Before the United States Sentencing Commission
Public Hearing on Compassionate Release

Statement of Kelly Barrett, First Assistant Federal Public Defender for the District of Connecticut, on Behalf of the Federal Public and Community Defenders

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Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

My name is Kelly Barrett and I am the First Assistant to the Federal Public Defender for the District of Connecticut. Since the First Step Act of 2018 enabled individuals to seek sentence reductions under 18 U.S.C. § 3582(c)(1)(A) on their own behalf, I have spearheaded my office's efforts under that statute. I have filed numerous § 3582(c)(1)(A) motions for my own clients and also helped facilitate the work of other attorneys for their clients.[1] Many of those motions were granted, some with the government's agreement, and many others were denied. With my clients who have prevailed, we are richer for having them back home—working, caring for their families, and sharing their talents with their communities.

Indeed, my former § 3582(c)(1)(A) clients aren't just doing well; they are *thriving*. More than a dozen of those clients have successfully graduated from the District of Connecticut's rigorous reentry court, and three of those graduates now mentor others in reentry court. The day before the Commission holds this hearing, another of my clients will be graduating.

This statement goes through the Commission's proposed amendments to §1B1.13, with an eye toward Issues for Comment 2, 3, and 4. Defenders will address the legal questions about the Commission's authority and whether there is any potential tension between §1B1.13 and other laws (Issues for Comment 1 and 5) in our written comments, which are due March 14. Of course, at the hearing, I will endeavor to answer any questions that Commissioners may have regarding any of the proposed amendments.

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[1] Commissioners may note that I refer to motions for sentence reduction under § 3582(c)(1)(A), rather than "compassionate release." As the Second Circuit has explained: "It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

I. Introduction

My circuit—the Second Circuit Court of Appeals—was one of the first to hold that the current USSG §1B1.13 does not apply to defendant-filed motions, and courts have broad discretion to determine whether the individualized circumstances presented in a particular case constitute "extraordinary and compelling reasons" for a sentence reduction.[2] Judges in the District of Connecticut have exercised that discretion carefully and reduced sentences in many cases where "circumstances [were] so changed" that it "would be inequitable" to maintain the sentence as originally imposed.[3] These are the kinds of cases to which Congress intended § 3582(c)(1)(A) to apply; that section was meant to function as a "safety valve"—one controlled by judges, not a parole board—in the newly determinate federal sentencing scheme.[4]

Defenders commend the Commission for proposing amendments to §1B1.13 that provide guidance while also granting courts discretion to consider the entire constellation of circumstances that might warrant a sentence reduction in a particular case. With these changes, § 3582(c)(1)(A) would be able to serve as a meaningful safety valve.

The past few years have served as a laboratory for the Commission, as district judges have had great discretion in determining which circumstances present extraordinary and compelling reasons for sentence reduction. The proposed amendments show that the Commission is listening to judges: the Commission is proposing to add new enumerated categories to §1B1.13 based on circumstances that judges have found to be extraordinary and compelling—*e.g.*, serious medical needs that are not being met, prison assault, and legal changes.[5]

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[2] *See Brooker*, 976 F.3d at 236–37.

[3] S. Rep. No. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3304. This is a quote from the Senate Report on the Sentencing Reform Act of 1984 that Defenders discussed in a recent letter to the Commission. *See* Defender Comment on the Commission's Proposed Policy Priorities, at 3 n.11 (Oct. 17, 2022).

[4] *See* S. Rep. No. 98-225, at 121 (1983).

[5] This is how the Commission is meant to work: "The statutes and the Guidelines . . . foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita v. United States*, 551 U.S. 338, 350 (2007).

Also, the Commission has proposed options for an open-ended catchall category, which reflects something we all learned from the recent pandemic: we cannot know what the future holds. It is essential that courts have discretion to recognize extraordinary and compelling circumstances that we cannot even imagine today, or that may arise only in a single case. As Defenders have said before, Congress's legal standard for § 3582(c)(1)(A)—"extraordinary and compelling reasons"—is not reduceable to a finite list.

II. The proposed amendments to §1B1.13 give clear guidance to federal courts while retaining flexibility.

Since Congress empowered individuals to file § 3582(c)(1)(A) motions on their own behalf, all the circuits that have decided the issue except one have held that the current §1B1.13 is not applicable to defense-filed motions.[6] Thus, in most of the country, there has been no Commission guidance on how to apply § 3582(c)(1)(A), which makes it unsurprising that different courts have applied the section differently. The proposed amendments to §1B1.13 will go far to reduce unwarranted disparities.[7]

The proposed §1B1.13's enumerated circumstances (sub. (b)(1)–(5)) address the Commission's obligation to provide "criteria" and also "examples" of extraordinary and compelling reasons.[8] They appropriately capture the kinds

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[6] *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

[7] In the past, the DOJ has raised concerns about disparities in this context. *See* DOJ Public Comment on the Proposed Priorities, at 5 (Sept. 12, 2022). It is impossible to ascertain from motion grant/denial rates whether disparities are unwarranted or are based on distinctions between individualized circumstances. It is the Defenders' experience that it is a combination of these. And the Commission should endeavor to reduce only *unwarranted* disparities. *See Gall v. United States*, 552 U.S. 38, 55 (2007) (approving of the effort to reduce not just unwarranted disparities but also "unwarranted similarities" among defendants who are not similarly situated).

[8] 28 U.S.C. § 994(t).

of circumstances that courts have found, in individual cases, may warrant a sentence reduction:

- *The proposed sub. (b)(1) appropriately expands the health-related circumstances that may warrant sentence reduction to include medical conditions that pose treatment challenges in prison and also infectious disease.* The former provides a path to complex medical care—while our clients can still benefit from it—that is removed from litigation about who is to blame for health-care failures. The latter reflects what we've all learned the hard way: infectious diseases can be difficult or impossible to manage in the prison setting.

- *Subsection (b)(3) recognizes that someone who is not an individual's minor child may require their care.* This does not only benefit our clients and their families. It benefits the public by easing communities' caretaking responsibilities and also by reducing recidivism risk.[9] It is essential that the amendment include the bracketed sub. (b)(3)(D) to capture circumstances that may be extraordinary and compelling in unusual cases. Family and kinship relationships are not one-size-fits-all. This is true generally and can also relate to varying cultural norms, which are entitled to respect.

- *The bracketed sub. (b)(4) acknowledges that sometimes imprisonment is more punitive and traumatic than the sentencing court intended or society can bear.* Prison rape and assault are real. And no judge would have intended such a violation. By acknowledging that some individuals are victimized while in custody and that this can impact the appropriateness of the sentence originally imposed, this proposed amendment promotes healing and rehabilitation.

- *The bracketed sub. (b)(5) appreciates that a sentence imposed under a legal scheme that is now understood to be overly harsh can epitomize "extraordinary" and "compelling."* It would harm the

[9] *See* Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L. Q. 191, 196 (2006) ("The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return. Studies have shown that prisoners who maintain family ties during imprisonment are less likely to violate parole or commit future crimes after their release than prisoners without such ties.").

credibility of our justice system to prohibit judges from recognizing this reality. By expressly endorsing the consideration of legal changes in the extraordinary-and-compelling analysis, regardless of whether a change would have retroactive application as a general matter, sub. (b)(5) will encourage circuit courts that have prohibited this practice to revisit pre-amendment caselaw, reducing disparities and protecting the credibility of the federal criminal justice system.

III. A few simple changes to the proposed enumerated circumstances would improve §1B1.13.

As discussed below, an open-ended catchall category is essential to the functioning of §1B1.13: it captures circumstances that we cannot foresee, or that would be too rare or idiosyncratic for an enumerated category. But even with a catchall, care must be taken with the enumerated circumstances. A court analyzing a circumstance that is close to, but does not quite fit within, an enumerated category may think that the Commission intended to delineate the boundaries of that category and feel compelled to deny the motion. We urge the Commission to clarify or broaden language proposed in three of the enumerated categories.

A. Subsection (b)(1)(C) should refer to medical care that is not being provided in a timely or "effective," rather than merely "adequate," manner.

Again, we commend the Commission for proposing the new sub. (b)(1)(C). Most Defenders have had clients who suffered from medical conditions that could have been managed far better, or even cured, in the community, but unfortunately they got much worse in prison.

One of my own cases, *United States v. Cruz*, 3:15-cr-96-VLB, doc. 402 (D. Conn. Dec. 19, 2022), provides an example. The motion containing the medical information in that case was filed under seal, but Ms. Cruz has given me permission to provide it to the Commission upon request. To summarize, after sentencing, Ms. Cruz was diagnosed with multiple sclerosis. Her condition was managed effectively while she served a state sentence but, once she was transferred from state to federal prison, all treatment stopped (apparently due to the need for multiple layers of BOP approval) and her health deteriorated. Thankfully, the government did not oppose our motion for

sentence reduction and the court granted it. Now Ms. Cruz is home with her family, getting treatment, and doing well. Other courts around the country have granted § 3582(c)(1)(A) motions in numerous similar cases, so that other individuals could get needed treatment.[10]

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[10] *See, e.g., United States v. English*, 2022 WL 17853361, at *7 (E.D. Mich. Dec. 22, 2022) (where Mr. English had several significant health concerns, including multiple tumors, but the BOP had no treatment plan, "BOP's gross mismanagement of English's serious health conditions, even if they are not yet life-threatening, presents an extraordinary and compelling reason for release"); Order, *United States v. Halliday*, No. 3:17-cr-267-JAM, doc. 176, at 1–2 (D. Conn. Aug. 11, 2022) ("I conclude that Halliday has shown that he suffers from a gravely serious eye disease—keratoconous—that has advanced to a great degree and imminently threatens permanent blindness unless promptly subject to sophisticated medical treatment. . . . Halliday's best hope for retaining his eyesight is to seek treatment by an eye specialist in the outside community as soon as possible."); *United States v. Verasawmi*, 2022 WL 2763518, at *10 (D.N.J. July 15, 2022) ("In these atypical circumstances, where Verasawmi suffers from a complex array of serious conditions, some of which the BOP has failed to treat diligently, the Court cannot simply wait until [life-threatening] outcomes materialize."); Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198, at 10–11 (D. Alaska Mar. 29, 2022) (granting § 3582(c)(1)(A) relief based on aggressive prostate cancer that appeared to have metastasized to other parts of Mr. Green's body while he waited for testing and treatment, and the BOP still did not have a treatment plan in place); *United States v. Russell*, 2022 WL 18542444, at *4 (D.N.J. Mar. 9, 2022) ("The surest and perhaps only path towards the proper treatment [Mr. Russell] urgently needs is his release from prison.") (quoting the motion); *United States v. McPeek*, 2022 WL 429249, at *9 (N.D. Iowa Feb. 11, 2022) (collecting cases where courts found that "BOP delays in treatment of serious disorders can constitute or contribute to finding extraordinary and compelling circumstances"); *United States v. Bandrow*, 473 F. Supp. 3d 778, 787 (E.D. Mich. 2020) ("Elkton's inability to provide care for Bandrow's hematuria further weighs in favor of compassionate release. Despite knowing about Bandrow's hematuria since January 2020, and being alerted that his condition was a 'serious illness/critical illness' on June 4, 2020, FCI Elkton has been unable to provide Bandrow with the CT urogram and urology consultation he needs to address this issue."); *United States v. Almontes*, 2020 WL 1812713, at *1, *6–7 (D. Conn. Apr 9, 2020) (granting relief to an individual in need of urgent spinal surgery related to a previously broken neck, where the BOP had delayed treatment for years and his health was deteriorating); *Bruno v. United States*, 472 F. Supp. 3d 279, 284 (E.D. Va. 2020) ("In addition to Petitioner's status as HIV-positive, the Court is also concerned that his mental health needs are being neglected during his term of incarceration. . . . This outcome is plainly unacceptable, as Petitioner was sentenced based in large part on his need for mental health treatment for his Bipolar Disorder.").

Defenders presume that the BOP is rarely deliberately indifferent—the Eighth Amendment standard.[11] The beauty of sub. (b)(1)(C) is that it does not attempt to assign blame or remedy harm. Instead, it permits the court to reduce a sentence *before* there is harm—or at least further harm—so that a person who urgently needs complex or specialized medical care can access it.

Our concern is with the word "adequate," as it appears in the phrase "that is not being provided in a timely or *adequate* manner." That word may discourage courts from granting § 3582(c)(1)(A) relief so that an individual can get medical care in the community (where other factors militate in favor of release) in all but the most extreme circumstances. And where circumstances are extreme, §1B1.13 may not even be needed; that's what the deliberate-indifference standard addresses. Section 3582(c)(1)(A) and §1B1.13(b)(1)(C) serve a different purpose.

In *Green*, a case in footnote 10 involving aggressive prostate cancer, the government opposed the motion on the ground that the BOP was providing "adequate" care.[12] But the court explained that nothing in § 3582 or §1B1.13 "require[d] the defendant to show that the BOP is not providing *adequate* medical care in order to be granted compassionate release."[13] Thus, the court did not have to assign a grade to the BOP's care of Mr. Green. It was enough that Mr. Green needed far more aggressive and urgent care than he was getting in BOP custody, and the § 3553(a) factors supported release.[14]

To ensure that courts have the discretion to consider sentence reductions in cases like Mr. Green's, where an individual needs access to urgent medical care in the community, Defenders recommend a stronger word than "adequate." We suggest "effective." As in: "The defendant is suffering from 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 *effective* manner." This is a small change that could make a big difference in some cases.

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[11] *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

[12] Order, *United States v. Green*, No. 3:16-cr-63-SLF, doc. 198 (D. Alaska Mar. 29, 2022) (quoting the government's motion.

[13] *Id.* at 4 (emphasis added).

[14] *See id.*

B. Subsection (b)(1)(D) should encompass *any* emergency situation that threatens the lives or health of individuals in prison that cannot be mitigated.

As currently drafted, sub. (b)(1)(D) applies only to an "infectious disease" or a "public health emergency." This is too narrow, given the reality of other emergency situations that may pose a health threat to the prison population. For example, it is easy to imagine a catastrophic weather event that prevents the BOP from protecting inmates' health and safety. And if such an event happened over a large enough area, and the aftermath extended for a long enough period, individuals could face significant health threats that the BOP would not be able to mitigate.

But if the proposed sub. (b)(1)(D) were expanded solely to include extreme weather events, that would be overly narrow, too, given other events that could occur: *e.g.*, war, geological disaster, economic collapse. Defenders hope that we never see any of these circumstances in our lifetimes, and it would not make sense for the Commission to write a doomsday provision into the §1B1.13 policy statement. But the Commission should broaden sub. (b)(1)(D) to cover *any* emergency situation that poses a health threat to imprisoned individuals that cannot be appropriately mitigated.

C. The Commission should expand sub. (b)(4) in two ways in order to reach all prison abuse that may warrant a sentence reduction.

The bracketed sub. (b)(4), regarding people who have been the victim of physical or sexual abuse in prison, would be a positive change, but it covers only abuse that was perpetrated by a BOP employee or contractor and only if it resulted in "serious bodily injury." The new subsection is well-meaning but these two limitations mean that it would not apply to circumstances that many—or even most—judges would find extraordinary and compelling.

First, there is no reasoned justification for limiting sub. (b)(4) to circumstances where the perpetrator is a BOP employee or contractor. With both sexual and physical abuse, the harm is real regardless of the identity of the perpetrator. Many Defenders have seen our clients return from prison with visible scars from injuries inflicted by other inmates and emotional scars

from violent rape. For victims of violent attacks while in prison, the fact that a BOP employee or contractor was not the perpetrator is utterly irrelevant.

Limiting sub. (b)(4) to situations where the perpetrator was a BOP employee or contractor makes the provision seem less like an illustrative example of an "extraordinary and compelling reason[]" for sentence reduction and more like compensation for harm inflicted by the government. In reality, the government can bear responsibility for inmate-on-inmate assault. But more importantly, the point of § 3582(c)(1)(A) is not to assign responsibility for harm, and it's not to reduce a sentence in order to punish the government.

The point is that a particular individual's circumstances might so change during their term of imprisonment that it would be inequitable to maintain the sentence as originally imposed. And sexual and physical abuse are life-changing no matter who the assaulter is: a federal employee or contractor,[15] a state or local correctional officer (which might arise where the individual is serving both state and federal sentences or where he is in transit to a federal facility),[16] or a fellow inmate.[17]

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[15] *See, e.g., United States v. Brice*, 2022 WL 17721031, at *4 (E.D. Pa. Dec. 15, 2022) (holding that prison guards' sexual assault of the individual was an extraordinary and compelling reason for sentence reduction).

[16] *Cf. United States v. Brocoli*, 543 F. Supp. 3d 563, 568–69 (S.D. Ohio 2021) ("[A]lthough Mr. Brocoli was investigated, charged, and sentenced in the federal system, he has nevertheless been detained in state-level institutions for a significant portion of his incarceration. During his incarceration in these state institutions, he reports having been severely abused and victimized. . . . For these reasons, the Court finds that Mr. Brocoli has demonstrated extraordinary and compelling reasons that could justify his release.").

[17] *See, e.g.,* Mot. for Compassionate Release Due to Serious Medical Condition at 3–4, *United States v. Smith*, No. 3:11-cr-194-14, doc. 2260 (M.D. Tenn. March 31, 2022) (granted by Order dated Dec. 15, 2022, doc. 2285) (explaining that the individual was (mistakenly) believed to have cooperated with the government, which resulted in him being beaten so severely that he went into a coma and likely would require permanent nursing care); *United States v. Wise*, 2020 WL 4251007, *2–3 (N.D. Ohio June 25, 2020) (granting § 3582(c)(1)(A) motion based in part on medical conditions for an individual who had been brutally attacked in prison in 2007, causing spinal fractures, a broken jaw, a broken nose, and lingering neurological problems); *cf. United States v. Pinson*, 835 F. App'x 390, 392 (10th Cir. 2020) (affirming a district court judgment where the court had apparently accepted that it could be extraordinary and compelling that the individual had been subjected to "serious violence by other inmates, including rape," but had denied the motion based on §

Second, Defenders are also concerned about the proposed sub. (b)(4)'s "serious bodily injury" requirement. The Guidelines define "serious bodily injury" as

> injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.[18]

This limitation may make sense as applied to abuse by fellow inmates. Unfortunately, low-level violence in prison is not extraordinary; it is all too common. This is among the reasons that ending mass incarceration is a moral imperative for our nation. But it means that courts are likely to think that inmate-inflicted abuse in prison is extraordinary only when it causes significant injury or involves non-consensual sexual assault.

However, the situation is different where a prison employee, contractor, or volunteer (*e.g.*, clergy member, teacher) is the perpetrator. In that situation, it is the gross imbalance of power that makes a sexual act "abusive." *See* 18 U.S.C. § 2243 (sexual abuse of a minor or ward). And it is this same imbalance of power that makes physical abuse of an imprisoned individual by a person with authority more than simple assault—it's a civil rights violation.

In this situation, there should be no need for an individual to make a showing of harm—and certainly not "serious bodily injury"—before a court can recognize that it is extraordinary and compelling.

3553(a) factors). I have also reviewed a redacted version of a § 3582(c)(1)(A) motion that was filed under seal on behalf of a transgender woman who was housed in male prisons, where she was repeatedly attacked and raped. That motion was withdrawn before the court ruled on it, after the individual's BOP sentence expired. Motion to Withdraw Document, *United States v. Gerald P.*, No. 4:04-cr-29-TRM-SKL-1, doc. 326 (E.D. Tenn. Jan. 27, 2023). As with the other sealed document discussed in this statement, if it would be helpful, the client has granted permission for me to provide the Commission with a copy of the § 3582(c)(1)(A) motion upon request.

[18] USSG §1B1.1, comment. (n. 1(M)).

Perhaps "serious bodily injury" was chosen for the proposed sub. (b)(4) because it applies anytime there has been sexual abuse as defined at 18 U.S.C. §§ 2241 or 2242, whereas the generally lower standard, "bodily injury," does not.[19] But in many sexual assault cases in which a BOP employee or contractor was the perpetrator, the offense comes within 18 U.S.C. § 2243 (sexual abuse of a minor or ward), but not necessarily §§ 2241 or 2242.[20] Thus, the limitation of sub. (b)(4) to circumstances that involve a "serious bodily injury" threatens to undermine even the core purpose of this proposed enumerated circumstance.

In order to address both of our concerns, Defenders recommend that the Commission alter sub. (b)(4) so that it reads:

> VICTIM OF ABUSE.—The defendant was a victim of sexual or physical abuse in prison, where such abuse resulted in serious bodily injury or where it was perpetrated by a prison employee, contractor, or volunteer.

IV. An open-ended catchall category is essential to §1B1.13's ability to capture unforeseeable and unique circumstances that are extraordinary and compelling.

Since the Sentencing Commission created a policy statement at §1B1.13, it has always had an open-ended catchall category. In the past, that category has turned on the BOP's discretionary judgment; that was out of necessity, since the BOP effectively controlled § 3582(c)(1)(A) motions until passage of the First Step Act of 2018.[21] Now that the BOP no longer controls these motions, the Commission need not reverse course; it should just update the entity that exercises discretion.

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[19] *Compare* USSG §1B1.1, comment. (n. 1(B)) *with* §1B1.1 comment. (n. 1(M)).

[20] In the context of the coercive relationship between a prison authority and an imprisoned person, consent is a thorny issue. That's why sexual abuse of a minor or ward is a serious felony regardless of force, threat, or consent, which are the elements that define §§ 2241 and 2242.

[21] When the BOP controlled sentence reductions under § 3582(c)(1)(A), as the Commission is aware, the BOP effectively abdicated its responsibility to seek sentence reductions. *See Brooker*, 976 F.3d at 231–32 (recounting this history).

The presence of an open-ended catchall category (like Option 3 for the proposed sub. (b)(6)) further defines the "criteria to be applied"[22] in these proceedings and is essential to the functioning of §1B1.13, and we appreciate that the Commission has proposed it as an option. Before 2020, the Commission did not think to include risks related to infectious disease in §1B1.13; now we know. But we do not know all that we still do not know.

And beyond our inability to predict the future, it would not make sense for the Commission to include every conceivable occurrence that might, in an individual case, warrant a sentence reduction. Consider a few situations that have been recognized as among the extraordinary and compelling reasons for sentence reduction in my own district in recent years:

- *BOP services halted.* Our client was at the point of his sentence where ordinarily he would be receiving transitional services and transferring to a halfway house but, because of circumstances outside of his control (the pandemic), he was receiving no transitional or supportive services.[23]

- *BOP rules increased sentence.* The parties and the sentencing court understood that the sentence would be fully concurrent to a state sentence, but the BOP deemed the federal sentence to be consecutive and thus our client was slated to serve a sentence far longer than the sentencing court had intended.[24]

- *Youth at the time of sentencing*. In the more than 20 years since our client was sentenced to life in prison for serious offenses committed

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[22] 28 U.S.C. § 994(t). The Commission acts well within its policy-making authority in this space when it decides, as a matter of policy, that the sentencing court should have broad discretion to recognize unusual extraordinary and compelling reasons when they arise.

[23] *See* Order, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 92 (D. Conn. May 20, 2020); *see also* Unopposed Mot. 4–5, *United States v. Coleman*, 3:17-cr-216-AWT, doc. 91 (D. Conn. May 18, 2020). Similar situations have arisen elsewhere. *See, e.g., United States v. Fraga*, 2020 WL 5732329, at *3 (D. Mass. Sept. 24, 2020) (granting release to home confinement where, if not for the pandemic, Mr. Fraga already would have been transferred to a halfway house or residential facility).

[24] *See United States v. Castillo*, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021). Again, similar situations have arisen elsewhere. *See, e.g., United States v. Comer*, 2022 WL 1719404, *5 (W.D. Va. May 27, 2022).

when he was 18 years old, society's and the courts' understanding of brain development had evolved considerably, calling into question the appropriateness of the sentence.[25]

- *Sentence lengthened by civic duty*. Our client's time in the RDAP program[26] was cut short when the government transported him to testify before a grand jury. If he'd been able to complete RDAP he would have been released already, but because the government pulled him out of prison for a civic duty he was still in prison.[27]

- *Family emergency*. Our client had just 20 days left to serve on his sentence under home confinement in New Jersey, and he was doing well. His mother was in hospice care in Georgia and would die any day. Given the short time left on our client's sentence, the court found that our client's need to be with his mother was extraordinary and compelling and granted his § 3582(c)(1)(A) motion.[28]

"Extraordinary and compelling" findings arising from idiosyncratic circumstances in other districts include: saving the life of another person while in prison[29]; risk of death at a halfway house related to cooperation with the

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[25] *See United States v. Morris*, 2022 WL 3703201, at *8–9 (D. Conn. Aug. 26, 2022). Again, similar situations have arisen elsewhere. *See, e.g., United States v. Mendez-Zamora*, 2022 WL 9333452, *2 (D. Kan. Oct. 14, 2022).

[26] The BOP's Residential Drug Abuse Program (RDAP) is an intensive treatment program, where completion of the program results in a sentence reduction. *See* Federal Bureau of Prisons, *Substance Abuse Treatment*, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp; Families Against Mandatory Minimums, *Frequently Asked Questions about the Residential Drug Abuse Program (RDAP)* at 1 (May 2012), https://famm.org/wp-content/uploads/FAQ-Residential-Drug-Abuse-Program-5.3.pdf.

[27] *See United States v. Wooten*, 2020 WL 6119321, at *8 (D. Conn. April 27, 2021).

[28] *See* Unopposed Emergency Mot., *United States v. Oreckinto*, No. 3:16-CR-026 (JAM), doc. 137 (D. Conn. Feb. 13, 2021) (granted by Order, doc. 138 (Feb. 13, 2021)).

[29] *See United States v. Pimental-Quiroz*, 2021 WL 915141, at *4 (W.D. Wash. Mar. 10, 2021) (fiding that Mr. Pimental-Quiroz "put himself at risk when he assisted a female corrections officer who was being assaulted by a mentally ill inmate"); *see also United States v. Meeks*, 2021 WL 9928774, at *3 (N.D. Ill. Dec. 15, 2021) (recognizing as extraordinary and compelling that the individual saved the life of a fellow inmate who was attempting suicide).

government[30]; unwarranted disparities among co-defendants that emerged after sentencing[31]; childbirth and inability to bond with a newborn while incarcerated[32]; unwarranted reincarceration after release to CARES Act home confinement[33]; and psychological problems manifesting in a child upon separation from her incarcerated parent.[34]

These sorts of circumstances do not relate to any enumerated category that the Commission has proposed. But also, it would not make sense to create an additional category for, say, saving someone's life or being pulled out of RDAP for grand jury service. These are too idiosyncratic. However, an open-ended §1B1.13(b)(6) ensures that sentencing courts are able to identify

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[30] In the case in which this arose, all documents were filed under seal and cannot be shared. But it is no secret that halfway houses can expose vulnerable individuals to new violence. *See, e.g., 1 wounded in shooting near halfway house in New Orleans*, 4WWL (Feb. 10, 2022), https://www.wwltv.com/article/news/crime/1-wounded-in-shooting-near-halfway-house/289-e975d60a-c908-48d1-b712-06974e995000.

[31] *See United States v. Edwards*, 2021 WL 1575276, at *1–2 (D. Md. Apr. 22, 2021); *see also United States v. Conley*, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021) (granting relief under § 3582(c)(1)(A) in a stash-house case in which Mr. "Conley was the next to least culpable, yet received the longest prison sentence by double based on outrageous and disreputable law enforcement tactics"). Pre-Sentencing Reform Act, at least one court in a published case reduced a sentence under a predecessor statute—18 U.S.C. § 4205, which permitted the BOP to seek a sentence reduction below an otherwise mandatory-minimum—based on disparities among co-defendants. *See United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978).

[32] *See United States v. Garcia-Zuniga*, 2020 WL 3403070, at *2–3 (S.D. Cal. June 19, 2020).

[33] *See* Mot. for Emergency Status Hearing, *United States v. Levi*, No. 8:04-cr-235-DKC, doc. 2086 (D. Md. July 2, 2021) (granted by Order, doc. 2086 (July 6, 2021)). It is my understanding that Gwen Levi will testify before the Commission, so the Commission is likely familiar with her case. But for a narrative of what occurred, *see* Kristine Phillips, *Woman who was arrested after missing officials' phone call while in computer class is headed home*, USA Today (July 7, 2021), https://www.usatoday.com/story/news/politics/2021/07/06/gwen-levi-headed-home-after-judge-approves-compassionate-release/7877359002/.

[34] *See* Order, *United States v. Ochoa*, No. 18-cr-03945-BAS-1, doc. 70 at 8 (S.D. Cal. Feb. 19, 2021) ("In light of the pandemic, the closed schools, and the serious difficulties L. has been experiencing—namely, his reported deterioration in mental health and suicidal ideation—the Court finds this showing constitutes 'extraordinary and compelling circumstances' to support reducing Ms. Ochoa's sentence to allow her to better care for her minor child.").

circumstances like these as extraordinary and compelling when they encounter them—in appropriate cases, on an individualized basis.

Of the three options the Commission has presented for the new §1B1.13(b)(6), the third option is the best. The proposed third option gives sentencing courts nothing more than the same meaningful discretion that the Commission has long afforded the BOP.[35] It does not preclude relief in circumstances that courts may reasonably find—indeed, have reasonably found—to be extraordinary and compelling reasons for sentence reduction, and its meaning is clear.

Option 1 is overly restrictive. Option 1 is limited to circumstances that are "similar in nature and consequence" to §1B1.13's enumerated circumstances. Thus, it wrongly suggests that those enumerated categories have entirely covered the kinds of circumstances that may present an extraordinary and compelling basis for sentencing relief. But none of us—including the Commission—is omniscient, nor can we see the future.

The circumstances that supported relief in the idiosyncratic cases bulleted above are not similar in nature to any of the enumerated circumstances in sub. (b)(1) through (b)(5). What's more, none of them make sense as a new enumerated category, given that they are so unusual and fact-specific.

Beyond what has arisen in actual § 3582(c)(1)(A) cases, it is not hard to imagine hypothetical fact-bound circumstances that, in a particular case, might be an extraordinary and compelling reason for sentence reduction:

- An individual co-owns a grocery store; while he is incarcerated, the other co-owner becomes incapacitated and the store is in danger of shutting down, which would negatively impact not just the defendant and his family but also the neighborhood's access to fresh, affordable food.

- An individual's spouse and children are killed in a tragic accident and no one else is able to plan memorials or ensure that the family home is not foreclosed upon, and also the sentencing court wants to encourage the individual to start rebuilding his life post-tragedy.

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[35] *See* USSG §1B1.13, comment. (n. 1(D)).

- An individual who suffers from Tourette's Syndrome has been repeatedly threatened in prison for involuntarily saying offensive things, leading to near-permanent solitary confinement.[36]

- The BOP erroneously releases an individual from prison who successfully serves his term of supervised release and then lives as a law-abiding citizen in the community for years, before the error is discovered and he is sent back to prison.

Perhaps some of these circumstances will never arise; but it is inevitable that there will be circumstances that are similarly extraordinary, compelling, and utterly distinct from any enumerated category. None of these circumstances would guarantee a sentence reduction, of course, but a court facing such a circumstance should be able to decide whether a reduction is warranted. Option 1 of the proposed options for sub. (b)(6) could be read to categorically bar relief in all these circumstances, regardless of other factors.

Option 2 of sub. (b)(6) could create uncertainty. Option 2 is not necessarily problematic. It is preferable to Option 1: it acknowledges that circumstances that are unrelated to §1B1.13's enumerated categories could warrant § 3582(c)(1)(A) relief. Also, it evokes § 3582(c)(1)(A)'s legislative history, in which a Senate Report referred to the provision as a "safety valve" that would apply whenever an individual's circumstances were "so changed" that it would be "inequitable" to maintain the original sentence.[37]

The Defenders' concern is that the phrases "changes in the defendant's circumstances" and "intervening events" do not have established meanings in this context, and so present uncharted litigation territory. Different courts could interpret the phrases differently. And given that the Commission has previously adopted the language of Option 3, there is no need to promulgate a new, untested standard.

If Option 2 is ultimately chosen, we would urge the Commission to adopt the language both outside and inside the brackets, so that courts would understand that sub. (b)(6) covers not only circumstances that are personal to

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[36] This hypothetical is based on a real situation, where a § 3582(c)(1)(A) motion may be filed in the future.

[37] *See* S. Rep. No. 98-225, at 121 (1983), *see also supra* note 3.

the individual, but also circumstances related to outside events that may impact the propriety of a particular sentence.[38] Or, even better, the Commission could simplify Option 2:

> The circumstances as understood at sentencing have so changed that it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of his or her sentence.

Also, if the Commission chooses Option 2, it should retain—either within sub. (b)(6) or elsewhere—the clarification that "the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement."[39] Indeed, it would be sensible for the Commission to retain this language regardless of sub. (b)(6). Defenders just note that it would be particularly important to retain the language if the Commission chooses Option 2 for sub. (b)(6), given uncertainties with the language. The Commission appears to have deleted this commentary as an accident of restructuring §1B1.13 so that it is no longer dependent on BOP action, not as a substantive policy choice, but some judges may assume otherwise.

Option 3 is the best, and simplest, option. Option 3 respects the courts' ability to exercise discretion under Congress's substantive standard no less than the Commission has always respected the BOP. This is consistent with one of the purposes of the Sentencing Reform Act: to keep sentencing decisions in the judiciary. And Option 3 is not overly restrictive; it is clear; and it will allow courts to transparently grant relief in cases that cry out for relief.

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[38] The drafters of the Model Penal Code's new sentence modification provision that is modeled, in part, on § 3582(c)(1)(A) have explained that while application of such provision "will usually focus on circumstances having to do with the prisoner, or the prisoner's behavior," it is meant to be "flexible enough to reach compelling changes of circumstances outside the institution." *Model Penal Code: Sentencing* § 305.7 (Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons), comment b. (Am. L. Inst., Proposed Official Draft 2017).

[39] USSG §1B1.13 comment. (n. 2).

V. Conclusion

Almost 20 years ago, Justice Kennedy gave a speech in which he criticized the legal profession for "losing all interest" after someone is judged guilty and the appeal ends.[40] "We have a greater responsibility," he said; "As a profession, and as a people, we should know what happens after the prisoner is taken away."[41]

> To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.[42]

This really speaks to § 3582(c)(1)(A). When Congress in 1984 abolished parole, it decided that under the new determinate sentencing system, there needed to be a way for courts to address changed circumstances—to find out what happened after someone was taken away to prison—where those circumstances may render the sentence inequitable as imposed. There needed to be an adaptable safety valve: § 3582(c)(1)(A).

In fulfilling its obligation to set policy for sentence reductions under § 3582(c)(1)(A), the Commission has recognized our incarcerated clients' humanity, and that they are not frozen in time at sentencing—they, their families, and larger forces change during their incarceration. The Commission has proposed a policy statement that would allow § 3582(c)(1)(A) to serve as a meaningful safety valve that can respond to these changes, as Congress intended, when they render the sentence in a particular case inequitable.

Defenders appreciate that you have given us the opportunity to suggest changes and comment on options that would improve and strengthen the Commission's proposals. At the hearing, I look forward to addressing any questions or concerns Commissioners may have.

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[40] Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

[41] *Id.*

[42] *Id.*