

**Testimony of Hon. Randolph D. Moss on Behalf of the Committee on Criminal Law of the  
Judicial Conference of the United States:  
Proposed Compassionate Release-Related Amendment to the Sentencing Guidelines**

**February 23, 2023**

Judge Reeves and members of the Sentencing Commission,

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States (“Criminal Law Committee”), thank you for providing us with the opportunity to comment on proposed amendments to the sentencing guidelines for the amendment year ending May 1, 2023. The Judicial Conference has authorized the Criminal Law Committee to “act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines . . . .”<sup>1</sup> Today, I will focus my comments on the proposed amendment to §1B1.13 - Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A).

On December 21, 2018, Congress enacted the First Step Act of 2018 (“FSA”), Pub. L. No. 115-391. Among other things, the FSA amended 18 U.S.C. § 3582(c)(1)(a) to allow individuals convicted of federal crimes, who have exhausted administrative remedies, to file motions for a sentence reduction (frequently referred to as motions for “compassionate release”). Under prior law, as you know, only the Director of the Bureau of Prisons (“BOP”) could file these motions. This amendment, combined with the onset of the COVID-19 pandemic a little over a year later, resulted in a dramatic increase in the number of compassionate release motions filed in federal district courts across the country.<sup>2</sup> Circuit splits have arisen over several issues related to compassionate release, including whether the current version of §1B1.13 is still an “applicable policy statement” post-FSA and what circumstances, or combinations of circumstances, rise to the level of “extraordinary and compelling” reasons warranting a reduction in sentence under § 3582(c)(1)(A).

The Commission has proposed several changes to §1B1.13 to respond to the FSA and to address circuit splits over what should be considered “extraordinary and compelling” reasons warranting a sentence reduction. There are undoubtedly a range of policy views regarding the proposed amendment. The Criminal Law Committee’s comments, however, focus on administration of justice issues—including the clarity of the governing rule and ease of application—and the potential effect on judicial resources.

### **General Comments on Proposed Changes**

In its request for comment on the proposed amendment, the Commission listed five “Issues for Comment” (Appendix A) that the Criminal Law Committee used as a starting part for its analysis. We

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<sup>1</sup> JCUS-SEP 1990, p.69.

<sup>2</sup> U.S. Sentencing Comm’n, *Compassionate Release: The Impact of the First Step Act and the Coronavirus Pandemic* (March 10, 2022), available at <https://www.usc.gov/research/research-reports/compassionate-release-impact-first-step-act-and-covid-19-pandemic>. See also, U.S. Sentencing Comm’n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022* (Sept. 8, 2022), available at <https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf>.

note at the outset that, in formulating our comments, the Criminal Law Committee has focused on the following general areas of concern:

### *1. The Need for Clarity*

The Criminal Law Committee urges the Commission to adopt clear standards and, where possible, to avoid open-ended standards that will invite excessive litigation, inconsistent application, circuit splits, and uncertainty. Indeed, in proposing these changes Judge Reeves, Chair of the Commission, indicated his hope that they would bring “greater clarity to the federal courts and more uniform application of Compassionate Release across the country.”<sup>3</sup> The Committee joins in that hope, and notes for the Commission’s consideration some instances in which the proposed changes may instead result in confusion or inconsistent application of the Guidelines.

### *2. The Need to Preserve Scarce Judicial Resources*

Relatedly, the Commission should consider potential strains on scarce judicial resources. Courts decided 7,280 compassionate release motions in FY 2020, 15,288 motions in FY 2021, and 2,848 motions in the first half of FY 2022.<sup>4</sup> Between October 2019 and March 2020, courts decided fewer than 50 motions for compassionate release per month; between October 2021 and March 2022 the numbers ranged from 427 to 565 per month.<sup>5</sup> Although the numbers of compassionate release motions have decreased in recent months—from a pandemic high of near 2,000 per month—courts still face far more compassionate release motions than before enactment of the FSA; in September 2022, for example, courts decided 267 motions.<sup>6</sup> Compassionate release motions are also often fact-intensive, demanding, and urgent, requiring judges to move these motions to the head of the queue and delaying resolution of other important matters. The more resource-intensive needs of reviewing compassionate release motions, combined with the increased number of motions anticipated to be filed under the proposed expanded eligibility criteria should be considered by the Commission before promulgating any amendments. .

### *3. The Need to Ensure Adequate Probation Resources*

When an individual is released to the community for federal supervision, a federal probation officer must develop and implement a supervision plan. The level of supervision depends on the needs of the individual released. Because of the more resource-intensive needs of some individuals released on compassionate release (e.g., those who are released for health-related reasons), as well as the ongoing

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<sup>3</sup> U.S. Sentencing Comm’n, News Release (Jan. 12, 2023), *available at* <https://www.ussc.gov/about/news/press-releases/january-12-2023>.

<sup>4</sup> U.S. Sentencing Comm’n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022* (Sept. 8, 2022), *available at* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf>; *see also* U.S. Sentencing Comm’n, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic* (Mar. 10, 2022) *available at* <https://www.ussc.gov/research/research-reports/compassionate-release-impact-first-step-act-and-covid-19-pandemic>.

<sup>5</sup> *Id.* at Table 1.

<sup>6</sup> U.S. Sentencing Comm’n *Compassionate Release Data Report: Fiscal Years 2020 to 2022* (Dec. 2022), Table 1, *available at* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

need of the probation system to support individual outcomes and ensure community safety, the Criminal Law Committee notes that additional resources may be required to ensure that the federal probation system is able to provide appropriate levels of supervision.

### **Specific Changes to “Extraordinary and Compelling Reasons”**

With these considerations in mind, we now turn to our specific comments and suggestions relating to each of the changes to the list of “extraordinary and compelling reasons” found in §1B1.13. We do not address, here, and leave to others whether the proposed changes and new categories are consistent with the statutory mandate, not least because such questions may be the subject of litigation in our courts.

#### *1. Relocation from the Commentary to the Guideline Text*

The proposed amendment moves the existing commentary setting forth particular “extraordinary and compelling” reasons to the main text of the guideline as §1B1.13(b). The Criminal Law Committee supports this proposal, which will avoid any uncertainty regarding the status of the list of reasons and will satisfy the congressional directive to promulgate “general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A),” 28 U.S.C. § 994(t).

#### *2. Expanded Medical Provisions*

The proposed amendment expands the list of extraordinary and compelling reasons to include: (a) defendants who have “a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner,” and (b) defendants “housed at a correctional facility affected or at risk of being affected by” an “outbreak of [an] infectious disease” or other “public health emergency,” where the defendant faces an “increased risk of . . . severe medical complications or death” that “cannot be mitigated in a timely or adequate manner.”

The Criminal Law Committee urges the Commission to consider whether other mechanisms may provide a more appropriate way to address the concerns that subsection (a) seeks to remedy (e.g., injunctive relief under the Eighth Amendment) and how this provision would interact with those existing mechanisms. At the very least, the Commission may want to consider making express reference to these other mechanisms and provide guidance on how they intersect with the proposed change.

If the Commission adopts the amendment proposed in subsection (a), the courts are likely to see increased litigation over whether incarcerated individuals have a medical condition that requires long-term or specialized medical care. The courts will need to decide whether the condition is likely to worsen, and if so, what is the timeline. Finally, the courts will be required to determine if the BOP can provide the necessary care. These are all complex questions that will require extensive research, the careful review of documents, and possibly the presentation of witnesses. If it adopts this amendment, the Commission is urged to consider ways to reduce the complexity of this kind of litigation.

The Criminal Law Committee supports efforts to add clarity to the guidelines and policy statements, such as those proposed in subsection (b), which adds clarity to the policy statement and will help judges evaluate motions for compassionate release arising from any future public health emergencies that endanger incarcerated individuals at risk of severe complications or death. Consistent

with 18 U.S.C. § 3582(c)(1), judges will still need to consider the section 3553(a) factors and will therefore be able to make case-specific judgments balancing all relevant considerations.

However, the Criminal Law Committee suggests that the Commission distinguish the circumstances that would support the application of this provision—meriting release from custody, without a requirement that the defendant return to prison after receiving necessary care—from those that might merit the granting of furlough pursuant to 18 U.S.C. § 3622(a). We note, for example, that the provision applies to defendants needing “long-term or specialized medical care,” raising the question whether a defendant needing short-term, but specialized treatment might be entitled to release (assuming, of course, that the § 3553(a) balance also weighs in favor of early release). Similarly, this provision provides little guidance on how a court should decide whether the defendant is “being provided” medical care “in a timely or adequate manner,” and whether the court should ensure that any relief available within the domain of the BOP has been exhausted.

In addition, the Commission may want to consider defining what is meant by “increased risk of . . . severe medical complications or death”, “or at risk of being affected,” and other medical or health-related terminology that the courts would have to consider when reviewing compassionate release motions under the new subsection (b). For example, it might be helpful to provide additional guidance regarding the level of risk (or the level of increase in risk) that would support compassionate release, particularly in circumstances in which a large percentage of the prison population could face some “increase” in the risk of severe medical complications.

### *3. Expanded Family Circumstances Provision*

The proposed amendments would also expand the circumstances under which a defendant might be released due to family circumstances. If the Commission adopts this amendment, the Criminal Law Committee urges the Commission to address questions that might arise in its application. As drafted, for example, the provision would apply to an adult child who is “incapable of self-care because of . . . a medical condition.” Would this apply to an adult child suffering from a short-term medical condition, such as several broken bones? How would this provision interact with 18 U.S.C. § 3622(a), which might resolve such a short-term crisis? Similarly, would the proposed addition permit a court to release a defendant to provide the equivalent of hospice care for a parent who is likely to pass away within weeks?

### *4. Addition of Two New Categories*

The proposed amendment brackets the possibility of adding two new categories. The first would add a new category if the “defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.” The Commission also seeks comment on whether this category should include victims of assaults committed by other defendants. The second category would apply to defendants serving sentences that are “inequitable in light of changes in the law.” We will address these categories in turn, but note that because these issues may involve litigation, we do not address the scope of the Commission’s statutory authority with respect to these bracketed additions.

#### A. Victims of Assault

Although the Criminal Law Committee strongly supports efforts to protect those who are assaulted in prison from further abuse, we believe that this proposed new category raises administration of justice concerns for the court in deciding if an inmate has been a victim. For example, courts would have to consider or decide whether to wait for finality of the BOP's investigation of the matter, whether to wait for conclusion of any criminal proceeding brought against the alleged assailant, and whether the BOP considered and addressed the issue through its internal grievance process. Absent guidance on these sorts of procedural steps and substantive questions, there is a risk that this provision could invite a deluge of litigation and confusion, which may otherwise be avoidable with more clear guidance.

Second, the proposal does not define or clarify application of a number of key terms. For example, does the Commission intend for the definition of "serious bodily injury" provided in the application notes to §1B1.1 (which includes all injuries "involving extreme physical pain") to apply here, especially where there is no long-term impairment? And, what constitutes "physical abuse"? Would the provision apply to an officer who uses more force than necessary to break up a fight? If so, would that "physical abuse" need to rise to the level of "excessive force," rendering the correctional officer's actions potentially criminal under 18 U.S.C. § 242?

Third, does the court need to consider alternatives to release that are sufficient to protect the safety of the defendant? Should the court grant release where someone is assaulted in prison, but their correctional officer assailant is fired or transferred to another facility? What if BOP transfers the defendant to another correctional facility with no history of abuse or otherwise provides a remedy for the defendant?

In raising these questions, the Criminal Law Committee does not take issue with the important goal of protecting incarcerated individuals. We urge the Commission, however, to consider these important questions and anticipated ensuing litigation in the courts before proceeding with the amendment.

The Commission seeks comment, specifically, on "whether this provision should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily injury committed by another inmate." This proposal raises many of the same questions posed above, litigation over which could result in substantial strain on judicial resources.

## B. Changes in the Law

The proposed amendment also brackets the possibility of adding a new compassionate release category at §1B1.13(b)(5), when the defendant "is serving a sentence that is inequitable in light of changes in the law." As we understand it, this revision would address the circuit split over whether changes in sentencing law can provide grounds for compassionate release.

The Criminal Law Committee has significant administrative concerns with this potential addition. More specifically:

- The proposed amendment does not provide clear guidance for courts in determining when an otherwise non-retroactive change in sentencing law rises to the level that would warrant a reduction under § 3582(c)(1)(A). How would this interact with decisions made by Congress

or the Sentencing Commission about retroactivity? Could a court consider a change in the governing sentencing statute that Congress declined to apply retroactively?

- The provision does not address what “changes in the law” would qualify. Would the provision apply only where Congress amends a relevant sentencing provision? Would it apply to state law changes (when, for example, the defendant has been convicted of a crime under the Assimilative Crimes Act)? Would it apply when Congress repeals a substantive offense? Would it apply to changes in the rules of evidence or in procedural rules that, if adopted earlier, might have made it harder for the government to obtain a conviction? Would it apply when a change in law would have made it impossible or more difficult for a federal or state prosecutor to obtain a conviction in an earlier case, which was counted in the defendant’s criminal history calculation?
- The provision does not limit how often a defendant could file a compassionate release motion on this ground. Could a defendant refile every time the Supreme Court or the relevant Circuit renders a decision that, if decided earlier, might have affected the defendant’s conviction or sentence?
- The provision does not address how it interacts with other rules relating to finality, including, for example, the rules relating to availability of collateral relief under 28 U.S.C. § 2255?

As with the victims of assault proposal, the Criminal Law Committee urges the Commission to evaluate these and the host of other issues raised by this proposal before proceeding.

Finally, the Criminal Law Committee notes that whether a change in law should constitute a category of cases justifying compassionate release is distinct from whether, in applying the § 3553(a) factors, courts can or should consider changes in the law. To the extent these and other issues raised by the proposal may be litigated in the federal courts, the Criminal Law Committee takes no position.

#### *5. Options for a Catch-all Provision*

The proposed amendments provide three options for a potential catch-all provision for circumstances not accounted in the enumerated list. Option 1 states: “The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described” in the previous paragraphs. Option 2 states: “As a result of changes in the defendant’s circumstances [or intervening events that occurred after the defendant’s sentence was imposed], it would be inequitable to continue the defendant’s imprisonment or require the defendant to serve the full length of the sentence.” Option 3 states: “The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described” in the previous paragraphs.

Of the three options, Option 1 provides the clearest guidance to courts, and it operates as “catch-all” by providing courts with the opportunity to consider unanticipated grounds for compassionate release that are “of similar severity or import to the enumerated grounds.”

In contrast, Options 2 and 3 provide courts with little guidance and could invite a deluge of compassionate release motions. Option 3 merely repeats the statutory test without the benefit of any

guidance from the Commission. Option 2 adds little, if anything, to that standard. Presumably, in every case in which a court concludes that “extraordinary and compelling reasons” justify early release, and the § 3553(a) factors weigh in favor of release, “it would be inequitable to continue the defendant’s imprisonment.”

If the Commission chooses to adopt one of these options, the Criminal Law Committee suggests Option 1, which will avoid inconsistent decisions across the judiciary and avoid further circuit conflicts, and preserve scarce judicial resources. Regardless of the selected option, however, the Criminal Law Committee notes that the new provision will still require courts to apply the 18 U.S.C. § 3553(a) factors before deciding whether to grant a motion for compassionate release.

### **Conclusion**

The Committee appreciates the work of the Commission and the opportunity to comment on these proposed changes to the sentencing guidelines. As we have in the past, the members of the Criminal Law Committee look forward to working with the Commission to ensure that our sentencing system is consistent with the tenets of the Sentencing Reform Act.

**Appendix A: “Issues for Comment” for Proposed Amendment Regarding §1B1.13 - Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)**

1. The proposed amendment would revise the list of “extraordinary and compelling reasons” in §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) in several ways. The Commission invites comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—exceeds the Commission’s authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law.
2. The proposed amendment would make changes to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on the proposed changes and whether the Commission should make any different or additional changes to implement the Act.
3. The proposed amendment would revise the categories of circumstances in which “extraordinary and compelling reasons” exist under the Commission’s policy statement at §1B1.13. The Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” The Commission also has the authority to promulgate general policy statements regarding the application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). See 28 U.S.C. § 994(a)(2)(C).

The Commission seeks comment on whether the proposed categories of circumstances are appropriate and provide clear guidance to the courts and the Bureau of Prisons. Should the Commission further define and expand the categories? Should the Commission provide additional or different criteria or examples of circumstances that constitute “extraordinary and compelling reasons”? If so, what specific criteria or examples should the Commission provide? Should the Commission consider an altogether different approach for describing “what should be considered extraordinary and compelling reasons for sentence reduction”?

4. The proposed amendment brackets the possibility of adding a new category of “extraordinary and compelling reasons” to §1B1.13 relating to defendants who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. The Commission seeks comment on whether this provision should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily injury committed by another inmate.
5. Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) sets forth the applicable policy statement for determining in what circumstances and to what extent a reduction in a term of imprisonment as a result of an



amended guideline range may be granted. In *Dillon v. United States*, 560 U.S. 817 (2010), the Supreme Court held that proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

The Commission seeks comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—is in tension with the Commission’s determinations regarding retroactivity of guideline amendments under §1B1.10. If so, how should the Commission resolve this tension? Should the Commission clarify the interaction between §1B1.10 and §1B1.13? If so, how?