WHEN COMPASSION MEETS THE LAW: SENTENCING DISPARITIES AS EXTRAORDINARY AND COMPELLING REASONS WARRANTING COMPASSIONATE RELEASE

JESSICA L. LEACH*

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I. INTRODUCTION

After Congress passed the First Step Act in 2018,[1] federal inmates flooded the courts with compassionate release motions.[2] And, although precedent interpreting the statute exists at the appellate level, many questions remain. Notably, courts are divided over what constitutes an "extraordinary and compelling circumstance" for purposes of an early release.[3] This confusion arises from a statutory anomaly: under the old law, only a Director of the Bureau of Prisons ("BOP") could file a motion for compassionate release.[4] Unsurprisingly, these Directors rarely filed motions on federal inmates' behalf.[5] As a result, Congress enacted the First Step Act. This new law empowered federal inmates to circumvent the BOP Directors and file motions directly with a federal district court.[6] This new feature is where the anomaly occurred.

Although Congress updated the law, the Sentencing Commission failed to update the corresponding policy statement defining the "extraordinary and compelling circumstance" categories.[7] This resulted in the existing policy statement being inapplicable to compassionate release motions filed by federal inmates.[8] The peculiar phrasing of the statement, when paired with the new law, resulted in applying the pre-defined "extraordinary and compelling circumstance" categories if and only if a

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[1] *An Overview of the First Step Act*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp (last visited Oct. 15, 2021).

[2] This note will use the informal name, "compassionate release" or "compassionate release motion," throughout when referring to "Motions for Sentence Reduction" under 18 U.S.C. § 3582(c)(1)(A).

[3] *See, e.g.*, United States v. Fine, 982 F.3d 1117, 1118 (8th Cir. 2020) ("The law is unsettled in this circuit about what reasons a court may consider extraordinary and compelling" circumstances for compassionate release motions.).

[4] 18 U.S.C. § 3582(c)(1)(A) (2017) (amended 2018).

[5] *See* David Roper, *Pandemic Compassionate Release and the Case for Improving Judicial Discretion over Early Release Decisions*, 33 FED. SENT'G. REP. 27 (2020).

[6] *See How the First Step Act Changed Federal Compassionate Release*, COMPASSIONATE RELEASE, https://compassionaterelease.com/first-step-act-compassionate-release/ (last visited Oct. 15, 2021).

[7] United States v. Long, 997 F.3d 342, 348 (D.C. Cir. 2021) ("The Sentencing Commission has lacked a quorum since early 2019, and so it has been unable to update its preexisting policy statement concerning compassionate release to reflect the First Step Act's changes.").

[8] *See* U.S. Sentencing Guidelines Manual § 1B1.13 (U.S. SENTENCING COMM'N 2018) (stating "[u]pon motion of the Director of the Bureau of Prisons" with no reference to motions brought by federal inmates).

BOP Director filed the motion.[9] As a result, so long as a federal inmate (and not a BOP Director) files the motion, the standard for "extraordinary and compelling circumstances" is discretionary—meaning judges have the power to ignore the categorical restraints.[10] Judges can find extraordinary and compelling circumstances based on what they deem fair, appropriate, and just on a case-by-case basis.[11] Eight of the nation's circuit courts have adopted this interpretation of the law on appeal.[12]

Courts have been generous in granting compassionate release since 2018.[13] This is largely due to courts being able to define extraordinary and compelling circumstances for each case instead of relying on Congress's existing definitions.[14] However, this judge-made standard has given rise to various, and sometimes contradicting, decisions.[15]

This Note will focus on one controversial extraordinary and compelling circumstance that has arisen so far: the treatment of sentencing disparities. A sentencing disparity exists when two different criminals

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[9] *See* United States v. Aruda, 993 F.3d 797, 801 (9th Cir. 2021) ("U.S.S.G. § 1B1.13 only applies to § 3582(c)(1)(A) motions filed by the BOP Director, and does not apply to § 3582(c)(1)(A) motions filed by a defendant [federal inmate].").

[10] *See* United States v. Elias, 984 F.3d 516, 518–20 (6th Cir. 2021) ("[D]istrict courts have discretion to define 'extraordinary and compelling' on their own initiative.").

[11] *See* United States v. Ruffin, 978 F.3d 1000, 1007 (6th Cir. 2020) ("[A] district court may freely identify extraordinary and compelling reasons on its own.").

[12] *See, e.g.*, United States v. Brooker, 976 F.3d 228, 235 (2d Cir. 2020); United States v. McCoy, 981 F.3d 271, 281–82 (4th Cir. 2020); United States v. Shkambi, 993 F.3d 388, 392–93 (5th Cir. 2021); United States v. Jones, 980 F.3d 1098, 1109–11 (6th Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *Aruda*, 993 F.3d at 802; United States v. McGee, 992 F.3d 1035, 1050 (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, 1247–48 (11th Cir. 2021).

[13] *See Department Of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System*, U.S DEP'T OF JUST. (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and (noting that 34 people were granted compassionate release in 2018); *see also First Step Act*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/fsa/ (last visited Nov. 12, 2021) (noting 3,765 compassionate release/reduction in sentences have been granted).

[14] *See Elias*, 984 F.3d at 519–20.

[15] *Compare* United States v. Martinez-Arias, No. 2:11-cr-00598, 2020 U.S. Dist. LEXIS 158691, at *3–4, *6, *7–8 (S.D. Tex. Sept. 1, 2020) (finding no extraordinary circumstance for a 58-year-old inmate suffering from diabetes, hypertension, and high cholesterol), *with* United States v. Rodriguez, 451 F. Supp. 3d 392, 394, 405–06, 407 (E.D. Pa. 2020) (finding extraordinary circumstances for an inmate who suffered from diabetes, hypertension, and liver abnormalities).

commit the same crime but one receives a lighter sentence or is held to a lesser standard of personal accountability.[16] Despite these disparities, not all courts agree on whether they are properly considered as an extraordinary and compelling circumstance.

In *United States v. McCoy*, the United States Court of Appeals for the Fourth Circuit held § 924(c) sentencing disparities, when paired with other factors, can constitute extraordinary and compelling circumstances warranting release.[17] Section 924(c) sentencing disparities (or "sentence stacking") refers to the changes made to 18 U.S.C. § 924(c), which "imposes mandatory minimum sentences for using or carrying a firearm in connection with a crime of violence."[18] For the first offense, a five to ten year mandatory minimum is applied; for a subsequent conviction, a consecutive twenty-five year mandatory minimum applies.[19] Thus, the sentences are "stacked" because the time has to be served consecutively (back-to-back) and not concurrently (at the same time).[20]

Prior to 2018, a second conviction triggered the twenty-five year minimum sentence, "even if the first § 924(c) conviction was obtained in the same case."[21] This means it could be a defendant's first time in court, and they could end up receiving thirty or more years for their crimes if they receive two separate convictions in the same case. Under current law, the twenty-five year mandatory minimum applies only when the first conviction arises from a separate case and has already become final.[22] Therefore, somebody would have to commit one crime, be convicted, and then commit a second crime before the twenty-five year consecutive mandatory minimum would apply. The practical effect of this change is a defendant sentenced in 2017 could have received thirty or more years for their crimes when they would have received only five to ten years if sentenced today. This is the type of disparity that the *McCoy* court found

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[16] *See, e.g.*, United States v. Vowell, 516 F.3d 503, 513 (6th Cir. 2008) (showing higher sentences between co-conspirators as reasonable, and noting statutes try to steer away from different sentences for co-defendants with similar records and who were convicted of similar crimes); *see also Sentencing*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/sentencing (last visited Nov. 12, 2021) (Sentencing disparities are those where "criminals receive[] very different sentences for the same crime.").

[17] *McCoy*, 981 F.3d at 274.

[18] *Id.* at 275.

[19] *Id.*

[20] *See id.*

[21] *Id.*

[22] *Id.*

could be an extraordinary and compelling circumstance.[23] However, not all courts may agree.

In a short opinion in *United States v. Fine*, the United States Court of Appeals for the Eighth Circuit held that a challenge to a career offender determination based on a change in law could not be properly considered as an extraordinary and compelling circumstance because it was an improper successive motion to vacate, set aside, or correct a sentence.[24] A defendant is a career offender if they are at least eighteen years old at the time the offense is committed, the instant offense is a felony "that is either a crime of violence or a controlled substance offense," and the defendant has at least two prior convictions of "either a crime of violence or a controlled substance offense."[25] If a defendant is classified as a career offender, their criminal history is automatically enhanced to a category VI and their offense level is categorized "at or near the statutory maximum penalty of the offense of conviction," which ultimately lengthens the amount of time that a defendant will receive.[26]

An example of a change in law that has affected the career offender determination is how prior felony convictions (convictions resulting in imprisonment exceeding one year) are assessed. Previously, the determination of whether an offense was a felony required looking at the highest sentence that an offender with the worst possible criminal record could have received under the statute of conviction.[27] Today, the potential term of imprisonment is calculated by using the offender's specific felony classification and prior record level.[28] Therefore, defendants who were evaluated under the old rule could have received the career offender enhancement even though they would not receive that enhancement if sentenced today. This ultimately creates a sentencing disparity between the sentence the defendant received and what the court would determine is fair and just under today's law.

Both *McCoy* and *Fine* involved changes in law that would substantially change the defendant's sentences if sentenced today, but

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[23] *Id.* at 286.

[24] United States v. Fine, 982 F.3d 1117, 1118–19 (8th Cir. 2020).

[25] 18 U.S.C. app. § 4B1.1(a).

[26] *Career Offenders*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf (last visited Oct. 14, 2021).

[27] United States v. Harp, 406 F.3d 242, 246 (4th Cir. 2005).

[28] United States v. Simmons, 649 F.3d 237, 240 (4th Cir. 2011).

McCoy and *Fine* came to differing conclusions when evaluating extraordinary and compelling circumstances for compassionate release. This dichotomy leads to several questions: Which sentencing disparities, if any, may constitute extraordinary and compelling circumstances warranting early release? Can *McCoy* and *Fine* be reconciled by focusing on the specific type of disparity? Does the *McCoy* opinion leave the door open for courts within the Fourth Circuit to consider other types of sentencing disparities in addition to § 924(c) disparities? These are the types of questions this Note considers.

This Note will argue that *McCoy* stands for the proposition that all sentencing disparities resulting from non-retroactive law changes may be considered as an extraordinary and compelling circumstance supporting compassionate release. Moreover, consideration of a sentencing disparity should not constitute an improper motion to vacate, set aside, or correct a sentence despite the Eighth Circuit's decision in *Fine*.

Part II of this Note will provide background on compassionate release, focusing on requirements since the passage of the First Step Act in 2018. It will also explain the requirements and differences between an 18 U.S.C. § 3582(c)(1)(A) Motion for Compassionate Release and a 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct a Sentence. Part III will explain the guidance on sentencing disparities provided by the Fourth Circuit decision in *United States v. McCoy*, and compare that decision to the Eighth Circuit decision in *United States v. Fine*. Finally, Part IV will discuss the possible implications arising from the differing opinions in *McCoy* and *Fine*, and Part V will provide a recommendation to the Sentencing Commission to include sentencing disparities as an example of extraordinary and compelling circumstances supporting compassionate release.

II. BACKGROUND

A. History on Compassionate Release Prior to the First Step Act of 2018

The statute authorizing compassionate release, as it exists today, was first enacted as part of the Comprehensive Crime Control Act of 1984.[29] Unlike the current law, the original statute gave the BOP exclusive power

[29] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976, 1998–99 (1984).

over all avenues of compassionate release.[30] For over thirty years, any motion for compassionate release had to be brought before the court by a Director of the BOP.[31] The BOP used this power sparingly, as evidenced by a 2013 report from the Office of the Inspector General that revealed, on average, only twenty-four incarcerated people per year were released between 2006 and 2011 following motions for compassionate release made by a BOP Director.[32] The Inspector General report concluded that the BOP did "not properly manage the compassionate release program," that its "implementation of the program [was] inconsistent and result[ed] in ad hoc decision making," and that it "ha[d] no timeliness standards for reviewing requests."[33] These failures were not without consequence. Of the 208 people whose release requests were approved by both a warden and a BOP Director between 2006 and 2011, 13% died while waiting for the BOP Director to bring a motion on their behalf.[34]

As a result of the Inspector General report and criticism by numerous commentators, the BOP revamped portions of its compassionate release procedures, which included expanding the population it would consider eligible for release to people over the age of sixty-five who had served a significant portion of their sentences.[35] In the first thirteen months after these changes, eighty-three people were granted compassionate release.[36] However, those eighty-three people were still only a small part of a potential release pool of over 2,000 people who met the BOP's revised criteria of being over sixty-five and having served at least half of their sentence.[37]

The Sentencing Commission also played a role in compassionate release standards. The Sentencing Reform Act of 1984 assigned the task

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[30] *See* 18 U.S.C. § 3582(c)(1)(A) (2017) (amended 2018).

[31] *Id.*

[32] U.S. Dep't of Just. Off. of the Inspector Gen., *The Federal Bureau of Prisons' Compassionate Release Program* 1 (2013), https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf.

[33] *Id.* at 11.

[34] *Id.*

[35] *See* U.S. Dep't of Just. Off. of the Inspector Gen., *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sent'g Comm'n* 4 (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf.

[36] *Id.*

[37] *Id.*

of defining the phrase "extraordinary and compelling circumstances" to the Sentencing Commission.[38] Specifically, the Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[39] Although the Sentencing Reform Act was passed in 1984,[40] it was not until 2006 that the Commission finally acted on this mandate and issued a policy statement known as Guideline § 1B1.13 ("policy statement").[41] At first, this policy statement did not define "extraordinary and compelling reasons," but instead, it stated in an application note only that "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of [the policy statement]."[42]

The following year, however, the Commission updated that policy statement to explain that extraordinary and compelling reasons for a sentence reduction exist if the defendant (1) "is suffering from a terminal illness," (2) is experiencing a significant decline related to the aging process that would make him unable to care for himself within a prison, or (3) upon "the death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children."[43] Thus, the Sentencing Commission expressly identified an inmate's health, age, and family circumstances as factors that may amount to "extraordinary and compelling circumstances" when assessing a motion for compassionate release. This 2007 policy statement amendment also introduced what has come to be known as the "catch-all clause."[44]

Under the "catch-all clause," compassionate release is warranted if, "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in [the other parts of the Guideline]."[45] By 2018, when the latest amendment to the policy statement was made, the Sentencing Commission expanded its definition of

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[38] United States v. Ruffin, 978 F.3d 1000, 1004 (6th Cir. 2020).

[39] 28 U.S.C. § 994(t) (1984).

[40] *See id.*

[41] *See* U.S. Sentencing Guidelines Manual § 1B1.13 (U.S. SENTENCING COMM'N 2006).

[42] *Id.* § 1B1.13 n.1(A).

[43] *Id.* § 1B1.13 n.1(A)(i)–(iii) (U.S. SENTENCING COMM'N 2007).

[44] *Id.* § 1B1.13 n.1(D).

[45] *Id.*

extraordinary and compelling circumstances to cover more events relating to the traditional categories of the imprisoned person's health, age, or family circumstances.[46] This included giving examples of what constitutes a terminal illness (such as metastatic solid-tumor cancer, end-stage organ disease, and advanced dementia)[47] and adding a family circumstance (where the defendant's spouse becomes incapacitated and the defendant is the only available caregiver for the spouse).[48] The Commission also clarified that such circumstances did not have to be unforeseen at the time of sentencing.[49]

B. The First Step Act of 2018: A Brief Overview and the Significant Changes it Brought to Compassionate Release Motions[50]

It was against this backdrop that Congress passed the First Step Act in December 2018.[51] Among numerous other reforms, the First Step Act made the first major changes to compassionate release since its beginnings in 1984.[52] Chief among these changes was the removal of the BOP as the sole gatekeeper of compassionate release motions.[53] While the BOP Director is still given the first opportunity to decide whether to bring a compassionate release motion, a defendant now has recourse if the BOP either declines to support or fails to act on that defendant's motion.[54] As the Act states, a defendant may go straight to the federal district 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 a request by the warden of the defendant's facility, whichever is earlier."[55]

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[46] *See id.* § 1B1.13 n.1 (U.S. SENTENCING COMM'N 2018).

[47] *See id.* § 1B1.13 n.1(A)(i).

[48] *See id.* § 1B1.13 n.1(C)(ii).

[49] *See id.* § 1B1.13 n.2.

[50] This note is focusing predominantly on the portion of the First Step Act that modified the requirements for § 3582(c)(1)(A) Motions for Compassionate Release. *See* 18 U.S.C. § 3582(c)(1)(A) (2018).

[51] *See An Overview of the First Step Act*, *supra* note 1.

[52] *See* Nina Ginsburg, *From the President: Compassionate Release: The Nuts and Bolts*, NACDL: THE CHAMPION (Mar. 5, 2020), https://nacdl.medium.com/from-the-president-compassionate-release-the-nuts-and-bolts-e3406408f644.

[53] *See* 18 U.S.C. § 3582(c)(1)(A) (2018) ("[O]r upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal . . . .").

[54] *Id.*

[55] *Id.*

One co-sponsor of the First Step Act described this provision as both "expand[ing]" and "expedit[ing]" compassionate release.[56] Another representative stated that the First Step Act was "improving application of compassionate release."[57] Sentiments like these were so widely shared that Congress titled this portion of the First Step Act, "Increasing the Use and Transparency of Compassionate Release."[58]

Though seemingly only procedural in its modification of who may bring a compassionate release motion, this change quickly resulted in significant substantive consequences. In 2018, only thirty-four people received compassionate release or sentence reductions.[59] In the almost four years since enactment of the First Step Act, over 3,750 motions for compassionate release or sentence reduction have been granted.[60]

C. § 3582(c)(1)(A) Motions for Compassionate Release: Requirements

Section (c)(1)(A) of 18 U.S.C.S. § 3582 is the portion of the First Step Act relevant to motions for compassionate release. It states, in the relevant part, that:

> [t]he court may not modify a term of imprisonment once it has been imposed except that . . . the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant 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 a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) . . . to the extent that they are applicable, if it finds that—(i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.][61]

Regarding the last requirement, and as mentioned above in Part II.A, the Sentencing Commission is required to develop "general policy statements regarding application of the guidelines or other aspects of sentencing . . . that in the view of the Commission would further the

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[56] 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin).

[57] 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

[58] *See* First Step Act of 2018, Pub. L. 115-391 § 603(b), 132 Stat. 5194, 5239.

[59] *See Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System*, *supra* note 13.

[60] *See First Step Act*, *supra* note 13.

[61] 18 U.S.C. § 3582(c)(1)(A) (2018).

purposes [of sentencing]" under 18 U.S.C. 3553(a).[62] Section 3553(a) lists "sentencing factors" such as the nature and circumstances of the offense, the history and characteristics of the defendant, whether a sentence reduction would properly reflect the seriousness of the offense, and whether the public would be protected from further crimes of the defendant if released.[63] The Commission must include the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c), which is the section about compassionate release.[64] In doing so, it is authorized to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[65]

Before the enactment of the First Step Act, the Sentencing Commission created a policy statement describing what should be considered as extraordinary and compelling reasons for sentence reduction.[66] However, this policy statement started with, "[u]pon motion of the Director of the Bureau of Prisons," so it seemingly did not apply to motions brought by federal inmates.[67] Since the enactment of the First Step Act, the Commission has not yet amended the applicable policy statement to coincide with the new language allowing federal inmates to bring motions on their own behalf.[68] This has caused circuit courts across the country to conclude that there is currently no applicable policy statement governing compassionate release motions filed by federal inmates,[69] and that courts are free to define extraordinary and compelling circumstances as they see fit.[70] Thus, because the requirement to follow an applicable policy statement is seemingly moot, circuit courts have determined the requirements for compassionate release—specifically for motions filed by defendants—are as follows: (1) exhaustion of administrative remedies, (2) extraordinary and compelling reasons warranting a sentence reduction, and (3) the § 3553(a) sentencing factors weigh in favor of release.[71]

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[62] 28 U.S.C. § 994(a)(2) (2006).

[63] *See* 18 U.S.C. § 3553(a)(1)–(7) (2018).

[64] 28 U.S.C. § 994(a)(2)(C).

[65] *Id.* § 994(t).

[66] *See* U.S. Sentencing Guidelines Manual § 1B1.13 (U.S. SENTENCING COMM'N 2018).

[67] *Id.*

[68] *See* United States v. Brooker, 976 F.3d 228, 233–34 (2d Cir. 2020).

[69] This is not the opinion of all courts across the country. For example, *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) disagrees with this view and remains persuaded that section 1B1.13's substantive provisions apply to Section 3582(c)(1)(A) motions.

[70] *See, e.g.*, United States v. Long, 997 F.3d 342, 355 (D.C. Cir. 2021) (collecting cases).

[71] *See, e.g.*, Unites States v. Jones, 980 F.3d 1098, 1105–106 (6th Cir. 2020).

D. § 2255 Motions to Vacate, Set Aside, or Correct a Sentence: Requirements

28 U.S.C.S. § 2255 was created to provide "an expeditious remedy for correcting erroneous sentences [of federal prisoners] without resort to habeas corpus."[72] Section (a) of 28 U.S.C.S. § 2255 lays out the general procedure that a prisoner must take in order to vacate, set aside, or correct a sentence:

> (a) [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.[73]

There is a one-year period of limitation on motions filed under this section.[74] The only way a prisoner can bring a motion to vacate, set aside, or correct a sentence outside of the one-year period is if the motion is certified by a panel of the appropriate court of appeals to contain either:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
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> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[75]

One purpose of § 2255 is to provide a remedy for constitutional errors and for violations of federal law.[76] The statute is not intended to address "every error that may have been made in proceedings leading to conviction."[77] Instead, the statute is meant to address errors or violations that qualify as a "fundamental defect that results in a complete miscarriage of justice."[78]

Motions to vacate, set aside, and correct a sentence differ from compassionate release motions both procedurally and substantively.

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[72] Sanders v. United States, 373 U.S. 1, 12 (1963).

[73] 28 U.S.C. § 2255(a) (2021).

[74] *Id.* § 2255(f).

[75] *Id.* § 2255(h).

[76] Slater v. United States, 38 F. Supp. 2d 587, 589 (M.D. Tenn. 1999).

[77] *Id.*

[78] *Id.*

Prisoners are limited in the time frame in which they are permitted to file § 2255 motions, and once out of that time frame, they must wait for either new evidence or a retroactive change in law in order to file a motion.[79] On the other hand, motions for compassionate release may be filed at any point in a prisoner's sentence. An overlap between the two types of motions tends to arise, however, when there are changes in law, and the question persists as to whether filing one type of motion is more proper than the other based on a particular change in the law.

III. THE FOURTH CIRCUIT DECISION: *UNITED STATES V. MCCOY* AND ITS COMPARISON TO OTHER FEDERAL DISTRICT AND COURT OF APPEALS DECISIONS

United States v. McCoy was the first published decision on "compassionate release" to come out of the Fourth Circuit since the enactment of the First Step Act.[80] It was published during the influx of motions brought by federal prison inmates at the height of the COVID-19 pandemic—and it was during this time that federal district courts and courts of appeals were working to interpret the new language of § 3582(c)(1)(A) under the First Step Act.[81]

United States v. McCoy consolidated multiple appeals where defendants were "convicted of robberies and accompanying firearms violations under 18 U.S.C. § 924(c)."[82] At the time of the defendants' convictions, sentences under § 924(c) were "stacked," meaning that defendants who were convicted of multiple charges had to serve the sentences consecutively, or back-to-back, instead of simultaneously.[83] "This exposed the *McCoy* defendants to additional mandatory minimums

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[79] 28 U.S.C. § 2255(f), (h).

[80] United States v. McCoy, 981 F.3d 271 (4th Cir. 2020). *United States v. McCoy* was published on December 2, 2020 and was the only published Fourth Circuit decision until the decision in *United States v. Kibble*, 992 F.3d 326 (4th Cir. 2021), which was published on April 1, 2021. The *Kibble* decision does not affect the questions being addressed in this Note.

[81] *See generally, e.g.*, United States v. Brooker, 976 F.3d 228 (2d Cir. 2020); United States v. Franco, 973 F.3d 465 (5th Cir. 2020); United States v. Alam, 960 F.3d 831 (6th Cir. 2020).

[82] *McCoy*, 981 F.3d at 274.

[83] *See What is the Difference Between a Stacked or Consecutive Sentence and a Concurrent Sentence in a Texas Criminal Case?*, PEEK & TOLAND (July 3, 2020), https://www.peekandtoland.com/what-is-the-difference-between-a-stacked-or-consecutive-sentence-and-a-concurrent-sentence-in-a-texas-criminal-case/. For example, if a defendant got convicted of two charges that both had sentences of 15 years each, the defendant would have to serve a total of 30 years instead of doing both 15-year sentence at the same time.

and led to sentences ranging from 35 to 53 years of imprisonment."[84] After the defendants' convictions, however, Congress ended sentence "stacking" under § 924(c).[85] "Today, the defendants' sentences would have been dramatically shorter—in most cases, by 30 years—than the ones they received."[86]

"[R]elying primarily on the length of their stacked sentences and the disparity between their sentences and those that Congress [now] deemed appropriate," the defendants moved for reductions in their sentences under the compassionate release statute.[87] The Fourth Circuit affirmed the district court's grant of release, holding that treating the defendants' former stacked sentences as an "extraordinary and compelling" reason was not inconsistent with any "applicable policy statement" of the Sentencing Commission.[88] The Court pointed to multiple district courts across the country that had reached this same conclusion to support its holding.[89]

The Court considered "two distinct features" of the stacked sentences when applying the extraordinary and compelling reasons standard: (1) "the sheer and unusual length of the sentences," and (2) the "gross disparity between [the sentences received] and the sentences Congress now believes to be an appropriate penalty for the defendants' conduct."[90] The Court concluded, "[w]e think courts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair."[91] However, the Court also made sure to note that the judgment was the product of an individualized assessment of each defendant's sentence—so the decisions were based on the defendants' individual circumstances as well as whether or not the § 3553(a) sentencing factors weighed in their favor.[92]

The decision in *McCoy* has led district courts in the Fourth Circuit to determine that sentencing disparities, generally, could now be considered extraordinary and compelling circumstances warranting release. However,

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[84] *McCoy*, 981 F.3d at 274.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 275.

[89] *See id.* at 285 (collecting cases).

[90] *Id.*

[91] *Id.* at 285–86.

[92] *Id.* at 286.

that determination is potentially limited to the Fourth Circuit in light of another court of appeals decision from the Eighth Circuit.

In *United States v. Fine*, the defendant pled guilty to multiple drug charges.[93] At sentencing, it was determined the defendant qualified as a career offender under the Sentencing Guidelines based on two prior convictions that qualified as "controlled substance offenses."[94] Using the career offender enhancement, which lengthens the recommended sentence by increasing both the defendant's criminal history category and offense level, the defendant was sentenced to 293 months' imprisonment.[95] After serving roughly five years in prison, the defendant moved to reduce his sentence, in part, based on his incorrect classification as a career offender under the Guidelines.[96] When the defendant was sentenced, one of his prior drug convictions qualified as a "controlled substance" offense for purposes of the career offender enhancement; under current law, however, the offense would no longer be considered a "controlled substance" offense.[97] The Eighth Circuit determined that the defendant was ultimately challenging his sentence, which should be done through a § 2255 motion to vacate, set aside, or correct a sentence and not a § 3582(c)(1)(A) motion for compassionate release.[98] The *Fine* court noted that the law is "unsettled in this circuit about what reasons a court may consider extraordinary and compelling" circumstances for compassionate release motions, but reasoned, "an intervening change in the law does not take a motion outside the realm of § 2255 when it seeks to set aside a sentence."[99]

The decisions in *McCoy* and *Fine* could potentially be reconciled because the Fourth Circuit focused on changes in § 924(c) sentence stacking and the Eighth Circuit focused on changes in career offender status. However, that does not account for the fact that the Eighth Circuit said an intervening change in law is not properly considered under a § 3582(c)(1)(A) motion for compassionate release. Indeed, the abolishment of § 924(c) sentence stacking was a change in the law. Thus, the question arises—what is properly considered as an extraordinary and compelling circumstance warranting release under a compassionate release motion,

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[93] United States v. Fine, 982 F.3d 1117, 1117 (8th Cir. 2020).

[94] *Id.* at 1117–18.

[95] *Id.* at 1118.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

and when should certain changed circumstances result in a different approach than a compassionate release motion (such as a motion to vacate, set aside, or correct a sentence)?

IV. DECISIONS POST-*MCCOY* (AND *FINE*) AND HOW COURTS ARE MOVING FORWARD

A. Decisions Interpreting the "Sentence Stacking" Holding from McCoy

There are a variety of opinions that agree with the *McCoy* decision, and there are several that do not. Some federal district courts disagree with the *McCoy* reasoning because their circuit directs district courts to apply the extraordinary and compelling reasons test as "statutory criteria."[100] Those courts looked to the change in the sentence stacking law, noting the new "anti-stacking" provision was not to be applied retroactively, and concluded there is no basis for revisiting the sentence through compassionate release motions.[101] According to these courts, allowing sentence stacking changes to qualify as an extraordinary and compelling circumstance would "dilute the meaning of the non-retroactivity provision" and "would make everything potentially retroactive at the sentencing court's discretion."[102]

Perhaps these district courts would agree with the Eighth Circuit's decision in *Fine* and find that changes in law involving stacked sentences are best addressed using a motion to vacate, set aside, or correct a sentence. Indeed, one court in the Seventh Circuit stated that "[c]ompassionate release is a mechanism for inmates to seek a sentence reduction for compelling reasons, not for remedying potential errors in a conviction."[103] However, no other circuit court has taken up the issue of sentence stacking, and there is very little authority supporting or rejecting the *McCoy* holding.

This Note takes the position that the decision in *McCoy* is correct for a few reasons: (1) Congress passed the First Step Act with the intent of expanding compassionate release; (2) the policy statement by the Sentencing Commission has not been updated since the enactment of the

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[100] *See, e.g.*, United States v. Watford, No. 3:97-CR-26(2) RLM, 2021 U.S. Dist. LEXIS 27762 at *12 (N.D. Ind. Feb. 12, 2021).

[101] *Id.* at *12–13.

[102] *Id.*

[103] United States v. Musgraves, 840 F. App'x *11, *13 (7th Cir. 2021).

First Step Act; and (3) allowing consideration of "sentence stacking" sentencing disparities would not guarantee release because of the built in "safety mechanism" for compassionate release—where the § 3553(a) sentencing factors must weigh in favor of release.[104]

Making "everything potentially retroactive at the sentencing court's discretion" is not against congressional intent if Congress's goal was to expand access to compassionate release for federal inmates.[105] Some purposes of sentencing are to impose a sentence that is "sufficient, but not greater than necessary,"[106] and to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[107] Sentence stacking has since been abolished, which means that those inmates previously sentenced under the old law have likely received sentences that are "greater than necessary."[108] Additionally, anyone sentenced today will inherently create a sentencing disparity to anyone similarly situated who was convicted and sentenced under the prior sentence-stacking version of the law. While true that the changes to the sentence stacking law were expressly made non-retroactive, this does not mean that federal inmates sentenced under the former law could not challenge their sentence using the compassionate release statute. Making changes in sentence stacking non-retroactive simply means that challenges to that sentence will not succeed under a § 2255 motion to vacate, set aside, or correct a sentence, because grounds for challenging a sentence include the law being retroactive.[109] Allowing sentence stacking sentencing disparities to be considered as extraordinary and compelling circumstances would further Congress's goal of granting compassionate release when the situation so warrants.

B. The Holding in McCoy is Clear in the Fourth Circuit—But Does the Holding Extend Beyond § 924(c) Sentencing Disparities?

At this point, there is no question, at least in the Fourth Circuit, that sentencing disparities arising from prior § 924(c) sentence stacking convictions can be considered extraordinary and compelling

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[104] *See* 18 U.S.C. § 3553(a)(1)–(7) (2018) (listing the factors that are considered by judges when deciding whether a defendant inmate should be granted compassionate release).

[105] *Watford*, 2021 U.S. Dist. LEXIS 27762, at *13.

[106] 18 U.S.C. § 3553(a).

[107] *Id.* § 3553(a)(6).

[108] *Id.* § 3553(a).

[109] *See* 28 U.S.C. § 2255(h)(2) (2021).

circumstances. However, the question remains whether or not the decision in *McCoy* supports the consideration of other types of sentencing disparities—such as changes in career offender status—especially in light of the (somewhat vague) decision in *United States v. Fine*. District courts in the Fourth Circuit have struggled with the rationale of the *Fine* decision and have noted that the decision is "somewhat unclear."[110] The United States District Court for the Middle District of North Carolina has stated,

> [t]he Fourth Circuit has issued one published opinion on what may constitute extraordinary and compelling circumstances, holding that statutory changes to mandatory minimum sentences can appropriately be considered as part of the § 3582(c)(1)(A) mix. The contours of that decision are not yet defined, and there is no decision addressing whether changes in the case law that affect the way the guidelines are calculated may also be considered. But the Fourth Circuit has held that such now known-to-be-erroneous career offender enhancements must be reconsidered when a defendant is eligible for a sentence reduction under the crack-retroactivity provisions of § 404 of the First Step Act, and it seems likely that the Fourth Circuit would also hold that such errors could be taken into account as part of the calculus applied to a compassionate release motion, at least until the Sentencing Commission says otherwise.[111]

This district court decision expressly contradicts the holding from *United States v. Fine*, which specifically stated career offender status changes could not be considered for a sentence reduction under § 3582(c)(1)(A) for compassionate release.[112]

Courts should follow the *McCoy* holding and expand its holding to cover all sentencing disparities. Agreeing with and following the *Fine* decision, with so little reasoning by the Court for its decision, could ultimately lead to unjust results. By forcing defendants into only being able to challenge a sentence through a § 2255 motion to vacate, set aside, or correct a sentence, the *Fine* court is ultimately limiting options defendants may have for justifiably challenging a grossly higher-than-necessary sentence. As previously explained, § 2255 motions must be made within one year of conviction and, if outside of that one-year period, only retroactive changes in law will realistically be considered as new evidence for a grant of the motion.[113] If the new rule of law is not retroactive, then defendants are essentially stuck with the sentence they

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[110] United States v. Dilworth, No. 1:04-CR-412, 2021 U.S. Dist. LEXIS 42619, at *13 n.7 (M.D.N.C. Mar. 8, 2021).

[111] *Id.* at *13 (citations omitted).

[112] United States v. Fine, 982 F.3d 1117, 1118 (8th Cir. 2020).

[113] 28 U.S.C. § 2255(b) (2021).

were given, even if that original sentence is unfair and unusually long under today's standards.

An example may help illustrate the unjust discrepancy the *Fine* decision could have. Imagine a defendant was convicted of three crimes in January 2020 and sentenced to fifteen years for each crime. For this example, assume the law in January 2020 required these sentences had to be stacked for a total time of forty-five years. However, the law then changed in February 2021 (and is not considered retroactive). Under the new law, these sentences could run concurrently for a total time of fifteen years. This means that one year and one month stood between this defendant receiving forty-five years and fifteen years, for the same conduct. Under *McCoy*, the discrepancy between fifteen and forty-five years is so significant that it should be considered an extraordinary and compelling circumstance. Under *Fine*, however, a challenge to this sentence should not be considered an extraordinary and compelling circumstance and, instead, the sentence should be challenged through a § 2255 motion to vacate, set aside, or correct a sentence. However, in this example, the defendant would be stuck with the sentence of forty-five years because the defendant is outside of the one-year challenge period and the law is not retroactive.

This example may seem extreme, but it is the exact type of thing that is currently happening throughout our federal prison system. Laws are changing and federal inmates have no way of challenging their sentences—that is, until the First Step Act emerged in 2018, allowing federal inmates to petition on their own behalf for compassionate release. Compassionate release gives federal inmates more options and allows them to challenge sentences in ways that they previously were not able. Congress wanted to "expand" and "expedite" compassionate release,[114] and "improve[e] application of compassionate release."[115] Allowing changes in law to be a proper consideration as an extraordinary and compelling circumstance would coincide with Congress's intent and allow federal inmates to challenge sentences that have become inherently unfair compared to other defendants sentenced under today's law.

[114] 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin).

[115] 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

V. RECOMMENDATION TO THE SENTENCING COMMISSION WHEN ADOPTING A REVISED POLICY STATEMENT

One of the biggest reasons for enacting the First Step Act was to expand and expedite compassionate release.[116] When the Sentencing Commission obtains the necessary number of commissioners and is able to update the policy statement under § 1B1.13,[117] it should include all types of sentencing disparities—for example, § 924(c) sentencing disparities, changes in career offender status, and changes in case law—as extraordinary and compelling circumstances potentially warranting release. Sentencing disparities are inherently unfair to prisoners. Prisoners who were sentenced before § 924(c) was repealed could be facing sentences that are twice as long as they would if sentenced today.[118] Prisoners categorized and punished as career criminals, who would not be considered as such under current laws, are facing longer than necessary sentences based simply on the year of their offense.[119]

While there is some validity to the argument that the law should encourage finality of sentences, as well as uniformity between sentences, there is also validity to the argument that prisoners should not be stuck with an unfair sentence simply because they were sentenced in 2010 as opposed to 2020. By not allowing sentencing disparities to be a valid consideration, courts are reducing opportunities for compassionate release, contrary to the expressed intention of the First Step Act's sponsors.[120] While prisoners may petition the court to change or reduce their sentence within one year of receiving their sentence, once the court denies that motion, prisoners have extremely limited recourse. Allowing prisoners to seek release using a compassionate release motion, and allowing prisoners to rely on changes in law that create sentencing disparities, will create additional remedies for prisoners who have received

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[116] 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin).

[117] "The Sentencing Commission has lacked a quorum since early 2019, and so it has been unable to update its preexisting policy statement concerning compassionate release to reflect the First Step Act's changes." United States v. Long, 997 F.3d 342, 348 (D.C. Cir. 2021).

[118] *See, e.g.*, United States v. McCoy, 981 F.3d 271, 278 (4th Cir. 2020) (where defendant was sentenced to 421 months' imprisonment based on § 924(c), but would have received less than half of that sentence if sentenced today—creating a disparity of over 200 months).

[119] *See First Step Act: Signed into Law December 21st, 2018*, U.S. SENT'G COMM'N (Feb. 2019), https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf.

[120] *See* 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler) (wanting to improve "application of compassionate release").

unusually long sentences and, in light of subsequent legislative changes, particularly unfair sentences.

There should be a presumptive "rule of thumb" that law changes creating sentencing disparities should amount to extraordinary and compelling circumstances that warrant reconsideration (or "compassionate release") of existing sentences.[121] Critics may argue that this would lead to a flood of litigation any time the law changed. Indeed, allowing sentencing disparities to be a valid consideration could bring more motions before the court when a law is changed; however, this would not necessarily be a ground for disallowing the consideration because Congress hoped to expand compassionate release.[122] Allowing an extraordinary and compelling circumstance that would expand compassionate release would further this congressional intent. Additionally, allowing sentencing disparities and various other factors to be considered an extraordinary and compelling circumstance would not lead to the guaranteed release of all prisoners who bring motions for this reason. Indeed, prisoners would still need to meet the other requirements of § 3582(c)(1)(A)—they would have to exhaust their administrative remedies and the § 3553 factors would have to weigh in favor of release. These are obstacles in place now, and they will remain in place even if extraordinary and compelling circumstances are expanded to encompass sentencing disparities.

VI. CONCLUSION

United States v. McCoy left the door open for courts to rely on the length of a defendant's sentence and the dramatic degree to which that sentence exceeds what Congress currently deems appropriate when considering whether extraordinary and compelling reasons exist for potential compassionate release. The decision was not limited to sentences imposed under § 924(c) for sentence stacking, and it should not be limited to that type of sentence going forward. While the Eighth Circuit in *United States v. Fine* may consider changes in law as an improper consideration for compassionate release, allowing these "sentencing disparity"

[121] This note does not express a specific numerical presumption (such as at least a 25% change in the maximum sentence) because the author believes the exact number should not matter; any change in law that would lower a defendant's sentence should be properly considered.

[122] *See, e.g.*, 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin) (describing the First Step Act as both "expand[ing]" and "expedit[ing]" compassionate release).

considerations ultimately aligns with the goal of Congress in expanding access to compassionate release for federal inmates.

Compassionate release means just that—release based on compassion. Defendants who received forty-five years, but under today's law would receive fifteen years, deserve compassion. Defendants deserve to have their cases heard, and defendants deserve to be able to challenge a sentence that is excessive based on today's standards. Concerns that allowing sentencing disparities to be considered an extraordinary and compelling circumstance are mitigated because, even if they are considered as such, release is not guaranteed. Defendants must exhaust their administrative remedies and the § 3553(a) sentencing factors must weigh in favor of their release. Only then will compassionate release ultimately be granted. Even so, defendants who are serving unusually long sentences should be able to have that first step through the door to have their motions heard and decided.