

Who Bears the Burden When Prison Guards Rape?

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ABSTRACT: Several recent scandals have highlighted the continued problem of institutional sexual abuse within the federal Bureau of Prisons (“BOP”). Most notoriously, the rampant sexual abuse of women incarcerated at Federal Correctional Institution (“FCI”) Dublin, also known as the “rape club,” resulted in the prosecution and conviction of several high-ranking officials within FCI Dublin, including both the former Warden and former Chaplain who worked there for several years. In response to these patterns of misconduct, the Federal Sentencing Commission’s new guidelines, which went into effect on November 1, 2023, now allow for victims of custodial sexual assault to apply for early release or sentence reductions based on that assault. However, the Sentencing Commission’s reform in this regard comes with a caveat: to be eligible to move a sentencing court for early release, the assailant’s misconduct must have been established in a separate civil, criminal, or administrative proceeding.

Although the new guideline is commendable, a requirement that misconduct be substantiated in this way effectively places an impossible burden of proof onto incarcerated victims—in a manner inconsistent with other federal early release provisions—and in a context in which the incarcerated movant is in a particularly disadvantaged position to meet and litigate that burden. For example, lack of access to counsel or discovery tools for survivors, and the need to litigate for one’s early release within a prison setting, make the effective litigation of the substantiation requirement impracticable in many circumstances. Further, this Essay argues that this substantiation requirement counterproductively minimizes the experiences of survivors, discounts their accounts of sexual abuse, and elevates the adjudication of the assailant above the immediate needs of victims.

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INTRODUCTION

When people¹ in prison are sexually assaulted by prison guards—when they are raped, humiliated, exploited, and traumatized by the very officers who are charged with their protection—these survivors must be afforded some measure of redress. However, civil remedies are often inadequate to address the severe psychological toll that such victimization takes.² This is especially true for incarcerated people who must navigate onerous legal hurdles³ from behind bars and who cannot adequately heal from the trauma of sexual abuse in a carceral setting. Indeed, victims of institutional sexual assault⁴ or rape often face psychological harms that cannot be meaningfully addressed—and are at risk of worsening—if they remain incarcerated.⁵ Often,

1. This Essay seeks to situate the experiences of incarcerated people in the broader context of the “credibility discount,” described further below, which was historically aimed at those who are classified as female at birth and identify as female. As such, the occasional use of the terms “woman” and “women” in this Essay provides a theoretical coherence that is useful to the argument that the Essay makes about the history of discrediting women’s legitimate rape and sexual abuse allegations. However, this Essay also explicitly recognizes that many incarcerated people who identify as nonbinary or identify as male are similarly subjected to sexual abuse while incarcerated, including by prison staff, and therefore more generally defaults to the term “people” when referring to sexual assault victims or potential victims of institutional abuse. *See, e.g.,* Bennett Capers, *While We’re Talking About Rape*, 31 CRIM. JUST. 16, 19 (2017) (discussing the importance of acknowledging the phenomenon of male victim rape).

2. *See generally*, Meredith Esser, *Extraordinary Punishment: Conditions of Confinement and Compassionate Release*, 92 FORDHAM L. REV. 1369, (2024) (describing the inadequacy of civil remedies).

3. *See, e.g.,* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015) (describing onerous exhaustion requirements under the PLRA); Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1149–51 (2023) (describing barriers to access to the courts because of onerous pleading requirements under the PLRA).

4. The terms “institutional sexual assault” or “institutional sexual abuse” can refer to sexual contact between two individuals who have a particular relationship, including within the correctional setting, group homes, mental health facilities, and others. In the context of this Essay, these terms refer to sexual acts by an officer of a correctional facility that are perpetrated against a person housed in that facility.

5. *See generally* Univ. of Denver Coll. of Law C.R. Clinic, Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2023), <https://www.uscc.gov/sites>

institutional sexual assault victims have lived lives filled with trauma, even prior to being victimized in prison.⁶ In some cases, these new traumas serve to uncover old traumas, contributing to a horrifying cycle of emotional and mental deterioration.

Partially recognizing this, the U.S. Sentencing Commission recently adopted a series of watershed amendments to the United States Sentencing Guidelines⁷ on who is eligible to apply for a sentence reduction. One of these amendments allows people incarcerated in federal prison to ask their original sentencing judge for early release if they have been sexually abused by employees of the federal Bureau of Prisons (“BOP”).⁸ However, the Sentencing Commission’s reform in this regard comes with an enormous caveat. To be eligible for this sentencing relief, the Guideline specifies that the assailant’s misconduct must be independently established in one of three ways: (1) “by a conviction in a criminal case”; (2) “a finding or admission of liability in a civil case”; (3) “or a finding in an administrative proceeding.”⁹

The requirement that an abuser’s misconduct must be independently adjudicated raises a host of problems. First, this requirement predicates eligibility for early release not on the punitive nature of the abuse nor on the experience of the survivor but, rather, on the success of external legal processes (which are often controlled by allies of abusers) to make that person eligible for the release remedy. Embedded within this requirement is a systemic failure to recognize the legitimate fear of retaliation that people face when they report institutional sexual abuse.¹⁰ Second, the Guideline contains no discovery requirement or indication about how an incarcerated person would be able to obtain any documentary support that would substantiate their claim of sexual abuse.¹¹ Indeed the Guideline does not explain how an incarcerated person would ever go about substantiating their claim when they

/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1329 [https://perma.cc/JZ5S-MgVZ] [hereinafter Porterfield Report].

6. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 753 (2005) (“An estimated forty to eighty-eight percent of women prisoners have been sexually or physically abused by men prior to their imprisonment.”); see also Porterfield Report, *supra* note 5, at 5 (defining institutional sexual abuse “as any type of sexual assault, harassment or rape perpetrated by an official or staff of an institution on an inmate/resident”).

7. Congress directed the Commission to promulgate general policy statements regarding the appropriate use of 18 U.S.C. § 3582(c)’s reduction in sentence provision. See 28 U.S.C. § 994(a)(2)(C) (2018). The Sentencing Commission’s amendments to § 1B1.13 are that policy statement. However, for ease of reading, this Essay refers generally to the new policy statement as part of the newly adopted Guidelines.

8. U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT’G COMM’N 2023).

9. *Id.* (specifying that sexual or physical abuse or “misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding”); see also, e.g., United States v. Left Hand, No. 1:16-CR-189, 2024 WL 579206, at *4 (D.N.D. Feb. 13, 2024) (quoting text of new guideline).

10. See, e.g., Jenny-Brooke Condon, *#MeToo in Prison*, 98 WASH. L. REV. 363, 417 (2023) (“[W]hen women who are incarcerated report sexual abuse, they are likely to face severe retaliatory harm such as loss of privileges, punishments, and threats to their safety.”).

11. U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT’G COMM’N 2023).

may or may not have access to counsel, may not be native English speakers, or may have a disability that would prevent them from advocating to obtain such records in the first place. Drawing on longstanding stereotypes about women's credibility, the substantiation requirement further entrenches the notion that women often fabricate allegations of rape.¹²

This Essay argues that the Sentencing Commission's decision to include the adjudication requirement within the text of this new guideline is seriously misguided, is perversely antifeminist, and that courts should exercise their own judgment in determining when a person is eligible for release because of abuse.

Part I of this Essay describes the recent uncovering of several horrifying sexual abuse scandals that have happened within the BOP, including most notoriously, the rampant sexual abuse of people incarcerated at Federal Correctional Institution ("FCI") Dublin in California, also known as the "rape club."¹³ Part II outlines the U.S. Sentencing Commission's response to these scandals, including adopting an amendment to the Sentencing Guidelines' policy statement on sentence reductions that allows an incarcerated person to petition for early release if they can show that they were the victim of institutional sexual abuse. Finally, Part III argues that the substantiation requirement is problematic for many reasons, including because it is a relic of the historic discounting of women's accounts of sexual abuse. Furthermore, this Part argues that the substantiation requirement places an unfair burden of proof onto incarcerated survivors without giving them the necessary tools—such as access to counsel or discovery provisions—to meet that burden.

This Essay concludes by arguing that the substantiation requirement should be discarded by the Commission in upcoming amendment cycles and disregarded by judges at their discretion because of the barriers that women face to reporting abuse, proving abuse, and gaining access to sources of proof.

I. THE BOP'S RECENT INSTITUTIONAL SEX ABUSE SCANDALS

Several recent abuse scandals have resulted in a groundswell of media and public attention about the continued problem of sexual abuse in federal prisons, and particularly regarding abuse of incarcerated women at the hands

12. See generally DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS (Harper Collins ed. 2021) (highlighting individuals' experiences of the aftermath of sexual assault).

13. Ramon A. Vargas, *Ex-Warden Who Allegedly Ran California Prison 'Rape Club' Goes on Trial*, GUARDIAN (Dec. 3, 2022, 1:00 AM), <https://www.theguardian.com/us-news/2022/dec/03/california-rape-club-warden-trial> [<https://perma.cc/gMJU-QF6A>]; see also Michael Balsamo & Michael R. Sisak, *Women's Prison in Dublin Nicknamed 'The Rape Club': AP Investigation*, KTVU FOX 2 (Feb. 7, 2022, 6:24 AM), <https://www.ktvu.com/news/womens-prison-in-dublin-nicknamed-the-rape-club-ap-investigation> [<https://perma.cc/CN6N-4XK4>] (describing the culture of sexual abuse and cover-up inside a California women's prison).

of BOP staff.¹⁴ In response to this crisis, the Senate Permanent Subcommittee on Investigations launched an investigation in April 2022 into the sexual abuse of women in federal prisons, culminating in a report that was released in December of last year.¹⁵ The report detailed the tragic and widespread abuse of women by BOP staff, as well as the barriers that women faced to reporting the abuse and escaping their abusers. The report focused on four BOP facilities where such abuse was occurring and widespread: Metropolitan Correctional Center (“MCC”) New York, Metropolitan Detention Center (“MDC”) Brooklyn, Federal Correctional Complex (“FCC”) Coleman, and FCI Dublin.¹⁶ The report included key findings that BOP employees had sexually abused incarcerated women in at least two-thirds of the federal prisons that held women over the past decade; that BOP “failed to prevent, detect, and stop recurring sexual abuse, including by senior prison officials;” and that the BOP “failed to successfully implement” aspects of the Prison Rape Elimination Act (“PREA”).¹⁷

At FCC Coleman, numerous BOP staff admitted to repeated sexual encounters with incarcerated women, including in written statements that were included in the Subcommittee’s report.¹⁸ For example, one former BOP officer, Keith Vann, admitted that he “had sexual intercourse and oral sex with [an incarcerated woman] on multiple occasions while [he] was a staff member . . . at FCC Coleman.”¹⁹ Another officer, Christopher Palomares admitted to “a large number of sexual encounters with [incarcerated women] when [he] was an officer at FCC Coleman.”²⁰ Yet another officer admitted to groping a particular incarcerated woman’s “breasts at least [eight] times from December 2017, to March 2018” and locking himself in the closet with an incarcerated woman for the purpose of having a sexual encounter, also at FCC

14. See, e.g., Sydney Johnson, *Dublin Women’s Prison Faces Class-Action Lawsuit Over Sexual Abuse Scandal*, KQED (Aug. 16, 2023), <https://www.kqed.org/news/11958308/dublin-womens-prison-faces-class-action-lawsuit-over-sexual-abuse-scandal> [<https://perma.cc/FU9Q-78DS>].

15. *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Subcomm. on Investigations, Comm. on Homeland Sec. & Gov’t Affs.*, 117 Cong. 26 (2022) [hereinafter *Hearing on Sexual Abuse of Female Inmates*].

16. Press Release, U.S. Attorney’s Off., S.D. of N.Y., Corr. Officer at Metropolitan Correctional Center Sentenced to 40 Months In Prison for Engaging in Abusive Sexual Contact With Inmates (Dec. 8, 2020), <https://oig.justice.gov/sites/default/files/2020-12/2020-12-08.pdf> [<https://perma.cc/K49B-MVWG>]; Press Release, Dep’t of Just., Off. of Pub. Affs., Jury Convicts Former Fed. Prison Warden for Sexual Abuse of Three Female Inmates (Dec. 8, 2022), <https://www.justice.gov/opa/pr/jury-convicts-former-federal-prison-warden-sexual-abuse-three-female-inmates> [<https://perma.cc/F4VZ-H946>]; Press Release, U.S. Attorney’s Office, E.D. of N.Y., Former Fed. Bureau of Prisons Lieutenant Sentenced to 25 Years in Prison for Sexual Abuse and Violation of Civil Rights Convictions (July 31, 2019), <https://www.justice.gov/usaoedny/pr/former-federal-bureau-prisons-lieutenant-sentenced-25-years-prison-sexual-abuse-and> [<https://perma.cc/P7PP-KZHD>].

17. *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 1–3 (opening statement of Sen. Jon Ossoff, Chairman, S. Comm. on Homeland Sec. & Gov’t Affs.).

18. *Id.* at 11–14.

19. *Id.* at 13.

20. *Id.* at 14.

Coleman.²¹ One brave woman, Lauren Reynolds, was raped by a BOP officer at FCC Coleman for six months while she was incarcerated there.²² Her abuser was a warehouse manager who targeted her in the final year of a twelve-year sentence.²³ In 2019 Ms. Reynolds decided to report her abuse, leading to the exposure of several other instances of abuse by officers who worked at the facility.²⁴

Prior to April 2021, FCC Coleman housed both male and female prisoners but in April 2021, BOP transferred all female prisoners out of the facility—just two days before a PREA audit was supposed to take place.²⁵ This made it impossible for a PREA auditor to interview women who had been incarcerated at FCC Coleman about the abuse allegations despite their legal requirement to do so.²⁶ The abuse at FCC Coleman, the lack of accountability for those perpetrating the abuse, and the subsequent attempt to frustrate the PREA reporting process by BOP officials are indicative of BOP’s overall dysfunctional handling of sexual misconduct within its facilities.

Even more notoriously, the rampant sexual abuse of incarcerated women at FCI Dublin, also referred to as the “rape club,” has been widely publicized.²⁷ Within the past few years, FCI Dublin and the systemic sexual abuse perpetrated by BOP employees there has been increasingly in the public eye. In February of 2022, an Associated Press investigation revealed “a permissive and toxic culture” at FCI Dublin that “enabled years of sexual misconduct by predatory employees” as well as “cover-ups” that enabled the abuse to continue.²⁸

Tragically, some measure of abuse is embedded within the restrictive and intentionally demeaning culture of prison life.²⁹ For example, degrading treatment by officers can include state-sanctioned strip searches, which are often humiliating and can include blatant groping, forced nudity, and

21. *Id.*

22. Romy Ellenbogen, *Lawsuit Settled in Which 15 Women Alleged Sexual Abuse at Florida Prison*, TAMPA BAY TIMES (May 6, 2021), <https://www.tampabay.com/news/florida/2021/05/05/lawsuit-settled-in-which-15-women-alleged-sexual-abuse-at-florida-prison> [<https://perma.cc/M7L2-S7NY>].

23. Glenn Thrush, *Justice Dept. Considers Early Release for Female Inmates Sexually Abused Behind Bars*, N.Y. TIMES (Dec. 13, 2022) (on file with the *Iowa Law Review*).

24. *Id.*

25. *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 2 (opening statement of Sen. Jon Ossoff, Chairman, S. Comm. on Homeland Sec. & Gov’t Affs.).

26. *Id.*

27. Vargas, *supra* note 13; *see also* Balsamo & Sisak, *supra* note 13.

28. Michael Balsamo & Michael R. Sisak, *AP Investigation: Women’s Prison Fostered Culture of Abuse*, ASSOCIATED PRESS (Feb. 6, 2022, 9:40 AM), <https://apnews.com/article/prisons-california-united-states-sexual-abuse-only-on-ap-d321ae51fe93dfd9d6e5754383a95801> [<https://perma.cc/4LRZ-SE24>].

29. *See, e.g.*, Condon, *supra* note 10, at 372 (“Gender subordination is endemic to women’s prisons and has been from their start.”).

penetration under the guise of looking for contraband.³⁰ Historically, such treatment by correctional officers has been tolerated because “[s]ociety assumes that this is what happens when a woman goes to prison.”³¹ But the culture of widespread rape and abuse at FCI Dublin was of an entirely different nature and degree. Reports about FCI Dublin revealed that BOP employees photographed women naked, raped them, forced them to penetrate themselves, called them derogatory names, forced them to dance and perform sex acts, and retaliated against them for speaking out.³² Women were terrorized throughout the prison, including in the kitchen, the security office, chapel, medical office, at work, and in their cells.³³ The abuse was so pervasive and difficult to escape because the abuse was being perpetrated by staff at every level.³⁴

The FCI Dublin assailants are now being prosecuted in a flurry of unprecedented indictments, and recent convictions include that of the former Warden, Ray Garcia,³⁵ and Chaplain, Theodore Highhouse, of that facility.³⁶ Indeed, multiple former FCI Dublin officials have been charged and convicted for repeatedly raping and sexually abusing incarcerated women and orchestrating efforts to cover up their offenses.³⁷ As of this writing, the Department of Justice (“DOJ”) is investigating at least seventeen current or former employees at FCI Dublin for sexual misconduct.³⁸ Sixty-three civil suits have been filed against FCI Dublin, the BOP, and its former employees based

30. E.g., Teresa A. Miller, *Keeping the Government’s Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 867 (2001) (“There is a strong correlation between cross-gender searches and custodial sexual misconduct among male guards.”); LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* 113 (Claire M. Renzetti ed., 2023).

31. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND PRISON, TORTURE AND EMPIRE* 47 (2005).

32. See, e.g., Lisa Fernandez, *Evidence, Photos Revealed Against Ex-Dublin Prison Warden Ahead of Sex Abuse Trial*, KTVU FOX 2 (Oct. 31, 2022, 9:42 AM), <https://www.ktvu.com/news/evidence-photos-revealed-against-ex-dublin-prison-warden-ahead-of-sex-abuse-trial> [<https://perma.cc/B3UV-3KES>].

33. *Id.*

34. See, e.g., Sisak & Balsamo, *supra* note 13.

35. Former Federal Prison Warden Sentenced, *supra* note 16.

36. Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Federal Prison Chaplain Sentenced for Sexual Assault and Lying to Federal Agents (Aug. 31, 2022), <https://www.justice.gov/opa/pr/federal-prison-chaplain-sentenced-sexual-assault-and-lying-federal-agents> [<https://perma.cc/FM89-Q4KQ>].

37. *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 15 (noting five former FCI Dublin employees had been indicted); Press Release, Dep’t of Just., Off. of Pub. Affs., Seventh Correctional Officer at Federal Facility in Dublin, California, Sentenced to Prison for Sexual Abuse of Female Prisoners (Mar. 27, 2024), <https://www.justice.gov/opa/pr/seventh-correctional-officer-federal-facility-dublin-california-sentenced-prison-sexual> [<https://perma.cc/gRDV-N4MK>] (explaining that the seventh former FCI Dublin employee was sentenced for crimes related to sexual abuse at the facility).

38. *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 17.

on sexual abuses that occurred at the prison.³⁹ A federal court in the Northern District of California appointed a special master to oversee the facility.⁴⁰ And in April 2024, because of an inability to fully address the widespread misconduct, the BOP decided to close the facility entirely.⁴¹

But in contrast to the current attention around FCI Dublin, the BOP was initially slow to respond to complaints of sexual misconduct—indeed, the agency did very little to address the widespread sexual abuse occurring there until the scandal publicly came to light.⁴² Reporting abuse was exceedingly difficult from within FCI Dublin, and often subjected survivors to retaliation and harassment.⁴³ It is the nature of incarceration that if a person wants to report something, including sexual assault, such reports must be made upward through institutional channels.⁴⁴ As “correctional officers have almost complete control over the lives of incarcerated people,”⁴⁵ survivors of abuse by prison staff cannot escape their abusers and are instead controlled by them in a very literal sense.⁴⁶ For most incarcerated people who don’t have access

39. Alex Hall, *What Happened at the Dublin Federal Women’s Prison Last Week and What to Expect Next*, KQED (Mar. 19, 2024), <https://www.kqed.org/news/11979936/judge-certifies-class-action-lawsuit-for-women-incarcerated-at-fci-dublin> [<https://perma.cc/LE7W-WWGY>].

40. Sydney Johnson, *Judge Chooses Top Pick for Special Master to Oversee Women’s Prison Following Rampant Abuse*, KQED (Apr. 5, 2024), <https://www.kqed.org/news/11982014/judge-chooses-top-pick-for-special-master-to-oversee-womens-prison-following-rampant-abuse> [<https://perma.cc/M5BD-FF6L>].

41. Michael R. Sisak, Michael Balsamo & Christopher Weber, *Bureau of Prisons to Close California Women’s Prison Where Inmates Have Been Subject to Sex Abuse*, ASSOCIATED PRESS (Apr. 15, 2024, 7:39 PM), <https://apnews.com/article/federal-prison-dublin-california-sexual-abuse-bureau-of-prisons-17731ecb5do14adf6011e853bf7e05d> [<https://perma.cc/464A-GYJ4>].

42. See 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> (on file with the *Iowa Law Review*). Despite this attention from elected officials and the public about these issues, the BOP was slow to develop a comprehensive plan to address and prevent such injustices moving forward. See *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 28–30 (noting that in response to widespread sexual abuse of female prisoners by BOP employees within the BOP, the BOP has merely updated language in employee handbooks; updated language in PREA posters within facilities; standardized orientation scripts regarding reporting abuse; and retained a contractor to train investigators).

43. E.g., *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 28–29; Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates, *supra* note 16 (former FCI Dublin Warden convicted of all seven counts of sexually abusing three incarcerated women); Balsamo & Sisak, *supra* note 13; Lisa Fernandez, *Retaliation is Real, FCI Dublin Prison Psychologist Testifies at Warden Trial*, KTVU FOX 2 (Nov. 30, 2022, 11:13 AM), <https://www.ktvu.com/news/retaliation-is-real-fci-dublin-prison-psychologist-testifies-at-warden-sex-trial> [<https://perma.cc/8KR5-FSFH>].

44. See, e.g., *Inmates Testify About Sexual Abuse at FCI Dublin Women’s Prison*, CBS NEWS (Jan. 5, 2024, 4:05 PM), <https://www.cbsnews.com/sanfrancisco/news/fci-dublin-sexual-abuse-scandal-inmates-testify-womens-prison> [<https://perma.cc/XHE7-QZDW>] (“Staff protect their abusive colleagues by failing to investigate claims or respond meaningfully, and by retaliating against those who report abuse.”).

45. GOODMARK, *supra* note 30, at 110.

46. See, e.g., Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 HASTINGS RACE & POVERTY L. J. 293, 297 (2013) (“The enormous

to outside lawyers, reporting internal abuse can thus be both dangerous and challenging. Indeed, “[t]he reporting process can be as traumatic as the sexual assault.”⁴⁷ This is, in part, because women reporting abuse are not viewed as credible, and accused officers are often viewed as being more credible than victim survivors.⁴⁸ Reporting abuse to family members through letters or over the phone may not be possible because communications between people incarcerated in BOP and people on the outside are usually monitored by prison staff.⁴⁹ Outside phone lines are not private, and mail is intercepted and reviewed.⁵⁰ “Thus, survivors of institutional abuse must report their abuse to the very staff who may be aware of it already, may have colluded or ignored the abuse in some way, or, in the very least, may not believe” the allegations.⁵¹ At FCI Dublin, the Warden himself was in charge of ensuring that the facility was complying with PREA and was friends with the Special Investigative Services (“SIS”) investigator.⁵² Thus, reporting abuse in that environment was futile.⁵³

Even prison employees may fear reporting abuse. One former correctional officer, Tess Korth, told reporters that she was reassigned after reporting abuses to her superiors.⁵⁴ In the case of FCI Dublin, women who

discretion of authority that is given to male guards places women inside in an undeniably vulnerable situation, which breeds a general atmosphere of fear, male domination, and submission.”); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 904 (2009) (“[T]he very architecture of incarceration gives prison officials, in a practical sense, enormous power over the incarcerated.”).

47. GOODMARK, *supra* note 30 at 115.

48. See, e.g., Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 69 n.202. Buchanan explains that the court in this case “refus[es] injunction on basis that prisoner was ‘not credible’ because she had formed a ‘plan’ to get a transfer by reporting sexual activity with corrections officers; the court found some of this activity not to have happened because it was uncorroborated, and stated that other activity ‘could only reasonably be described as consensual’ because the prisoner ‘never tried to fight [the guards] off, scream, or yell.’” *Id.* (citing *Fisher v. Goord*, 981 F. Supp. 140, 145–48, 150 (W.D.N.Y. 1997)).

49. See, e.g., *United States v. Van Poyck*, 77 F.3d 285, 291–92 (9th Cir. 1996) (holding that prisoners have no constitutional right to privacy in their outgoing phone calls with non-attorneys).

50. *Id.*

51. Porterfield Report, *supra* note 5, at 8.

52. See, e.g., Michael R. Sisak and Michael Balsamo, *Ex-Warden of Dublin Prison Convicted of Sexually Abusing Incarcerated Women*, KQED (Dec. 8, 2022), <https://www.kqed.org/news/11934639/ex-warden-of-dublin-womens-prison-convicted-of-sexually-abusing-inmates> [<https://perma.cc/L2XS-FQQW>] (noting that the warden “was in charge of training staff and incarcerated women on reporting abuse and complying with the federal Prison Rape Elimination Act while at the same time committing abuse”).

53. See Natalia Galiczka, *The Women that ‘Me Too’ Left Behind*, DESERET NEWS (June 14, 2023, 11:00 PM), <https://www.deseret.com/indepth/2023/6/14/23728001/fci-dublin-warden-convicted-sexual-assault> [<https://perma.cc/8KF8-LEBA>]; Trial of Transcript Proceedings at 14, *United States v. Garcia*, No. CR 4:21-cr-00429-YGR (N.D. Cal. 2022).

54. Lisa Fernandez, *Federal Prison Director Conducts ‘Cultural Assessment’ of FCI Dublin*, KTVU FOX 2 (Sept. 30, 2022), <https://www.ktvu.com/news/prison-director-conducts-cultural-assessment-of-fci-dublin> [<https://perma.cc/4X4V-EJF2>].

reported incidents faced retaliation from BOP staff, including being sent to solitary confinement, being transferred to facilities far from their families,⁵⁵ and being threatened with withholding or interfering with privileges, programming, and education.⁵⁶

The barriers to reporting sexual abuse at FCI Dublin were chillingly described during the trial of the former Warden. Cynthia Townsend, the BOP psychologist who was working at FCI Dublin during the height of the widespread sexual abuse, testified that she did not encourage survivors of abuse to report it to BOP officials because she was, “concerned that adverse action might be taken” by the Warden.⁵⁷ Dr. Townsend testified that one abuse reporter, Melissa,⁵⁸ was placed in the prison’s Special Housing Unit (“SHU”)—essentially solitary confinement—for eleven months after reporting her abuse and then transferred “far away” from FCI Dublin and her family.⁵⁹ Further, Dr. Townsend recounted Melissa saw the former Warden “putting his arm around” the SIS lieutenant in charge of investigating abuse allegations, and that the Warden told Melissa that he was “buddies” with the SIS investigator—ostensibly to discourage his victims from reporting the abuse.⁶⁰

Retaliation against survivors who report abuse by guards is commonplace and can include denial or loss of privileges, placement in solitary confinement or segregation, or serving longer terms in prison by guards writing women up for minor infractions.⁶¹ Even after a person is transferred within the BOP, retaliation for reporting abuse may not end. Survivors of abuse at FCI Dublin who were transferred to other institutions have reported being “tormented” even after their transfer.⁶² After Melissa’s transfer, BOP officials in her new facility blamed her for the FCI Dublin scandal, telling her that “inmates . . . f*ck to take their shots⁶³ off.”⁶⁴ But it is clear from Melissa’s testimony that the Warden was grooming her for abuse, eventually saying vulgar and sexually

55. *Id.* (describing how women at Dublin “were sent to solitary confinement or sent away to another prison after speaking up”).

56. *E.g.*, *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 5 (written statement of Carolyn Richardson); Balsamo & Sisak, *supra* note 13; Fernandez, *supra* note 32.

57. Transcript of Record, at 575–76, *United States v. Garcia*, No. CR 4:21-cr-00429-YGR.

58. Throughout the trial, this abuse survivor was referred to by just her first name, Melissa. I follow this convention to humanize her and to ensure that her words and experiences are appropriately respected.

59. Transcript of Record, at 576, *United States v. Garcia*, No. CR 4:21-cr-00429-YGR.

60. *Id.* at 574–75.

61. *See, e.g.*, Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195, 210 (1999).

62. Transcript of Record, at 328, *United States v. Garcia*, No. CR 4:21-cr-00429-YGR.

63. A “shot” is a colloquial term for infractions or violations of prison policy that will appear on a person’s prison disciplinary record. The implication here is that women incarcerated at FCI Dublin were having sex with BOP staff just so that they could have disciplinary history erased from their BOP records.

64. Transcript of Record, at 328, *United States v. Garcia*, No. CR 4:21-cr-00429-YGR.

explicit things to her,⁶⁵ forcing her to pose for him naked,⁶⁶ showing her pictures of his penis,⁶⁷ and perpetrating hands-on sexual abuse⁶⁸ that it will take Melissa years—if not a lifetime—to recover from. Melissa was not the only survivor who suffered at the hands of the former Warden: several other survivors testified against him at trial. And, as noted, at least seventeen other former BOP staff are being investigated for similar patterns of abuse.

II. THE SENTENCING COMMISSION'S AMENDED POLICY STATEMENT INCLUDES THE POSSIBILITY OF EARLY RELEASE FOR INSTITUTIONAL SEXUAL ABUSE VICTIMS

Partially in response to the exposure of widespread sexual abuse within the BOP, the Sentencing Commission recently adopted an amendment to the Federal Sentencing Guidelines' policy statement on reductions in sentence that would enable a victim of institutional sexual abuse to apply for early release because of the "extraordinary and compelling" nature of the abuse.⁶⁹

The Federal Sentencing Commission consists of seven voting members and requires a quorum of at least four members to make amendments to the Federal Sentencing Guidelines.⁷⁰ From the time that the First Step Act was enacted until the Summer of 2022, the Sentencing Commission did not have a quorum. Because of this, the Commission was unable to promulgate a post-First Step Act policy statement interpreting the federal early release statute.⁷¹

In November 2023, however, the Sentencing Commission's newly adopted amendments took effect.⁷² The Commission radically expanded the definition of what constitutes an "extraordinary and compelling" reason warranting early release or sentence reduction⁷³ to include, as relevant here, being a victim of institutional sexual abuse. Specifically, in order to demonstrate an "extraordinary and compelling" reason ("ECR") under this provision, a movant must show that they were the victim of "sexual abuse involving a 'sexual act'" or "physical abuse involving 'serious bodily injury'"

65. *Id.* at 265.

66. *Id.* at 287.

67. *Id.* at 286.

68. *Id.* at 272-74.

69. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

70. 28 U.S.C. § 991(a) (setting forth the number of members); 28 U.S.C. § 994(a) (requiring the vote of four members).

71. The First Step Act of 2018 modified the language of the federal reduction in sentence statute to allow incarcerated people to petition sentencing courts for early release rather than having release be determined by the Director of the Bureau of Prisons. This watershed change has enabled thousands of federally incarcerated individuals to successfully petition courts for early release. *See generally* Michael Doering, Note, *One Step Forward: Compassionate Release Under the First Step Act*, 2020 WIS. L. REV. 1287 (2020) (describing the potential of the First Step Act's changes to 18 U.S.C. § 3582(c)).

72. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

73. *See* 18 U.S.C. § 3582(c) (2018).

committed by or at the direction of a BOP employee or contractor.⁷⁴ The Commission also adopted a “catch-all” provision that would enable district courts wide latitude in deciding what constitutes an ECR that is “similar in gravity” to those otherwise enumerated.⁷⁵

Federal motions for sentence reduction have several steps. First, a person seeking early release must satisfy the statute’s administrative exhaustion provision.⁷⁶ This exhaustion requirement is seemingly straightforward: it involves a request to the warden of the facility where an incarcerated person is housed, asking that the warden file a motion on the person’s behalf.⁷⁷ A motion is ripe to file after the “lapse of [thirty] days from the receipt of such a request by the warden of the defendant’s facility.”⁷⁸ It is important to note, however, that even this exhaustion hurdle can be dangerous and scary for survivors who must first describe abuse to potentially skeptical or hostile prison staff in an exhaustion context.

After the exhaustion process is completed, a motion may be filed with a person’s sentencing judge, who must decide whether the person has demonstrated ECRs that warrant relief in the form of a sentence reduction or immediate release from prison.⁷⁹ If a person is deemed to have an eligible ECR, the judge then determines whether the person poses a danger to the community and, under the traditional federal sentencing factors, whether and how much of a sentence reduction is warranted.⁸⁰

The Sentencing Commission’s decision to include being a victim of abuse as a category of ECR, enabling a person to move for a reduction in their sentence, is commendable. Release as a remedy for sexual abuse makes sense for many reasons. In particular, the psychological aftereffects of sexual abuse are severe and can include mental health disorders such as posttraumatic stress disorder, anxiety disorders, panic attacks, and flashbacks.⁸¹ Such aftereffects can “re-traumatize victims for years.”⁸² Indeed, as a 2009 PREA report explains, release from custody is a proper remedy for abuse because survivors need sustained mental health treatment—treatment that is generally unavailable in BOP custody: “Unimpeded access to treatment by qualified medical and mental health care practitioners and collaboration with outside providers are critical to ensuring that victims of sexual abuse can begin to heal.”⁸³

74. U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT’G COMM’N 2023).

75. *Id.* § 1B1.13(b)(5).

76. 18 U.S.C. § 3582(c)(1)(A).

77. *Id.*

78. *Id.*

79. *Id.*

80. 18 U.S.C. § 3553(a).

81. Porterfield Report, *supra* note 5, at 4.

82. NAT’L PRISON RAPE ELIMINATION COMM’N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 14, 44 (2009).

83. *Id.* at 16.

Further, as courts have noted, the punitive nature of being exposed to and forced to endure such abuse should justify a reduction in sentence because the abuse itself should be considered as part of the experience of punishment. As one federal district judge observed in *United States v. Brice*, “sexual assault . . . is far beyond the ordinary ‘derelictions on the part [of] prison officials’ that a defendant (or the sentencing judge) can anticipate at the time of sentencing.”⁸⁴

Decarceration in this context also makes sense from the lens of abolition. The continued incarceration of women who have been abused does nothing to advance the cause of justice. Attempts to reform prisons and eradicate the phenomenon of prison rape, have been futile.⁸⁵ There is also ample research to support the proposition that women’s exposure to custodial sexual abuse is often racialized.⁸⁶ This is borne out by the fact that women of color make up a disproportionate portion of the female prison population,⁸⁷ but also plays into individual experiences of victims who are often specifically targeted for abuse because of their race or immigration status.⁸⁸ Thus, efforts should be made to ensure that as many survivors of institutional abuse be afforded sentence reductions as possible.

III. THE SUBSTANTIATION REQUIREMENT SHOULD BE DISCARDED (OR DISREGARDED)

Despite the Commission’s effort to provide an avenue for relief to survivors of abuse by prison staff, the Commission’s new ECR text presents barriers to relief that cut directly against the spirit and intent of the amendment. Perversely, the guideline explicitly requires that the sexual or physical abuse be substantiated by some outside proof. The final amendment

84. *United States v. Brice*, No. 13-CR-206-2, 2022 WL 17721031, at *4 (E.D. Pa. Dec. 15, 2022).

85. See, e.g., Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 43 (2019) (“reforming prisons results in more prisons”); ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, *ABOLITION. FEMINISM. NOW.* 43 (Naomi Murakawa ed., 2022) (“[w]e know that the very history of the prison system has been one of putative reforms, which have carefully safeguarded the system itself”); see also *id.* at 109–11 (discussing the futility of addressing gender-based violence in isolation and apart from other forms of violence, including state-sponsored violence such as policing and incarceration).

86. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 753 (2005) (noting that “[t]he courts’ failure to effectively protect women prisoners from sexual abuse both reflects and constructs the devaluation of black women and other women of color in the criminal justice system and illustrates the lack of seriousness with which assaults on women of color are generally taken by the courts”).

87. Niki Monazzam & Kristen M. Budd, *Incarcerated Women and Girls*, SENT’G PROJECT (Apr. 3, 2023), <https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls> [<https://perma.cc/5HV2-F4PH>] (showing Female Imprisonment Rate Per 100,000, by race and Ethnicity, 2000–21).

88. Sam Levin, *She Reported Being Abused by US Prison Guards. Now She Faces Deportation*, *Guardian* (Apr. 6, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/apr/06/federal-prison-sexual-abuse-deportation-california-mexico> [<https://perma.cc/8YF6-JK6L>] (noting that guards victimized women in their custody and often targeted non-citizens).

to the reduction in sentence policy statement requires that any such misconduct “be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.”⁸⁹ As touched upon earlier, this so-called “substantiation” requirement is likely to bar relief for many litigants—survivors who deserve better. The reasons for this are many.

First, civil, administrative, and criminal proceedings are slow and can take a very long time to result in a conviction or other resolution. In particular, civil proceedings against prisons or prison officials can take many years, and often result in settlements that are non-public or might not involve a finding or admission of liability.⁹⁰ An administrative proceeding may be similarly lengthy, especially one involving the termination of prison employees.⁹¹ The resolution of such proceedings may also be non-public. In these cases, even though the abusive conduct might be the subject of litigation, and even though parties may have an understanding that the misconduct occurred, the final resolution of a case is unlikely to meet the strict text of the Guideline.

Second, structural barriers exist that make substantiating claims in the manner required impracticable or even dangerous for abuse survivors. Under the current text of the Guideline, survivors of institutional sexual abuse—even those who testified against FCI Dublin employees—are not currently entitled to counsel to assist with litigating their early release claims.⁹² Instead, these survivors have relied on a network of volunteer, pro bono counsel, and some public defenders who have worked to identify and file sentence reduction motions on their behalf.⁹³ As mentioned above, the kinds of retaliation that these survivors have faced makes it both difficult and sometimes dangerous for survivors to represent themselves and request documents related to such abuse, let alone even report their abuse to prison staff.

89. U.S. SENT’G GUIDELINES MANUAL §1B1.13(b)(4) (U.S. SENT’G COMM’N 2023).

90. A comprehensive study from the Institute for the Advancement of the American Legal System at the University of Denver concluded that the average time to resolve a civil rights case in the District of Colorado was 423.61 days from the time of filing to the time of disposition. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 28 (2009). This statistic would include cases that settled, meaning that some cases that did not resolve in settlement would last far longer than that. *See id.* “The median time from filing of proceedings to termination for criminal defendants was 9.8 months.” U.S. COURTS, *U.S. District Courts—Judicial Business 2021*, <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021#:~:text=Combined%20of%20civil%20cases,nearly%201%20percent%20to%2074%20C465> [<https://perma.cc/35JL-UBLM>] (last visited June 8, 2024).

91. *See, e.g., Hearing on Sexual Abuse of Female Inmates, supra* note 15, at 15–17 (describing the multistep process for administrative investigation of sexual abuse allegations at Federal Correctional Institution, Dublin).

92. *See* Federal Criminal Justice Act (“CJA”) 18 U.S.C. § 3006A(1) (2018) (noting who is entitled to appointment of counsel).

93. *E.g., Second Chances, FAMILIES FOR JUSTICE REFORM*, <https://famm.org/our-work/compassionate-release> [<https://perma.cc/29QP-2CK7>] (last visited June 8, 2024).

Relatedly, there is no discovery mechanism that allows for an incarcerated person or their lawyers to demand access to any of the required forms of proof. Without access to counsel or a discovery tool that would require prosecutors, civil attorneys, or administrative bodies to turn over documents related to proceedings against assailants, there is little chance that a survivor will be able to substantiate their claims in accordance with the mandate of the policy statement.

Further, prosecutors control which abuse allegations are investigated in the first instance. In other words, control over what abuse is substantiated is squarely in the hands of parties who have an ambivalent relationship to abuse victims. On the one hand, federal prosecutors need some victims to testify to secure convictions. On the other hand, however, the DOJ is directly adverse to the early release interests of incarcerated survivors—they are the adverse party in sentence reduction proceedings. If prosecutors have identified enough victims to move forward with an indictment of a particular abuser, they may stop short of investigating other legitimate claims of abuse if that investigation is duplicative, onerous, or diverts resources from prosecutions of other assailants—leaving many victims with claims that go uninvestigated. Allegations against certain assailants may be too difficult to investigate or prove or may not be prosecutorial priorities. Thus, while named victims of high-profile abusers such as the Warden or the Chaplain of FCI Dublin may be able to meet the difficult burden of substantiating their claims of sexual assault, the majority of victims will have a much more difficult time doing so.

Similarly, the BOP determines whether an administrative proceeding should move forward.⁹⁴ And neither the BOP nor DOJ is likely to voluntarily turn over reports about the investigation of prison staff suspected of perpetrating abuse without a court order or other discovery mandate. Thus, for many survivors, their abusers may never be charged with a crime or administratively disciplined, largely for the reasons outlined above: the barriers to reporting abuse may be so grave or so dangerous—or prosecutions too difficult to pursue—that the abuse may never be investigated, let alone substantiated.

Thus, although the new remedy of release may enable some victims of institutional sexual abuse to seek and receive sentence reductions or early release, the substantiation requirement is likely to hinder access to relief for most victims, often for reasons beyond their control.⁹⁵ In short, requiring a substantiation of liability on the part of an official effectively places the burden onto the survivor movant to prove misconduct by some outside actor rather than focusing on a survivor's subjective experience. But this evidentiary

94. See, e.g., *Hearing on Sexual Abuse of Female Inmates*, *supra* note 15, at 15–17 (describing the multistep process for administrative investigation of sexual abuse allegations at Federal Correctional Institution, Dublin).

95. See, e.g., Thrush, *supra* note 41 (describing BOP's characterization of documentation of claims of sexual abuse by prison officials at FCI Dublin as insufficient to warrant early release under BOP's internal review).

burden does not come with the access to counsel, discovery tools, or investigative mandate necessary to meet that burden.

Furthermore, the substantiation requirement serves to perpetuate longstanding stereotypes about the credibility of assault victims and about who is entitled to an assumption of credibility. For women who are incarcerated, this “credibility discount”⁹⁶ is even more pronounced: not only are women disbelieved because they are women, but they are subject to additional credibility discounts by virtue of having been convicted of a crime and, consequently, incarcerated.⁹⁷

Before the adoption of the recent ECR policy statement, district courts across the country had broad discretion to determine what constituted “extraordinary and compelling” reasons warranting early release or sentence reduction. Several district courts responded to this discretion by granting sentence reduction motions based on institutional sexual abuse, primarily on the theory that such institutional abuse was not anticipated at the time of sentencing and makes a person’s experience of incarceration far more punitive than intended.⁹⁸ In *United States v. Bray*, a district judge remarked when granting a sentence reduction to a victim of institutional sexual abuse that that sexual assault by a prison guard is “so egregiously outside the ordinary, routine, and proper course of prison administration that it can only be called extraordinary.”⁹⁹ Notably, in *Bray*, the district judge—not yet bound by the substantiation requirement—granted Ms. Bray’s motion based on her own declaration made under penalty of perjury.¹⁰⁰ And this is as it should be.

Federal prosecutors responded to the recent BOP prison sex abuse scandals by focusing on alleged assailants, and the penalties that individuals

96. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017) (coining the term “credibility discount” to refer to the ways in which the criminal legal system discounts women’s accusations of rape and other forms of sexual abuse and noting that “[r]ape allegations are, and always have been, deeply intertwined with questions of credibility”). Although the term “credibility discounting” was popularized in recent years, scholars have long theorized and lamented the historic discounting of women’s accounts of rape within the legal system. See generally, Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008) (describing how American witness-impeachment rules tie a woman’s credibility up with her sexual virtue); Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER, 183 (2017) (discussing the courts’ role in narratives about women’s credibility).

97. See, e.g., Buchanan, *supra* note 47, at 69 (describing discredited incarcerated woman’s account of sexual assault); see also M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1215 (2020) (“General sentiments that prisoners (‘convicts’) are untrustworthy manifests in rules permitting impeachment of witnesses with prior convictions for certain crimes. Skepticism about prisoners’ trustworthiness also manifests in critiques of ‘frivolous’ prisoner civil rights suits.”).

98. See, e.g., *United States v. Herrera*, No. 17 CR. 415, 2023 WL 3614343, at *6 (S.D.N.Y. May 24, 2023) (considering sexual assault by a correctional officer in reducing defendant’s sentence and noting that her time in prison “has proven substantially more punitive than the Court envisioned when it first sentenced her”).

99. *United States v. Bray*, No. 11-CR-20206, Dkt. No. 145, at *12 (W.D. Tenn. May 3, 2023).

100. *Id.* at 9.

convicted of sexually abusing women might face if convicted.¹⁰¹ During the Guidelines amendment process, the DOJ's insistence on including the substantiation requirement focused on two rationales: the credibility of people alleging institutional abuse and the integrity of the DOJ's own investigations and proceedings against the assailants.¹⁰² Specifically, the DOJ pushed for the substantiation requirement because, in its view, the requirement would "help ensure that allegations are more fairly adjudicated, prevent mini-trials on allegations, and reduce interference with pending investigations and prosecutions."¹⁰³ But the DOJ's concerns about mini-trials is misplaced. District judges are called upon to make credibility determinations on a routine basis. Judging a survivor's account of institutional sexual assault should be no different. In fact, given the structural problems described with reporting abuse and obtaining documentation, having judges rather than federal prosecutors (who decide which cases get prosecuted and thus substantiated) or BOP staff (who were the very people abusing women in some cases and who control whether employees are administratively sanctioned) control whether a survivor is granted release is entirely in line with the spirit of these policy statement amendments. Notably, none of the other categories of ECR require this kind of documentary support.¹⁰⁴ Incarcerated people seeking early release based on medical condition are not required to provide independent proof of a serious medical condition, for example.¹⁰⁵ Although such proof may aid in convincing the court that release or sentence reduction is warranted, the lack of such support does not automatically disqualify such a claim.

Although the DOJ argued that this substantiation requirement would help to "secure justice, and vindicate the rights of victims,"¹⁰⁶ its view of victims' rights is narrowly focused on whether the assailants were successfully prosecuted not whether the victims received needed treatment, compensation, or relief in the form of early release from custody. This narrow view of victims' rights is both antiquated and runs counter to the interests of the survivors who were abused by BOP officials. Advocates pursuing early release have reported that "federal prosecutors are now routinely fighting to disqualify" victims who

101. Lisa Fernandez, *8 Correctional Officers Now Charged with Sex Abuse at FCI Dublin; 7 Found Guilty*, KTVU FOX 2 (July 17, 2023, at 6:23 AM), <https://www.ktvu.com/news/8-correctional-officers-now-charged-with-sex-abuse-at-fci-dublin-7-found-guilty> [<https://perma.cc/77W3-NZY3>].

102. Crim. Div., U.S. Dep't of Just., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines 6 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=387 [<https://perma.cc/45CM-BBM2>].

103. *Id.*

104. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b) (U.S. SENT'G COMM'N 2023).

105. *Id.* at § 1B1.13(b)(1).

106. U.S. DEP'T OF JUST. CRIM. DIV., *supra* note 101, at 6.

are petitioning for early release “because of an unreasonably narrow definition.”¹⁰⁷

It bears repeating that for incarcerated survivors, attempting to investigate their own abuse against the very people who may still oversee their day-to-day existence simply makes no sense, and can lead to a dangerous risk of retaliation. In sum, the substantiation requirement places an impossible evidentiary burden on incarcerated victims—in a manner inconsistent with other “extraordinary and compelling” categories of people eligible for early release—and in a context in which the movant is in a particularly disadvantaged position to meet and litigate that burden.

For these reasons, the Sentencing Commission should omit the substantiation requirement in future amendment cycles. And, in the interim, district courts should use their discretion to exercise independent judgment in assessing the credibility of survivors and their accounts of rape. The policy statement’s “catch all” provision gives judges wide latitude in deciding whether a person presents an “extraordinary and compelling reason” that is “similar in gravity” to those otherwise enumerated, including being a victim of institutional sexual assault.¹⁰⁸ One way that judges can acknowledge the barriers that the substantiation requirement places on survivors’ release is by using this “catch all” provision in circumstances where abuse was clearly present, but where the strict language of the substantiation requirement has not been met.

CONCLUSION

Although the Sentencing Commission’s efforts to allow for early release of survivors of institutional sexual abuse is commendable, the barriers to release that the Commission has codified in the existing policy statement amendments are concerning and problematic. In short, the policy statement amendment gives the illusion of problem-solving by permitting victims to apply for early release. But the possibility of release for some victims, and the denial of release for others based on factors that have nothing to do with the severity of abuse, serves to legitimate a system in which this kind of violence occurs routinely, and feeds into a narrative that survivors, particularly incarcerated survivors, are not credible witnesses of their own abuse. Further, requiring abuse survivors to substantiate claims in proscribed ways creates an impossible evidentiary burden in many instances and does not serve the intended aims of the Guideline amendment.

107. C.J Ciaramella, *Advocates Say the Justice Department is Failing to Provide Relief to Women Who were Abused in Prison*, REASON (June 10, 2024, 8:00 AM), <https://reason.com/2024/06/10/advocates-say-the-justice-department-is-failing-to-provide-relief-to-women-who-were-abused-in-prison> [https://perma.cc/6RMW-ACR9].

108. U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(5) (U.S. SENT’G COMM’N 2023).