



March 14, 2023

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed 2023 Amendments to the Federal Sentencing Guidelines

Dear Judge Reeves:

We are pleased to provide these comments on behalf of FAMM, supporting a number of the Commission’s proposed amendments to the federal Sentencing Guidelines. FAMM is a 33-year-old non-profit, non-partisan organization advancing sentencing and corrections reform. Our membership of over 70,000 people includes the currently and formerly incarcerated, as well as their loved ones, and others concerned about the criminal justice system’s impact on our communities. We work to elevate the voices of impacted people so that their experiences are taken into account by policy makers. Thank you for the invitation to testify at the hearing in February and for your attention to our written comments.

I. First Step Act: Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(A)

a. Proposed Amendment (B)(1)

- i. Proposed amendment (B)(1)(C) rightfully recognizes the impact of medical care in BOP for certain individuals*

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 adequate manner.

FAMM endorses the proposed additional subcategory to “Medical Condition of the Defendant” in new subsection (B)(1). This criterion would provide potential relief to individuals whose medical conditions are chronic and/or complex and who are at risk of serious or life-ending consequences should the Bureau of Prisons (BOP) delay or fail to adequately or timely diagnose, test, treat the condition, or refer the patient for testing and treatment. While some courts have



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recognized such situations either under the current guideline¹ or using their discretion in the absence of an applicable guideline,² (and still others cite both³), the addition of this subcategory will give courts confidence to consider motions alleging that people in BOP custody cannot access adequate or timely specialized or long-term care they require.

FAMM hears all too often from incarcerated members or their loved ones on the outside who tell us about failures to provide medical care and delays in being transferred to outside doctors for ordered diagnostic tests and/or treatments.

For example, Ashley S. told us she woke up one morning in late April 2022 to find her head moving in a "no-no" motion. She visited sick call at the first chance, six days later, for her uncontrollable head movement and intense headaches. She was given an appointment two weeks after her sick call, but she was never called out for it. Another three weeks went by before she could get anyone's attention. Medical personnel said they would request CT scans, an MRI, and neurologist consultation, as well as emergency lab work. Those tests were not performed. Another week passed and she talked to and emailed everyone she could reach about her symptoms.

Ashley began to experience severe vertigo and nearly a month after her first symptoms she lost consciousness. In the emergency room some tests were finally conducted to rule out stroke or heart attack. The hospital physician told her she should see a neurologist by May 31. It wasn't until over a month later, July 6, that she was taken for an MRI.

As of July 18, 2022, when Ashley wrote to us, she had not seen or been scheduled to see a neurologist, nor been informed of the MRI results. She wrote:

The medical staff I have talked to have said that the longer my head shakes the more likely it will be to never stop. I cannot concentrate. People constantly stare at me. I'm in pain. I am dizzy. I feel like I am getting off a carnival ride. My tongue tingles. My stomach is clinched constantly.

This is debilitating. I have never been in any trouble. I am respectful. I don't want to be the kind of inmate who throws a fit to get help. I just want to be a good person who people want to help.

I want to be a human not an inmate.⁴

Were it to adopt (b)(1), the Commission would not be writing on a blank slate. According to compassionate release data, courts cited "BOP failure to provide treatment" in 25 compassionate

¹ *United States v. Roach*, No. 5:97cr-50041, ECF 364, Order Granting Motion for Relief Under the First Step Act at 6 (D.S.D. Jan. 15, 2021).

² *United States v. Beck*, 425 F. Supp. 3d 573, 580–84 (M.D.N.C. 2019).

³ *United States v. Verasawmi*, No. 17-cr-254, ECF 111, Opinion at 14 (D.N.J. July 15, 2022).

⁴ Corrlinks from Ashley S. (July 18, 2022) (edited for brevity) (on file with FAMM).

release grants in Fiscal Years 2020 through 2022.⁵ While not numerous, these compassionate release grants addressed tragic real or feared outcomes due to inadequate or untimely medical care.

For example -

- Michael Derentz, a 70-year-old prisoner at Ft. Dix, reported lost vision in one eye and was taken to an outside specialist who diagnosed a retinal tear. The doctor wanted him returned in a week, but the BOP delayed the appointment for six weeks. By that time, the neglected retinal tear had progressed to a total retinal detachment. The doctor said Mr. Derentz needed surgery within the week to repair the detachment. The BOP did not make the appointment and, despite the doctor's repeated attempts to reach BOP staff to schedule the surgery, did not return Mr. Derentz to the doctor until more than a month later. By then, the detached retina was inoperable. Mr. Derentz lost the vision in that eye. He filed for compassionate release. Although the government contended that Mr. Derentz's vision issues were being attended to by facility medical staff at Ft. Dix and in the community hospital, the court found otherwise. "[T]he BOP's repeated delays in arranging for care to protect Derentz's vision constitute an extraordinary and compelling reason for release."⁶
- Ronnie Burr was granted compassionate release, because according to the court, despite the fact that a number of doctors ordered biopsies of his ulcers over a two-year period, the BOP failed to schedule a biopsy, "in reckless disregard of [the defendant's] health."⁷ The court observed that incarcerated people suffering severe medical issues are "at the BOP's mercy . . . and cannot independently schedule needed medical tests or care."⁸ It noted that the BOP's repeated cancellations and failures to schedule endoscopy appointments made it impossible to trust that Mr. Burr would receive timely care while incarcerated. The biopsies were intended to rule out cancer. But by delaying or simply not performing these procedures, the cancer they intended to rule out could go undiagnosed and untreated, "with potentially deadly consequences." Accordingly, "the inadequate medical care and reckless disregard of [the defendant's] health needs constitutes extraordinary and compelling circumstances."⁹
- Lawrence Crowell had lupus, a disease in which one's immune system attacks one's own tissue. It was documented in his medical history, in the PSR, and by an infectious disease specialist who assessed him. BOP medical personnel instead first diagnosed and then

⁵ U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022*, tbls. 10, 12, & 14 (Sept. 8, 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencingstatistics/compassionate-release/20220908-Compassionate-Release.pdf>.

⁶ *United States v. Derentz*, No. 15-cr-418, ECF 52, Memorandum Opinion at 5-6 (E.D. Pa. June 17, 2022).

⁷ *United States v. Burr*, No. 15-cr-362, ECF 129, Memorandum Opinion and Order at 7 (M.D.N.C., Dec. 1, 2022) (Burr Order).

⁸ *Id.*

⁹ *Id.* at 8.

treated him for a year for syphilis despite his repeated assertions and evidence to the contrary. BOP and the government opposed Mr. Crowell's compassionate release motion saying that only a rheumatologist can diagnose lupus. The court ordered the BOP to take Mr. Crowell to a rheumatologist but the BOP ignored the order and failed to explain its conduct. "The combination of Mr. Crowell's medical condition and the BOP's response to it, and its blatant disregard of this Court's order, establish extraordinary and compelling reasons to release Mr. Crowell."¹⁰

Not every complaint of inadequate medical care warrants compassionate release.¹¹ But when a defendant has evidenced to the court that BOP care is inadequate and/or untimely, release should be considered. Lengthy and unexplained delays of needed medical care, failure to follow up on a doctor's order for urgently needed surgery, provision of inadequate treatment for invasive cancer, and failure to schedule ordered diagnostic procedures in serious cases have been found to justify compassionate release.¹²

A concern has been raised about burdening the courts with determining if and to what extent the BOP is failing to timely provide needed procedures.¹³ Courts handle these routine medical questions often in compassionate release cases. Courts cited USSG §1B1.13, Notes I (A)(i) (terminal illness) and (ii) (non-terminal conditions that diminish self-care ability) in 586 compassionate release grants in Fiscal Years 2020-2022.¹⁴ In such cases, judges rely on the parties' briefs, occasional specialist declarations, and especially on medical records maintained by the BOP. Courts use these resources to answer questions about whether an individual is terminally ill or suffering from a medical condition that diminishes their ability to provide self-care in prison. What differentiates proposed (b)(1)(C) cases from traditional medical cases, is the question of whether the individual is receiving the needed procedure or care in a timely or adequate manner and if not, is the incarcerated person in danger of deterioration or death.

But these questions have also been raised in traditional medical cases. Courts often ask what kind of medical care a person is receiving and how this medical care impacts the trajectory of their

¹⁰ *United States v. Crowell*, No. 1:16-cr-107, ECF 58, Order at 5-6 (D.R.I., Aug. 14, 2020).

¹¹ *See Burr* Order at 15-16 (collecting cases where compassionate release based on failure to timely or adequately provide care was denied).

¹² *See id.* at 17 (collecting cases).

¹³ *See, e.g.*, Testimony of Hon. Randolph D. Moss on Behalf of the Committee on Criminal Law of the Judicial Conference of the United States: Proposed Compassionate-Release Related Amendments to the Sentencing Guidelines at 3 (Feb.23, 2023) (expressing concern that courts will see increased litigation over whether a medical condition exists that requires long-term or specialized care, if BOP is providing the care, and if the condition will worsen).

¹⁴ *See*, U.S. Sentencing Comm'n, *Compassionate Release Data Report, Fiscal Years 2020 to 2022*, at tbls. 10, 12, & 14 (Dec. 2022). While courts denied motions citing terminal or serious medical conditions, the data report does not provide the same level of detail for denials that are provided for grants.

health conditions. Such inquiries are and can be handled by courts referring to medical records.¹⁵ Medical records routinely include chronologies of visits complete with complaints and assessments, test results (and lack of ordered test results), and orders for treatments, procedures or follow-up visits. We expect cases under proposed (b)(1)(C) will rely on the same kinds of records that courts already consult in mill run medical cases, to resolve issues about whether the BOP missed appointments, failed to respond to serious medical complaints, or follow up on ordered procedures, as well as the consequences to the individual's health that could ensue if the individual is not released to seek community treatment.

ii. Proposed amendment (B)(1)(D) appropriately accounts for the lessons learned during COVID

The Defendant presents the following circumstances—

- (i) *The defendant is housed at a correctional facility affected or at risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;*
- (ii) *The defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and*
- (iii) *such risk cannot be mitigated in a timely or adequate manner.*

FAMM supports the Commission's proposal to expand compassionate release eligibility to account for infectious disease outbreaks or public health emergencies that pose risks for complications or death that cannot be mitigated in a timely or adequate manner. While we hope courts will never need to use this provision, we appreciate the Commission's recognition that such situations are indeed extraordinary and compelling, warranting a reduction in sentence review.

If we are confronted by a COVID-like event again, adopting (b)(1)(D) will save lives by giving courts the authority to entertain motions from incarcerated people, and by giving the BOP and U.S. Attorneys the guidance and confidence they need to bring motions for people BOP identifies as at risk.

Starting in 2019 through 2022, courts entertained 27,789 motions for compassionate release.¹⁶ While Commission statistics do not reveal how many of those motions were made by people whose underlying medical conditions could make them vulnerable to serious illness or death should they contract COVID, it is safe to say that the pandemic led to the majority of filings

¹⁵ See, e.g., *Verasawmi*, No. 17-cr-254, ECF 111 at 6-7 (D.N.J. July 15, 2022) (relying on BOP medical records submitted by the government in determining that inadequate medical care may be a relevant factor in finding extraordinary and compelling reasons).

¹⁶ *Supra* note 14 at Tbl. 1.

during those years. But the BOP and U.S. Attorneys sponsored only 1.2 percent of motions granted during the pandemic.¹⁷

If the Commission does not promulgate (b)(1)(D), it is likely that the BOP will not identify at-risk individuals, and attorneys for the government will not file motions, just as they failed to do in the midst of COVID-19. Besides neglecting medically vulnerable people, the government opposed release in the vast majority of cases placed during COVID through the Compassionate Release Clearinghouse COVID-19 Project,¹⁸ and not just based on factors in 18 U.S.C. § 3553(a).

At the beginning of the pandemic, the government opposed pandemic-based motions explaining that §1B1.13 did not cover vulnerability to COVID exposure, incarcerated people had not exhausted their administrative remedies, and/or because the BOP was taking adequate steps to protect vulnerable people from COVID.

It was abundantly clear early on that the BOP could not protect incarcerated people from COVID. For example, a lawsuit filed on behalf of people housed at the Butner II Federal Correctional Institute alleged:

Butner’s health care system is grossly inadequate to treat the growing number of sick men. The Federal Bureau of Prisons (“BOP”) has inadequate infection surveillance, testing, quarantine, and isolation practices, further exacerbating the crisis. What is more, people with pre-existing medical conditions often do not receive the treatment needed for their underlying conditions, presumably because the prison’s medical resources are over-taxed.¹⁹

The early case of Marie Neba is one example. Ms. Neba sought compassionate release while incarcerated at Carswell Federal Medical Center. She initially sought compassionate release due to her cancer diagnosis but she supplemented her motion on March 30, 2020, based on her risk of serious complications from contracting COVID. The government opposed her motion because it said she was still able to work and was exercising with weights, she had not exhausted her administrative remedies with respect to her claim about COVID vulnerability, and the BOP was taking measures to protect people in its facilities from contracting COVID and would be able to meet her needs.

¹⁷ *Id.* at Tbl. 5.

¹⁸ See Written Testimony from Mary Price on behalf of FAMM at 1 (Feb. 15, 2023) (describing the Compassionate Release Clearinghouse), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf>.

¹⁹ *Hallinan, et al. v. Scarantino, et al.*, No. 5:20-hc-02088, ECF 1, Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 and Class Action Complaint for Injunctive and Declaratory Relief at 2 (E.D.N.C. May 26, 2020) (alleging unsanitary conditions and housing in which incarcerated people are unable to socially distance or quarantine).

The BOP healthcare system failed to protect Ms. Neba.

The record is unclear if the court ever ruled on Ms. Neba's initial motion. Her attorney filed an opposed motion to expedite a ruling on August 26, 2020 because, he explained, he had heard from Ms. Neba's 19-year-old daughter that her mother had been hospitalized and was on life support and had already been resuscitated once. Her daughter had only learned of her mother's condition when private hospital staff reached out to make end-of-life arrangements.²⁰

Unbeknownst to counsel, Ms. Neba had died the day before.²¹

It was only in May 2020 that the Criminal Division issued guidance to the effect that people with CDC-identified risk factors could be considered as meeting the Serious Medical Condition standard at §1B1.13, Application Note 1(A)(ii).²² But even that did not change the government's practice of opposing the majority of motions.

The BOP was aware of the existence of individuals who were at risk should they contract COVID. It was aware that Ms. Neba was one such person. Following Ms. Neba's death, the BOP issued a press release stating: "On Tuesday, August 25, 2020, Ms. Neba, who had long-term, preexisting medical conditions, which the CDC lists as risk factors for developing more severe COVID-19 disease, was pronounced dead by hospital staff."²³ It is not clear if the government would not join the expedited motion because Ms. Neba had failed to exhaust or for other reasons, but the BOP clearly had not acted to bring her case and hundreds of others to the attention of the courts.

During COVID, the BOP routinely issued press releases very similar to the one for Ms. Neba, explaining the death was due to the fact the deceased had long-term, preexisting medical conditions recognized by the CDC as risk factors. But, the BOP neither moved for their release nor furloughed individuals although it had the authority under 18 U.S.C. § 3622(a) to do so. Professor Alison Guernsey of the University of Iowa collected every press release and compiled a spreadsheet showing, chronologically every death in custody and, where relevant, compassionate release efforts.²⁴ The releases make plain that the BOP was aware of the

²⁰ *United States v. Tilong*, 4:15-cr-591, ECF 355, Opposed Motion to Expedite Ruling on Sentence Reduction (S.D. Tx, Aug.26, 2020).

²¹ Federal Bureau of Prisons, Press Release, Inmate Death at FMC Carswell (August 26, 2020), https://www.bop.gov/resources/news/pdfs/20200826_press_release_crw.pdf.

²² See, e.g., *United States v. Wright*, 8:17-cr-00388-TDC, ECF 50, *Supplemental Response* (D. Md. May 19, 2020) ("The Government now supplements [its] response in light of intervening Department of Justice guidance. Based on that guidance, the Government concedes that the defendant's Type I diabetes, and perhaps other of her medical conditions, constitute 'extraordinary and compelling circumstance' during the current pandemic, even if these conditions in ordinary times would not allow compassionate release.").

²³ *Supra* note 21.

²⁴ The University of Iowa College of Law, *Compassionate Release: List of Known Deaths and Compassionate Release Attempts* (March 28, 2020 to Jan 1, 2022),

individuals' vulnerability to COVID and nonetheless failed to act to release them. Meanwhile, the government opposed many cases brought by incarcerated people.

To date, BOP has identified 314 people who died while incarcerated due to COVID.²⁵

We hope the guidance provided by proposed subcategory (b)(1)(D) will prompt the BOP and U.S. Attorney Offices to actively identify and seek compassionate release review for at-risk individuals, or at a minimum, refrain from opposing their release when they otherwise meet reduction in sentence criteria.

b. Proposed Amendment (b)(3) is a proper expansion of family circumstances to account for the reality of many incarcerated people and their loved ones

i. Proposed amendment (b)(3)(A), (D)

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(D) The defendant presents circumstances similar to those listed [above] involving any other immediate family member or an individual whose relationship with the defendants is similar in kind to that of an immediate family member.

FAMM supports these proposed additions to the Family Circumstances ground. The principles and concerns that animate providing compassionate release based on the death or incapacitation of a minor child's caregiver support this thoughtful proposed amendment. Children cannot be left to care for themselves, whether they are legally minors or have a mental, cognitive, or physical disability that requires caregiving best provided by a parent. Moreover, family and loved ones' bonds are not necessarily tied to immediate family relationships. Many of our members live in families that include people other than immediate family members. The bonds of love and mutual support among them are evident and should be recognized.

ii. Proposed Amendment (b)(3)(C)

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

FAMM urges the Commission to adopt this subsection, which allows for compassionate release to provide support that no one else can provide to a parent in need of caregiving.

The Commission heard from Bryant Brim, whose release enabled him to care for his mother. Commissioners will recall his moving testimony about the inability of Mr. Brim's alcoholic

<https://law.uiowa.edu/sites/law.uiowa.edu/files/2022-02/List%20of%20Compassionate%20Release%20Attempts%20-%20201-31-22.pdf>.

²⁵ Federal Bureau of Prisons, COVID-19 Cases (last visited March 10, 2023), <https://www.bop.gov/coronavirus/>.

brother to care for their mother, and whose lapses and absences led to her dehydration or abandonment.²⁶

While Mr. Brim sought compassionate release due to vulnerability to COVID, the life sentence he would not have received, and his exemplary rehabilitation, the judge pointed out “what [made] Mr. Brim’s situation particularly precarious is the health of his mother, Ruth Brim. 87-year-old Ruth Brim is in her twilight years and . . . has heart disease, suffered seizures and strokes, is partially blind and partially paralyzed, and is functionally bed-ridden.”²⁷ She required assistance with getting in and out of bed, getting to the toilet and tub, with food preparation, and with sorting and ensuring her medications were taken correctly. Her other son’s absences, sometimes for days at a time — including due to brushes with the law — had endangered her life. She was in fact alone when she suffered a third stroke.²⁸ Mr. Brim’s brief pointed to court decisions that had extended the family circumstances prong to justify release to care for loved ones other than minor children.²⁹

The government opposed release because the policy statement does not recognize release to care for a parent in need of care and because, in its view, other family members could have cared for Mr. Brim’s mother.³⁰ This was not the case as other family members were not available.³¹

The court granted Mr. Brim’s release and, as the Commission heard, Mr. Brim’s consistent and loving caregiving has transformed his mother’s life and improved her health and mobility.

FAMM agrees that this amendment is needed. While a number of courts support compassionate release in these circumstances, a number do not, primarily because no policy statement exists

²⁶ Written Testimony from Bryant Brim at 2-3 (Feb. 23, 2023), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Brim.pdf>.

²⁷ *United States v. Brim*, No. 8:93-cr-98, ECF 560, Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1) at 12 (C.D. Cal, Nov. 25, 2020).

²⁸ *Id.*

²⁹ *Id.* at 31-32 (relating that a “growing number of courts have found extraordinary and compelling reasons can exist when a defendant is the only available caregiver of incapacitated close family members other than spouses or registered partners—particularly parents”); *see also United States v. Wooten*, No. 3:13-CR-18, 2020 WL 6119321, at *4 (D. Conn. Oct. 16, 2020) (collecting cases and noting that following *United States v. Brooker*, earlier decisions to the contrary “are even less persuasive”); *United States v. Bucci*, 409 F.Supp.3d 1, 2 (D. Mass 2019) (holding there is “no reason to discount this unique role because the incapacitated family member is a parent and not a spouse”); *United States v. Lisi*, 440 F.Supp.3d 246, 252 (S.D. N.Y. 2020) (finding extraordinary and compelling reason where defendant’s mother was ill and her hired aides were incompetent); *United States v. Hasanoff*, No. 10-CRCASE 8:93-cr-00098-DDP, ECF 560 (Nov. 25, 2020).

³⁰ *Brim*, ECF 570, Government’s Opposition to Defendant Brian Keith Brim’s Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1)(A)(1) at 49, 55.

³¹ *Id.* ECF 575, Reply in Support Notice of Motion and Motion to Reduce Sentence Pursuant to Compassionate Release at 8-10 (Feb. 1, 2021).

that recognizes parental caregivers.³² Adding proposed (D) to Family Circumstances will give courts confidence that they can account for situations like that faced by Mr. Brim and his mother.

c. Proposed Amendment (b)(4) provides hope to survivors of sexual violence in prison

Victim of Assault.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.

FAMM greatly appreciates the Commission’s inclusion of (b)(4) in the slate of proposed amendments to the guidelines. Sexual abuse in custody is unequivocally an extraordinary and compelling circumstance. Prisoners who are abused by the very people responsible for ensuring their safety must have an avenue to seek a sentence reduction. The Commission’s proposed amendment provides that. It also gives hope to the people who have survived abuse at the hands of BOP employees. Recognizing sexual abuse as a ground for release dignifies survivors; it says, we see you. It also signals that the justice system’s intolerance of abuse is not limited to using survivors’ victimization to try and punish perpetrators, but embraces the government’s duty to find and release survivors so that they can heal.

Although we support the inclusion of such an amendment, we write to raise a few concerns, primarily with suggestions proposed by the Department of Justice in the February 2023 hearing.³³

In its written testimony, the Justice Department wrote that it “takes very seriously allegations that individuals have suffered sexual and physical abuse at the hands of correctional officers or other BOP employees or contractors while in custody.”³⁴ To that end, DOJ agrees that “in certain circumstances” a sentence reduction may be warranted. But the DOJ has asked the Commission to introduce a burden of proof on the petitioner in these cases – that the conduct they allege should only be considered by a court if there has been “a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case.”³⁵ This proposal by

³² *Id.* ECF 570 at 50-51 (collecting cases in which courts have not found support for parent caregiver release).

³³ FAMM previously wrote about the need for a robust guideline amendment addressing these heinous circumstance, and also wrote with some threshold questions about this proposed amendment, about the definition of sexual assault. *See* Written Testimony from Mary Price (Feb. 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf>; Letter from Mary Price & Shanna Rifkin to the Hon. Carlton W. Reeves at 3-4 (Oct. 17, 2022), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm2.pdf>.

³⁴ Written Testimony from Jonathan Wroblewski at 5 (Feb. 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf>.

³⁵ *Id.* at 6.

DOJ would place a higher burden on individuals who are victims of abuse by federal employees than on any other compassionate release litigants. Of equal concern, this proposal would restore the DOJ (and the BOP) as the gatekeeper of compassionate release motions – undoing Congress’ crowning reform to § 3582(c)(1)(A) in the First Step Act.

When Congress reformed compassionate release in the First Step Act to allow individuals to file directly in court, it did so after decades of failure and intransigence by the BOP and DOJ.³⁶ BOP has persistently and abjectly failed to take seriously its role in compassionate release cases.³⁷ As such, the Commission should reject any proposal that would restore the government’s control of a compassionate release motion. DOJ’s proposal does just that – it sets up a requirement that the government needs to have made an official finding that the alleged sexual abuse occurred. This is precisely the kind of one-sided, government-controlled process that the First Step Act rejected. Moreover, DOJ has not shown that it has an administrable plan in place to implement the standard it asks the Commission to impose.

The DOJ has made numerous public statements regarding the victims of sexual abuse in custody.³⁸ It has said that it takes these situations very seriously. But in practice, its handling of these cases reflects a Justice Department that is unprepared and ill-equipped to manage and advance the investigation of what we understand is widespread sexual abuse in custody.

For one, internal disagreement on how sexual assault cases should be handled threatens the availability of government-initiated compassionate release. It could also reflect the Department and the BOP’s unwillingness to tackle this issue. Take, for example, the case of Aimee Chavira.³⁹ Ms. Chavira was abused by a number of corrections officers at FCI Dublin.⁴⁰ She reported the abuse to prison officials, including the Warden who was recently convicted at trial of sexually abusing women at Dublin. Ms. Chavira has endured retaliation for reporting the conduct. Because no one took these allegations seriously, she meticulously documented them in her own notebook. But prison guards who were implicated by her writing seized that notebook. A BOP psychologist at Dublin told Ms. Chavira that she was “crazy.” Ms. Chavira met with federal agents and prosecutors and under penalty of perjury detailed the accounts of abuse that she suffered at Dublin. A few months ago, Ms. Chavira filed a request with the Warden at her facility asking BOP to bring a motion for compassionate release on her behalf given the sexual abuse she endured.

³⁶ See *supra* note 18 at 12.

³⁷ *Id.*

³⁸ See, e.g., The Principal Associate Deputy Attorney General, Working Group of DOJ, *Report and Recommendations Concerning the Department of Justice’s Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* (Nov. 2, 2022).

³⁹ Note, Aimee Chavira is Erica Zunkel’s client. Ms. Chavira’s story is told in more detail in Zunkel’s submissions to the Commission.

⁴⁰ Written Testimony from Erica Zunkel Before the U.S. Sentencing Comm’n at 29 (Feb. 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Zunkel.pdf>.

BOP and DOJ's responses highlight the internal disorganization that stands in the way of relief for these women. Responding to Ms. Chavira's request, the General Counsel for the BOP acknowledged that her assertions were "extremely concerning" but said that "the Office of General Counsel has not been notified of a final adjudication of Ms. Chavira's allegations," and as a result, that it "currently lacks sufficient documentation to determine whether her circumstances are 'extraordinary and compelling.'"⁴¹ He denied her request. However, according to a New York Times story, other officials familiar with the case "do not dispute her allegations."⁴² Those officials characterized the denial as temporary, but, despite repeated requests by Ms. Chavira's counsel,⁴³ no information has been provided as to what might lead to an approval, or the timetable for such an approval.⁴⁴

Justice Department representatives testified at the Commission's hearings on February 23 and 24. Their testimony and the questions elicited from the commissioners highlighted the shortcomings of the government's proposal. When pressed on how long it takes to conduct investigations that would lead to evidence the government would find sufficient to warrant compassionate relief, the Justice Department officials could provide no timetable. When asked about what these investigations would look like, who would be responsible for them, when they would occur, and what would suffice to trigger an investigation, the witnesses had no illuminating responses. Moreover, the Justice Department could not answer how it intends to handle situations like Ms. Chavira's where an adjudication is impossible due to circumstances outside of the petitioner's control; one of her main abusers committed suicide when federal law enforcement officers began investigating him. In the Department's view, Ms. Chavira is without recourse because the government does not know how to handle her account and cannot take action against her abuser. The government's plan is no plan at all.

Post-First Step Act, it is a petitioner's burden to provide to the court an explanation of the circumstances that would warrant relief, and to substantiate those circumstances for a court to rule in their favor. To this end, courts routinely examine evidence in a petitioner-initiated compassionate release request and determine if there is enough to support a finding. Only in the context of sexual abuse cases, however, is the government saying the petitioner's own explanation is not good enough. In the First Step Act, Congress expressly removed the government from gatekeeping compassionate release claims. And now, the government is demanding to be gatekeeper once again by proposing that a judge can only entertain a sexual abuse-based motion if the government substantiates the survivor's claims. Moreover, the Justice Department's proposal sends a message to survivors of abuse that their stories and experiences have zero credibility on their own. But for reasons identified by both the DOJ Inspector General

⁴¹ *Id.* at 31 & n.1.

⁴² Glenn Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/2023/02/22/us/politics/federal-prisons-inmate-abuse.html>.

⁴³ Correspondence from Erica Zunkel, Ms. Chavira's counsel, seeking clarification of the adjudication standard is on file with Erica Zunkel.

⁴⁴ *Supra* note 42.

and The Senate Permanent Subcommittee on Investigations, the government’s own investigative ability lacks the credibility and competency that is demanded in these highly sensitive cases.

On October 12, 2022, the Inspector General wrote to Colette Peters, the Director of the BOP, “to notify [her] of serious concerns” with the manner in which BOP “handles investigations of alleged misconduct by BOP employees.”⁴⁵ In summarizing the findings of the investigation, the IG wrote:

we were told by OIA [Office of Internal Affairs for BOP] that, in cases that have not been accepted for criminal prosecution, the BOP will not rely on inmate testimony to make administrative misconduct findings and take disciplinary action against BOP employees, unless there is evidence aside from inmate testimony that independently establishes the misconduct, such as a video capturing the act of misconduct, conclusive forensic evidence, or an admission from the subject. The OIA further informed the OIG that the BOP uses inmate statements in administrative proceedings solely for investigative lead purposes.⁴⁶

As the IG points out, BOP’s refusal to rely on a survivor’s words flies in the face of logic and ignores practice, given that “such testimony is fully admissible in criminal and civil cases, . . . [I]nmates are not disqualified from providing testimony with evidentiary value in federal courts, and there is no valid reason for the BOP to decline to rely on such testimony” Based on the BOP’s illogical and impractical approach to investigations, the government’s demand that a survivor actually secure an administrative finding against a BOP employee raises a next-to-impossible bar.⁴⁷ There is no credible reason why the Justice Department should insist on such a heightened standard that is in exclusive control of the government. Not only is it unduly restrictive, it disempowers and erases the voice of the survivor. And, it would bar their access to the courts.

The DOJ IG is not alone in expressing serious concern over BOP’s capacity to investigate sexual assault claims. In a report published in December 2022, the Senate Permanent Subcommittee on Investigations (PSI) “found that mechanisms that BOP employs to identify and prevent sexual abuse of female prisoners by BOP employees are ineffective.”⁴⁸ And, these mechanisms can be

⁴⁵ Michael E. Horowitz, Inspector General, Dep’t of Just., *Management Advisory Memorandum, 23-001, Notification of Concerns Regarding the Federal Bureau of Prisons’ (BOP) Treatment of Inmate Statements in Investigations of Alleged Misconduct by BOP Employees* at 1 (Oct. 2022), <https://oig.justice.gov/sites/default/files/reports/23-001.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.* at 3 (“BOP’s reluctance to rely on evidence provided by inmates enhances the likelihood that employees who have engaged in misconduct avoid accountability for their actions and remain on staff, thereby posing serious insider threat potential, including the risk of serious harm to inmates.”).

⁴⁸ Permanent Subcommittee on Investigations, United States Senate, *Sexual Abuse of Female Inmates in Federal Prison* at 3 (Dec. 2022), <https://www.hsgac.senate.gov/wp->

controlled by the perpetrators of abuse. At Dublin, the former officer responsible for training other prison staff on the Prison Rape Elimination Act requirements and audits, was himself convicted of sexually abusing female prisoners.⁴⁹

BOP has also failed to hold employees accountable for misconduct, thus preventing the finding or conviction the Department would make survivors and courts wait for. As of October 2022, BOP had a backlog of approximately 8,000 cases of BOP employee misconduct. Some of the cases have been pending for more than five years, despite BOP guidelines that complaints of employee misconduct should be resolved within 120-180 days.⁵⁰ Absent their resolution, all the survivors will be barred from relief, under the Department's proposal.

These widespread and systemic failures and inaction are the very type of conduct that led Senators to remove the power grip that BOP had over compassionate release cases. Nothing has changed in BOP.

Requiring an administrative finding by BOP presents considerable concerns. So too does requiring a criminal or civil adjudication. Survivors of violence should not be held in an unpredictable waiting game, dependent on complex decisions regarding whether or when a prosecutor will exercise discretion to file charges. Those decisions can involve a calculus that in no way implicates the veracity of the claims made by survivors, or the evidence they have collected. But the decision to not prosecute would, if the DOJ's formulation is adopted, deny the court any ability to address the veracity of a survivor's evidence of abuse. Similarly, given the insurmountable roadblocks that prisoners face in bringing civil cases against government agencies,⁵¹ requiring such a finding is a Sisyphean task.

In the First Step Act, Congress eliminated the BOP's control over who courts may consider for compassionate release. Incarcerated people have been able to present their cases before the sentencing court, using the evidence available to them. Judges have made reasoned determinations, with arguments from both sides, about whether that individual presents extraordinary and compelling reasons. Sexual abuse cases should be treated no differently than any other category for relief. The DOJ's proposal would bar the courtroom doors to survivors of sexual abuse unless the government has formally recognized the conduct. The First Step Act eliminated the government's control and the Commission should not permit it to sneak back in under the guise of ensuring veracity or protecting government prosecutions.

d. Proposed Amendment (b)(5) is a proper exercise of the Commission's authority and responds to longstanding injustice in federal sentencing

content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ Andrea Fenster & Margo Schlanger, Prison Policy Initiative, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act* (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html.

Changes in Law.—The defendant is serving a sentence that is inequitable in light of changes in the law.

As the Commission knows from our appearance at the compassionate release hearing and written testimony, FAMM supports expanding the definition of extraordinary and compelling reasons to account for changes in the law that render a sentence inequitable.⁵²

We write to supplement our testimony in light of concerns voiced by other commenters and questions raised by Commissioners at the hearing.

i. Proposed (b)(5) Changes in the Law will ameliorate sentencing disparities

The Department of Justice predicts that adopting changes in the law that render a sentence inequitable “will lead to widespread sentencing disparities, as the Commission’s proposal will exacerbate the conflict among the courts of appeals on the statutory scope of Section 3582(c)(1)(A)(i).”⁵³ The Department did not explain how it arrived at that prediction. We hazard a guess that it believes some circuits will not recognize the amendment based on challenges to the amendment brought by the government. In other words, continued disparity would likely result from the government’s litigation position in court, rather than the impact of the amendment itself.

In fact, this proposed amendment will actually help *minimize* the sentencing disparity that currently exists, rather than exacerbate it, by providing courts with an applicable policy statement. As FAMM, the DOJ, and other commenters noted, the current disagreement among the circuits is unsurprising in light of the absence of guiding policy.

The government’s position at the Commission is even more curious given that the government took a rather different position before the Supreme Court in opposing petitions for certiorari on the circuit split issue. There, it explained that the Commission would and should resolve the split and doing so would lead to more consistent application of compassionate release.

The government correctly explained to the Supreme Court that “[t]he Sentencing Commission could promulgate a new policy statement that resolves the disagreement. Under Section 3582(c)(1)(A), any sentence reduction must be ‘consistent with applicable policy statements issued by the Sentencing Commission.’”⁵⁴ The brief related that the circuits that permit district courts to rely on the First Step Act non-retroactive changes have done so in light of §1B1.13’s inapplicability. “Nobody disputes, however, that the Commission has the power—indeed, the statutory duty—to promulgate a policy statement that applies to prisoner-filed

⁵² Oral Testimony of Mary Price before the U.S. Sentencing Comm’n (Feb. 23, 2023), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf>.

⁵³ Written Testimony from Jonathan J. Wroblewski at 8 (Feb. 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf>.

⁵⁴ *Jarvis v. United States*, No. 21-568, Br. for the United States in Opp’n of Cert. at 17 (Dec. 2021).

motions, or that *it could resolve this particular issue.*”⁵⁵ It then laid out a set of possibilities, all predicting that the Commission would forbid or limit the use of non-retroactive changes in the law.⁵⁶

If the Department perhaps believed that disparity will flow from circuits that would not abide by the Commission’s adoption of the minority circuits approach, it did not advise the Court of that possibility. It only advised the Commission of that possibility when it became clear that the agency took seriously the practical experience of courts, and proposed amendment (b)(5).

But the Commission should not resolve this dispute by giving weight to the government’s litigation position. The Commission should resolve this dispute by making a sound and reasoned policy decision. The resulting policy statement, fulfilling § 994(t)’s direction, will provide district and appellate courts the guidance the law requires. Courts must ensure a reduction is consistent with policy statements issued by the Commission and courts ruling on these motions would give the agency’s interpretation appropriate deference.⁵⁷ That should limit disparate treatment of compassionate release.

Furthermore, FAMM believes that the specter of disparity is overblown. Compassionate release is an exception to the rule of finality and its use *can* lead to disparity, even in jurisdictions where all courts are following the same rules. But that kind of disparity is to be expected given the highly individualized inquiry compassionate release motions demand. No two people present the same set of circumstances or features, and comparisons among individuals will often be difficult to draw. This is precisely as the statute intended.

Our criminal justice system provides that uniformity and consistency sometimes must give way to individualized considerations. The Supreme Court explained in *United States v. Booker* that “Congress sought to ‘provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities ... [and] maintaining sufficient flexibility to permit individualized sentences *when warranted*.’ 28 U. S. C. § 991(b)(1)(B).”⁵⁸

Review to determine if an individual demonstrates extraordinary and compelling reasons justifying reducing the sentence is a highly specific inquiry based on the individual’s circumstances and the § 3553(a) factors. How does one begin to find similarly situated compassionate release petitioners when the medical, family, or change-in-the-law situations vary widely among petitioners and even within eligibility categories? Even if there are overlapping features between categories of the enumerated grounds for relief, judges still must evaluate the § 3553(a) factors, which, once again, are uniquely tailored to each person.

One of the implicit principles animating compassionate release is that a sentence may no longer serve the purposes of punishment and should be reduced. Reducing a sentence consistent with

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* at 18.

⁵⁷ *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“[I]t is for agencies, not courts, to fill statutory gaps.”).

⁵⁸ *United States v. Booker*, 543 U.S. 220, 264 (2005).

the policy statement and grounded in reasons that are relevant to the purposes of punishment will be appropriate. Moreover, as the witness for the Federal Public and Community Defenders stated at the compassionate release hearing, warranted disparity is better than unwarranted uniformity

ii. Proposed (b)(5) includes an important limiting principle

As a preliminary matter, FAMM points out that the government's submission and testimony mischaracterize the Commission's proposal in (b)(5). For example, the Department's letter

- explains that the United States has taken the litigation position in *Jarvis v. United States* and other cases that *a change in sentencing law* that is not retroactive is not extraordinary as required by the statute.⁵⁹
- warns the Commission against conflicts with “even . . . more permissive courts of appeals, if it were to permit reductions based *on the mere fact that sentencing law had changed.*”
- states that proposed (b)(5) could allow defendants to “move for compassionate release *any time there is a change in the law . . .*”⁶⁰

Of course that is not the Commission's proposal or intent. Instead, the Commission proposes to address *only those changes that render the sentence inequitable.*

Moreover, FAMM finds the government's focus on what is and isn't “extraordinary” puzzling. For example, in *Jarvis*, the government cited approvingly to the decision below. It found that a change in law made by the First Step Act was not “extraordinary and compelling,” and that risks of exposure to COVID were not extraordinary and compelling. The government's opposition relied on the court's ruling that “[f]acts like the First Step amendments (which impact[] hundreds of prisoners) and COVID-19 (which impacts all prisoners) are too general to satisfy this individualized analysis.”⁶¹

Certainly one can disagree about the breadth of “extraordinary” reasons, but the fact that a circumstance can affect hundreds or thousands of people should not convince the Commission that it is therefore not “extraordinary.” This is, of course, because the court must examine how the circumstance that may generally affect a large group of people *actually and directly* impacts the individual petitioner. Common, widespread circumstances may become both extraordinary and compelling in a particular context. In fact, shortly after filing the Brief in Opposition in the Supreme Court, the Justice Department made a concession that supports this view. It agreed that people with underlying medical conditions making them uniquely vulnerable to COVID *did* present extraordinary and compelling reasons.⁶²

⁵⁹ *Supra* note 53 at 7 (emphasis added).

⁶⁰ *Id.* (emphasis added).

⁶¹ *Supra* note 54 (emphasis added).

⁶² *See, e.g., United States v. Wright*, 8:17cr00388-TDC, ECF 50, Supplemental Response (D. Md. May 19, 2020) (“The Government now supplements [its] response in light of intervening Department of Justice guidance. Based on that guidance, the Government concedes that the defendant's Type I diabetes, and perhaps other of her medical conditions, constitute

Moreover, the Guidelines have never referenced rarity or scarcity of a reason as a prerequisite to finding a reason “extraordinary.” For many years, for example, the Commission has recognized the combination of age plus time served plus chronic age-related medical conditions as an extraordinary and compelling reason. Growing old and developing chronic medical conditions, while serving long sentences is hardly a rare circumstance. Currently, over 10,000 people 61 years old and older are incarcerated in the federal Bureau of Prisons.⁶³ Many of them are suffering from age related chronic conditions.⁶⁴ The Commission recognizes that constellation of factors as “extraordinary and compelling.”⁶⁵

Similarly, changes in the law, while uncommon, still affect a number of incarcerated people. The Commission proposes to cabin changes in the law by reference to their impact on the fairness of the sentence. Equity is a substantive limiting principle in (b)(5). Individuals must be able to convince the court not only that they are serving a sentence that could not be imposed today, but also that the sentence is inequitable. This is a robust standard.

Between 2020 and 2023, courts decided over 27,789 compassionate release motions. Only 379 motions were granted on grounds based on non-retroactive changes made by the First Step Act.⁶⁶ Those grants represent 1.36 percent of all motions filed and 8.4 percent of all motions granted.

Courts in the circuits that permit use of changes in the law have already tilled the ground in opinions that the Commission can point to if it feels the need to provide examples of inequity. One measure of inequity is the difference between the sentence imposed and the sentence the individual would serve had they been sentenced after the First Step Act. Courts have rendered release decisions that can help their colleagues understand what inequity looks like in the (b)(5) context.

Take, for example, the Tenth Circuit. There, changes in the law are considered extraordinary and compelling reasons when viewed in light of the extent of the disparity between the sentence imposed and those available following the First Step Act, and when accompanied by one or more additional reasons.⁶⁷

‘extraordinary and compelling circumstances’ during the current pandemic, even if these conditions in ordinary times would not allow compassionate release.”).

⁶³ Federal Bureau of Prisons, *Inmate Age*, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp. (last visited March 14, 2023).

⁶⁴ See Office of the Inspector General, U.S. Dep’t of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* at ii (Revised Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf>.

⁶⁵ USSG §1B1.13, comment. (n.1 (b)).

⁶⁶ U.S. Sentencing Comm’n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022*, tbls. 10, 12, & 14 (Sept. 8, 2022), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencingstatistics/compassionate-release/20220908-Compassionate-Release.pdf>.

⁶⁷ *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021).

A Wyoming district court judge granted the release of Leonard Uram, a decorated Vietnam veteran who had been sentenced to life in prison due to two prior felony convictions that can no longer trigger §851 enhancements. Mr. Uram’s guideline range would have been 188 to 235 months absent the enhancement and he had already exceeded that sentence, serving more than 25 years. The court found a “drastic sentencing disparity,” that, when combined with the defendant’s exceptional military career and “near-non-existent disciplinary record” — he had incurred only one disciplinary violation while incarcerated — to be extraordinary and compelling reasons warranting early release.⁶⁸ Notably, the government did not oppose the substance of the motion.⁶⁹

Another case, in the District of Colorado, involved Robert Bernhardt who was serving life for possession with intent to distribute methamphetamine and two counts of using and carrying a firearm. He was in declining health and, though fully vaccinated, at risk should he contract COVID. He was “an exemplary inmate,” whose sentence to die in prison was disparate when compared with the 12-year sentence he had been offered to plead guilty, the mandatory 35-year sentence he would have been subject to under the First Step Act, and the sentences imposed on his co-defendants that did not exceed 13 years.⁷⁰ The unopposed motion in Bernhardt includes citations to numerous cases from around the country in which judges have afforded similar relief.⁷¹

Even in the absence of an applicable policy statement, judges have demonstrated their ability to discern a case presenting truly extraordinary and compelling circumstances from a case without them. The Commission’s proposed amendment, which provides judges with discretion to recognize changes in the law that render a sentence inequitable, will help aid the assessment of these cases.

Although (b)(5) as drafted, is sufficient to limit the circumstances justifying release, were the Commission to feel that more guidance and explicit limiting language is necessary, FAMM would support the additions to the proposed language offered by Professor Erica Zunkel in her comment—

Changes in Law—For the purposes of § 1B1.13(b)(5), a “change in the law” is a legal development, whether by statute or binding judicial decision, that would have affected the defendant’s sentence had it occurred prior to their initial sentencing. Legal developments that primarily would have affected a defendant’s conviction rather than sentence are not covered by this subsection. However, such changes may be considered,

⁶⁸ *United States v. Uram*, No. 2:96-cr-00102, ECF 503, Order Granting Defendant’s Unopposed Motion for Sentence Reduction and Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A) at 12 (D.Wyo Nov. 2, 2022).

⁶⁹ *Id.*

⁷⁰ *United States v. Bernhardt*, No 1:96-cr-00203, ECF 804, Order Granting Defendant’s Unopposed Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(1) (Nov. 8, 2022).

⁷¹ *Id.* at ECF 801, Defendant’s Unopposed Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582 (c)(1)(A)(i) at 14, nn 10 & 11 (Oct 28, 2022).

along with other individualized factors, by judges exercising their discretion under §1B1.13(b)(6).⁷²

This language would ground the policy statement in the changes in law that FAMM urges the Commission to retain, while providing substantive guidance to courts on which changes in the law contribute to extraordinary and compelling reasons when they result in inequity in given cases. And, it focuses the courts' attention on the impact of the change on sentencing, which is the heartland inquiry of (b)(5).

We also recognize that should the Commission wish to provide additional guidance to courts, it could refer to the Circuits that currently recognize changes in the law. They generally require those changes be in addition to other extraordinary and compelling reasons.⁷³

iii. Courts can, and already do, distinguish between 18 U.S.C. § 3582(c)(1)(A), 28 U.S.C. § 2255, and USSG §1B1.10

Some commenters expressed concerns, and commissioners had questions, about whether any structural limitations would cabin the use of (b)(5), or whether the Commission should limit the application of (b)(5) more directly. One witness raised a question how a change-in-the-law compassionate release provision “interacts with other rules relating to finality, including, for example, the rule relating to availability of collateral relief under 28 U.S.C. § 2255.”⁷⁴

FAMM believes that the laws and distinct aims of 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c)(1)(A) provide adequate guidance to courts considering (b)(5)-based motions. The delineation between habeas and compassionate release is clear based on the purpose and scope of each statute. Moreover, courts have already demonstrated their ability to discern a true compassionate release claim from a habeas claim masquerading as compassionate release.

Compassionate release is a limited and express exception to the general rule of finality in criminal sentencing.⁷⁵ Its exercise is entirely discretionary and concerns a judge's power to modify the length of a sentence that was valid when it was imposed but no longer meets the purposes of punishment.⁷⁶ Relief under § 2255, however, is neither discretionary nor limited to modifying the length of a sentence. A challenge under § 2255 tests the *validity, legality, or*

⁷² Letter from Erica Zunkel, et al. to the Honorable Carlton W. Reeves, at 11-12 (March 13, 2023).

⁷³ See, e.g., *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022).

⁷⁴ *Supra* note 13.

⁷⁵ See 18 U.S.C. § 3582(c)(1)(A); see also *United States v. Saccoccia*, 10 F.4th 1 at 3 (1st Cir. 2021) (explaining that “[c]ompassionate release is a narrow exception to the general rule of finality in sentencing.”).

⁷⁶ *Id.* “A court . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a)” Included in those factors are the purposes of punishment. See 18 U.S.C. § 3553(a)(2).

constitutionality of a conviction, that may result in the legal innocence of the defendant. If a judge finds a claim valid under § 2255, relief is not discretionary.⁷⁷

As one court points out, the two statutes are

distinct vehicles for relief. [Section 2255] deals with the legality and validity of a conviction and provides a method for automatic vacatur of sentences (when warranted under the statute). In contrast . . . the compassionate release statute is addressed to the court's discretion as to whether to exercise leniency based on an individualized review of a defendant's circumstances (it is not a demand of a district court to recognize and correct what a defendant says is an illegal conviction or sentence).⁷⁸

Thus, one can imagine certain claims that would be facially inappropriate if argued as a “change in law” under (b)(5).⁷⁹ Courts are already able to draw these lines and distinguish between claims brought under § 3582 that are actually § 2255 motions.⁸⁰

For example, the Tenth Circuit allows a non-retroactive change made by the First Step Act to be considered an extraordinary and compelling reason warranting reduction in sentence (in essence what (b)(5) would permit).⁸¹ But that court observed in *United States v. Wesley* that the “extraordinary and compelling reason” standard is not limitless.⁸² The court rejected an argument that prosecutorial misconduct could be an extraordinary and compelling reason for compassionate release. The prosecutorial conduct-based claim went to the constitutionality of Wesley’s conviction and sentence.⁸³ *Wesley* cited to similar rulings in six other circuits distinguishing claims that must be brought under § 2225 from those under § 3582(c)(1)(A).⁸⁴

Relatedly, the Commission asked for comment on whether subsections (b)(5) and (b)(6) are “in tension” with the agency’s determinations regarding retroactivity under §1B1.10. Several witnesses also raised this question. The Department asserted that adopting (b)(5) and either option 2 or 3 of (b)(6) will “eliminate the restrictions that Section 3582 and §1B1.10 place on sentence reductions predicated upon a Guideline amendment.” This would include considering

⁷⁷ 28 U.S.C. § 2255(b) (instructing that a court “shall discharge the prisoner or resentence him or grant a new trial or correct the sentence”).

⁷⁸ *United States v. Trenkler*, 47 F.4th 42, 48 (1st Cir. 2022) (internal citations omitted).

⁷⁹ There may be certain circumstances where a judge may, in her discretion, consider a traditional § 2255-type argument among other factors in (b)(6) options 2 or 3. Additionally, nothing precludes a judge from considering these facts as part of the § 3553(a) analysis.

⁸⁰ See *United States v. Wesley*, ___ F.4th ___, No. 22-3066, 2023 WL 2261817 (10th Cir. Feb. 28, 2023) (denying motion asserting various grounds for finding extraordinary and compelling reasons in his case, including alleged prosecutorial misconduct, because challenges to the constitutionality of conviction and sentence can only be brought under § 2255).

⁸¹ See *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021).

⁸² *Wesley*, 2023 WL 2261817 at *20.

⁸³ *Id.* at *3.

⁸⁴ *Id.* at *16-17.

guideline reductions other than those identified in §1B1.10, and even to impose a sentence lower than permitted under that provision.⁸⁵

As with the distinction between habeas and compassionate release claims, there should be little difficulty in distinguishing between motions that should be made under §1B1.10 and those under appropriate for §1B1.13. As the Commission knows, there are structural differences between the two reduction authorities. Section 1B1.10 is used when the Commission lowers a guideline sentence *and* makes the change retroactively available. By law, the Commission must specifically identify which lower guideline changes to make retroactive, and how much relief to permit.⁸⁶

If the Commission lowers a guideline only prospectively, courts will be readily able to identify and address (b)(5) claims that might undermine the Commission's decision not to list the amendment under §1B1.10.

To the extent that the Commission is concerned that litigants disappointed about the extent of a retroactive reduction they received will resort to retrying their §1B1.10 motion via §1B1.13, the Commission could clarify that such claims are properly brought under the former, not the latter. Consistent with § 994(u), the Commission has limited §1B1.10 relief, directing that courts may not reduce the term except for a listed amendment and, with a couple of exceptions, not below the minimum of the amended guideline range.⁸⁷

Similarly, most individuals denied §1B1.10 relief, as a practical matter could hardly ask the court to reconsider its decision under §1B1.13. Courts denying retroactive application of guideline changes cite inapplicability of the change as the top reason (ranging from 64 percent to 76.6 percent) for the denials.⁸⁸ In other words, there was no change in the law that applied in the cases before them. Those denied based on public safety, purposes of sentencing, or other reasons, will hardly find a court willing to revisit the issue simply because it is pleaded in a §1B1.13 motion.

Finally, compassionate release motions under (b)(5) would have to show both a change in the law and that the failure to apply the change renders the sentence inequitable. As a substantive matter, we think a court would be hard-pressed to find this change (or lack thereof) inequitable enough to justify a reduced sentence.

FAMM believes that the statute and guidelines provide sufficient guideposts for courts to follow. FAMM urges the Commission to adopt proposed amendment (b)(5). Doing so would provide potential relief to people whose continued incarceration under existing and future changes in the law is inequitable.

⁸⁵ *Supra* note 53 at 8.

⁸⁶ 18 U.S.C. § 994 (u).

⁸⁷ USSG §1B1.10(b)(2)(A).

⁸⁸ *See supra* note 18 at 7-8 (discussing retroactivity denial rates).

e. Proposed Guideline (b)(6) reflects lessons from the past four years – the Commission cannot anticipate every scenario that may transpire, and a catchall helps provide necessary relief in discrete situations

Option 1: Other Circumstances.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

Option 2: Other Circumstances.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]

Option 3: Other Circumstance.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

FAMM supports Option 3 and strongly opposes Option 1. FAMM strongly favors Option 3 over Option 2.

Courts around the country have been exercising their discretion in a real time preview of how practice under proposed (b)(6) can account for circumstances not enumerated in §1B1.13. While differences in outcomes exist, the very robust practice in which the courts have been engaged in the past three years provides the Commission with the information it needs to update the policy statement. Judges exercising (b)(6)-like discretion since the First Step Act granted motions on un-enumerated grounds. The Commission now proposes to add some of those new reasons to §1B1.13. These include the untimely or inadequate provision of medical care that puts a person at medical risk, the BOP's inability to protect people at risk of serious illness or death should they suffer exposure to infectious disease, the need to care for parents who are alone and in need of caregiving, and, of course, non-retroactive changes in the law made by the First Step Act.

In the Sentencing Reform Act, Congress provided that the sentencing guidelines be periodically amended based on, among other things, feedback from the judiciary.⁸⁹ This amendment cycle shows off that feedback mechanism operating at its very best. The outcomes and written opinions from courts ruling on compassionate release motions in the absence of applicable guidelines are now helping the Commission ensure the guidelines reflect best compassionate release practices.

This terrific set of proposed amendments to §1B1.13 might not have been identified had judges not been able to exercise discretion under a catchall that almost mirrors the proposal in (b)(6) Option 3.⁹⁰ And most importantly, many people are now back home, contributing to their

⁸⁹ The Commission was to periodically "review and revise [the guidelines], in consideration of comments and data coming to its attention" 28 U.S.C. § 994(o).

⁹⁰ USSG §1B1.13, comment. (n. (1)(D)).

families and their communities because of that discretion. The Commission heard from several of them in the hearing on compassionate release.

As FAMM and others have pointed out, even as the Commission is poised to add a number of litigation-tested reasons to the §1B1.13 list, it cannot see into the future to identify those we have not experienced or cannot imagine. It needs to leave an avenue open for unanticipated events that may occur and justify consideration for reduction in sentence.

Moreover, the Commission cannot and should not try to account for every unusual, one-off reason that happens so infrequently it doesn't merit mention in their own §1B1.13 subcategory, but is nonetheless extraordinary and compelling. The Commission heard from several compassionate release beneficiaries whose grants were predicated in part on just such unusual grounds.

- Gwen Levi told commissioners about her experience of being released to home confinement under the CARES Act and then ordered to return to prison to serve the rest of her sentence because her failure to answer a halfway house phone call constituted “escape.”⁹¹
- Dwayne White testified about his 25-year incarceration, imposed when he was 22, as a result of the fake stash house sting operation that some law enforcement agencies used, but then abandoned following deserved criticism of the methods and the excessive sentences imposed for crimes that never happened.⁹²

Option 3 is the only way to keep a path cleared for people with unforeseen and unusual extraordinary and compelling reasons, so they can be identified and their release considered. It will also guarantee that judicial decisions continue to inform the Commission in its mission to periodically review and revise the guidelines.

The Justice Department asked the Commission to adopt option 1: “[t]he defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].” A number of the formerly incarcerated individuals who testified before the Commission would likely have remained incarcerated today if Option 1 were in place. It is impossible to hear that panel and think theirs were not extraordinary and compelling reasons and that their continued incarceration would serve the interest of justice.

⁹¹ Oral Statement of Gwen Levi (Feb. 23, 2023), <https://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Levi.pdf>.

⁹² Oral Statement of Dwayne White (Feb. 23, 2023), <https://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/White.pdf>; *see also supra* note 40 at 18-23.

Moreover, as highlighted by Joshua Matz’s testimony, option 1 is unnecessarily restrictive and confusingly so.⁹³ It is likely to lead to more litigation as courts and litigants grapple with identifying which circumstances would be “similar in nature and consequence” to the enumerated grounds. The Commission has been fairly precise about the nature and circumstances outlined in the proposed enumerated grounds. How similar in nature to those grounds would the Option 1 circumstances need to be?

Option 2 is not nearly as concerning as Option 1. However, Option 2 unnecessarily, and without justification, limits a sentence reduction to “changes in the defendant’s circumstances.” This limitation is far narrower than the policy statement currently affords to the Director of the BOP. To be sure, many compassionate release motions will involve a change in circumstances, there are others that may not, or would need to stretch to fit that standard. Judges should not be prohibited from considering reasons, without limit, just as they have been able to do with such good effect as described above.

FAMM urges the Commission to promulgate Option 3. The last three years have demonstrated conclusively that discretion to identify the unanticipated or neglected extraordinary and compelling reason can both improve compassionate release by providing feedback to the Commission on common but un-enumerated grounds and provide discretion in the unusual and infrequent extraordinary and compelling reason.

II. Proposed Amendment, First Step Act: Drug Offenses

a. The Commission should update the safety valve to reflect Congress’ language and intent in the First Step Act

The Sentencing Reform Act of 1984 “extensively overhauled sentencing at the federal level” which included the implementation of mandatory minimums so as to “provide a meaningful floor in sentences for certain serious federal controlled substance and weapons-related cases.”⁹⁴ However, Congress later realized that the federal sentencing guidelines and statutory minimums did “not always operate in a satisfactorily integrated manner.”⁹⁵ The statutory safety valve was created in 1994 with the passage of the Violent Crime Control and Law Enforcement Act.⁹⁶ The safety valve provision was implemented to “refine the operation of certain mandatory minimum sentencing provisions applicable in federal drug trafficking cases” which would permit the least culpable participants to receive “reductions in prison sentences for mitigating factors” that were already reflected in the guidelines.⁹⁷

⁹³ Oral Statement of Joshua Matz at 1:11:00 (Feb. 23, 2023),

<https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-february-23-24-2023>.

⁹⁴ H.R. REP. NO. 103-460, Background (1994). *See also* Sentencing Reform Act, Pub. L. No. 98-473, Title II, § 212(a)(2), 98 Stat. 1989 (1984).

⁹⁵ H.R. REP. NO. 103-460, Summary and Purpose (1994).

⁹⁶ Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (1994).

⁹⁷ *Id.*

The safety valve was amended by the First Step Act of 2018.⁹⁸ The amendment expanded applicability of § 3553(f) to cover more offenses and defendants with a somewhat more extensive prior criminal record.⁹⁹ When Congress amended the statutory safety valve, it did so with the aim to mitigate the harm of “failed policies” that “created harsh sentencing, harsh mandatory minimum penalties.”¹⁰⁰ FAMM, which was a key advocate in Congress for the safety valve in 1994 and in 2018, appreciates the Commission’s efforts to incorporate the FSA’s changes into the guidelines. FAMM believes that the guideline change should reflect the spirit of the First Step Act – to expand access to the safety valve, not to further narrow it.

Congress expanded both the statutory offenses and the eligibility criteria for safety valve relief.¹⁰¹ The original safety valve was only available to defendants who had no more than one criminal history point. But now, a court may disregard a statutory minimum if:

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; **and**

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;¹⁰²

b. Updating Section 5C1.2 with the language in the First Step Act and selecting Option 1 will honor Congressional intent

As the Commission noted in the background to the proposed amendment, Congress “directed the Commission to promulgate or amend guidelines and policy statements to ‘carry out the purposes of [section 3553(f)].’”¹⁰³ In following this directive, the current guidelines incorporate the statutory text of Section 3553(f) in §5C1.2. Section 5C1.2 has historically mirrored the statutory language. The Commission has proposed to update §5C1.2 to, once again, mirror the statutory language added by the First Step Act to §3553(f). FAMM supports the Commission’s updates to §5C1.2(a) which do just that. We also support the proposed changes to §5C1.2(b), which ensure that the guideline reflects Congress’ purpose.¹⁰⁴

⁹⁸ First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

⁹⁹ *See id.* (expanding the safety valve to apply to convictions under the Maritime Drug Enforcement Act and to defendants with up to four criminal history points).

¹⁰⁰ 164 Cong. Rec. S7762 (Daily ed. Dec. 18, 2018) (Statement of Sen. Booker).

¹⁰¹ 18 U.S.C § 3533(f)(2018).

¹⁰² *Id.* (emphasis added).

¹⁰³ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(b).

¹⁰⁴ Now that people with higher criminal history category are eligible for safety valve relief, USSG §5C1.2(b) should accommodate that with the relevant guideline range, as the Commission’s proposal does.

Amending the guidelines reflect the statutory language is as far as the Commission need go at this point in time. In recent months, a circuit split has emerged about the interpretation of the criminal history criteria outlined above in (1)(A)-(C). Some courts read the bolded “and” as being conjunctive.¹⁰⁵ In these circuits, “and” means “and” – a person is safety-valve eligible unless they meet all three of (a); (b); and (c). But other courts read “and” to mean “or,” making it disjunctive.¹⁰⁶ In these circuits, if a person meets just one of (a); (b); or (c) they are ineligible for the safety valve. Given the split over the statutory language, both the Department of Justice and defendants asked the Supreme Court to grant certiorari. The Court agreed and granted certiorari in *United States v. Pulsifer* on February 27, 2023.¹⁰⁷

The Commission has proposed two options for §§2D1.1 and 2D1.11, both of which incorporate the safety valve in a two-level reduction for eligible defendants. Option 1 would leave the text of §§ 2D1.1(b)(18) and 2D1.11(b)(6) unchanged, while option 2 would amend the language in those provisions to provide that the two-level reduction would apply to defendants who do not have *any* of the disqualifying offenses for eligibility. In other words, in option 2, the two-level reduction would follow the disjunctive approach of the Fifth, Sixth, Seventh, and Eighth Circuits.

FAMM urges the Commission to adopt option 1. This approach will not settle the split but will preserve the language on which the differing circuits rely until the Supreme Court resolves the correct interpretation and impact of “and” in the coming term.

Option 2, on the other hand, could undermine the Commission’s historical approach of aligning the guidelines with the statutes on which they are based and, in particular, “carry out the purposes” of section 3553(f).¹⁰⁸ Imagine if the Court agrees with the conjunctive approach to “and” and the Commission has adopted Option 2. In that scenario, the statutory safety valve would require a different approach than the guidelines safety valve. District courts would need to perform two separate safety valve determinations, one based on statute and one based on the guidelines. This is not what Congress contemplated or the Commission would intend.

As noted above, Congress was clear that the Commission should create amendments that are in line with Congress’ goals in creating and amending 3553(f).¹⁰⁹ We will have clarity on how to interpret Congress’ updates to the statutory safety valve when the Supreme Court rules next year. While not ideal, a delay allows the Commission to wait for the Supreme Court to decide the issue rather than getting ahead of the Court by adopting Option 2.

¹⁰⁵ See *United States v. Jones*, ___ F. 4th ___, 2023 WL 2125134, at *1 (4th Cir. Feb. 21, 2023); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc); *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), *reh’g denied*, 58 F.4th 1108 (9th Cir. 2023).

¹⁰⁶ *United States v. Haynes*, 55 F.4th 1075, 1080 (6th Cir. 2022); *United States v. Palomares*, 52 F.4th 640, 652 (5th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 760 (7th Cir. 2022); *United States v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022).

¹⁰⁷ See S. Ct. Granted & Noted List, Oct. Term, <https://www.supremecourt.gov/orders/23grantednotedlist.pdf>.

¹⁰⁸ See *supra* note 103.

¹⁰⁹ *Id.*

In short, to ensure that the Commission is respecting the spirit and intent of Congress, it should not take action that would appear to be directly at odds with Congress or second guess the Court. When the Supreme Court issues its opinion in *Pulsifier*, the Commission will be well poised to take any further action that might be warranted. The Commission should adopt option 1, and make the changes to §5C1.2 that bring the provision in line with the updating language from the FSA.

III. Proposed Amendment: Acquitted Conduct

FAMM is thrilled that the Commission’s proposed amendments would forbid the use of acquitted conduct as part of a guideline calculation of relevant conduct under §1B1.3. Enhancing a sentence with acquitted conduct has long been a stain on the federal sentencing process. It undermines public confidence in the federal criminal system and public confidence is key to the legitimacy of the courts. As one jurist noted, “[i]nstitutional legitimacy is critical to the effectiveness of the judicial branch of government.”¹¹⁰ Acquitted conduct sandbags defendants, and offends practitioners, the general public, and judges.

Jury trials are a vanishing act in the federal system.¹¹¹ One of the systemic problems leading to their demise is the use of acquitted conduct. As we discussed in an amicus brief before the Supreme Court on the issue, the practice provides the government with incentives to overcharge and pressures defendants to plead guilty when not otherwise warranted. We explained that if the defendant succumbs to the government’s aggressive charges and pleads guilty, the government wins; if he goes to trial and is convicted on those charges, the government still wins; and if he goes to trial and persuades a jury that he is innocent of them, the government still wins, so long as it secures conviction on a more easily proved offense and persuades the sentencing judge of his guilt by a preponderance of reliable “information” (not necessarily even “evidence”).¹¹²

Acquitted conduct serves as a heads-we-win-tails-we-win for the government. This is particularly pernicious because an individual’s liberty is on the line. What incentive does a defendant have to ask the government to prove its case, when, even a win at trial means that acquitted conduct may be considered relevant by the sentencing judge?

¹¹⁰ *Hallows Lecture: Tough Talk and the Institutional Legitimacy of Our Courts*, Marquette Law School (Mar. 7, 2017), <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2017-fall/2017-fall-p45.pdf>.

¹¹¹ U.S. Sentencing Comm’n, *Proposed Amendments to the Sentencing Guidelines*, at 212 (Feb. 2, 2023) (explaining that 98.3 percent of defendants pled guilty in FY 2021), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.

¹¹² *McClinton v. United States*, No. 21-1557, Brief of National Ass’n of Federal Defenders and FAMM as Amici Curiae Supporting Petitioner for Cert. at 7 (July 14, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1557/230055/20220714103728274_Brief.pdf.

If the defendant does elect to go to trial, she is forced to argue to two different factfinders with two different standards of proof. That is because argument and evidence that resonates with a jury can alienate judges, and vice versa.¹¹³

How confident can jurors and the general public be about the integrity of the jury trial system when the jury’s verdict can be undermined in this way?

In deciding not to use acquitted conduct as part of a guideline calculation one judge noted that the “jurors . . . who sacrificed seven weeks to hear the evidence and arguments and thoroughly deliberate each charge would likely be shocked to learn that [the defendant] could be sentenced on the basis of conduct that they determined the government had not proven beyond a reasonable doubt.”¹¹⁴

Most judges do not think that acquitted conduct should be considered relevant conduct for purposes of sentencing. In a survey conducted by the Commission, 84 percent of judges said that acquitted conduct should not be deemed relevant conduct.¹¹⁵ One judge noted that, “allowing a judge to dramatically increase a defendant’s sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment’s jury-trial guarantee.”¹¹⁶

The fact that some judges may use acquitted conduct at sentencing, while others strive not to, only contributes to unwarranted disparities across the country, undermining a goal of the Guidelines.¹¹⁷

It is high time to eliminate acquitted conduct in sentencing and the Commission has the power to do so. As the government has argued to the Supreme Court urging denial of certiorari of a case challenging acquitted conduct, the “Sentencing Commission could promulgate guidelines to preclude such reliance.”¹¹⁸ The proposed amendment is an important step to that end. But the Commission’s proposal raises concerns for FAMM. Put simply, it does not go far enough and its exceptions risk creating more confusion.

¹¹³ See, e.g., Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 31(2008) (“It is often said that a ‘jury argument’ will not play well to a judge. Indeed, it almost never will.”).

¹¹⁴ *United States v. Katallah*, 41 F.4th 608, 646-47 (D.C. Cir. 2022) (internal quotation marks omitted).

¹¹⁵ U.S. Sentencing Comm’n, *Survey of United States District Judges: January 2010 through March 2010*, Tbl. 5 (June 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

¹¹⁶ *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc); see also *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (“Many judges and commentators have [] argued that using acquitted conduct to increase a defendant’s sentence undermines respect for the law and the jury system.”).

¹¹⁷ 28 U.S.C. § 991(b)(1)(B) (observing a purpose of the Sentencing Commission is to “avoid unwarranted sentencing disparities”).

¹¹⁸ See *United States v. McClinton* (No. 21-1557), *Br. in Opp.* at 15. The Government filed a letter a few months later alerting the Court to the Commission’s proposed guideline. https://www.supremecourt.gov/DocketPDF/21/21-1557/252407/20230118095503909_Letter%2021-1557%20%2021-8190%20%2022-118%20%2022-5345%20%2022-4828.pdf.

As written, the proposal instructs that “acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—(A) was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction.”¹¹⁹

We fear that lawyers, judges, and defendants across the country will struggle to interpret these limitations. The exceptions rely on confusing and circular reasoning. The limitations appear to say that acquitted conduct cannot be used unless the defendant was convicted of a charge. But if the defendant was convicted, then the conduct is inherently not acquitted conduct. Although the government is concerned that judges won’t know how to identify acquitted conduct, judges, particularly those that sat through the fact-finding portion of the criminal case, are uniquely positioned to identify which conduct the defendant has been acquitted of.

The issue for comment suggests the proposed limitations are meant to get at the exceedingly rare instances of overlapping conduct in a criminal proceeding between acquitted and convicted charges. The Commission should not fashion a rule that will capture a circumstance that is out of the ordinary and only rarely likely to occur. The government seems to suggest that split verdicts happen frequently. They note that “[o]ften in civil rights cases” the verdicts may be split.¹²⁰ For one, jury verdicts are necessarily rare, given that only 1.7% of criminal cases went to trial in FY 2021.¹²¹ And even if trials occurred with more frequency, only 0.1% of all criminal cases in FY 2021 resulted from civil rights offenses.¹²² The scenario the government paints as occurring “often” plainly occurs rarely. The Commission should strain instead to avoid a result that would sow more confusion into the sentencing process.

Acquitted conduct should also not, as the Commission proposed, be used to select a point within the guideline range or to justify an upward departure from the Guidelines. Were the Commission to prohibit acquitted conduct generally, but permit its use to establish a departure or a sentence within a guideline range, this would lead to confusion and unwarranted disparities. It also sends mixed signals as to the Commission’s view on acquitted conduct. If acquitted conduct is to be prohibited as relevant conduct, why then permit its use for an upward departure? It would undermine the force of the prohibition and do little to restore public confidence in the fairness of the proceeding.

FAMM urges the Commission to eliminate the use of acquitted conduct as relevant conduct, and to do so by promulgating guidance to the effect that “acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range, a sentence within the range, or a departure above the range.”

¹¹⁹ U.S. Sentencing Comm’n, Proposed Amendments to the Sentencing Guidelines, at 213 (Feb. 2, 2023), https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.

¹²⁰ *Supra* note 53 at 15.

¹²¹ *Supra* note 119 at 212.

¹²² U.S. Sentencing Comm’n, *Use of Guidelines and Specific Offense Characteristics*, Fiscal Year 2021, https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch2_Guideline_Based.pdf.

FAMM applauds the Commission for its efforts to end the use of acquitted conduct at sentencing. We hope that the Commission's final rule will be unequivocal and without exceptions.

IV. Conclusion

FAMM thanks the Commission for considering our views on these important proposed amendments.

Sincerely,



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FAMM



Shanna Rifkin
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