"Proposed Amendments to the Sentencing Commission Guidelines Related to Compassionate Release"

U.S. Sentencing Commission Hearing

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Dear Commissioners:

Thank you for the invitation to testify today regarding the proposed guideline changes addressing compassionate release and post-sentencing alterations in sentencing law. As a professor at the Antonin Scalia Law School, I teach and write in the areas of administrative law, the separation of powers, constitutional law and interpretation, and federal courts, and I co-lead the C. Boyden Gray Center for the Study of the Administrative State at the law school. Previously I served as a Deputy Assistant Attorney General in the Office of Legal Counsel and an Associate Deputy Attorney General within the U.S. Department of Justice. Currently I serve as a Public Member of the Administrative Conference of the United States and have testified on multiple occasions in Congress on issues related to statutory and constitutional interpretation and the constitutional division of authority among the federal branches of government.

In particular, my statement today addresses the Commission's request for commentary on its proposed additions of paragraphs (b)(5) -(b)(6)[1] to Section 1B1.13 of the Sentencing Guidelines. Under traditional principles of statutory interpretation, the breadth of those proposed additions likely exceeds the Commission's statutory authority to provide policy guidance within the limited contours of the judicial sentencing modification provisions of 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(t) for the reasons described below among others.[2]

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[*] This statement reflects my personal views as an academic and does not necessarily represent the views of my academic institution.

[1] "Notice and Request for Public Comment and Hearing," United States Sentencing Commission, 88 Fed. Reg. 7180, 7184 (Feb. 2, 2023).

[2] The Commission's proposed amendments list three possible options for a new paragraph (b)(6). *See id.* Options 1 and 2 may very well exceed the Commission's statutory instructions to provide guidance on "extraordinary and compelling" reasons for sentence reductions whereas Option 3 essentially tracks the substance of the current catchall provision in Application Note 1(D) accompanying § 1B1.13 and therefore would be just as appropriate as the current catchall commentary language. *Compare* current Application Note 1(D) ("As determined by the Director of the Bureau of Prisons, there exists in the defendant's case *an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).*" (emphasis added)), *with* proposed Option 3 ("The defendant presents *an extraordinary and compelling reason other than, or in combination with, the*

As several court decisions have observed and the Commission's request for commentary notes, the Commission's authority to alter the sentencing guidelines regarding sentencing modification stems from the Commission's statutory authority in 28 U.S.C. § 994(t).[3] Regarding sentencing modifications, that statutory authority specifically instructs that the Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction." That description in turn must "include[] the criteria to be applied" to evaluate that standard "and a list of specific examples" of qualifying reasons. Subsection 994(t) further specifies that rehabilitation does not constitute "an extraordinary and compelling reason."

Section 3582(c)(1)(A) of Title 18 further undergirds, and limits, Commission authority to promulgate statements related to sentencing modifications by imposing restrictions on the kinds of sentencing modifications that courts may grant. The Commission's authority to provide policy guidance on those modifications arises only within the contours of the underlying judicial modification authority itself.[4] And the default threshold statutory position is that no modifications are permissible, subject to only the expressly stated exceptions in section 3582(c).[5]

In particular, the statute provides that a "court *may not modify* a term of imprisonment once it has been imposed except" for several sets of circumstances subsequently delineated in subsections 3582(c)(1) and (2). The Commission's authority under 28 U.S.C. § 994(t) is simply to provide policy guidance regarding particular circumstances and justifications for sentencing modifications that fall within the contours of those precise exceptions.[6]

First, a court may reduce a sentence upon a motion brought by the Bureau of Prisons ("BOP") Director or the defendant, subject to certain procedural restrictions,

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circumstances described in paragraphs (1) through [(3)][(4)][(5)]" (emphasis added)) (updating the current language simply to reflect the First Step Act's allocation of *procedural* authority to a criminal defendant to make a motion for a sentencing reduction in addition to the Bureau of Prisons Director's preexisting statutory authority to make such a motion).

[3] *See, e.g.*, United States v. McCall, No. 21-3400, slip op. at 6-8 (6th Cir. Dec. 21, 2022) (en banc); U.S. v. Jenkins, No. 21-3089, slip op. at 13-15 (Oct. 11, 2022); cf. United States v. Crandall, 25 F. 4th 582 (8th Cir. 2022); United States v. Andrews, 12 F. 4th 255, 261 (3d Cir. 2021); United States v. Thacker, 4 F. 4th 569, 574 (7th Cir.2021). But see United States v. Chen, No. 20-50333 (9th Cir. Sept. 14, 2022) (taking a more generous interpretation of Commission authority); United States v. Ruvalcaba, 26 F. 4th 14 (1st Cir. 2022) (same); United States v. McGee, 992 F.3d 1035 (10th Cir. 2021) (same); United States v. McCoy, 981 F.3d 271 (4th Cir. 2020) (same).

[4] *See, e.g.*, 28 U.S.C. § 994(t) (addressing Commission promulgating of "general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18").

[5] 18 U.S.C. § 3582(c) ("The court may not modify a term of imprisonment once it has been imposed except . . . .").

[6] "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t).

only where the court has considered applicable factors set forth in 18 U.S.C. 3353(a) and only if the court finds that "extraordinary and compelling reasons warrant such a reduction" and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."[7] This is the section 3582(c) no-sentence-modification exception most relevant to the Commission's proposed paragraphs (b)(5) and (b)(6). In addition to this "extraordinary and compelling" exception, courts may also grant reductions to defendants of a certain age or who have served a certain length of time in response to a motion by the BOP director or defendant in certain circumstances.[8] The only other two section 3582(c) instances where courts may modify previously imposed sentences are where a statutory provision or Federal Rule of Criminal Procedure 35 "expressly permit[]" a modification[9] or in certain cases where the Commission subsequently lowered the sentencing range for the offense leading to the defendant's sentence of imprisonment.[10]

Currently the Commission's commentary and the bulk of the Commission's proposed alterations to section 1B1.13 list physical or mental health concerns of the defendant or close family members as examples of qualifying "extraordinary and compelling" reasons for a sentence reduction. The Commission's proposed paragraph (b)(5) would in contrast expand those categories to include circumstances where "[t]he defendant is serving a sentence that is inequitable in light of changes in the law." Proposed Option 1 for paragraph (b)(6) would expand the current catchall provision to permit the defendant to "present[] *any other* circumstance or a combination of circumstances *similar in nature and consequence*"[11] to any of the specified listed circumstances rather than just presenting "*an extraordinary and compelling reason*"[12] other than or in combination with the previously listed specific extraordinary circumstances. And Proposed Option 2 would expand the current sentence reduction categories to include instances where "it would be inequitable" to continue imprisonment "[a]s a result of changes in the defendant's circumstances [or intervening events . . .]" in addition to the significant health or mental challenges already specified in the preceding several paragraphs.

By its terms, proposed paragraph (b)(5) is perhaps the clearest deviation from the statutory "extraordinary and compelling reasons" threshold in that it apparently creates an entirely separate standard of inequity as a justification for statutory modifications. For proposed paragraph (b)(5) to fall within the statutorily permitted sentencing modification categories, the Commission would need to establish that circumstances of inequity in light of legal changes are necessarily commensurate with the "extraordinary and compelling" standard. Further, even if the Commission could make such a case, which several recent court decisions suggest is unlikely,[13] the terms of paragraph (b)(5)

[7] 18 U.S.C. § 3582(c)(1)(A)(i).

[8] *Id.* § 3582(c)(1)(A)(ii).

[9] *Id.* § 3582(c)(1)(B).

[10] *Id.* § 3582(c)(2).

[11] *See* 88 Fed. Reg. at 7184 (emphases added).

[12] *See* 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

[13] *See supra* note 3 (citing relevant cases).

also likely fall short of Congress's statutory instruction to the Commission to include "criteria" and a "list of specific examples" in its policy statements on sentencing modification. The general standard of inequity in light of legal changes in the proposed new paragraph is not accompanied by any particular criteria for courts to use in measuring or evaluating inequity. Nor does the proposed paragraph list examples of when legal changes might create the kind of inequity that would amount to an "extraordinary and compelling" reason for sentencing reduction even if such inequity could rise to the level of that section 994(t) standard.

Proposed Option 2 for paragraph (b)(6) falls prey to a similar set of difficulties in that it makes inequity the touchstone for evaluation of the justification for a sentencing reduction rather than the statutory "extraordinary and compelling" standard. Option 2 is worded somewhat distinctly from proposed paragraph (b)(5) in that it is keyed more generally to "changes in the defendant's circumstances" or post-sentencing "intervening events" rather than to "changes in the law." Nonetheless, unless factual circumstances leading to inequity necessarily rise to the statutory level of "extraordinary and compelling reasons" across the board, proposed Option 2, like proposed paragraph (b)(5), seems to establish a different legal touchstone for sentencing reduction than the standard that Congress set in the terms of 28 U.S.C. § 994(t). The Commission's policy guidelines already delineate specific health and mental circumstances that might be sufficiently "extraordinary and compelling" to meet the statutory standard for change, and neither of the currently proposed paragraphs setting forth the distinct standard of "inequitable" specify the kinds of particular legal and factual changes that might create an "extraordinary and compelling" inequity. Several court decisions explain why bare inequity[14] created by post-sentencing changes might as a general matter fail to meet such a standard.

Finally, proposed Option 1 also by its terms apparently creates a standard distinct from the statutory threshold bar of "extraordinary and compelling reasons." In contrast to the current catchall language advising that courts may grant sentence reductions for "extraordinary and compelling reason[s] other than, or in combination with," the health and mental reasons specified in the preceding paragraphs, proposed Option 1 would sweep in "any other circumstance or a combination of circumstances" that are simply "similar in nature and consequence" to the previously specified sample justifications. Here again, to draft such a standard, the Commission should provide justification as to how any similar consequence or circumstance would also rise to the level of "extraordinary and compelling." Perhaps in applying this new proposed language, courts would limit themselves to only those "similar" circumstances that are just as "extraordinary and compelling" as the Commission's already-specified examples. But the wording of this new option risks transforming the previously listed examples into the standard against which sentencing reduction justifications are measured rather than in light of the textual statutory standard itself. And it is unclear why this slightly more attenuated catchall language would be necessary to include in the Guidelines as an alternative to the current "extraordinary and compelling" catchall language, if the

[14] *See supra* note 3 (citing relevant but split authorities on the permissible range of considerations for compassionate release sentencing reductions).

Commission indeed intends for Option 1 to sweep in only inherently extraordinary circumstances.

The context of the statutory scheme authorizing the Commission to provide policy guidance on specific "extraordinary and compelling reasons" underscores and buttresses the interpretive conclusion that Congress has authorized the Commission to recommend only sentencing modifications that precisely meet this section 994(t) standard. In addition to the section 3582(c) language establishing the default position of no sentencing modification, subsection 3582(b) of title 18 highlights the finality of an original sentence but for corrections under Fed. R. Crim. P. 35 and 18 U.S.C. 3742,[15] section 3742 appeals and modifications where sentences were outside the guidelines range,[16] and subsection 3582(c) modifications.[17] Subsection 3582(b) is thus very precise about the general buckets of alterations that can disturb a sentence's finality, and those include modifications in only two general classes of cases.

Moreover, when enacting the First Step Act, Congress altered the preexisting compassionate release provisions to "increas[e] the use and transparency of compassionate release" without substantively altering the standard for imposition of sentencing reductions.[18] In addressing compassionate release in section 603(b) of the Act, rather, Congress made just procedural changes, authorizing defendants (in addition to the BOP Director) to bring motions for sentencing reductions;[19] defining the term "terminal illness";[20] and imposing new notification and reporting requirements related to the numbers of motions filed for sentence reduction, the denials of those motions, and the poor or terminal health conditions of a defendant.[21] In these section 603(b) changes to the sentencing modification system, Congress did not expand the category of permissible justifications for sentencing modifications. Indeed, many of Congress's specific reporting and notification requirements suggest that Congress views "extraordinary and compelling" reasons for section 3582(c) modifications as largely tied to serious health conditions as many of those requirements involve circumstances where a defendant suffers from a terminal illness or a significant mental or health impairment.[22]

Further as multiple judicial decisions have observed, the ordinary meaning of the statutory terms "extraordinary and compelling" imposes a high bar for the justification of a sentencing modification that general changes in circumstances or new post-

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[15] *See* 18 § U.S.C. 3582(b)(2).

[16] *See id.* § 3582(b)(3).

[17] *See id.* § 3582(b)(1).

[18] *See* § 603(b), Pub. L. No. 115-391, section 603(b),132 Stat. 5194, 5239-41 (Dec. 21, 2018).

[19] *Id.* § 603(b)(1), 132 Stat. at 5239.

[20] *Id.* § 603(b)(3), 132 Stat. at 5239.

[21] *See id.* § 603(b)(3), 132 Stat. at 5239-41.

[22] *See, e.g., id.* § 603(b)(3) (providing for new subsections 28 U.S.C. § 3582(d)(2)(A), (B) (notification that a defendant with a physical or mental condition needs assistance in filing the relevant motion) and § 3582(d)(3)(H)-(J) (reports on visits and denials of requests involving terminally ill prisoners).

conviction legal rules might not satisfy. For example, in *United States v. Jenkins*, the U.S. Court of Appeals for the D.C. Circuit noted that the definition of the terms "extraordinary" and "compelling" suggest justifications that are "most unusual, far from common, and having little or no precedent" and that are "both powerful and convincing."[23] The U.S. Court of Appeals for the Sixth Circuit, sitting en banc, recently agreed.[24]

Although Congress has assigned to the Commission the role of issuing policy guidance on sentencing modifications, Congress also has carefully cabined that authority through specific statutory instructions. The Commission has only that discretion given to it by Congress.[25] Within the carefully reticulated system of separation of powers in the U.S. Constitution, agencies like the Commission exist only to the degree that the policymaking legislative branch creates the entity and allocates to it lawful authority to act, making it critical for legitimacy and consistency with the core values of electoral and representative accountability that administrative authority be exercised only within the carefully interpreted contours of enacted statutory grants of power.

Thank you. I look forward to answering questions from the Commission.

[23] *See Jenkins*, No. 21-3089, slip op. at 13 (internal quotation marks omitted) (referencing Sixth Circuit and First Circuit case law and definitions in *Webster's Third New International Dictionary: Unabridged* (1971)).

[24] *See McCall*, No. 21-3400, slip op. at 9 (quoting similar dictionary definitions and noting that they would have reflected the meaning of the terms "extraordinary and compelling" at the time those terms were first enacted by Congress in the Sentencing Reform Act of 1984).

[25] *Cf. Jimenez v. Quarterman*, 555 U.S. 113, 118-19 (2009) (indicating that the authority for action must derive from the text of the relevant statute as statutes must be interpreted and enforced in line with their plain terms and the precise meaning of a statutory term depends in large measure on its context).