- I mean --

MS. ZUNKEL: Can I just briefly respond that? I think what 994(t) says is that this Commission should be the one that describes extraordinary and compelling reasons. So you have the ability to describe an extraordinary and compelling reason being changes in the law that
result in an inequitable sentence, with the ultimate finding that a judge has to make is, you know, is the decision consistent with the policy statement? Are there extraordinary and compelling reasons?

So I see you can define however you want, and then ultimately, you know, the judge uses his or her discretion to decide.

CHAIR REEVES: You've got another question?

VICE CHAIR MURRAY: I have a question, a drafting question on the catch-all. So I take the point very much to heart that Option 1 does not allow for these sort of strange one-offs, the kind of unknown unknowns. And but I think there are concerns with Option 3 in terms of leading to disparity.

I mean our data from the last three-ish years shows a lot of disparity in grant rates, and just in sort of like in -- also concerns in terms of flooding courts if there isn't a lot of the standard. Do you all have
kind of drafting advice?

Is there a way to draft a catch-all that captures one-offs, but doesn't open the flood gates or you know, leave things so not subject to guidance that there's huge disparities? I mean I guess that's, maybe that's squaring the circle. But if you have advice, I'm all ears.

MS. ZUNKEL: I think it is difficult. I think the reason why Option 3 is helpful is because it in some ways is language that courts have been using for the past four years, because they've said even though the policy statement isn't applicable, let's look at what the framework was for the Bureau of Prisons and here it is.

I think that we see in other areas of sentencing law, for example, I think of like, you know, when the guidelines were mandatory and these 5K2.0 departures, where it was, you know, an extraordinary situation that was taking, taking the person out of the heartland of normal
cases. And you know, that's a little bit of a
squishy standard as well, but I think it allows
judges the discretion to --

My concern is being able to capture
the idiosyncratic circumstance with a lot of
other idiosyncratic circumstances. That's what I
think Mr. White's case really shows, is that
there were a number of different factors that the
judge looked at that and said that is
extraordinary and compelling, but it would not
fit in any of the enumerated categories.

So I think because this is an
iterative process between you the experts, the
Commission and the courts, and this like going
back and forth, that starting a little bit more
broadly, knowing that there is this a need to
revisit it, you can. I also come back to what
Ms. Barrett said about uniformity and concerns
about disparities.

I think that if people are rising to
the level of extraordinary and compelling
circumstances, plus meeting the 3553 factors,
that some disparities on the margins and how
judges are interpreting inequitable or, you know,
a change in the law is sort of a feature of this
system, and not a bug of it. It is in some ways
how we, how we, you know, how we approach
sentencing, and so I think that is kind of built
into the system.

MR. LARKIN: I was just going to say,
your question reminded me of two things. One was
Liechtenstein, the other was dominos. The
problem is any time you try to define a term,
there will always be a core meaning to it and a
peripheral meaning.

The problem is once you start getting
it applied by the hundreds of district court
judges out there, you'll then start seeing a game
of dominos or telephone, where each case looks a
lot like the one before, with maybe one or two
differences. You will ultimately get to a point
where there is no relationship to the core case.

The problem is you've now reached the
point where all you're doing is making an
arbitrary judgment, because this is not what the
core was like. And you can't avoid that with
language, which is a reason I think you shouldn't
start down that path.

CHAIR REEVES: Did you want to say
something? Oh, did you?

MS. ZUNKEL: No, thank you.

CHAIR REEVES: Mr. Larkin, I was
curious about your opening statement and what you
might have read about your belief that there may
be a parole system out there.

MR. LARKIN: Yeah.

CHAIR REEVES: Now one of the things
we've talked about early across other panels, the
floodgates being open, for example. Now that our
hearing is open, people listening to it all over
the world. Inmates probably listening to it now.
They may file motions. For the last 12 years, on
all these guilty pleas and every other criminal
conviction I've had, I've told them that parole
is not a possibility for you. So now an inmate
may -- I may be inundated, for example, with a
motion, a motion.

(Simultaneous speaking.)

MR. LARKIN: You can blame me.

CHAIR REEVES: No, no, I'm not going to blame you, but again our courthouses are open. Anyone can petition the court for any relief whatsoever. We can't close it. So we have to deal with what's filed. So I guess, I guess, you know, so any compassionate relief I think I mentioned earlier, no matter what the criteria might be, people might file it even though they -- even in their own minds they are ineligible for it.

Just like the person who might now file something that says look, I was confused about -- I thought I didn't have a right to parole. Now you need to withdraw my guilty plea, blah blah blah. So we may be faced with that. That's all I want to say.

But with that said, I think that brings us -- oh, we got two minutes left. Okay. So --
(Laughter.)

CHAIR REEVES: Any further question from any of the Commissioners? I think we've had a very productive day today, and I do want to bring this first day to a close. On behalf of my fellow Commissioners, I want to again thank our panelists, our incredible staff, and all those who have taken time to participate by listening, by watching. I do admire those who came here.

The courts in general, as I tell people back home, need our witnesses to what happens in our democracy. Whether it's before this agency or in our courtrooms or our city council meetings. We need our witnesses and concerned citizens. I want to remind people who are watching and those who are here, we have uploaded the testimony of each individual who's testified today.

That testimony is quite revealing. That testimony is quite insightful. It's well-researched, it's thoughtful. It's just plain good. It really is, and you know, to boil what
we've been talking about all today, in fact much
of that testimony is extraordinary and
compelling. It truly is.

I would encourage you to look at it.
I also would encourage you, and I'm not trying to
put more work on the Commissioners or the staff.
But the comment period is open until March 14th.
We ask is there language, Professor Zunkel, that
answers this question? You can supplement.

MS. ZUNKEL: We're on it.

CHAIR REEVES: All right, thank you.

In that regard, we will be back tomorrow morning
at 9:00 a.m. to receive testimony on our proposed
amendments regarding sexual abuse of a ward and
acquitted conduct. I look forward to seeing each
of you. I look forward to having all who want to
participate involved. So please tune me in,
please come. This hearing is now adjourned.

Thank you so much.

(Whereupon at 4:55 p.m., the above-
entitled matter went off the record.)
CERTIFICATE

This is to certify that the foregoing transcript

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