February 15, 2022

Ms. Lisa Monaco
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Dear Deputy Attorney General Monaco:

We write to urge that the Department of Justice direct United States Attorney Offices ("USAOs") to discontinue the practice of demanding, during plea negotiations, that an accused waive his or her right to seek compassionate release relief under 18 U.S.C. § 3582(c)(1)(A). This practice undermines Congress's recent expansion of compassionate release and its declared intention that it be used more frequently. This practice also aggravates the most coercive aspects of plea bargaining by requiring an accused to waive the opportunity to seek relief for future, unknown, and unpredictable personal or familial tragedies including terminal diagnoses. One highly distinguished federal judge has denounced the practice as "unconscionable," "senseless," and "inhumane." *United States v. Osorto*, 445 F. Supp. 3d 103, 105, 107, 110 (N.D. Cal. 2020).

Our request is not novel. In fact, DOJ has taken action in the past to put an end to plea waiver provisions that undermined the fair, responsible, and balanced functioning of the adversarial legal system. *See James M Cole,* Dep. Att'y Gen, *re: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel* (Oct. 14, 2014). We urge you to take similar action and put an end to waivers of compassionate release in plea agreements.

Since passage of the First Step Act, and throughout the enduring pandemic, we have been pleased to see many defendants use a tool granted to them by Congress to seek a reduced sentence when they confront extraordinary and compelling circumstances. We understand that the Department of Justice has an interest in ensuring the finality of a sentence, but we fear that recent behavior by USAOs place the interest of efficiency and finality above anything else, including the person's life and their rights under law.

Although sentences imposed in federal criminal courts "constitute[] a final judgment," 18 U.S.C. § 3582(b)(3), Congress specifically carved out an exception to finality when "extraordinary and compelling reasons warrant . . . a reduction" in the sentence, 18 U.S.C § 3582(c)(1)(A)(i). This provision had long been in place, but until recently, it was rarely used.[1] The changes in the First

[1] As you are certainly aware, the First Step Act was Congress' corrective method to ameliorate the BOP's paucity of approving compassionate release. Between 2014-2018 (pre-FSA), 3,182 inmates applied for compassionate release, but only 9.6% of these applications were granted. On average, individuals waited 141 days for approval and 196 days for a denial. Eighty-one incarcerated people died waiting for a response from BOP. *See Letter from Stephen E*

Step Act that allowed individuals to bring motions directly to court transformed compassionate release from a pipe dream to a safety valve and lifeline. Our experience during the pandemic has been instructive. Uncertainty is rife, circumstances change on a dime, health circumstances are especially fraught, and, as such, the availability of compassionate release played a critical role in the criminal justice system. And yet, USAOs throughout the country are using their immense power and forcing defendants to bargain away their right to ask the court to send them home to die, release them to care for their children who have been orphaned by the death of the other parent, or free them to cope with a debilitating medical condition with dignity. This is certainly not what Congress had in mind.

Take, for example, the language that appeared in a recent plea agreement from the Southern District of Indiana:

> **Motions for Compassionate Release:** As concerns this Section 3582 waiver, the defendant reserves the right to file one (and only one) motion seeking a "compassionate release" sentence reduction pursuant to the First Step Act of 2018 and 18 U.S.C. § 3582(c)(1)(A)(i) based on "extraordinary and compelling reasons" established by the defendant and consistent with U.S.S.G. § 1B1.13 application note 1(A) & (C) (or, in the event of amendment of those U.S.S.G. provisions, the provisions, if any, with the same effect at the time of the filing of the motion for sentence reduction). However, the defendant waives any right to file more than one motion on that basis. This waiver also bars an appeal from the District Court's decision regarding that motion. The government further reserves the right to oppose any motion for compassionate release on any other grounds.

The wife of the man[2] whose plea agreement included this waiver wrote to FAMM recently. She is distressed to learn not only that her incarcerated husband – who has multiple and serious health conditions – was recently diagnosed with COVID, but that a spot has now been discovered on his lung. The government has forced the family into a Hobson's choice – file a motion for compassionate release now based on COVID, aneurysms, a heart condition, and other underlying conditions, or wait to see if he survives COVID and assess the severity of the spot on his lung at some later date. If he files now and is rejected, but two years later the spot on his lung turns into malignant terminal cancer, the terms of his agreement proscribe him from seeking compassionate release.

The dilemma is real. This individual's circumstances are not unique. FAMM and NACDL have assisted many individuals initially denied compassionate release who refiled and were granted compassionate release based on a change in health circumstances – changes that are dire and augmented by the impact of this relentless pandemic.

Boyd to Senator Bryan Schatz (Jan. 16 2018), available at, https://famm.org/wp-content/uploads/Response-from-BOP-re.-Compassionate-Release-Letter-1-16-2018.pdf

[2] Note: Individuals have been anonymized because of an ongoing cases and to protect confidential medical information.

Not only does the waiver undermine the goal of compassionate release, but it also distorts the development of the law. The waiver we reproduced above precludes an appeal of the district court's denial of compassionate release. This is particularly imprudent at a time when district and circuit courts are grappling with developing law on the First Step Act and the scope of compassionate release. Had Mr. Estrada-Elias signed such a waiver, he would still be in prison today. Mr. Estrada-Elias, a 90-year-old terminally ill person serving a mandatory life sentence for a marijuana offense, was denied compassionate release by a district court judge who failed to consider his health circumstances. Instead, the court focused solely on the sentencing factors at 18 U.S.C. § 3553(a). His attorney appealed to the Sixth Circuit and the Sixth Circuit remanded, finding that the district judge had "engaged in substantively unreasonable balancing of the 3553(a) factors and therefore abused its discretion." *United States v. Estrada-Elias*, 2021 WL 5505499, 21-5680 (6th Cir., Nov. 24, 2021). Roughly two weeks after the Sixth Circuit's order, the district judge reduced Mr. Estrada-Elias' sentence to time-served. An appeal waiver would have left Mr. Estrada-Elias to die in prison.

Pressuring an individual to waive the right to file or appeal a compassionate release motion as part of a guilty plea is not limited to one jurisdiction. We are aware of at least six jurisdictions across the country where § 3582 (c)(1)(A) waivers are being used by USAOs. In some districts, the waiver prohibits an individual from filing *any* motion under § 3582. The resulting geographic disparity undermines DOJ's interests in fairness and uniformity throughout the federal criminal system. Following Judge Breyer's condemnation of a compassionate release waiver provision as "inhumane" and "senseless," *see Osorto*, 445 F. Supp. 3d at 105, 110, the USAO in the Northern District of California no longer includes the compassionate release waiver provision in standard plea agreement language. Incarcerated individuals in that district can file compassionate release motions as warranted by their circumstances. Contrast that with the District of Arizona where plea agreements appear to include a broad waiver of "any right to file a motion for modification of sentence including under . . . 18 [U.S.C. §] 3582(c)."

In one case out of Arizona, a sixty-five-year old individual with pre-existing health conditions asked the court to permit him to withdraw from the plea agreement after the plea had been entered, because of the compassionate release waiver provision. The individual argued that he neither knowingly nor voluntarily agreed to waive those rights at the time of the plea. The government vehemently opposed this motion, and months of litigation ensued. Ultimately, the government agreed to drop the waiver provision in that particular case. Many other defendants in Arizona are not so fortunate; the compassionate release waiver provision appears to remain as part of the template plea agreement.

Finally, until the Sentencing Commission updates USSG § 1B1.13 (the policy statement regarding compassionate release), an individual cannot knowingly and voluntarily agree to waive claims that are subject to some future unknown interpretation by the Commission. Although Congress amended the grounds and procedures for seeking compassionate release in the First Step Act, the inactive Sentencing Commission has not yet issued an updated policy statement defining the contours of extraordinary and compelling circumstances. Until the Commission is

able to update 1B1.13, individuals by definition are unable to knowingly and voluntarily waive rights to seek compassionate release on grounds that have not been defined.

We strongly encourage the Department to send a clear policy memorandum to all USAOs across the country proscribing this pernicious practice. In rejecting a plea agreement that included a compassionate release waiver provision, Judge Breyer denounced the provision as "undermin[ing] Congressional intent and . . . an unconscionable application of a federal prosecutor's enormous power to set the terms of a plea agreement." *Osorto*, 445 F. Supp. 3d at 105. We wholeheartedly agree.

We would welcome the opportunity to meet with you to discuss the Department's plans for policy-making in this area. Thank you for considering our views.

Sincerely,

Kevin A. Ring
President, FAMM

Martín Sabelli
President, NACDL