Testimony of Andrea Harris,
Adjunct Professor, Federal Criminal Sentence Reduction Clinic
University of Virginia School of Law
Before
The United States Sentencing Commission
Public Hearing on Proposed Amendments to U.S.S.G § 1B1.13

February 23, 2023

My name is Andrea Harris, and I am an Adjunct Professor of the Federal Criminal Sentence Reduction Clinic at the University of Virginia School of Law. By day, I am also an Assistant Federal Public Defender in the Charlottesville Division of the Western District of Virginia. Thank you for inviting me in my capacity as an Adjunct Clinical Professor to testify regarding the proposed amendments to policy statement Section 1B1.13, relating to reductions in terms of imprisonment under 18 U.S.C. § 3582(c)(1)(A).

I. Federal Criminal Sentence Reduction Clinic

The Federal Criminal Sentence Reduction Clinic was started at the University of Virginia School of Law in the Fall of 2020 by my former colleague Lisa Lorish. When Ms. Lorish was appointed to the Virginia Court of Appeals in August 2021, I took over teaching the clinic in the Fall semester of 2021. The clinic is now in its sixth semester and is being taught this semester by my colleague from the Eastern District of Virginia Federal Defender's Office, Mary Maguire.

During the semester, clinic students learn about all of the mechanisms available to reduce a federal sentence, specifically including "compassionate release" motions under 18 U.S.C. § 3582(c)(1)(A).[1] The students work directly with clinic clients held in federal prisons, and they research, investigate, and draft motions for filing. Over the last three years, clinic students have been involved in the drafting and filing of more than forty compassionate release motions under Section 3582(c)(1)(A). The bases for these motions have included increased susceptibility to severe illness from COVID-19, end stage organ failure, the death and/or incapacitation of the caregiver of a minor child, age and deteriorating health conditions, and the gross disparity between the sentence a client received years ago and the likely sentence today in combination with other factors.

[1] Other types of motions that students may work on include motions for early termination of supervised release pursuant to 18 U.S.C. § 3583(e)(1); motions for sentence reductions based on retroactive changes to the law under 18 U.S.C. § 3582(c)(1)(B) (such as Section 404 of the First Step Act of 2018); habeas petitions under 28 U.S.C. § 2241; and motions to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255, among others.

II. Proposed Amendments

The starting point for the students' work on any motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A) is the determination of whether "extraordinary and compelling" reasons exist for a compassionate release motion. Congress did not define the term and instead directed the Sentencing Commission to described what should be considered as extraordinary and compelling reasons for sentence reductions, including the criteria to be applied and a list of specific examples.[2] The only limitation that Congress established on what may qualify is that rehabilitation, by itself, is not such a reason. That Congress gave the Commission broad authority to determine extraordinary and compelling reasons makes sense because one reason for Section 3582(c)(1)(A) is to allow courts to consider circumstances that may not have been considered or even existed when a sentence was first imposed.

When U.S.S.G. § 1B1.13 was first drafted in 2006, the Director of the Bureau of Prisons was the gatekeeper who determined whether to file such a motion, and it is understandable that the only specific criteria in the commentary describing "extraordinary and compelling" reasons focused on reasons directly related to an inmate's custody within the BOP or related to their family circumstances outside of custody. Medical conditions, age, and family circumstances are areas of an inmate's life over which the BOP presumably knew a great deal, and it was in a good position to recognize whether these circumstances, separately or combined with each other, might rise to the level of an extraordinary and compelling reason supporting a sentence reduction motion. The BOP rarely exercised this authority, and, as a result, Congress has expanded the statute to allow inmates to petition the courts directly. It is now appropriate to consider whether the criteria for determining an "extraordinary and compelling reason" should similarly be expanded.

a. Proposed Amendment to add Section 1B1.13(b)(1)(C) (Medical condition requiring long-term or specialized care):

In 2022, the clinic students worked on a Section 3582(c)(1)(A) motion on behalf of Patrick Crowe, a 70-year-old man with a pre-existing foot injury that deteriorated while he was in the Bureau of Prisons.[3] Though Mr. Crowe had a pre-existing injury, he was able to walk when he entered federal custody in 2014. Medical records documented that his foot condition worsened in 2018, and by 2019 he required the use of a cane to walk.[4] In 2019, he was referred to a neurologist and vascular surgeon to evaluate him for surgical reconstruction of the foot, and he was recommended for triple arthrodesis (surgical fusion of the talonavicular,

[2] 28 U.S.C. § 994(t).
[3] *See United States v. Patrick Crowe,* Nos. 4:14-cr-9 & 14, 2022 WL 1299957 (W.D. Va. Apr. 11, 2022).
[4] *Id.* at *2.

talocalcaneal, and calcaneocuboid joints).[5] Despite this referral, no surgery was performed.

By the end of 2020, Mr. Crowe's condition worsened. He was issued a wheelchair, was wholly unable to walk, and needed assistance with activities of daily living.[6] In March 2021, Mr. Crowe was again referred for surgical evaluation and was hospitalized in May 2021 due to concerns about his foot.[7] Upon his release from the hospital, he was transferred to a federal medical center where treatment providers requested yet another consultation with a vascular surgeon and neurologist.[8] More than five months later, he was transferred to a medical center in Boston for the consultation, at which time the physician wrote that Mr. Crowe "has a very serious issue. This is a chronic condition not at goal and he is at high risk of limb amputation as a result of this condition."[9]

Despite this dire diagnosis, Mr. Crowe received no additional treatment before his compassionate release motion was granted and he was released from federal prison on April 22, 2022. The district court found that the medical condition was an extraordinary and compelling reason for relief because records supported that Mr. Crowe "needs additional medical care" and that "[f]urther delay in treatment could cause him to lose his limb, which is clearly a severe outcome."[10] Since his release, he has received the vital reconstructive surgery to his foot and is recovering well.

I share this story in support of the proposed addition to the examples of medical circumstances that constitute an extraordinary and compelling medical condition in proposed amendment § 1B1.13(b)(1)(C). Clearly, Mr. Crowe was suffering from a medical condition that required specialized medical care that was not being provided in a timely or adequate matter and without which he was in danger of limb amputation – a dire and unnecessary outcome. His condition was serious and falls cleanly within the ambit of the proposed new example of a medical circumstance constituting an extraordinary and compelling reason supporting a sentence reduction.

Because of his age and other serious health conditions, Mr. Crowe's ability to provide self-care within the confines of his prison was substantially diminished, and it seems apparent that even if the district court had been bound by the current version of Section 1B1.13[11] applicable to motions made by the Director of the

---

[5] *Id.*
[6] *Id.* at *2-3.
[7] *Id.*
[8] *Id.*
[9] *Id.* at *3.
[10] *Id.*
[11] The Fourth Circuit where Mr. Crowe's case is located held in *United States v. McCoy,* 981 F.3d 271, 281 (4th Cir. 2020), that Section 1B1.13 is only a policy statement applicable to Section 3852(c)(1)(A) motions brought by the Director of the BOP.

Bureau of Prisons, his circumstances would have qualified as an extraordinary and compelling reason under the "medical condition" and "age of the defendant" provisions outlined in the commentary to current Section 1B1.13.[12] However, it is easy to envision a scenario where a younger inmate suffering from a similar type of deteriorating injury needing specialized surgery or treatment but who is without the additional health maladies that often come with aging would not qualify under one of the existing categories.

In many cases, such a condition may be treatable by BOP medical staff or outside health care providers and will never rise to the level of an extraordinary and compelling reason for compassionate release. But where the BOP is unable or unwilling to provide necessary specialized care in a timely or adequate manner, proposed Section 1B1.13(b)(1)(C) is a reasonable expansion of the medical circumstances constituting extraordinary and compelling reasons and is absolutely critical to allow an inmate to bring an urgent and inadequately treated medical need to the court's attention.

b. Proposed Amendment to add Section 1B1.13(b)(1)(D) (infectious disease outbreak or public health emergency):

As no one will find surprising, many of the motions the clinic students worked on in the early days of the clinic's existence involved motions for compassionate release based on the inmate's increased susceptibility to severe complications or death from COVID-19. The motions were based on health conditions as varied as kidney disease, obesity, asthma, hypertension, skin cancer, coronary artery disease and other heart ailments; all of which put the inmates at greater risk from COVID-19. These conditions were often present in combination with other chronic and acute health conditions that substantially increased the individual inmate's risk. As is well documented by now, there have been 314 inmate and 7 BOP staff deaths attributable to COVID-19.[13] The § 3582(c)(1)(A) motions filed by clinic students, federal defenders, and defense attorneys around the country were critically important to help ensure these numbers were not able to climb higher. The COVID-19 pandemic and the deadly and destructive toll it took on Bureau of Prisons' inmates and staff clearly demonstrate that proposed Section 1B1.13(b)(1)(D) is critically important to allow both the BOP and the district courts to act quickly to address similar health emergencies that place individual inmates at great risk in the future.

c. Proposed Amendment to add Section 1B1.13(b)(4) (Victims of assault):

Though the clinic students have not worked on any Section 3582(c)(1)(A) motions where the client was a victim of sexual assault or physical abuse by a correctional officer or other employee of the Bureau of Prisons, this proposed

[12] U.S.S.G. § 1B1.13, comment. (n.1(A)(ii)(I) and 1(B)).
[13] *See https://www.bop.gov/coronavirus/*.

amendment to Section 1B1.13 is well-founded and appropriate. Recent news articles have drawn attention to widespread abuse of female prisoners in federal prisons.[14] Indeed, the Senate Permanent Subcommittee on Investigations recently conducted a bipartisan investigation into the sexual abuse of female inmates in the custody of the federal Bureau of Prisons. The investigation found, among other things, that BOP employees, including senior BOP officials, sexually abused female prisoners in at least two-thirds of federal prisons housing female inmates over the last decade, that the BOP has "failed to detect, prevent, and respond to sexual abuse of female prisoners in its custody," and that the BOP failed to "hold employees accountable" for such misconduct or to take agencywide action to address the sexual abuse of inmates.[15] These reports and investigations demonstrate female inmates have been egregiously victimized by prison employees tasked with keeping them safe while they serve their sentences and that this does not appear to be an isolated problem at a few prisons. It is also worth noting that these types of assaults also happen to male inmates at prisons across the country. In both cases it is appropriate to consider whether such assaults can constitute extraordinary and compelling circumstances supporting a sentence reduction.

The current language of the proposed amendment allows a petitioner to seek compassionate release based on a sexual assault or physical abuse committed by a correctional officer or other BOP contractor or employee if and only if that assault or abuse resulted in "serious bodily injury." This language is too limiting. Guidelines commentary defines "serious bodily injury" as that 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.[16] It also deems any offense conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or similar state law to have caused "serious bodily injury," regardless of actual physical injury from the abuse.[17] The net effect of applying this definition to compassionate release motions is that in the case of sexual abuse of an inmate, the serious bodily injury is element is automatically met, while in the case of physical abuse of an inmate by a correctional

---

[14] *See, e.g.,* Jonathan Dienst and Joe Valiquette, *3 Federal Correction Officers Arrested for Alleged Rape, Sexual Abuse of Female Inmates,* NBC New York, May 25, 2017; Michael Balsamo and Michael Sisak, *AP investigation: Women's prison fostered culture of abuse,* AP News, Feb. 6, 2022; Tami Abdollah, *Famed federal women's prison under investigation as 5th worker charged with sexual abuse of inmates,* USA Today, Mar. 24, 2022; Jo Ellen Nott, *More BOP Guards at FCI-Dublic "Rape Club" Accused of Sex Abuse by Female Prisoners,* Prison Legal News (Aug. 5, 2022).

[15] Staff of S. Permanent Subcomm. on Investigations, Rep. on *Sexual Abuse of Female Inmates in Federal Prisons,* (Released in conjunction with the Permanent Subcommittee on Investigations December 13, 2022 Hearing); available at https://www.hsgac.senate.gov/subcommittees/investigations/library/files/majority-and-minority-staff-report_-sexual-abuse-of-female-inmates-in-federal-prisons/

[16] U.S.S.G. § 1B1.1, comment. (n.1(M)).

[17] Id.

officer, no matter how protracted or predatory, relief would only be available if the individual also suffered a serious bodily injury, essentially permanent damage. This requires too much – especially given that such physical abuse constitutes such an unconscionable crime against an inmate for whom the employee has a duty to protect. I thus propose changing the language to require "bodily injury"[18] instead of "serious bodily injury."

It is also appropriate to further amend this provision to allow consideration of whether any mental or emotional injury resulted from the sexual abuse or physical assault. Just as mental and emotional conditions may be relevant in determining whether a sentencing departure is warranted in a case "if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical case,"[19] they may also be relevant in the case of a serious sexual or physical assault on an individual while they are in custody.

Finally, it is appropriate to expand this provision to include sexual or physical assaults committed on individuals by other inmates, particularly if the assault results in "serious bodily injury." While such assaults committed on inmates by BOP employees and officials are particularly egregious from a moral and legal perspective, assaults committed by other inmates are no less traumatic for the victims of such assaults when the perpetrator of the offense is a fellow inmate. When an individual is punished for his or her participation in a crime, the punishment should not include physical or sexual assault during the service of the term of incarceration. The BOP has the duty to ensure the safety of inmates while they serve their sentences. If an inmate suffers a serious bodily injury due an assault by anyone while in BOP custody that is an extraordinary and compelling circumstance.

d. Proposed Amendment to add Section 1B1.13(b)(5) Changes in Law:

As vaccines for COVID-19 became readily available in the BOP and as the pandemic began to wane, many of the more recent Section 3582(c)(1)(A) motions filed by the clinic students have focused on changes in the law that have created gross disparities between the sentences some clients are serving and the sentences they would likely receive today for the same conduct.

For example, in *United States v. Alfanco Britton,* 2022 WL 4082477 (W.D. Va. Sept. 6, 2022), a clinic student drafted a Section 3582(c)(1)(A) motion arguing that the mandatory life sentence that Mr. Britton received for his participation in a non-violent crack cocaine conspiracy no longer comported with justice because Mr.

[18] "Bodily injury" is defined as "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought. U.S.S.G. § 1B1.1, comment. (n.1(B)).

[19] *See* U.S.S.G. § 5H1.3.

Britton would only face a mandatory 25-year sentence for the same conduct today and that his evidence of rehabilitation was exemplary. Mr. Britton faced a life sentence because the government filed a notice of intent to pursue an enhanced sentence of life based on two prior cocaine possession convictions,[20] and, after conviction at trial, the court had no choice but to impose a life sentence.

The district court found that the gross disparity between the mandatory life sentence that Mr. Britton received and the mandatory 25-year sentence he would face today was an extraordinary and compelling reason warranting a reduction. The district court then weighed the Section 3553(a) factors, including that Mr. Britton had not received a single disciplinary infraction in prison despite being housed in U.S. penitentiaries due to his life sentence, had earned his GED, and had received exemplary reviews and recommendations by his institutional supervisors. The district court granted the motion, and reduced Mr. Britton's sentence to 360 months.[21] Thirty years in prison is still a severe sentence that addresses the goals of sentencing but is one that, in Mr. Britton's individual case, more appropriately comports with current Congressional intent regarding how much time is sufficient in a drug offense.

Similarly, a clinic student filed a successful Section 3582(c)(1)(A) motion in the case of *United States v. Mark W. Woods* in which the district court reduced Mr. Woods' 1,095-month (91.25 years) sentence for a drug conviction with four stacked Section 924(c) gun convictions to 300 months (25 years).[22] The district court found two features of Mr. Woods' 80-year stacked Section 924(c) sentences constituted

---

[20] The district court mistakenly stated in its order granting Mr. Britton's motion that the government's notice was based on two prior convictions in Florida state court for possession with intent to distribute cocaine. *Britton,* 2022 WL 4082477 at *1. In fact, the notice referenced convictions for "possession" of cocaine, which would no longer count as "serious drug felonies" to support an enhanced sentence, 21 U.S.C. 802(57), but at the hearing on the enhancement notice evidence was admitted that showed Mr. Britton did have two convictions for sale of cocaine that occurred on the same day and for which he was sentenced at the same time.

[21] The district court had previously reduced the life sentence of the only other co-defendant in the case who had received a life sentence. In *United States v. Antonio Williams,* No. 5:12-cr-14, 2020 WL 5834673 (W.D. Va. Sept. 30, 2020), Mr. Williams, who was 22 years old at the time, received a life sentence after conviction of a crack cocaine offense at trial where the government had filed two § 851 enhancement notices for two prior cocaine possession convictions in Florida that were committed when he was 18 years old and for which the combined sentence for both convictions was only 47 days in custody. The prior convictions no longer qualified as "serious drug felonies" and the court found that "the striking disparity between the short duration of Williams' prior state court sentences and his federal mandatory life sentence and subsequent recognition by Congress that a mandatory life sentence is not warranted under these circumstances" established extraordinary and compelling reasons to reduce the life sentence. *Id.* at *8.

[22] *United States v. Mark W. Woods,* No. 5:03-cr-30054, 2021 WL 1572562 at * (W.D. Va. Apr. 21, 2021).

extraordinary and compelling reasons for a reduction in his case: first, the 80-year sentence on these counts was "nearly four times the national average federal murder sentence in fiscal year 2020 of just over 21 years" and qualified as one of "sheer and unusual length," and second, because Mr. Woods did not have a prior "final" Section 924(c) conviction at the time of his sentencing, today he would face consecutive sentences of 20 years rather than 80 years and this 60-year difference constituted a gross disparity.[23]

Clinic students have filed successful Section 3582(c)(1)(A) motions in at least nine other stacked Section 924(c) cases, which have resulted in sentence reductions from 720 months to 324 months,[24] 572 months to 356 months,[25] 572 months to 300 months,[26] 480 months to 324 months;[27] 423 months to time served (approximately 19 years),[28] 420 months to 240 months, 420 months to 180 months, 240 months to time served (approximately 173 months),[29] and 225 months to 120 months. In each of these cases, the inmates were serving sentences dramatically longer than the ones they would likely receive today.

Importantly, in each case the district court did not reduce the sentences simply because of a non-retroactive change in sentencing law; rather, the district court considered the severe length and disparateness of the sentence imposed in light of revisions or clarifications to the sentence stacking provisions of Section 924(c) in determining whether the individual's particular circumstances constituted an extraordinary and compelling reason warranting a sentence reduction.[30] This is precisely as it should be. In her Senate Floor comments about the First Step Act, Senator Amy Klobuchar acknowledged that some sentencing laws implemented decades ago have "resulted in prison sentences that actually don't fit the crime" and that the provisions in the First Step Act "allow[] people to petition courts … for an individualized review based on the particular facts of their case."[31]

Congress did not make the First Step Act's changes to the recidivist enhancements and Section 924(c) stacking provisions retroactive. But allowing consideration of these changes in determining whether to grant a Section 3582(c)(1)(A) sentence reduction in an individual case is not an end-run around Congress' will in this regard because Congress specifically delegated to the

---

[23] *Id.* at *4.
[24] *United States v. Richard Lighty,* No. 7:04-cr-72, 2022 WL 4017279 (W.D. Va. Sept. 2, 2022).
[25] *United States v. Rickey Merica,* No. 5:04-cr-15 (W.D. Va. Feb. 8, 2021)
[26] *United States v. Reid,* No.1:03-cr-12, 2021 WL 4499019 (W.D. Va. Aug. 26, 2021).
[27] *United States v. Wells,* No. 5:04-cr-30029 (W.D. Va. Apr. 12, 2022).
[28] *United States v. Michael Short,* No. 2:01-cr-10039, 2021 WL 4499020 (W.D. Va. Aug. 17, 2021).
[29] *United States v. Propst,* No. 3:06-cr-17 (W.D. Va. Oct. 22, 2020).
[30] *See, e.g., United States v. Short,* 2021 WL 4499020 at *2.
[31] 164 Cong. Rec. S7747-48 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

Sentencing Commission the authority to describe "what should be considered extraordinary and compelling reasons for a sentence reduction."[32]

The changes to these statutory provisions reflect Congress' determination that the previous sentencing laws were too harsh and "resulted in prison sentences that actually don't fit the crime."[33] Congress' recognition of the harshness of the prior sentencing regimes and its redirected focus on evidence-based treatment and programming instead of longer prison sentences is a relevant consideration for the Sentencing Commission as it carries out its mission to determine what could and should constitute an extraordinary and compelling reason supporting a sentence reduction in an individual case. Changes in the law that demonstrate the sentence a defendant is serving is inequitable is an extraordinary and compelling reason.

e. Proposed Amendment to add Section 1B1.13(b)(6) Other Circumstances:

In the current version of U.S.S.G. § 1B1.13, the commentary includes a catch-all provision that lets the Director of the BOP determine whether an extraordinary and compelling reason exists other than, or in combination with, the explicitly listed medical, age, or family circumstances in a particular inmate's case.[34] This provision is appropriate because it has allowed the BOP some flexibility to take unusual, unanticipated, or unaccounted for facts into consideration when determining whether to make a request for a sentence reduction in any given case. Option 3 in the proposed amendments to Section 1B1.13 is the most analogous to this original provision and is the most appropriate option for several reasons.

First, it similarly allows the defendants themselves to move for a sentence reduction based on unusual, unanticipated, or unaccounted for facts by themselves or in conjunction with other anticipated types of situations that may arise. Given that Section 3582(c)(1)(A) was amended by Congress specifically because the BOP failed to exercise its right to file motions for compassionate release in many compelling and deserving cases, there is no reason to give inmates and district courts *less* authority than the BOP itself has had for many years.

Second, Option 1 is too limiting. It only allows consideration of other circumstances that are "similar in nature and consequence" to the other enumerated circumstances. As the COVID-19 pandemic has clearly demonstrated, sometimes the unexpected happens. Though infectious disease experts, virologists and others had been warning of the possibility of a pandemic for some time,[35] most

---

[32] 28 U.S.C. 994(t).
[33] 164 Cong. Rec. S7747-48 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).
[34] U.S.S.G. § 1B1.13, comment. (n. (1)(D).
[35] *See, e.g.,* Hillary Hoffower, *Bill Gates has been warning of a global health threat for years. Here are 12 people who seemingly predicted the coronavirus pandemic,* Business Insider (Dec. 15, 2020), available at https://www.businessinsider.com/people-who-seemingly-predicted-the-coronavirus-pandemic-2020-3.

of us, including the BOP, were caught flat-footed and were unprepared to address its devastating impact. This policy statement should continue to be flexible enough to address such circumstances as they arise. Option 3 allows the BOP and courts the most flexibility.

Finally, while Option 2 is also a good option that allows both the BOP and courts some flexibility to consider changes in the defendant's circumstances and intervening events occurring after the defendant's sentence that make a defendant's continued incarceration inequitable, Option 3 remains preferable because it gives district courts the same authority that the BOP has had for years.

III. Additional Issues for Comment

a. Whether the proposed amendment exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t)?

The proposed amendments, including proposed subsections (b)(5) and (6), do not exceed the Commission's authority. As discussed above, Congress specifically delegated to the Sentencing Commission the task of describing "what should be considered extraordinary and compelling reasons for a sentence reduction, including the criteria to be applied and a list of specific examples."[36] The one and only limitation set by Congress is that the rehabilitation of a defendant is not enough, by itself, to be considered an "extraordinary and compelling reason."[37]

In multiple areas of the Commission's work, Congress specifically tasked it with revising guidelines based on consideration of new data, comments and changed circumstances, such as community view of the gravity of an offense, public concern generated by an offense, and the deterrent effect particular sentences may have on the commission of the offense by others.[38] Consideration of these and similar criteria in the guidance as to what constitutes an extraordinary and compelling circumstance is entirely consistent with the specific delegation of authority in Section 994(t).

b. Whether the proposed amendment is in tension with the Commission's determinations regarding retroactivity of guideline amendments under § 1B1.10?

While the proposed amendments to Section 1B1.13 may appear at first blush to be in tension with the Commission's determinations regarding retroactivity of guideline amendments under Section 1B1.10, the different purposes of sentence modifications under 18 U.S.C. §§ 3582(c)(1)(A) and 3582(c)(2) render any apparent tension inconsequential.

---

[36] 28 U.S.C. § 994(t).

[37] *Id.*

[38] *See, e.g.,* 28 U.S.C. §§ 994(o), (s).

Section 3582(c)(2) authorizes a court to modify an otherwise final sentence in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission. Notably, the provision only applies to a limited class of prisoners – "those whose sentence was based on a sentencing guideline range that was subsequently lowered by the Commission."[39] Discussing the limits of § 3582(c)(2) in *Dillon v. United States*, the Supreme Court acknowledged the "substantial role that Congress gave the Commission with respect to sentence modifications."[40] In this context Congress gave the Commission the authority to determine (1) whether to the amend the guidelines,[41] (2) whether and to what extent an amendment will be retroactive,[42] and (3) "by what amount" a sentence "may be reduced"[43] In carrying out its responsibility to make these determinations in the § 3582(c)(2) context, the Commission established U.S.S.G. § 1B1.10, which instructs courts (1) which guidelines are retroactive, (2) to first determine the amended guideline range that would have been applicable to the defendant had the relevant amendment been in effect at the time of the initial sentencing – without allowing the court to amend any other guideline application decisions,[44] and (3) that the court shall not reduce the term of imprisonment to a term that is less than the amended guideline range.

So, in the § 3582(c)(2) context, Congress first gave the Commission authority to determine whether a guideline amendment is retroactive. Then Congress gave the Commission authority to decide "by what amount" a sentence may be reduced, and the Commission determined that the amended guideline range to be considered could only include retractive guideline amendments – no other subsequent Guideline changes or corrections – and that the sentence could only be reduced to a sentence within this new range. The Commission was specifically given the authority to make these decisions about retroactivity.

But this is not in tension with Section 3582(c)(1)(A) or the proposed amendments to U.S.S.G. § 1B1.13 because the Commission is not making anything retroactive. Rather, as authorized by Congress' command to describe what should be considered extraordinary and compelling reasons, the Commission is considering whether dramatic changes in the law, whether retroactive or not, can ever be part of the analysis of whether extraordinary and compelling reasons exist that support a district court's modification of an otherwise final sentence. The universe of cases

---

[39] *Dillon v. United States,* 560 U.S. 817, 826 (2010).
[40] *Id.*
[41] 994(o)
[42] 994(u),
[43] *Id.*
[44] U.S.S.G. § 1B1.10(b)(1). The provision prohibiting the court from amending any other guideline application decisions was included in § 1B1.10 by Amendment 505 in 2003, which "simplifie[d] the operation of § 1B1.10 by providing that, in determining an amended guideline range, the court will use only those amendments expressly designated as retroactive."[44]

with extraordinary and compelling circumstances is smaller than the universe of cases that would not be stacked 924(c)s today or than the universe of drug cases that would not face recidivist enhancements of life today, and while the changes to the stacking and recidivist enhancement provisions may not be universally retroactive – rendering all of those cases eligible for resentencing – it would be inequitable to block a court from considering the changes at all within the smaller circle of extraordinary and compelling cases.

This is particularly so because the consideration of whether extraordinary and compelling reasons exist is only one part of a district court's analysis. Just as § 3582(c)(2) establishes a "two-step inquiry" before a court reduces a sentence pursuant to an amended guideline range, § 3582(c)(1)(A) establishes a multi-step process to govern a sentence modification in the compassionate release context.[45] First, the court determines whether extraordinary and compelling reasons that are consistent with applicable policy statements exist, and then it considers whether an authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a). Congress gave the Commission "substantial authority" to establish the criteria a district court uses to evaluate whether extraordinary and compelling reasons exist, but, ultimately, it gave the district court the authority to decide whether to modify a sentence under § 3582(c)(1)(A). The proposed amendments to Section 1B1.13, including proposed subsections (b)(5) and (b)(6), give district courts the appropriate guidance to make these important decisions, and are not in tension with Section 1B1.13.

[45] *Dillon v. United States,* 460 U.S. at 826 (outlining that in the § 3582(c)(2) context a court "must first determine that a reduction is consistent with § 1B1.10 before it may consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a).").