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EXPANDING JUDICIAL DISCRETION TO GRANT COMPASSIONATE RELEASE DURING COVID-19

Deborah Wang*

Abstract: In the 1980s, Congress introduced compassionate release to counteract the increased rigidity of our federal sentencing system. This mechanism allowed courts, through a motion filed by the Bureau of Prison's director, to reduce a prisoner's sentence if "extraordinary and compelling" circumstances warrant such a reduction. However, because the Bureau of Prisons (BOP) seldom brought these motions, few people were released early via compassionate release. At the same time, public discourse and concerns regarding mass incarceration have continued to grow, causing lawmakers to revisit and revise compassionate release through the First Step Act of 2018 to ensure that this mechanism's potential is fully realized.

From the First Step Act's passage in 2018 until 2020, however, compassionate release was still more modestly utilized than legislators envisioned. This changed when the COVID-19 pandemic swept the United States and its prisons. The pandemic has presented courts with new opportunities to expand the use of compassionate release. While some legal scholars have examined the pandemic's impact on courts' compassionate release decisions, this Comment is the first to address a split among district court judges on how to interpret the relevant compassionate release statute's exhaustion requirement. Some courts have interpreted the statute to allow prisoners to file a motion for compassionate release thirty days after a warden's receipt of the request, regardless of whether the warden acted upon the request within that timeframe. In contrast, other courts have held that, if the warden denied the request within thirty days of receipt, the defendant must first exhaust administrative remedies within the BOP before filing a motion with the court. This Comment argues that courts should allow prisoners to directly file a motion with the court even if the warden timely denied the request. Not only is this interpretation more faithful to the statutory text, but it also allows courts to reach the merits of the case and thus grant more motions for compassionate release, which aligns with the First Step Act's purpose of alleviating our current mass incarceration crisis.

INTRODUCTION

Two contrasting cases illustrate the impact procedural requirements can have on whether a prisoner is ultimately granted compassionate release. Daniel Lynn Brown, Jr. was a "model inmate."¹ His Bureau of Prisons report was glowing: it indicated that he did not have a single disciplinary incident and that Mr. Brown showed "excellent character, determination, and readiness to be a productive and responsible citizen in

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1. *United States v. Brown*, 457 F. Supp. 3d 691, 701 (S.D. Iowa 2020).

his community.”² Moreover, the report noted that he remained an outstanding prisoner despite facing medical hardships, including pain from a leg surgery.³ While in prison, Mr. Brown also suffered from hypertension, migraines, and sleep apnea.⁴ When the COVID-19 pandemic hit, Mr. Brown petitioned the district court for compassionate release, which the court granted.⁵

Like Mr. Brown, James McNair was a prisoner who showed remarkable rehabilitation, as evidenced through his educational achievements and involvement in various mentorship programs in prison.⁶ Also like Mr. Brown, Mr. McNair suffered from medical conditions in prison—he had asthma and was treated for acute bronchopneumonia.⁷ But unlike Mr. Brown, Mr. McNair’s motion for compassionate release based on the pandemic was denied.⁸

What caused the courts to reach different outcomes in these two cases? On the merits, these cases are similar—two prisoners exhibited good behavior and rehabilitation which, combined with medical conditions that would make them more susceptible to contracting COVID-19, would have previously swayed courts in favor of granting the motion. The difference is that, in Mr. McNair’s case, the court never reached the merits—because it found that Mr. McNair did not exhaust his administrative remedies, it would not consider whether his rehabilitation and medical issues justified his compassionate release.⁹

Our society is concerned about mass incarceration, but at the same time, one of the main methods Congress created to reduce the prison population—compassionate release—is not being fully utilized, in large part due to bureaucratic deficiencies.¹⁰ By dismissing petitions for compassionate release because of prisoners’ failure to exhaust administrative remedies, courts are contributing to the underutilization of compassionate release and taking us one step backwards in addressing the mass incarceration issue.

Part I provides background regarding the federal prison population, sentencing, and compassionate release. Section I.A addresses our nation’s

2. *Id.* at 694, 701 (quoting Summary Reentry Plan Progress Report at 30–31, *United States v. Brown*, 457 F. Supp. 3d 691, No. 4:05-CR-00227-1 (S.D. Iowa 2020), ECF No. 220).

3. *Id.* at 701.

4. *Id.* at 703.

5. *Id.* at 705.

6. *United States v. McNair*, 481 F. Supp. 3d 362, 364, 368–70 (D.N.J. 2020).

7. *Id.*

8. *Id.* at 370.

9. *Id.*

10. *See infra* section I.C.0.

mass incarceration crisis to demonstrate why it is necessary to reduce the prison population. Section I.B addresses the early federal sentencing system and the parole system in place before the introduction of compassionate release. Section I.C focuses on the Sentencing Reform Act of 1984, how it contributed to mass incarceration, and why the compassionate release statute was subsequently enacted. Section I.D discusses the First Step Act of 2018, specifically looking at its purpose and its revisions to the compassionate release mechanism. Part II describes how the pandemic affected petitions for compassionate release, lays out the statutory ambiguity in the compassionate release statute, and shows the two ways district court judges have dealt with this ambiguity. Finally, Part III proposes that courts should adopt the interpretation more lenient to prisoners because doing so aligns with the purpose of the First Step Act and is a step towards fixing our current mass incarceration problem.

I. THE PRISON POPULATION AND FEDERAL SENTENCING PRIOR TO THE COVID-19 PANDEMIC

To understand compassionate release, why this mechanism was created, and why it has thus far been largely ineffective, we must first examine the ongoing tragedy of mass incarceration and the evolution of the federal sentencing system.

A. *The Mass Incarceration Crisis*

The United States has a mass incarceration problem—more people are imprisoned here than any other nation.¹¹ This problem stemmed from the Nixon administration’s “War on Drugs”¹² and the subsequent Reagan administration’s “tough-on-crime” policy changes.¹³ During a time when many Americans felt that the counterculture’s drug use seriously threatened the country and its morals, President Nixon formally inaugurated a war on drugs to eliminate illicit drug use in the United

11. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/UZ4D-3FFY>].

12. *War on Drugs*, HIST. (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/WPY3-YZM7>].

13. Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/> [<https://perma.cc/8TJF-VY3V>].

States.¹⁴ In the 1980s, the Reagan administration expanded on its predecessor's law-and-order politics,¹⁵ signing into law a bill that increased spending on drug enforcement, created new mandatory minimum sentences, and increased penalties for drug-related offenses.¹⁶

Because of these policy changes, the number of Americans incarcerated for drug offenses grew exponentially.¹⁷ At the same time, the length of sentences for those convicted of federal drug offenses nearly tripled.¹⁸ As a result, from 1980 to 2013, the federal prison population grew from 24,640 prisoners to 219,298, with the latter number having decreased only slightly since 2014.¹⁹ Although people incarcerated for drug convictions make up nearly half the federal prison population,²⁰ most of them have no serious history of violence.²¹ Approximately 9,000 people incarcerated in federal prisons are over sixty years old, despite research concluding that recidivism rates decline significantly with age.²²

Mass incarceration produces several major problems. One of these problems is the fiscal costs associated with imprisoning more than two million Americans; taxpayers pay approximately eighty billion dollars annually for incarceration.²³ And as the average age of prisoners

14. German Lopez, *The War on Drugs, Explained*, VOX (May 8, 2016, 1:21 PM), <https://www.vox.com/2016/5/8/18089368/war-on-drugs-marijuana-cocaine-heroin-meth> [<https://perma.cc/KVV7-MMXC>].

15. See Howell Raines, *Reagan Proposes Revision of Laws to Combat Crime*, N.Y. TIMES (Sept. 29, 1981), <https://www.nytimes.com/1981/09/29/us/reagan-proposes-revision-of-laws-to-combat-crime.html> [<https://perma.cc/J5YX-ZQ2E>].

16. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

17. *Criminal Justice Facts*, THE SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/SB7T-76VQ>] (noting that the number of federal drug offenders grew from 40,900 in 1980 to 430,926 in 2019).

18. *Id.* (noting that the length of sentences for federal drug offenders grew from an average of twenty-two months in 1986 to sixty-two months in 2004).

19. *Population Statistics*, FED. BUREAU OF PRISONS (Sept. 22, 2022), https://www.bop.gov/about/statistics/population_statistics.jsp [<https://perma.cc/AUW8-D65T>]. As of September 22, 2022, 158,758 prisoners are currently held in federal prison. *Id.*

20. *Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS (Sept. 17, 2022), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [<https://perma.cc/6TJS-NG82>] (showing 45.2% of inmates incarcerated for drug offenses).

21. CHARLES COLSON TASK FORCE ON FED. CORR., URB. INST., WHO GETS TIME FOR FEDERAL DRUG OFFENSES? DATA TRENDS AND OPPORTUNITIES FOR REFORM 1 (2015) <https://www.urban.org/sites/default/files/publication/72971/2000513-Who-Gets-Time-for-Federal-Drug-Offenses-Data-Trends-and-Opportunities-for-Reform.pdf> [<https://perma.cc/C96D-F2EF>].

22. *Inmate Statistics: Inmate Age*, FED. BUREAU OF PRISONS (Sept. 17, 2022), https://www.bop.gov/about/statistics/statistics_inmate_age.jsp [<https://perma.cc/CZK2-RZCD>].

23. Ronnie K. Stephens, *Annual Prison Costs a Huge Part of State and Federal Budgets*, INTERROGATING JUST. (Feb. 16, 2021), <https://interrogatingjustice.org/prisons/annual-prison-costs-budgets/> [<https://perma.cc/LG77-VLQN>].

increases, so does the cost of incarceration.²⁴ Additionally, the human costs of mass incarceration are extreme: incarcerated individuals are often deprived of rights and opportunities, and significant hardships are imposed on their families.²⁵ Many scholars have also examined the racial impact of mass incarceration, particularly the effects of mass incarceration on communities of color.²⁶ Black and brown people are disproportionately incarcerated compared to their white counterparts,²⁷ and this exposure to the criminal justice system has profound and negative intergenerational effects.²⁸

Whereas the costs of mass incarceration are high, the benefits are low. Mass incarceration has not meaningfully improved community safety.²⁹

24. Chris Feliciano Arnold, *The Dying American Prisoner*, ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/politics/archive/2019/12/compassionate-release-lets-prisoners-die-free/603988/> [<https://perma.cc/XE79-7MDD>] (“By some estimates, incarcerating older inmates costs anywhere from three to nine times more than younger prisoners—largely due to healthcare costs as prisoners age.”).

25. See Mirko Bagaric, Peter Isham & Jennifer Svilar, *The Increased Exposure to Coronavirus (COVID-19) for Prisoners Justifies Early Release: And the Wider Implications of This for Sentencing—Reducing Most Prison Terms Due to the Harsh Incidental Consequences of Prison*, 48 PEPP. L. REV. 121, 167 (2021); Casey Kuhn, *The U.S. Spends Billions to Lock People Up, But Very Little to Help Them Once They’re Released*, PBS NEWSHOUR (Apr. 7, 2021), <https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released> [<https://perma.cc/KDA4-PJN8>].

26. This is a massive and comprehensively researched topic, a fuller exploration of which is beyond the scope of this paper.

27. See, e.g., *Criminal Justice Facts*, *supra* note 17 (“Black men are six times as likely to be incarcerated as white men and Latinos are 2.5 times as likely. For Black men in their thirties, about 1 in every 12 is in prison or jail on any given day.”).

28. See, e.g., THE PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 18–21 (2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1.pdf [<https://perma.cc/23LW-XWFC>] (noting that children of incarcerated individuals face a “host of repercussions,” including the trauma of separation and an increased risk of poverty and juvenile delinquency); JUST. STRATEGIES, CHILDREN ON THE OUTSIDE: VOICING THE PAIN AND HUMAN COSTS OF PARENTAL INCARCERATION 2 (2011), <http://www.justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf> [<https://perma.cc/REQ7-G8J3>] (recognizing that current sentencing laws “not only bloat the incarceration rate and budget lines” but also “create an intergenerational malaise”); Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS 8, 14–15 (2010), http://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00019 [<https://perma.cc/3C5U-MRD4>] (observing that “[h]igh rates of parental incarceration likely add to the instability of family life among poor children” and that “children of incarcerated parents . . . are at greater risk of developmental delays and behavioral problems”).

29. Jamiles Lartey & Weihua Li, *New FBI Data: Violent Crime Still Falling*, THE MARSHALL PROJECT (Sept. 30, 2019), <https://www.themarshallproject.org/2019/09/30/new-fbi-data-violent-crime-still-falling> [<https://perma.cc/QUQ7-34KG>]; DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 1, 2 (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/GCS5-8LAN>].

The expansion of incarceration primarily increased imprisonment of individuals convicted of nonviolent offenses, such as low-level drug offenses, which has had little impact on the violent crime rate.³⁰ In fact, although the United States incarcerated 1.2 million more people in 2000 than in 1975, the violent crime rate was nearly identical to the rate in 1975, and the property crime rate dropped by twenty percent.³¹ Research indicates that, while incarceration does little to lower crime rates, other factors such as increased wages, employment, and graduation rates have greater relation to reduced crime rates.³² This realization has led to a growing consensus that over-reliance on incarceration is misguided.³³ This bipartisan consensus contributed to the passage of the First Step Act of 2018, which was enacted to reduce the federal prison population and is discussed in section I.D. below.

B. *Sentencing Prior to the Sentencing Reform Act of 1984*

Contributors to our mass incarceration problem include lengthy sentences and underutilization of sentence reduction methods like compassionate release.³⁴ To understand compassionate release and its purpose, it is crucial to first understand how sentencing has evolved.

Before the 1980s, the federal judiciary and parole boards exercised the most power over sentencing.³⁵ Judges were viewed as sentencing experts, and they tailored each offender's sentence to reflect the goals of punishment, factoring in the offender's rehabilitative potential.³⁶ Under a system known as indeterminate sentencing, judges did not sentence prisoners to a specific term of imprisonment but instead to fixed minimum and maximum terms.³⁷ The minimum term set the date prior to which a prisoner could not be paroled.³⁸ The time the prisoner would serve was indeterminate because the defendant could ultimately serve the minimum, the maximum, or any sentence between those two terms.³⁹ Appellate

30. See STEMEN, *supra* note 29.

31. *Id.*

32. *Id.*

33. See NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019), <https://sgp.fas.org/crs/misc/R45558.pdf> [<https://perma.cc/5FEY-6SNP>].

34. See *infra* section I.C.2; John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2465–66 (2021).

35. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–96 (2010).

36. *Id.*; ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4:2 (3d ed. 2021).

37. See CAMPBELL, *supra* note 36.

38. See *id.*

39. Ferraro, *supra* note 34, at 2466.

review of sentencing was limited.⁴⁰ Beyond prescribing a broad range of punishments for each offense for which judges had substantial discretion to sentence, Congress rarely intervened.⁴¹

Along with federal judges, parole authorities were powerful sentencing players that could reduce the length of a sentence based on the defendant's conduct while incarcerated.⁴² During the 1900s, sentence reductions for federal prisoners came solely through presidential pardons and credit for good behavior.⁴³ Later, individual parole boards at each federal prison controlled early release.⁴⁴ Then, in 1930, Congress established a single unified Board of Parole in Washington D.C. under the ambit of the United States Department of Justice.⁴⁵ The parole board was tasked with deciding whether, when, and under what conditions a prisoner may be released early.⁴⁶ Its goal was to promote rehabilitation and protect the community.⁴⁷ Under this parole system, federal prisoners became eligible for early release after serving one-third of their sentence.⁴⁸ This system received criticism in large part due to sentencing inconsistencies—similarly-situated prisoners often received different parole outcomes because of the parole board's unchecked discretion.⁴⁹

In response to these concerns, Congress passed the Parole Commission and Reorganization Act of 1976.⁵⁰ This Act renamed the Board of Parole as the United States Parole Commission and required it to adopt explicit guidelines for parole decision-making and provide written reasons for parole denial.⁵¹ But critics were not satisfied with these reforms and issues with sentencing disparities continued until the Sentencing Reform Act of 1984.⁵²

40. See Gertner, *supra* note 35, at 695–96.

41. See *id.* at 696.

42. See *id.*

43. See *id.*

44. See *id.*

45. See PETER B. HOFFMAN, U.S. PAROLE COMM'N, U.S. DEP'T OF JUST., HISTORY OF THE FEDERAL PAROLE SYSTEM 1, 1 (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf> [<https://perma.cc/6CTL-QCA2>].

46. See NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 4:5 (2d ed. 2021).

47. See KARL OAKES, 67A CORPUS JURIS SECUNDUM, PARDON & PAROLE § 51 (2022).

48. Ferraro, *supra* note 34, at 2470.

49. *Id.* at 2470–71.

50. *Id.* at 2472; Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219, 219–33.

51. HOFFMAN, *supra* note 45, at 1.

52. *Id.*; CAMPBELL, *supra* note 36.

C. *The Sentencing Reform Act of 1984*

The Sentencing Reform Act of 1984 (SRA) was enacted to address disparities in sentencing.⁵³ The SRA increased penalties through mandatory minimums⁵⁴ and abolished parole for persons convicted under federal law after November 1, 1987.⁵⁵ It also created the Sentencing Commission responsible for providing judges with Sentencing Guidelines⁵⁶ and general policy statements regarding application of the Guidelines.⁵⁷

1. *The Sentencing Guidelines and Prosecutorial Discretion*

The Sentencing Guidelines establish criteria for judges to use when imposing sentences.⁵⁸ Notably, the Guidelines set mandatory minimums for many nonviolent drug offenses.⁵⁹ Many have criticized the Guidelines for taking power from judges and giving it to prosecutors, who can charge defendants under any statute they choose.⁶⁰ By threatening to charge

53. See S. REP. NO. 98-225, at 78 (1983).

54. Molly N. Van Etten, *The Difference between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2*, 56 VAND. L. REV. 1265, 1272 (2003).

55. Michael Doering, Comment, *One Step Forward: Compassionate Release Under the First Step Act*, 2020 WIS. L. REV. 1287, 1291 (2020); THOMPSON INFO. SERVICES, FDA ENFORCEMENT MANUAL ¶ 1520 (2005) [hereinafter Enforcement Manual].

56. For the most current version, see U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021), <https://www.uscc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf> [<https://perma.cc/QKD8-MF3K>].

57. See generally 28 U.S.C. § 994.

58. See U.S. SENT'G COMM'N, *supra* note 56, § 1B1.3; *id.* at 406–07; ENFORCEMENT MANUAL, *supra* note 55.

59. See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration> [<https://perma.cc/9U9A-F4RR>]; see also Morning Edition, *A Federal Judge Says Mandatory Minimum Sentences Often Don't Fit the Crime*, NAT'L PUB. RADIO (Jun. 1, 2017) [hereinafter Morning Edition], <https://www.npr.org/2017/06/01/531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime> [<https://perma.cc/4JR9-CFKN>] (United States District Judge Mark W. Bennett: “These mandatory minimums are so incredibly harsh, and they’re triggered by such low levels of drugs that they snare at these non-violent, low-level addicts who are involved in drug distribution mostly to obtain drugs to feed their habit. They have a medical problem. . . . [A]nd they’re going to be faced with five and 10 and 20-year and sometimes life mandatory minimum sentences.”).

60. See Cullen, *supra* note 59; see also Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> [<https://perma.cc/6GPN-A3K8>] (United States District Judge Coughenour: “By [federal prosecutors’] charging decisions, they can tie the hands of the sentencing judge, particularly on mandatory minimums. And [prosecutors’] discretion, by the way, is exercised in darkness.”); John Gleeson, *Debevoise’s Holloway Project and “Second Looks”: How Challenging One Discrete Racial Inequity in Federal Criminal Justice Can Help Produce Systemic*

defendants with crimes that can trigger a mandatory minimum, defendants may feel coerced into falsely admitting guilt.⁶¹ With their hands tied, judges are often forced to give sentences that do not fit the crime,⁶² further contributing to the mass incarceration problem.⁶³ Additionally, prosecutors have discretion over investigation, charging, and plea practices.⁶⁴

Despite the SRA's stated goal of reducing sentencing disparity through the Sentencing Guidelines, there is little evidence to suggest that such a reduction has been achieved.⁶⁵ Rather, systemic disparities still exist; on average, young, Black males receive guideline sentences significantly longer than those received by their white counterparts for similar offenses.⁶⁶ For instance, data collected from the Sentencing Commission shortly after the First Step Act's (FSA) passage show that Black males between the ages of eighteen and thirty-five were given sentences approximately two years longer than similarly-situated white males.⁶⁷

In 2005, the United States Supreme Court held in *United States v. Booker*⁶⁸ that the Sentencing Guidelines are no longer mandatory but are advisory.⁶⁹ Consequently, a judge is not required to impose a sentence within the Guideline's range so long as the range is considered on the record and the judge states the reason for the departure.⁷⁰ Although no longer binding, the introduction of the Sentencing Guidelines has nevertheless irreversibly influenced the way many judges sentence.⁷¹

Change, 33 FED. SENT'G REP. 319, 323 (June 2021) (emphasizing the need for the federal judiciary to "act as a check on prosecutorial power over sentencing"); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L REV. 16, 165 (1991).

61. See Cullen, *supra* note 11.

62. See Morning Edition, *supra* note 59 ("[Judge Bennett] says mandatory minimum laws have forced him to put more than a thousand people in prison for lengthy stays, sometimes for the rest of their lives. And in a majority of those cases, Judge Bennett says the punishment didn't fit the crime.").

63. See Stefan R. Underhill, *Did the Man I Sentenced to 18 Years Deserve It?*, N.Y. TIMES (Jan. 23, 2016), https://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html?_r=0 (last visited Oct. 14, 2022) ("The tragedy of mass incarceration has recently focused much attention on the need to reform . . . the federal-sentencing guidelines, which often direct judges to impose excessive sentences.").

64. Heaney, *supra* note 60, at 165.

65. *Id.* at 164.

66. *Id.* at 165.

67. *Id.* at 206.

68. 543 U.S. 220 (2005).

69. *Id.* at 245.

70. *Id.* at 264–65; 28 U.S.C. § 3553(c).

71. See Van Meter, *supra* note 60 (noting that judges who started their careers after the late 1980s "have come to think that the guidelines defined fairness" (quoting Harvard Law professor and former

2. *Compassionate Release*

Despite the SRA's increased sentencing rigidity through the introduction of the Sentencing Guidelines and the abolition of parole, lawmakers inserted a "compassionate release" exception by which a sentence could be reduced.⁷² The exception allows courts to reduce a term of imprisonment if "extraordinary and compelling" circumstances warrant such a reduction.⁷³ Courts must consider the sentencing factors outlined in section 3553(a),⁷⁴ and, under this original version of the compassionate release mechanism, only allow a reduction if it is consistent with the Sentencing Commission's applicable policy statements.⁷⁵ Congress never defined the "extraordinary and compelling" standard but instead directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction."⁷⁶ But the Sentencing Commission did not define the standard for two decades; the relevant policy statement was not promulgated until 2006.⁷⁷ In this policy statement, the Sentencing Commission defined the standard broadly, giving courts flexibility and discretion to evaluate the prisoner's medical condition, age, family circumstances, and any other extraordinary and compelling circumstances.⁷⁸

federal judge Nancy Gertner)); Gleeson, *supra* note 60 (anecdotally highlighting how one judge, despite being on the bench before the guidelines era began, was uncomfortable with his discretionary power to review sentencing and asked whether the interviewing lawyer "was contending that the amended sentence reduction statute made [the judge] 'King'").

72. See 18 U.S.C. § 3582(c)(2). "Compassionate release" and "reduction in sentence" are used interchangeably. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT NO. 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [<https://perma.cc/TT3M-FT53>]; see also Gleeson, *supra* note 60, at 320 (noting that the term "compassionate release" is not only nowhere to be found in the statute itself, but is also a misnomer—the name wrongly implies that a reduction in sentencing through this statute is limited only to those who are extremely ill).

73. 18 U.S.C. § 3582(c)(1)(A)(i).

74. Some key factors include: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, provide just punishment, adequately deter criminal conduct, and protect the public; and the need to avoid unwarranted sentence disparities among similar defendants. See 18 U.S.C. § 3553.

75. See 18 U.S.C. § 3582(c)(1); see also 28 U.S.C. § 994(a)(2)(C) (authorizing the Sentencing Commission to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that . . . would further the purposes set forth in section 3553(a)(2) of title 18 . . . including the appropriate use of . . . the sentence modification provisions set forth in section[] . . . 3582(c) of title 18").

76. 28 U.S.C. § 994(t).

77. See Gleeson, *supra* note 60, at 320, 325 n.9.

78. See U.S. SENT'G COMM'N, *supra* note 56, § 1B1.13 cmt. n.1. It is worth noting that

The Sentencing Commission’s failure to timely describe the standard likely allowed the Bureau of Prisons (BOP) to interpret the “extraordinary and compelling” standard more narrowly than Congress or the Sentencing Commission intended, as indicated by the Commission’s subsequent clarification in its policy statement.⁷⁹ This effectively restricted the use of the compassionate release mechanism to terminally ill prisoners.⁸⁰ When the Commission finally promulgated its policy, a generation of lawyers, judges, and prisoners had come to believe that compassionate release was limited to very narrow circumstances.⁸¹

In particular, until the statute’s amendment under the First Step Act in 2018,⁸² a court could only modify an imposed term of imprisonment upon motion of the Director of the BOP.⁸³ Stated plainly, the BOP functioned as a gatekeeper between prisoners and the courts, filtering compassionate release applications under a restrictive standard. Along with various bureaucratic deficiencies and delays,⁸⁴ this contributed to very few compassionate release motions entering the judicial system and thus very few compassionate release motions being granted.⁸⁵ In fact, between 2013

subsection D allows the Bureau of Prisons Director to consider any other extraordinary and compelling reason not already listed. *Id.*

79. William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 852–53 (2009).

80. *Id.*; see Gleeson, *supra* note 60, at 322 (noting that “[t]he relief contemplated by § 3582(c) . . . has never been restricted to the aged and infirm” and that “[o]n its face, it authorizes sentence reductions whenever ‘extraordinary and compelling reasons’ warrant them”).

81. See Gleeson, *supra* note 60, at 320.

82. See *infra* section I.0.

83. 18 U.S.C. § 3582(c)(1)(A). Colette S. Peters is the current director of the BOP. See *About Our Agency, Executive Staff*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/bio_dir.jsp [<https://perma.cc/H22S-TEBT>]. The previous Director retired amid widespread criticism about the BOP’s poor handling of the pandemic and implementation of the FSA in its institutions. *BOP Director Announces Plans to Retire*, FED. BUREAU OF PRISONS (Jan. 5, 2022, 6:53 PM), https://www.bop.gov/resources/news/20220105_director_to_retire.jsp [<https://perma.cc/E6DH-6AV5>]; Walter Pavlo, *As COVID Cases Spike, Federal Bureau of Prisons Is Not Releasing Eligible Inmates*, FORBES (Jan. 11, 2022, 10:33 AM), <https://www.forbes.com/sites/walterpavlo/2022/01/11/as-covid-cases-spike-federal-bureau-of-prisons-is-not-releasing-eligible-inmates/?sh=3c9c4423786d> [<https://perma.cc/4MAQ-KY2W>].

84. Siobhan A. O’Carroll, “*Extraordinary and Compelling*” *Circumstances: Revisiting the Role of Compassionate Release in the Federal Criminal Justice System in the Wake of the First Step Act*, 98 WASH. U. L. REV. 1543, 1547 (2021); OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., I-2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 11 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/7LSN-XRGZ>] (noting the BOP’s mismanagement of the compassionate release program, the lack of expediency in processing release requests, the inconsistent standards for evaluating release requests across prisons, and the lack of resources informing potentially eligible prisoners about the program).

85. See David Roper, *Pandemic Compassionate Release and the Case for Improving Judicial Discretion over Early Release Decisions*, 33 FED. SENT’G REP. 27, 28 (2020) (“[A]n average of only

and 2017, about 266 prisoners eligible for compassionate release died while their requests were pending.⁸⁶

D. The First Step Act and Its Changes to Compassionate Release

On December 21, 2018, then-President Donald Trump signed into law the First Step Act of 2018 (FSA).⁸⁷ This was the culmination of a bipartisan effort⁸⁸ to reduce the prison population, reflecting Congress's recognition that the BOP was severely underutilizing compassionate release.⁸⁹ The FSA has three major components: (1) correctional reform through a risk and needs assessment system at the BOP; (2) sentencing reform involving changes to penalties for some federal offenses; and (3) the reauthorization of the Second Chance Act of 2007.⁹⁰

In addition, the FSA amended the compassionate release statute, providing prisoners with a mechanism to directly petition courts for compassionate release instead of relying solely on the BOP to bring a motion on their behalf.⁹¹ To use the mechanism, the prisoner must have first "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or waited "30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."⁹²

This change is merely procedural and does not affect the substantive criteria used to assess these motions; defendants must still present the court with an "extraordinary and compelling" circumstance, just as they had to do prior to the FSA.⁹³ However, most circuit courts have held that,

twenty-four federal prisoners per year were granted compassionate release from 1984 to 2013."); Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html> (last visited Oct. 14, 2022) (noting that between 2013 and 2017, the BOP granted only 6% of petitions).

86. Thompson, *supra* note 85.

87. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

88. See *supra* section I.0.

89. See *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/P4RA-WSFH>]; see also *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019) (noting that Congress passed the FSA in part to increase the use and transparency of compassionate release).

90. See JAMES, *supra* note 33, at 1. The Second Chance Reauthorization Act of 2018 (Title V of the FSA) reauthorizes many of the grant programs that were initially authorized by the Second Chance Act of 2007, including grants to state and local governments to promote the safe and successful reintegration of offenders into the community upon their release. *Id.* at 10.

91. See 18 U.S.C. § 3582(c)(1)(A).

92. *Id.*

93. *Id.*; see also Ferraro, *supra* note 34, at 2484–85 (noting that the FSA "does not purport to change the substantive criteria used to assess individual motions for compassionate release").

because the Sentencing Commission’s applicable policy statement⁹⁴ had not been amended since the FSA’s passage and still only references motions filed by the BOP Director, its notes regarding what constitutes “extraordinary and compelling” are not “applicable” to a prisoner’s motion for compassionate release presented under the FSA.⁹⁵ In other words, the section 1B1.13 factors⁹⁶ are not binding but may still inform a court’s exercise of discretion.⁹⁷ These circuit courts have so concluded in part due to the “legislative history of the First Step Act’s compassionate-release amendment, which sought to expand and expedite compassionate-release motions because they had seldom been brought by the BOP.”⁹⁸

Legislators’ goals to expand the use of compassionate release have been partially realized; there was a modest increase in the number of petitions filed and granted during the sixteen months following passage of the FSA.⁹⁹ Whereas the BOP only granted an average of twenty-four petitions per year between 1984 and 2013,¹⁰⁰ 1,735 petitions were filed¹⁰¹ and 107 federal prisoners received compassionate release in the year

94. See U.S. SENT’G COMM’N, *supra* note 56, § 1B1.13 cmt. n.1.

95. Nine out of ten circuit courts that have addressed the issue have held that the section 1B1.13 factors are not binding on courts considering motions for compassionate release presented directly by prisoners under the FSA. See *United States v. Brooker*, 976 F.3d 228, 234–37 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281–84 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050–51 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see* *United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021).

96. See 18 U.S.C. § 3553.

97. *Aruda*, 993 F.3d at 802.

98. *Id.* at 801.

99. See Roper, *supra* note 85. Several major law firms—taking advantage of the opportunity the FSA’s reforms have presented—have been actively involved in pro bono compassionate release litigation in an effort to combat lengthy prison terms. See Roy Strom, *How Debevoise Scrubbed 1,000 Years from ‘Unjust’ Prison Terms*, BLOOMBERG L. (Mar. 10, 2022), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X16O4P8400000?bna_news_filter=business-and-practice#jcite (last visited Nov. 26, 2022) (describing a former federal judge and current Debevoise & Plimpton partner’s “Holloway Project”); see also Gleeson, *supra* note 60, at 322 (describing that Holloway Project, through motions filed directly with the court under § 3582(c)(1)(A), has won twenty-one cases in the district courts, has had at least one success in every circuit except the D.C. and Eighth Circuits, and has “reduced its clients’ sentences by a total of 827 years”).

100. *Compassionate Release and the Conditions of Supervision: Hearing Before the U.S. Sentencing Comm’n* (2016) (statement of Michael E. Horowitz, Inspector General, U.S. Dep’t of Justice).

101. Daniel A. Rosen, *Federal BOP Overwhelmingly Denies Compassionate Releases During COVID*, PRISON LEGAL NEWS (Sept. 1, 2021), <https://www.prisonlegalnews.org/news/2021/sep/1/federal-bop-overwhelmingly-denies-compassionate-releases-during-covid/> [<https://perma.cc/HJ5E-WLVF>].

following the FSA's passage.¹⁰² The number of petitions for compassionate release would explode during the COVID-19 pandemic, but the number of requests granted by the BOP would not reflect this growth.

II. COMPASSIONATE RELEASE MOTIONS IN THE COVID-19 ERA

The onslaught of COVID-19 infections in federal prisons was accompanied by a surge in compassionate release petitions, which courts generally have more willingly granted than the BOP. But a perceived ambiguity in section 3582(c)'s exhaustion requirement has thrown a wrinkle in some courts' readiness to grant these requests.

A. *More Prisoners Are Now Applying for Compassionate Release*

Whereas a relatively modest amount of petitions were filed in the first months after the FSA's passage,¹⁰³ thousands of federal prisoners applied for compassionate release after the COVID-19 virus began spreading rapidly through prisons.¹⁰⁴ In 2019, prior to the pandemic, the BOP received 1,735 requests for compassionate release.¹⁰⁵ In contrast, prisoners made nearly 31,000 requests since the pandemic began in March 2020.¹⁰⁶ Of the approximately 128,707 prisoners in BOP custody who have been tested, 49,616 prisoners tested positive for COVID-19 and 311 had died from the virus.¹⁰⁷ Poor conditions in these prisons contribute to the high infection and mortality rates.¹⁰⁸ However, despite the surge in

102. Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, THE SENT'G PROJECT (Dec. 17, 2019), <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/> [<https://perma.cc/E9Z5-M8HJ>].

103. Roper, *supra* note 85, at 29 (citation omitted).

104. Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, THE MARSHALL PROJECT (June 11, 2021), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36> [<https://perma.cc/5HUA-EPCP>].

105. KATHLEEN HAWK SAWYER, COMPASSIONATE RELEASE – FIRST STEP ACT OF 2018 REPORT TO CONGRESS 1 (2020), <https://www.documentcloud.org/documents/20805670-2019-compassionate-release-data> [<https://perma.cc/H43P-4AZT>].

106. Blakinger & Neff, *supra* note 104.

107. *National COVID-19 Statistics*, THE COVID PRISON PROJECT (Sept. 23, 2022), <https://covidprisonproject.com/data/national-overview/> [<https://perma.cc/Y6QQ-5JJA>].

108. *See, e.g.*, Walter Pavlo, *The Women's Federal Prison Camp at Alderson in Middle of COVID-19 Outbreak*, FORBES (Dec. 24, 2021), <https://www.forbes.com/sites/walterpavlo/2021/12/24/the-womens-federal-prison-camp-at-alderson-in-middle-of-covid-19-outbreak/?sh=5c8b040720c0> [<https://perma.cc/D7R8-8SKH>] (noting lack of hot water in quarantine unit and staffing shortage at

applications for compassionate release and the number of COVID-19 cases and deaths within the federal prison population, the number of requests granted by the BOP *decreased* during the pandemic.¹⁰⁹ At least thirty-five of the incarcerated individuals that died from COVID-19 were waiting for a decision on their request for compassionate release.¹¹⁰

When denied relief by the BOP, prisoners have sought relief directly from the courts, as permitted by the FSA's amendment. This method of bypassing the BOP has resulted in some success; 3,221 people were let out on compassionate release between the start of the pandemic and June 2021, and 99% of those releases were granted by judges over the BOP's objections.¹¹¹ In 2020, at the height of the pandemic, federal judges approved 21% of the compassionate release requests they considered.¹¹² In contrast, the BOP approved only 0.1%.¹¹³

Daniel Lynn Brown is an example of a previously incarcerated individual who successfully obtained compassionate release during the COVID-19 pandemic.¹¹⁴ In its order granting Mr. Brown's motion for compassionate release, the court first noted that Mr. Brown had exhausted his administrative remedies.¹¹⁵ Second, the court noted the presence of extraordinary and compelling reasons.¹¹⁶ The court pointed to Mr. Brown's remarkable rehabilitation.¹¹⁷ The court next acknowledged that Mr. Brown's health issues—including hypertension, low white blood cell count, and a history of migraines—were risk factors linked to COVID-19 complications.¹¹⁸ The court recognized that the defendant did not fit

FPC Alderson); Conrad Wilson, *Federal Inmates in Oregon Report Alarming Health Conditions as Pandemic Continues*, OR. PUB. BROAD. (Aug. 18, 2021), <https://www.opb.org/article/2021/08/18/oregon-federal-prison-covid-19-pandemic-sheridan-correctional-facility/> [<https://perma.cc/9ZFL-D8XA>] (reporting lack of hygiene and treatment for serious medical conditions at FCI Sheridan).

109. See Rosen, *supra* note 101.

110. Blakinger & Neff, *supra* note 104.

111. *Id.*; see also *Compassionate Release Data Report*, U.S. SENT'G COMM'N (June 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210609-Compassionate-Release.pdf?utm_medium=email&utm_source=govdelivery [<https://perma.cc/8WTN-TYSS>] (collecting data on total motions filed and granted in 2020).

112. See *Compassionate Release Data Report*, *supra* note 111.

113. See Letter from Amy Fettig, Exec. Dir., The Sentencing Project, to Merrick Garland, U.S. Att'y Gen. (Feb. 14, 2022), <https://www.sentencingproject.org/wp-content/uploads/2022/02/BOP-Letter-2-14.pdf> [<https://perma.cc/DW97-62XF>].

114. *United States v. Brown*, 457 F. Supp. 3d 691, 705 (S.D. Iowa 2020).

115. *Id.* at 698.

116. *Id.* at 703.

117. *Id.* at 701.

118. *Id.* at 703.

within the Sentencing Commission's traditional categories that once defined compassionate release cases: he was not terminally ill, was younger than sixty-five, and did not need to look after his adult daughter.¹¹⁹ Nevertheless, the court granted Mr. Brown's motion for compassionate release.¹²⁰ Notably, the court focused its decision on the purpose of the FSA, which was "to increase the use of compassionate release."¹²¹

However, since COVID-19 vaccines and booster shots became widely available, many courts have concluded that health conditions no longer represent an extraordinary and compelling reason warranting a reduction in a sentence where a defendant has already experienced a COVID-19 infection without serious complications and has been vaccinated.¹²²

B. District Court Judges Split Over Section 3582(c)(1) Exhaustion Requirement

Despite the FSA's clear purpose, the uncertainties and risks associated with COVID-19, and the meritorious claims that prisoners may have, courts have denied many motions for compassionate release on a procedural technicality.¹²³ Because of a perceived ambiguity in the statutory language, courts have reached different conclusions regarding the exhaustion requirement. Some courts have interpreted section 3582(c)(1) to mean that a motion for compassionate release may be filed with a court once thirty days have passed after a warden's receipt of the request, regardless of whether the warden acted upon the request within that time frame.¹²⁴ In contrast, other courts have interpreted the

119. *Id.* at 703–04.

120. *Id.* at 705.

121. *Id.* at 701.

122. *E.g.*, *United States v. Adams*, No. CR14-0181, 2021 WL 2073389, at *1 (W.D. Wash. May 24, 2021); *United States v. Ramirez-Jimenez*, No. 13-cr-00694, 2021 WL 6126929, at *2 (N.D. Cal. Dec. 28, 2021); *United States v. Sosa*, No. 14-cr-468-1, 2022 WL 1690833, at *3 (S.D.N.Y. May 26, 2022); *United States v. Mills*, No. 18-cr-128-13, 2022 WL 192270 at *4 (S.D. Ohio Apr. 29, 2022).

123. *See, e.g.*, *United States v. Sims*, No. CR18-0262, 2020 WL 2838611, at *4 (W.D. Wash. June 1, 2020) ("This court and other district courts in the Ninth Circuit that have considered [the exhaustion] issue have nearly unanimously concluded that failure to exhaust administrative remedies is fatal to a compassionate release motion even in light of the urgency created by COVID-19.").

124. *E.g.*, *United States v. Somerville*, 463 F. Supp. 3d 585, 592 (W.D. Pa. 2020) (noting that "[n]othing in the statutory text limits the 30-day, fast-track option to circumstances in which the Warden failed to respond—the clock runs from the Warden's 'receipt' of the request" and refusing to "read additional requirements in the statute that aren't there"); *United States v. Carter*, 469 F. Supp. 3d 583, 586 (S.D. W. Va. 2020) ("[T]he 'lapse of 30 days' provision has nothing to do with whether the warden grants or denies the inmate's request for compassionate release, but simply sets the amount of days an inmate has to wait before petitioning the court." (quoting *United States v. Weidenhamer*,

language to provide that, if the warden has responded to the request within thirty days of receipt, the defendant must exhaust administrative remedies with the BOP before filing a motion with the court.¹²⁵

1. Some District Courts Allow Prisoners to File Motion with Court After Thirty Days Regardless of Warden's Timely Denial

Several district courts have interpreted section 3582(c)(1) to provide that a prisoner may file a motion for compassionate release with a court thirty days after the warden's receipt of the request, even when the warden denies the prisoner's request within the thirty-day window. Under this reading, either the warden's failure to respond within thirty days *or* the warden's denial within thirty days can function as a trigger for the prisoner to initiate a court proceeding. This interpretation allows a court to reach the merits of the motion for compassionate release instead of dismissing the motion on procedural grounds.

For example, in *United States v. Amarrah*,¹²⁶ Mr. Amarrah sought compassionate release, arguing that he suffered from several chronic health conditions that rendered him susceptible to COVID-19.¹²⁷ He filed an application with the warden, which the warden denied within thirty days.¹²⁸ The Government did not contest that the exhaustion requirement was satisfied, and the court likewise found that Mr. Amarrah had satisfied the statutory requirement by waiting thirty days after providing the warden with his request to file a motion with the court.¹²⁹ The court then addressed the motion's merits, analyzing the extraordinary and compelling reasons, section 3553(a) factors, and any danger Mr. Amarrah posed to the public, ultimately finding that these factors weighed in favor of immediate compassionate release.¹³⁰ Because the court allowed Mr.

No. CR-16-01072-001, 2019 WL 6050264, at *2 (D. Ariz. Nov. 8, 2019)); *United States v. Robinson*, No. 18-cr-00597, 2020 WL 1982872, at *2 (N.D. Cal. Apr. 27, 2020); *United States v. Laureti*, No. 16-60340-CR, 2019 WL 7461687, at *1 (S.D. Fl. Dec. 17, 2019).

125. *E.g.*, *United States v. Peuser*, No. 17CR60, 2020 WL 2732088, at *1 (D. Neb. May 26, 2020); *United States v. Delemus*, No. 16-cr-00046, 2021 WL 2092986, at *2 (D. Nev. May 21, 2021); *United States v. Miller*, No. 16-cr-00269, 2020 WL 113349, at *2 (D. Idaho Jan. 8, 2020); *Weidenhamer*, No. CR-16-01072-001, 2019 WL 6050264, at *4 (D. Ariz. Nov. 8, 2019); *United States v. Brummett*, No. 07-103, 2020 WL 1492763, at *1 (E.D. Ky. Mar. 27, 2020); *United States v. Nance*, No. 92CR00135, 2020 WL 114195, at *2 (W.D. Va. Jan. 10, 2020).

126. 458 F. Supp. 3d 611 (E.D. Mich. 2020).

127. *Id.* at 612–13 (“[Defendant Amarrah] suffers from the following chronic health conditions: Type II diabetes, hypertensive heart disease, cardiac arrhythmia, obstructive sleep apnea, and asthma.”).

128. *Id.* at 615.

129. *Id.*

130. *Id.* at 615–20.

Amarrah to circumvent the BOP's administrative appeals process, Mr. Amarrah's release was significantly expedited.

Of course, a court will not always grant a motion for compassionate release just because it does not deny the motion on procedural grounds. An obvious consequence of adopting an interpretation that allows a court to reach the merits is that a court may deny the motion on its merits. Like in *Amarrah*, in *United States v. Ruelas-Payan*,¹³¹ Mr. Ruelas-Payan sought compassionate release, arguing that his underlying medical conditions made him susceptible to COVID-19 complications.¹³² The court found that he met the exhaustion requirement because he filed his motion more than thirty days after he submitted his request to the warden.¹³³ However, unlike in *Amarrah*, the court here found that extraordinary and compelling reasons did not exist. The court noted that any risk of complications was significantly reduced by the fact that he had been fully vaccinated and that his underlying conditions appeared to be well-managed.¹³⁴

2. *Other District Courts Require Prisoners to First Exhaust Administrative Remedies Within BOP Before Filing with Court After Warden's Timely Denial*

Other district courts have adopted a stricter approach that requires prisoners to jump through more hurdles within the BOP before letting them have their day in court. These courts have interpreted the language to provide that, if the warden responded to the request within thirty days of receipt, the defendant must exhaust administrative remedies with the BOP before filing a motion to the court. Under this interpretation, *only* the warden's failure to respond within thirty days can trigger the prisoner's immediate initiation of a court proceeding. If, however, the warden denies the request within thirty days, the prisoner must first go through the BOP appeals process¹³⁵ before bringing a motion to the court. Failure to go

131. No. CR17-0229, 2021 WL 5847587 (W.D. Wash. Dec. 9, 2021).

132. *Id.* at *3.

133. *Id.* at *2.

134. *Id.* at *4.

135. When a prisoner's request is denied by the warden, the prisoner will receive a written notice and a statement of denial. The prisoner may appeal this denial of the Regional Director within twenty calendar days of the date of the warden's response. A prisoner who is not satisfied with the Regional Director's response may submit an appeal to the General Counsel within thirty calendar days of the Regional Director's date of response. The General Counsel's denial constitutes a final administrative decision. 28 C.F.R. § 542.15 (2017); FED. BUREAU PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT: COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) 15 (Jan. 17, 2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [<https://perma.cc/2PT6-ZRZR>].

through the appeals process will result in the court dismissing the motion on procedural grounds, often without examining its merits.

To illustrate, in *United States v. Van Sickle*,¹³⁶ Mr. Van Sickle sought compassionate release on the grounds that he suffered from medical conditions that qualify as risk factors for COVID-19.¹³⁷ He filed a request with the warden of his facility and received a denial within thirty days.¹³⁸ The response advised Mr. Van Sickle that, if he was not satisfied with the result, he could appeal the decision via the administrative remedy process by submitting his concerns on the appropriate form within thirty days of receiving the denial.¹³⁹ The response also informed him that “an appeal would take approximately six months, and if he was concerned about his health he should immediately file with the [c]ourt.”¹⁴⁰ Although the government conceded that Mr. Van Sickle had exhausted his administrative remedies and that the present motion was properly before the court, the court found otherwise.¹⁴¹ Acknowledging the bureaucratic delay that the administrative appeal would create and the differing interpretations of section 3582(c)(1), the court nevertheless found that Mr. Van Sickle had failed to exhaust his administrative remedies.¹⁴² The court noted that the warden’s timely written denial clearly stated Mr. Van Sickle’s right to an administrative appeal and the procedures for filing the appeal and that he thus “ignored those instructions at his peril.”¹⁴³ The court emphasized that section 3582(c)(1) “does not allow a defendant to short-circuit the BOP’s administrative procedures simply by waiting 30 days after filing the request if the warden timely acted on the request.”¹⁴⁴ Relying on a plain meaning interpretation, the court further noted that “lapse” in this context clearly means that the warden must fail to respond to the defendant’s request within thirty days.¹⁴⁵ The court thus denied Mr. Van Sickle’s motion without considering whether or not his medical conditions, in light of the pandemic, constituted an extraordinary and compelling reason to grant compassionate release.

Similarly, in *United States v. Smith*,¹⁴⁶ Mr. Smith sought compassionate

136. No. 18-0250, 2020 WL 3962225 (W.D. Wash. Jul. 13, 2020).

137. *Id.* at *1.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at *2.

142. *Id.* at *1, 2–3.

143. *Id.* at *3.

144. *Id.* at *2–3.

145. *Id.* at *2.

146. No. 15-cr-19, 2020 WL 2063417 (N.D. Ohio Apr. 29, 2020).

release because of his age (sixty-nine years) and health conditions (heart disease and diabetes).¹⁴⁷ He filed a supplemental motion arguing that these characteristics put him at a higher risk of contracting COVID-19.¹⁴⁸ The court denied Mr. Smith's original and supplemental motions, finding that he failed to fully exhaust his administrative remedies in both instances.¹⁴⁹ With respect to his original motion, the warden had explicitly denied his request for compassionate release, presumably within the thirty-day timeframe, and Mr. Smith had failed to appeal the denial.¹⁵⁰ Regarding his supplemental motion, the court found that Mr. Smith had failed to demonstrate that thirty days had passed without a response from the warden.¹⁵¹ Thus, as in *Van Sickle*, the court denied Mr. Smith's motions for compassionate release solely on procedural grounds and without determining whether or not Mr. Smith qualified for compassionate release.¹⁵²

III. DISTRICT COURTS SHOULD ADOPT THE APPROACH USED IN *AMARRAH*

Unless and until Congress clarifies the language in section 3582(c)(1)(A), district court judges should allow a prisoner to file a motion after thirty days have passed from the warden's receipt of a prisoner's request, even when the warden timely denies the request. At the most basic level, this reading aligns with the plain meaning of the statutory text. Additionally, this reading aligns with the FSA's purpose of reducing the number of federal prisoners. Finally, this allows courts to quickly reach the merits of the case, which is important in light of the pandemic and the need to reduce the number of incarcerated individuals, many of whom are well advanced in age and nonviolent offenders. Allowing courts to reach the merits of these motions also returns sentencing discretion back to judges, who are better suited to make sentencing judgments than prosecutors.

A. *The Plain and Literal Meaning of the Text Supports Approach Used in Amarrah*

The plain meaning of the statute supports an interpretation more lenient

147. *Id.* at *1.

148. *Id.*

149. *Id.* at *2.

150. *Id.*

151. *Id.*

152. *Id.* at *1, 4.

to the defendant. A basic principle of statutory interpretation is that courts should “give effect, if possible, to every clause and word of a statute, avoiding . . . any construction which implies that the legislature was ignorant of the meaning of the language it employed.”¹⁵³ Under the “plain meaning” rule, where the statutory language is unambiguous, a court should not go beyond that meaning in interpreting the statute.¹⁵⁴

Although this split in interpretation suggests ambiguity in the statutory language, section 3582(c)(1)(A)’s language is clear on its face. It provides that a defendant can petition the court “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf *or* the lapse of 30 days from the *receipt* of such request, whichever is earlier.”¹⁵⁵ The presence of the conjunction “or” indicates that a prisoner has two *alternative* timeframes for obtaining direct judicial relief: (1) after exhaustion of administrative appeals within the BOP or (2) after thirty days from the warden’s receipt of a prisoner’s request to bring a motion for compassionate release. The text does not suggest that the latter option requires exhaustion of administrative remedies; rather, these are two distinct routes prisoners can take to obtain direct relief from the court. Moreover, nothing in the statutory text limits the latter option to a warden’s failure to respond; rather, “the clock runs from the Warden’s ‘receipt’ of the request.”¹⁵⁶ An alternate reading allowing the prisoner to seek judicial relief only if the warden had not responded after thirty days is “unmoored from the statutory text.”¹⁵⁷

B. The FSA Envisions Increased Use of Compassionate Release

This reading also aligns with the FSA’s purpose. The FSA was enacted to address mass incarceration by reducing the size of the federal prison population and increasing the use of compassionate release.¹⁵⁸ Congress recognized the BOP was underutilizing the compassionate release mechanism that was first created under the SRA and amended section 3582(c)(1) to allow prisoners to bring motions on their own behalf.¹⁵⁹ The BOP’s underutilization of compassionate release was not

153. *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

154. *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1121 (9th Cir. 2011).

155. 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

156. *See United States v. Somerville*, 463 F. Supp. 3d 585, 592 (W.D. Pa. 2020).

157. *Id.*

158. *See An Overview of the First Step Act*, *supra* note 89; *see also United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa Oct. 8, 2019).

159. *See An Overview of the First Step Act*, *supra* note 89.

only due to bureaucratic delays and the BOP's failure to timely respond to requests but also because the BOP interpreted the "extraordinary and compelling" standard so narrowly that it was denying requests to all but those who were terminally ill.¹⁶⁰ Requiring prisoners to exhaust remedies within the BOP overlooks the fact that compassionate release is also underutilized in large part because the BOP—using its narrow interpretation of the standard—ultimately rejects most of these requests at some point in the administrative process.¹⁶¹ Unlike the BOP, courts have exercised their discretion to read the "extraordinary and compelling" language more broadly and have extended relief to prisoners that have shown remarkable rehabilitation and/or have medical conditions linked to COVID-19 complications.¹⁶² And although some courts have commented that it seems odd that Congress would allow a defendant to avoid the BOP's administrative procedures by simply waiting thirty days after filing a request,¹⁶³ the FSA's purpose suggests that this method of bypassing the BOP is not odd at all but rather exactly what Congress intended.¹⁶⁴

Moreover, nearly every circuit court has held that the Sentencing Commission's policy statement regarding what constitutes an "extraordinary and compelling" reason for compassionate release is not binding on motions filed by prisoners under the FSA.¹⁶⁵ In reaching this conclusion, these courts recognized the FSA's purpose: expanding and expediting compassionate release motions rarely brought by the BOP.¹⁶⁶

160. See *Berry III*, *supra* note 79, at 852.

161. See *Blakinger & Neff*, *supra* note 104.

162. See, e.g., *United States v. Brown*, 457 F. Supp. 3d 691, 701, 704 (S.D. Iowa 2020) (granting compassionate release where "model inmate" defendant suffered from pain post-leg surgery, hypertension, migraines, sleep apnea); *United States v. Arreola-Bretado*, 445 F. Supp. 3d 1154 (S.D. Cal. 2020) (granting compassionate release where defendant had tested positive for COVID-19 and suffered from paroxysmal atrial fibrillation, cardiac murmur, an enlarged liver, and other serious medical conditions that heightened defendant's risk of grave COVID-19 complications); *United States v. Heffington*, 476 F. Supp. 3d 1042 (E.D. Cal. 2020) (granting compassionate release where defendant was seventy-five years old and suffered from various serious medical conditions that placed him at higher risk of becoming seriously ill if infected by COVID-19); *Miller v. United States*, 453 F. Supp. 3d 1062 (E.D. Mich. 2020) (granting compassionate release where defendant's chronic lung disease, serious heart condition, and liver disease put him at higher risk of serious illness from COVID-19).

163. *United States v. Miller*, No. 16-cr-00269, 2020 WL 113349, at *2 (D. Idaho Jan. 8, 2020).

164. See, e.g., *United States v. Carter*, 469 F. Supp. 3d 583, 587 (S.D. W. Va. 2020) ("[T]he statutory requirements a defendant must meet before petitioning the courts cannot be divorced from the purpose of compassionate release. . . . The context of the statute . . . is to address exigent and urgent situations. An unlimited timeframe for the administrative exhaustion process frustrates the purpose of the statute.").

165. U.S. SENT'G COMM'N, *supra* note 56, § 1B1.13.

166. See, e.g., *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa Oct. 8, 2019) ("[The

These circuit court decisions signal deference to Congress and demonstrate the approach that courts should take in addressing this present and remarkably similar issue—they should rule in favor of an interpretation that encourages more compassionate release filings, not less.

C. *By Reaching the Merits, Judges Can Exercise Their Discretion in Determining Whether Prisoner’s Health Conditions in Light of COVID-19 Pandemic and Prisoner’s Low Risk to Society Warrant Early Release*

Additionally, this reading of the statute allows courts to reach the merits of the case, which is especially important during the pandemic and the ongoing uncertainty with new variants. Overcrowding, poor sanitary conditions, and lack of access to healthcare exacerbate the risk and harms of a COVID-19 infection.¹⁶⁷ Many federal prisoners are over sixty years old and thus especially vulnerable to developing serious complications from COVID-19.¹⁶⁸ Moreover, many of these aging prisoners are incarcerated for non-violent drug offenses and are not a serious risk to society.¹⁶⁹ For example, unlike those who might be selling drugs for profit as part of large conspiracies—activities more likely to involve large quantities of money, dangerous firearms, and violence—many prisoners are low-level offenders who use and trade small quantities of drugs merely to support a medical addiction.¹⁷⁰ But because of bureaucratic delays with the BOP, prisoners who are otherwise eligible for compassionate release may die waiting for responses.¹⁷¹ Even when the BOP does respond to a request within the thirty-day window, the appeals mechanism can take months, time that prisoners often cannot afford.¹⁷²

Opponents might point to the fact that, even if the courts reached the case’s merits, many courts have denied motions that argue the pandemic and underlying health conditions constitute an extraordinary and

FSA] amends numerous portions of the U.S. Code to . . . unwind decades of mass incarceration. . . . The provision allows defendants, for the first time, to petition district courts directly for compassionate release. Under the old regime, defendants could petition only the [d]irector of the [BOP], who could then make a motion, at her discretion, to the district court. The [d]irector rarely did so.”) (internal citations omitted).

167. See sources cited *supra* note 108.

168. See *Inmate Statistics: Inmate Age*, *supra* note 22.

169. See Cullen, *supra* note 59; see also Morning Edition, *supra* note 59.

170. See STEMEN, *supra* note 29; Morning Edition, *supra* note 59.

171. See Blakinger & Neff, *supra* note 104.

172. See *United States v. Van Sickle*, No. 18-0250, 2020 WL 3962225, at *2–3 (W.D. Wash. July 13, 2020).

compelling reason ever since the widespread availability of COVID-19 vaccines and booster shots.¹⁷³ However, other courts have acknowledged the pandemic's dynamic and unpredictable future trajectory and remain willing to consider these motions in spite of prisoners' vaccination status.¹⁷⁴ While so much remains in flux, it is crucial for vulnerable prisoners to have access to the courts instead of having to face administrative hurdles and stonewalling from the BOP.¹⁷⁵

D. More Judicial Discretion Is Better

Finally, the *Amarrah* approach returns more sentencing discretion to the courts. The SRA eroded the discretion courts once had in sentencing.¹⁷⁶ Behind the Sentencing Guideline's veneer of objectivity is a system that too often directs judges to impose excessive sentences, which has contributed to the tragedy of mass incarceration.¹⁷⁷ Returning to an era of greater judicial discretion in sentencing allows judges to account for the rehabilitative potential of the offender. Although opponents might argue that this would return us to a time where people in similar situations get different sentences, mandatory minimums create unwarranted uniformity by treating everyone alike even though their situations are dramatically different.¹⁷⁸ For example, one defendant could be selling drugs for profit and another could be using and trading drugs for an addiction, or one defendant could show remorse whereas another could show none at all. The Sentencing Guidelines fail to account for these differences.¹⁷⁹ Moreover, there is little indication that SRA's changes have actually reduced unwanted discrepancies in sentencing; discrepancies between defendants of different races convicted of similar

173. *E.g.*, *United States v. Adams*, No. CR14-0181, 2021 WL 2073389, at *1 (W.D. Wash. May 24, 2021); *United States v. Ramirez-Jimenez*, No. 13-cr-00694, 2021 WL 6126929, at *2 (N.D. Cal. Dec. 28, 2021); *United States v. Sosa*, No. 14-cr-468-1, No. 18-cr-128-13, 2022 WL 1690833, at *3 (S.D.N.Y. May 26, 2022); *United States v. Mills*, No. 18-cr-128-13, 2022 WL 1292270, at *4 (S.D. Ohio Apr. 29, 2022).

174. *E.g.*, *United States v. Mansourov*, No. 17-cr-164, 2021 WL 6063235, at *3 (D. Conn. Dec. 22, 2021); *United States v. Crockett*, No. ELH-18-166, 2022 WL 2116846, at *15 (D. Md. June 13, 2022).

175. *See, e.g.*, *United States v. Carter*, 469 F. Supp. 3d 583, 587 (S.D. W. Va. 2020) (adopting same reading of statute as in *Amarrah*, recognizing that “[p]rompt judicial determination may be critical in the age of the COVID-19 pandemic”).

176. *See supra* section I.0–C.0.

177. *See supra* section I.C.0.

178. *See* Gleeson, *supra* note 60, at 324 (“Mandatory sentencing provisions dehumanize defendants, as does a guidelines regime that creates the illusion, by establishing a labyrinthine calculus that quantifies countless factors, that sentencing is some kind of science. Our clients are three-dimensional human beings . . .”).

179. *See* Morning Edition, *supra* note 59.

offenses persist.¹⁸⁰ In other words, while we have tried to remove inconsistencies in areas where nuance matters, inconsistencies remain where they should not.

Some opponents might simply be wary of giving judges more discretion. But the reality is that someone will always hold that discretion. Any sentencing system, no matter how seemingly uniform and precise, must be administered by individuals who exercise judgment concerning facts and law. The question is therefore whether we prefer that discretion to be vested, as it is now, with federal prosecutors whose decision-making occurs privately and largely unchecked or with judges who must explain their decision-making to the public and undergo public scrutiny and appellate review.¹⁸¹

Opponents may argue that this approach would flood our courts with cases. But our courts are already reviewing these cases because of the existing ambiguity in the statutory language. This approach would instead improve judicial efficiency by requiring courts to rule on the merits the first time the motion reaches the courts. Because many courts will often not examine more than is necessary to reach a decision, the alternative approach would send the prisoner back for exhaustion within the BOP, which would likely ultimately deny the prisoner's request.¹⁸² Thus, this case would eventually return to the court for a resolution to the same issue. The only difference would be that the case would return after a significant delay that could prove fatal to a vulnerable prisoner.¹⁸³

CONCLUSION

Concerns about disparities in sentencing led to reforms that contributed to our current mass incarceration crisis. This development has in turn led to efforts towards reducing the prison population. The compassionate release mechanism is a method that can and should be used to address this problem; unfortunately, this mechanism has not been used to its full potential. The FSA and the current pandemic present courts with new opportunities to fully utilize compassionate release. To do so, courts must adopt a reading of the compassionate release statute that allows prisoners to file a motion for compassionate release with the court thirty days after a warden's receipt of the request, irrespective of whether the warden acted upon the request within that timeframe. This interpretation is not only more faithful to the statute's text and legislative intent, but it will also

180. See Heaney, *supra* note 60.

181. See Van Meter, *supra* note 60.

182. See Berry III, *supra* note 79.

183. See Thompson, *supra* note 85.

allow courts to quickly reach the merits of and hopefully grant more motions for compassionate release. While this solution alone is unlikely to solve our mass incarceration crisis, it will certainly be a step in the right direction.