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Mary Trotter

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Unclear Guidelines from the Sentencing Commission and a Prejudiced Warden Result in (Un)compassionate Release

I. Introduction

Mass incarceration is an epidemic unique to America.¹ There are currently two million people in United States' prisons and jails,² yet, for all the people mass incarceration affects, the system does not treat all inmates fairly.³ Additionally, sometimes new circumstances present themselves that make the continued confinement of someone unnecessary and cruel.⁴ An inmate's circumstances like an aggressive illness, old age, the absence of a caregiver for a child, or revisions in sentencing laws show how a sentence can become inhumane if not reduced.⁵ Due to the reality of harsh, long sentences and possible changes to the inmate's circumstances while incarcerated, the legislative and executive branches created procedures to allow inmate's a chance to reduce their sentences.⁶ There are five main ways to reduce a federal prison sentence,⁷

¹ Sandro Galea, *Addressing the Horrors of Mass Incarceration*, BU SCH. OF PUB. HEALTH (Sept. 23, 2022), <https://www.bu.edu/sph/news/articles/2022/addressing-the-horrors-of-mass-incarceration/>.

² *Growth in Mass Incarceration*, THE SENT'G PROJECT, <https://www.sentencingproject.org/research/> (last visited Feb. 20, 2023).

³ Galea, *supra* note 1.

⁴ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, HUMAN RIGHT WATCH-FAMM, SENTENCES THAT FIT, JUSTICE THAT WORKS (Nov. 2012), <https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf>.

⁵ *Id.*

⁶ *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> (last visited Feb. 19, 2023).

⁷ *See infra* notes 24–28.

and among those is compassionate release, which gained recognition in recent years because of the increased number of applications based on the COVID-19 pandemic.⁸

Compassionate release encourages compassion—the idea that a judge can reduce a prisoner’s sentence based on circumstances that warrant empathy.⁹ However, judges do not always exhibit compassion at sentencing; therefore, defendants can petition for a sentence reexamination in the form of compassionate release.¹⁰ Compassionate release often occurs decades after the defendant’s initial conviction, and courts grant release due to the inmate’s particular circumstances at that present time, not judgment from the original sentence.¹¹ The passage of time and the reviewal of an inmates’ specific circumstances shows the similarity between compassionate release and clemency in the executive branch—the executive power to cut a sentence short.¹² Clemency is deeply rooted in American historical tradition, and

⁸ *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, U.S. SENT’G COMM’N (Mar. 10, 2022), <https://www.ussc.gov/research/research-reports/compassionate-release-impact-first-step-act-and-covid-19-pandemic>.

⁹ See Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743, 1746 (2022), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5914&context=flr>.

¹⁰ Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1564 (2012), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1062&context=pen_n_law_review; Sonja B. Starr & M. M. Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320 (2014), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles>.

¹¹ 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, 1551 (2021), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6534&context=law_lawreview.

¹² *Id.*

empowers a President to mitigate a sentence, resembling the President’s pardon powers.¹³ The Constitution states the President “shall have Power to grant Reprieves and Pardons,”¹⁴ meaning the Executive holds the power to grant relief from punishment for every type of offense, and may exercise this power at any point in a legal proceeding, or after conviction.¹⁵ Like clemency and pardons, compassionate release is a power vested in the Executive Branch that Congress should strive to improve.¹⁶

Congress first developed compassionate release in 1984, granting federal courts the authority to reduce sentences for “extraordinary and compelling” reasons.¹⁷ Compassionate release allows the Federal Bureau of Prisons (BOP)¹⁸ and inmates to apply for immediate early release on grounds of “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.”¹⁹ Congress assigned the United States Sentencing Commission (USSC) to define “extraordinary or compelling

¹³ *Id.* The author states that “the pardon power is a form of clemency with deep historical roots.” *Id.*

¹⁴ *Id.*; U.S. CONST. art. II, § 2, cl. 1.

¹⁵ *ArtII.S2.C1.3.1 Overview of Pardon Power*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C1-3-1/ALDE_00013316/ (last visited Mar. 10, 2023).

¹⁶ O’Carroll, *supra* note 11, at 1551.

¹⁷ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4.

¹⁸ *Historical Information*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/history/> (last visited Feb. 20, 2023). Congress created the BOP within the Department of Justice (DOJ), which is under the Executive Branch, and assigned the BOP with the “management and regulation of all Federal penal and correctional institutions.” *Id.*

¹⁹ *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS (Jan. 17, 2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

circumstances” in the Sentencing Guidelines, and the BOP to file compassionate release motions to the courts.²⁰ Since the passage of the First Step Act (FSA) in 2018, inmates can petition their compassionate release motions to the courts if the BOP rejects their claims.²¹ Questions remain about how the BOP and the courts grant compassionate release and whether the courts apply the compassionate release guidelines consistently.²² The uncertainty is due to the lack of clarity from the USSC to define “extraordinary or compelling circumstances,” and this uncertainty results in inconsistency by courts and the BOP when considering release motions.²³

Section II of this note examines the historical background behind compassionate release, and the process of applying for compassionate release before Congress passed the First Step Act. Section II also explains the First Step Act and the application process for compassionate release. Section III examines how a defendant’s race and medical records, the geographic location of their prison, the defendant’s warden and prison staff, and inmate’s lack of access to counsel can all affect their chances of the court or the BOP granting their compassionate release claim. Finally, Section IV explains why the USSC should redefine and expand the definitions of “extraordinary and compelling circumstances” and how this will lead to more consistent and fair results. Section IV also explains that the USSC should leave some discretion to the courts for

²⁰ *Id.*

²¹ *An Overview of the First Step Act, supra* note 6.

²² *The Federal Bureau of Prisons’ Compassionate Release Program*, U.S. DEP’T OF JUST. OFFICE OF THE INSPECTOR GEN. EVALUATION AND INSPECTIONS DIV. (Apr. 2013), <https://oig.justice.gov/reports/2013/e1306.pdf>.

²³ *Id.* The report states that “the BOP does not have clear standards on when compassionate release is warranted, resulting in ad hoc decision making.” *Id.*

circumstances not clearly defined in the rules. Lastly, Section IV explains how wardens are not the right persons to be first in line to carry out these motions, and why a neutral third party within the BOP should begin the process.

Due to the lack of consistency from the courts, as well as Congress's intent in enacting compassionate release, the USSC must define the factors that warrant release with clarity, by providing more specific examples and allowing reductions for revisions in sentencing law. However, the USSC should make clear that this definition is not exhaustive, and courts may apply some discretion to broaden the rule. Additionally, a neutral third party within the BOP should oversee the first round of review, the Executive Branch should oversee that this third party provides reasoning to the prisoner for denying their claim, and the BOP should store accurate compassionate release records in their facilities.

II. Historical Background

Compassionate release has evolved significantly since Congress's original enactment in 1984.²⁴ In addition to compassionate release, there are four other ways a prisoner can reduce a sentence: good time credit,²⁵ Residential Drug Awareness Program (RDAP),²⁶ executive

²⁴ *An Overview of the First Step Act*, *supra* note 6.

²⁵ *Id.* The Federal Bureau of Prisons have "Incentives for Success," where inmates can "earn up to 54 days of good time credit for every year of their imposed sentence rather than for every year of their sentenced served." *Id.*

²⁶ *Substance Abuse Treatment*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp#:~:text=Residential%20Drug%20Abuse%20Program%20\(RDAP\),-RDAP%20is%20the&text=CBT%20is%20used%20in%20a,%2C%20school%2C%20or%20vocational%20activities](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp#:~:text=Residential%20Drug%20Abuse%20Program%20(RDAP),-RDAP%20is%20the&text=CBT%20is%20used%20in%20a,%2C%20school%2C%20or%20vocational%20activities) (lasted visited Feb. 19, 2023). The RDAP is a voluntary, nine-month program with vocational and school training, as well as group therapy for federal prisoners with substance abuse problems. *Id.*

clemency,²⁷ and second look acts.²⁸ Congress enacted compassionate release in 1984; however, because the BOP used its compassionate release power infrequently, Congress passed the FSA in 2018 to improve criminal justice outcomes.²⁹ And currently, the BOP and inmates do not utilize compassionate release to its full potential, resulting in a lack of motions filed and granted, which frustrates Congress's intent for enactment.³⁰

A. History of the Federal Bureau of Prisons' Role in Compassionate Release

In 1984, Congress passed the Sentencing Reform Act (SRA), which changed the landscape for federal sentencing, and established the first version of compassionate release.³¹ To ensure fairness in punishment, the SRA eliminated indeterminate sentencing and sentencing disparities by creating uniform federal sentencing guidelines, which required fixed and final sentences.³² Congress recognized, however, that in some circumstances, final sentences could be

²⁷ *Frequently Asked Questions*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/frequently-asked-questions#:~:text=In%20the%20federal%20system%2C%20commutation,who%20have%20committed%20federal%20crimes> (last visited Jan. 17, 2023). Executive clemency refers to the President's broad power to "exercise leniency toward persons who have committed federal crimes" by reducing a prisoner's sentence either totally or partially. *Id.*

²⁸ *Second Look Sentencing*, FAMILIES AGAINST MANDATORY MINIMUMS, <https://famm.org/secondlook/> (last visited Feb. 20, 2023). Second look sentencing allows courts to re-look at a person's sentence after they have served a significant amount of their sentence to decide if the remainder of their sentence is still necessary. *Id.*

²⁹ *An Overview of the First Step Act*, *supra* note 6.

³⁰ Mariah D. Haley, *Unequal Treatment: (In)compassionate Release from Federal Prison in the Context of COVID-19 Pandemic and Vaccine*, 122 COLUM. L. REV. 1997, 2012 (2022), https://columbialawreview.org/wp-content/uploads/2022/11/Haley-Unequal_Treatment_Incompassionate_Release_from_Federal_Prison_In_The_Context_Of_The_COVID_19_Pandemic_and_The_Vaccine.pdf.

³¹ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4.

³² *Simplification Draft Paper*, U.S. SENT'G COMM'N, <https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2> (last visited Mar. 2, 2023).

unjust, and thus developed “safety valves” to allow judges to relook at a sentence when appropriate.³³ Compassionate release is one of these safety valves, which authorizes a federal judge to reduce a sentence in specific situations.³⁴ Congress outlined circumstances that warranted a sentence reduction, or compassionate release, like terminal illness, and “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.”³⁵ Congress required the warden of a prison facility, an employee of the BOP, to begin the process by motioning to the court for an inmate whom the warden believed qualified.³⁶ In 1994, the BOP created new rules that broadened compassionate release to non-medical grounds, like if a parent was the only caregiver of a child or someone in their family was terminally ill; however, the BOP rarely granted these types of motions.³⁷ Unfortunately, as the federal inmate population grew in the 2000s, the number of motions the BOP granted did not grow alongside it.³⁸

³³ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4, at 16.

³⁴ *Id.*

³⁵ *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, *supra* note 19, at 1.

³⁶ *Id.*

³⁷ 28 C.F.R. 571 (1994), Subpart G – Compassionate Release (Procedures for the Implementation of 18 U.S.C. 3582(c)(1)(A) and 4205(g)), <http://www.gpo.gov/fdsys/search/pagedetails.action;jsessionid=n18JQStpLNjXJSXNP1L94NnmXk42zRvG3m7mVc5PyBChwGpC1WrJ!-874026954!-1164957459?collectionCode=CFR&searchPath=Title+28%2FChapter+V%2FSubchapter+D%2FPart+571%2FSubpart+G&granuleId=CFR-2010-title28-vol2-part571-subpartG&packageId=CFR-2010-title28-vol2&oldPath=Title+28%2FChapter+V%2FSubchapter+D%2FPart+571%2FSubpart+G&fromPageDetails=true&collapse=false&ycord=831> (last visited Mar. 2, 2023).

³⁸ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4, at 35. Records show that “in 1994, the BOP housed 95,034 prisoners and made 23 motions for sentence

The BOP and courts rarely granted these motions because of the way the statute laid out the process for applying and granting release.³⁹ Section 3582(c)(1)(A), the statute allowing for compassionate release, only authorized the courts to grant a reduction to a prisoner’s sentence “upon motion of the Director of the Bureau of Prisons.”⁴⁰ The procedure began with a prisoner’s request to the warden for compassionate release, following the warden’s review of the request to analyze if it warranted release.⁴¹ If the warden decided the request warranted release, the warden would send the referral package to the BOP regional director.⁴² If the regional director approved the request, the director would send the package to the BOP headquarters to the Bureau’s general counsel.⁴³ The general counsel would then send all recommended requests to the BOP director, who would make the final approval decision.⁴⁴ If the director approves the request, the general

reduction,” however “[i]n 2011, even though the federal prison population had more than doubled to over 218,170, it made only 30 motions.” *Id.*

³⁹*Id.*; *United States v. Maldonado*, 138 F. Supp. 2d 328, 333. The court in this case stated that the court must defer to the BOP in compassionate release cases, and the only determination the court must make is “whether the Bureau ... has filled the statutory gap ‘in a way that is reasonable in light of the legislature’s revealed design.’” *Id.* Because the defendant was not terminally ill with a measurable life expectancy, the court found that the BOP’s determination was reasonable. *Id.*

⁴⁰ *Proposed Amendments to the Sentencing Guidelines*, U.S. SENT’G COMM’N, at 1 (last visited Sep 10, 2023), <https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines>.

⁴¹ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4, at 28. There was no “hearing or other required procedure in which the prisoner can orally make a case for release directly to the warden.” *Id.* at 30.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

counsel would then draft a motion and request the US attorney in the district where the prisoner was sentenced to file it, and the court would conduct a review.⁴⁵

The BOP used this process from 1984 until 2018 and had virtually unlimited discretion and no duty to move for a sentence reduction.⁴⁶ For instance, from 1992 to 2012, the BOP made 492 motions, averaging about two dozen a year.⁴⁷ The lack of compassionate release motions from the BOP frustrated Congress's purpose for enacting it, and encouraged Congress to change the process.⁴⁸ The BOP's infrequent filing of compassionate release motions occurred partly because the USSC did not clearly define the criteria, allowing the BOP to take a restrictive approach.⁴⁹ Additionally, after receiving a rejection, the inmates did not have another avenue to seek release, leaving all the power in the hands of the BOP.⁵⁰

⁴⁵ *Id.* The district courts usually granted motions filed by the BOP, and in 2011, the courts “granted every motion submitted on behalf of the BOP.” *Id.* at 31.

⁴⁶ Stephen R. Sady & Elizabeth G. Daily, *Compassionate Release Basics for Federal Defenders*, FED. PUB. DEF., DIST. OF OR. (Jan. 31, 2019), https://or.fd.org/system/files/case_docs/Compassionate%20Release%20Basics_REVISED_2templates.pdf.

⁴⁷ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4, at 34. It also remains unclear how many prisoners are motioning for release, because the BOP does not “maintain records of requests denied by wardens,” only requests granted by wardens. *Id.*

⁴⁸ *The Federal Bureau of Prisons' Compassionate Release Program*, *supra* note 22.

⁴⁹ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4. The author states that “[i]n 2006, it promulgated Guideline §1B1.13, which provided simply 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].’”; Zachary Segal & Alan Vinegrad, *From ‘Booker’ to ‘Brooker’: A Return to Judicial Discretion in Sentencing*, N.Y.L.J. (Dec. 22, 2022), <https://www.law.com/newyorklawjournal/2022/12/22/from-booker-to-brooker-a-return-to-judicial-discretion-in-sentencing/?slreturn=20230121211318>.

⁵⁰ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4.

The BOP provided little accountability and transparency on BOP procedures when analyzing compassionate release claims.⁵¹ In addition, according to a 2013 DOJ report, the BOP did not have timeliness standards for approving requests, effective procedures to inform inmates about compassionate release, or a system to track the requests, making it hard for the DOJ and executive branch to hold the BOP accountable.⁵² In one example, a BOP record showed that in 13% of cases where the warden and Regional Director approved the inmate’s request for compassionate release, “the inmate died before a final decision was made by the BOP Director,” because the process took too long to hear the inmate’s claim, even though the inmate met the qualifications for release.⁵³ Furthermore, compassionate release, although enacted to show compassion to inmates, was not utilized by the BOP.⁵⁴

B. Compassionate Release and the First Step Act

Because the BOP failed to implement compassionate release, Congress intervened and enacted the First Step Act (FSA) to rectify these issues.⁵⁵ Congress enacted the FSA in 2018, which was the result of bi-partisan efforts to improve the criminal justice system, and “reduce the

⁵¹ *The Federal Bureau of Prisons’ Compassionate Release Program*, *supra* note 22.

⁵² *Id.*

⁵³ *Id.* at 143; Marielle Paloma Greenblatt, *In Search of Judicial Compassion: the Cantu-Lynn Divide over Compassionate Release for Federal Prisoners*, 52.1 COLUM. HUM. RTS L. REV. 140, 142 (2020), https://hrlr.law.columbia.edu/files/2020/11/140_Greenblatt.pdf.

⁵⁴ *Id.* From 2013 and 2017, the BOP “received 5,400 requests for compassionate release from people in federal prison but approved just 6% of them, taking an average of 141 days to make a decision. These delays proved deadly: 266 prisoners, nearly 5% of all applicants, died while waiting for the BOP’s answer.” *Id.*

⁵⁵ *An Overview of the First Step Act*, *supra* note 6.

size of the federal prison population while also creating mechanisms to maintain public safety.”⁵⁶ Congress enacted the FSA—“the most far-reaching overhaul of the criminal justice system in a generation” —to assist prisoners whose sentences were “excessively punitive.”⁵⁷ The FSA helped transform federal resentencing, as almost three times more defendants received compassionate release in nine months of 2019 than in all of 2018.⁵⁸

The FSA changed federal resentencing by amending Section 3582(c)(1)(A) to allow the inmate, rather than the director of the BOP, to file for compassionate release.⁵⁹ An inmate could file a motion to reduce their sentence after fully exhausting all administrative rights to appeal a failure from the BOP to bring a motion, or after thirty days from the receipt of a request by the warden of the inmate’s facility, whichever came earlier.⁶⁰ In addition, the prisoner must display “extraordinary and compelling reasons” the court should reduce their sentence.⁶¹ Finally, the court must find that “relief is warranted under the section 3553(a) sentencing factors.”⁶²

⁵⁶ *Id.*

⁵⁷ *Eleventh Circuit Creates Circuit Split by Holding that the First Step Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, 135 HARV. L. REV. 1182, 1182 (Feb. 10, 2022), <https://harvardlawreview.org/wp-content/uploads/2022/01/135-Harv.-L.-Rev.-1182.pdf>.

⁵⁸ Greenblatt, *supra* note 53, at 144. The author notes that by October 2020, “approximately 1,800 federal prisoners have been granted compassionate release since the FSA’s passage, with the overwhelming majority coming from judicial approvals overturning BOP denials.” *Id.* at 144–45.

⁵⁹ *Proposed Amendments to the Sentencing Guidelines*, *supra* note 40.

⁶⁰ *Id.*

⁶¹ Charles R. Breyer, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, U.S. SENT’G COMM’N, at 6 (Mar. 2022), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

⁶² *Id.*; 18 U.S.C.A. § 3553 (West). The factors to be considered in imposing a sentence include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need

Congress, however, never defined what factors constitute “extraordinary and compelling” and instead delegated the USSC to describe and define the phrase, which has led to debate among the courts and scholars on how the court should apply the phrase.⁶³

The USSC has defined some criteria for compassionate release, while leaving other parts open-ended with no clear standard for application.⁶⁴ The USSC provides some clarity in Section 1B1.13 of the guidelines, where it lists different instances when the BOP can grant compassionate release like the defendant’s age combined with the amount of time they have served, the defendant’s likelihood of bringing danger to the community, and that reducing the sentence is consistent with the policy statement.⁶⁵ “Other reasons,” however, have not been clearly defined or applied consistently, and the USSC is considering redefining the rule.⁶⁶ The agency promulgates rules through “notice and comment” rulemaking, in which an agency issues a notice of a proposed rule and allows the public to comment before Congress issues a final

for the sentence imposed; (3)the kinds of sentences available; (4)the kinds of sentence and the sentencing range established for; (5)any pertinent policy statement; (6)the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7)the need to provide restitution to any victims of the offense. *Id.*

⁶³ Breyer, *supra* note 61; Comment, *Eleventh Circuit Creates Circuit Split by Holding that the First Step Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, *supra* note 57, at 1182. The author states that extraordinary and compelling “was initially defined by a U.S. Sentencing Commission policy statement, U.S.S.G. § 1B1.13, which by its terms seems to apply only to compassionate release motions filed by the BOP.” *Id.*; *See infra* notes 71–72.

⁶⁴ *See* U.S.S.G. 1B1.13.

⁶⁵ *Id.*

⁶⁶ *Proposed Amendments to the Sentencing Guidelines*, *supra* note 40.

rule.⁶⁷ Currently, the USSC is seeking comment from the public on how to expand the rule, offering three options: 1) the defendant presents any other circumstance or a combination of circumstances similar to the circumstances previously stated; 2) because the defendant's circumstances have changed, it would be inequitable to continue the defendant's imprisonment; and 3) the defendant presents an extraordinary and compelling reason other than, or in addition to, the circumstances previously stated.⁶⁸ While the increased specificity is helpful, the new structure of the guidelines still does not encompass and clearly define all of the circumstances in which the BOP and courts should grant relief.⁶⁹

The unclear guidelines about what constitutes “extraordinary and compelling” circumstances and “other reasons” has led to circuit splits and inconsistencies in how judges and the BOP apply compassionate release.⁷⁰ Although it is apparent that inmates are now allowed to petition their sentences for discretionary relief, the courts' level of discretion remains unclear.⁷¹ For instance, some circuits hold that the FSA did not give the courts authority to define what

⁶⁷ *Rulemaking Process*, ABOUT THE FCC, <https://www.fcc.gov/about-fcc/rulemaking-process#:~:text=In%20notice%2Dand%2Dcomment%20rulemaking,requirement%20for%20notice%20and%20comment> (last visited Mar. 10, 2023).

⁶⁸ *Proposed Amendments to the Sentencing Guidelines*, *supra* note 40; *see also United States Sentencing Commission 2022-2023 Amendment Cycle*, U.S. SENT'G COMM'N (last visited Sep 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

⁶⁹ *Id.*

⁷⁰ Comment, *Eleventh Circuit Creates Circuit Split by Holding that the FIRST STEP Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, *supra* note 57, at 1183.

⁷¹ Kielan Barua, *The First Step Act and Individualized Review: Must Judges Apply the 18 U.S.C. 3553(a) Factors to Section 404 Petitioners?*, 90 FORDHAM L. REV. 1665, 1665 (2022), <https://ir.lawnet.fordham.edu/flr/vol90/iss4/6>.

“extraordinary and compelling” means and only the BOP can define it, while other courts have taken it within their discretion to decide whether the inmate’s circumstances are “extraordinary and compelling.”⁷² This discord between circuit and district courts not only leaves confusion and inconsistency for future application but also leaves confusion and inequity for the people looking for compassion: the inmate applying for release.⁷³

The inconsistency and inequity in the way the BOP and the courts apply compassionate release means some inmates receive relief while similarly situated inmates do not.⁷⁴ For example, in two separate cases where defendants applied for compassionate release after serving a majority of their sentences and asserting they were the only caregiver for their terminally ill mothers, one judge granted compassionate release, whereas the other stated “[m]any, if not all inmates, have aging and sick parents. Such circumstance is not extraordinary.”⁷⁵ Courts also showed discrepancies regarding the COVID-19 pandemic; specifically, how to apply different factors like health conditions, prior infections to COVID-19, and vaccination status.⁷⁶ Even though courts granted more compassionate release motions during the pandemic overall, the

⁷² Comment, *Eleventh Circuit Creates Circuit Split by Holding that the FIRST STEP Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, *supra* note 57, at 1186.

⁷³ Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. C.R.- C.L. L. REV. (Oct. 23, 2019), <https://harvardcrcl.org/the-answer-can-be-yes-the-first-step-act-and-compassionate-release/>.

⁷⁴ *Id.*

⁷⁵ *United States v. Ingram*, No. 2:14-CR-40, 2019 WL 3162305, at *2 (S.D. Ohio July 16, 2019).

⁷⁶ Haley, *supra* note 30, at 2002.

outcomes differed drastically depending on the court.⁷⁷ The inconsistent application by the courts undercuts the purpose for the FSA and compassionate release, and results in inequitable, court-based outcomes.⁷⁸

I. Unfair Sentencing Practices and Inconsistencies in Compassionate Release Application

The defendant's age, medical complications, whether a defendant is the only caregiver for a family member, and egregiously long sentences when laws have evolved should all contribute to whether a defendant is granted compassionate release. However, the BOP and courts are deciding the reasoning for release under their own discretion, and using factors not presently defined by the USSC.⁷⁹ A defendant's race, the geographic location of their prison, the defendant's warden and prison staff, and inmates' lack of access to counsel can all affect the inconsistent rates at which the BOP and the court grant a defendant compassionate release. Although the USSC guidelines do not state these circumstances, compassionate release is not immune from this kind of bias.⁸⁰

A. Racial Disparities with Compassionate Release

⁷⁷ *Id.* In one example of this discrepancy, a Texas court held that “the obesity—a disorder recognized by the CDC as a comorbidity for COVID-19—of the defendant, Mr. Tyron Deshan Forman, was not extraordinary or compelling because obesity is a “commonplace malad[y]” in the United States,” however, two weeks earlier in Florida, a court found that “obesity of the defendant, Ms. Evelyn Cecilia Bozon Pappa, was reason enough for her to be granted compassionate release.” *Id.* at 2015.

⁷⁸ *Id.* at 1997.

⁷⁹ *See generally The Federal Bureau of Prisons' Compassionate Release Program, supra* note 22.

⁸⁰ *See Haley, supra* note 30, at 2002.

A defendant's race contributes to a judge's compassionate release consideration due to the way doctors analyze Black defendants' medical records.⁸¹ For example, the BOP and judges use a decades-old formula for measuring kidney health, a formula that not only differentiates between races but also disproportionately impacts Black inmates.⁸² Compassionate release motions for chronic kidney disease became especially apparent during the COVID-19 pandemic, because a person with chronic kidney disease is more susceptible to contracting COVID-19 and becoming severely ill or dying.⁸³ Additionally, people in prison were infected by COVID-19 at a rate more than five times higher than that of the general population, due to the inability to quarantine and overcrowding in prisons.⁸⁴ Maurice McPhatter, a Black inmate with kidney complications, petitioned for compassionate release because he was born with only one kidney and blood tests showed low kidney function.⁸⁵ However, the judge used the decades-old formula because of instructions from the prison medical records, and the medical staff adjusted Mr. McPhatter's score, putting him on the healthy side.⁸⁶ The judge then concluded that Mr.

⁸¹ Joseph Goldstein, *How a Race-Based Medical Formula Is Keeping Some Black Men in Prison*, THE N.Y. TIMES (Apr. 22, 2022), <https://www.nytimes.com/2022/04/22/nyregion/prison-kidney-federal-courts-race.html>.

⁸² *Id.*

⁸³ *See* United States v. Robinson, No. CR 04-128 (RDM), 2021 WL 1318027, at *8 (D.D.C. Apr. 8, 2021), *aff'd*, 853 F. App'x 681 (D.C. Cir. 2021).

⁸⁴ *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE, <https://eji.org/news/covid-19s-impact-on-people-in-prison/> (last updated Apr. 16, 2021).

⁸⁵ Goldstein, *supra* note 81.

⁸⁶ *Id.*

McPhatter was “at no particular risk of a dangerous Covid infection,” and denied his compassionate release claim.⁸⁷

However, healthcare institutions and experts have discarded this formula, because reports have found that the formula can lead to “misdiagnoses and inequitable care for Black patients.”⁸⁸ Additionally, multiple studies have found that this formula is outdated and incorrect, and have debunked the process of measuring kidney health altogether.⁸⁹ For example, a growing number of institutions are using a new, race-free formula to measure kidney health, and do not rely on “problematic race-based and pseudoscientific assumptions.”⁹⁰ To correctly measure kidney health, a doctor obtains a blood test to measure the patients’ Glomerular Filtration Rate (“eGFR”).⁹¹ When the patients’ eGFR goes below 60 for three months, then the doctor can diagnose the patient with kidney disease.⁹² However, using the controversial race-based formula, if the patient is Black, the doctor may adjust their score, which “inflates a Black

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Juyoun Han, Jennifer Tsai & Rohan Khazanchi, *Medical Algorithms Lack Compassion: How Race-Based Medicine Impacted the Rights of Incarcerated Individuals Seeking Compassionate Release During COVID-19*, 26 STAN. TECH. L. REV. 49, 57 (2023), http://law.stanford.edu/wp-content/uploads/2023/01/Publish_26-STLR-49-2023_Medical-Algorithms-Lack-Compassion_Han-Tsai-Khazanchi6282.pdf. National groups such as the American Medical Association and the American Association of Biological Anthropologists have critiqued these harmful mistakes. *Id.* Additionally, “the notion that Black-white differences in GFR are due to differential muscle mass or nutritional status has itself since been explicitly debunked.” *Id.*

⁹⁰ *Id.* at 59. A number of reputable healthcare institutions, including the American Society of Nephrology and the National Kidney Foundation, recommended this new formula in February 2022. *Id.*

⁹¹ *Id.* at 53.

⁹² *Id.*

person’s eGFR measurements by 21%.”⁹³ This happened to an inmate named J.R., who had unadjusted kidney measurements between 56 and 58, but could not get compassionate release because the doctor adjusted his score, and the BOP found him only “on the cusp of kidney disease.”⁹⁴ However, if J.R.’s measurements were taken from a White inmate, it would have resulted in his release.⁹⁵

It is unclear how many federal judges apply this formula, but lawyers are filing lawsuits against the BOP to stop adjusting the kidney function score for their Black clients.⁹⁶ One attorney, representing Jonte Robinson—a Black inmate in West Virginia—filed a lawsuit in federal court and demanded the BOP stop using the kidney functions scores, stating that “the bureau re-evaluate the scores of thousands of Black prisoners using a newer race-free formula.”⁹⁷ The Robinson litigation remains ongoing as Robinson waits in prison; yet, the court did recognize that “alternative methods of diagnosing chronic kidney disease . . . may exist.”⁹⁸ Medical experts and lawyers urge the court to adopt a race-blind formula because such a formula would lead to more equitable results for Black inmates who suffer from kidney problems.⁹⁹

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Goldstein, *supra* note 81. In these cases, if the inmate had been White, the data would show that the inmate was suffering from chronic kidney disease, and the judge would likely grant compassionate release where the judge would not if the inmate was black. *Id.*

⁹⁷ *Id.*

⁹⁸ *United States v. Robinson*, No. CR 04-128 (RDM), 2021 WL 1318027, at *10 (D.D.C. Apr. 8, 2021), *aff’d*, 853 F. App’x 681 (D.C. Cir. 2021).

⁹⁹ Goldstein, *supra* note 81.

Because a defendant’s race can lead to an unfair analysis of a defendant’s medical records in compassionate release motions, the commission must redefine how the BOP and courts analyze compassionate release claims, including how to read medical records of Black inmates.¹⁰⁰

A. Geographic Location

A defendant’s geographic location while incarcerated may also affect their chance of receiving compassionate release.¹⁰¹ Because judges nationwide differ in their application of factors for compassionate release, defendants outcomes differ depending on where they are located.¹⁰² Sometimes, the difference is between two directly adjacent districts in the same state.¹⁰³ For example, in 2020 and 2021, in the Middle District of Georgia, judges granted only 1.5% of compassionate release cases, whereas in the Northern District of Georgia, judges granted 46% of compassionate release cases.¹⁰⁴ During the COVID-19 pandemic, because the BOP never defined the circumstances or the medical and non-medical criteria warranting release,

¹⁰⁰ See *infra* p. 34.

¹⁰¹ See *U.S. Sentencing Commission Compassionate Release Data Report*, U.S. SENT’G COMM. (Dec. 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

¹⁰² *Id.* Although judges are allowed to apply compassionate release factors at their discretion, there appears to be some trends. The judges in the districts of Kansas, Oregon, Northern Georgia, Northern Florida, Vermont, Rhode Island, Nevada and New Mexico grant the highest percentage of compassionate release motions, while judges in the districts of Eastern Texas, West Michigan, Southern Georgia, Middle Georgia, West Oklahoma, North Dakota, and Eastern Arkansas grant the lowest percentage of compassionate release motions. *Id.*

¹⁰³ See *infra* p. 20.

¹⁰⁴ *Id.* “From January 1, 2020, through June 30, 2021, the Southern District of California granted 44.3% of the 194 compassionate release motions it heard—releasing eighty-six individuals from prison.” Haley, *supra* note 30, at 2024. “During the same time period, the Southern District of Georgia granted 1.7% of its 230 compassionate release requests—for a total of just four individuals released from prison.” *Id.*

federal courts did not have a “clear understanding of which pandemic-era circumstances demand[ed] release.”¹⁰⁵ This led to unjust outcomes for defendants, with similarly situated individuals who applied for compassionate release in various districts experiencing differing results.¹⁰⁶

While some districts are generally more likely to grant compassionate release, the decision ultimately lies with individual judges.¹⁰⁷ Factors such as politics, sentencing trends, and access to a lawyer all affect whether an inmate is granted release.¹⁰⁸ Although federal judges are charged with applying the same laws for compassionate release, the specific court and judge analyzing an inmate’s motion is almost as pivotal as the facts of the case.¹⁰⁹ One report found that district judges appointed by a Democrat president were more than twice as likely to grant compassionate release during the pandemic than those judges appointed by a Republican president.¹¹⁰ However, this study also notes that political affiliation is only one lens to look at compassionate release grants, and that results likely vary due to “geography, timing of the

¹⁰⁵ Haley, *supra* note 30, at 2022.

¹⁰⁶ *Id.*

¹⁰⁷ Jake Shore, *Where is it hardest to gain ‘compassionate release’ in America? Georgia.*, GA. PUB. BROAD. NEWS (Sept. 16, 2022, 2:51 PM), <https://www.gpb.org/news/2022/09/16/where-it-hardest-gain-compassionate-release-in-america-georgia>.

¹⁰⁸ *Id.*

¹⁰⁹ Casey Tolan, *Compassionate release became a life-or-death lottery for thousands of federal inmates during the pandemic*, CNN (Sept. 30, 2021, 7:05 AM), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html>.

¹¹⁰ Victoria Finkle, Note, *How Compassionate?: Political Appointments & District Court Judge Responses to Compassionate Release During COVID-19*, 110 GEO. L.J. 1495, 1513 (2022), <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/09/Finkle-How-Compassionate.pdf>.

decision, whether the government opposed release, or whether the incarcerated individual was represented by counsel or made the motion pro se.”¹¹¹ Between fiscal years 2020 and 2022, the First and Ninth Circuits granted release 28.8% and 28.6% of the time respectively and the Fifth and Eighth Circuits granted release 9.6% of the time.¹¹² A defendant’s location should not influence their chances of release and defendants applying for compassionate release deserve a criminal justice system in which the outcomes of their motions are not determined “solely by location, or by a court’s political preference.”¹¹³ Furthermore, a defendant’s hardship and extraordinary and compelling reasons for release do not change depending on the location of the prison.¹¹⁴

B. Issues with the BOP and the Warden

Even though the FSA removed the BOP and warden’s gatekeeping power, the role the BOP and warden play in the process of compassionate release motions is still prevalent¹¹⁵ which leads to inequities and inconsistencies for inmates. Under the FSA, inmates may directly motion for compassionate release, but inmates still have many bureaucratic hurdles to jump through and must involve the BOP and the warden before they petition their motions to the court.¹¹⁶ In the

¹¹¹ *Id.* at 1514.

¹¹² *U.S. Sentencing Commission Compassionate Release Data Report*, *supra* note 101.

¹¹³ Haley, *supra* note 30, at 2022.

¹¹⁴ *See id.*

¹¹⁵ *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, *supra* note 19.

¹¹⁶ *E.g., id.* at 7–12.

“first review stage” of a compassionate release motion, a defendant must submit statements and documentation to the warden.¹¹⁷ The request is normally in writing and is only submitted if there are “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.”¹¹⁸

The defendant must submit to the warden an extraordinary or compelling circumstance warranting consideration and a proposed release plan detailing where the inmate will live, how they will support themselves, and health and medical treatment information, if applicable.¹¹⁹ If the warden grants the request, General Counsel and then the Director of the BOP considers the request.¹²⁰ If the warden denies the request, the inmate may file a motion with the sentencing court after receiving the denial from General Counsel.¹²¹ If the inmate does not receive notice from the warden, the inmate can file a motion with the sentencing court thirty days after the receipt of the original request by the warden.¹²² Furthermore, the warden and the BOP still play a major role in the criteria for granting compassionate release motions.¹²³

¹¹⁷ *New Compassionate Release Rules: Breaking it down.*, FAMILIES AGAINST MANDATORY MINIMUMS, 1, 2 <https://famm.org/wp-content/uploads/FAMM-explains-new-compassionate-release-rules.pdf> (last visited Feb. 23, 2023).

¹¹⁸ *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, *supra* note 19, at 3.

¹¹⁹ *Id.*

¹²⁰ *Id.*; *supra* notes 41–45.

¹²¹ *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, *supra* note 19, at 15.

¹²² *Id.*

¹²³ *See id.*

The BOP's discretion over compassionate release cases poses problems like the BOP's failure to proactively respond to motions during the COVID-19 pandemic,¹²⁴ lack of record-keeping, and conflicts of interest that are inherent in the warden's dual role of working in the prison and reviewing compassionate release motions.¹²⁵ For one, data shows that during the COVID-19 pandemic, wardens denied or ignored "more than 98 percent of compassionate release requests, including many from medically vulnerable prisoners."¹²⁶ Although the pandemic presented an array of issues for prisons like lack of resources, supplies, medical equipment, reduced correctional staff, and insufficient information regarding COVID-19,¹²⁷ the warden's denial of compassionate release motions were grossly inadequate, and in many instances, fatal.¹²⁸ Additionally, the BOP often failed to communicate with the immediate family members of the incarcerated, and more than once, failed to inform family members of a loved one's death due to COVID-19.¹²⁹

¹²⁴ See Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, THE MARSHALL PROJECT (Oct. 7, 2020) <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied>.

¹²⁵ O'Carroll, *supra* note 11, at 1564.

¹²⁶ 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, 6:00 AM), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36>.

¹²⁷ *Covid-19's Impact on People in Prison*, *supra* note 85.

¹²⁸ Blakinger & Neff, *supra* note 126.

¹²⁹ *FAMM submits testimony in advance of Senate Judiciary Committee hearing on oversight of the Federal Bureau of Prisons*, FAMILIES AGAINST MANDATORY MINIMUMS (Apr. 14, 2021), <https://famm.org/famm-submits-testimony-in-advance-of-senate-judiciary-committee-hearing-on-oversight-of-the-federal-bureau-of-prisons/>.

Finally, wardens failed to consistently provide reasoning for rejecting a claim, outrightly rejecting or ignoring a majority of motions they received.¹³⁰

In 2016, a court convicted Marie Neba of health care fraud and sentenced her to seventy-five years in Carswell medical prison.¹³¹ A 56-year-old woman with stage four cancer, Neba moved for compassionate release in 2019 and the warden denied her request.¹³² The second time she petitioned for compassionate release in March of 2020, during the COVID-19 pandemic, “the warden ignored her [request] altogether.”¹³³ Neba could “barely walk around because of generalized body pain and feet numbness,” and thought she would eventually die in prison.¹³⁴ Unfortunately, once the pandemic hit and prisoners at Carswell were infected with COVID-19, more than 500 women became ill, and six, including Neba, died.¹³⁵ The Carswell warden received 349 compassionate release motions and denied or ignored 346 of them.¹³⁶ The warden failed to uphold their compassionate release duty, and thus shows that the warden is ill-suited for this job.

A. Lack of Accurate Data and Recordkeeping by the BOP

¹³⁰ Blakinger & Neff, *supra* note 126.

¹³¹ *United States v. Neba*, 901 F.3d 260, 262 (5th Cir. 2018); Blakinger & Neff, *supra* note 126.

¹³² Blakinger & Neff, *supra* note 126.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

During the pandemic, the BOP did not accurately record data—including data for compassionate release motions—and withheld information regarding infections and death in their facilities.¹³⁷ From March to May of 2020, 10,940 federal prisoners applied for compassionate release nationwide, but wardens only approved 156 motions, or 1.4%.¹³⁸ The BOP released a statement about this issue but did not address why wardens failed to respond to release requests, and the wardens referred their questions to the BOP.¹³⁹ Concerns about the BOP’s recordkeeping at facilities raises flags about whether the prison staff follows correct release motion procedures and provides prisoners with detailed reasoning and notice of motion denials.¹⁴⁰ For example, in fiscal year 2021 wardens denied motions in 13,236 cases; of the 23,706 reasons given in total, wardens cited failure to meet sentencing factors in the rejection of 7,360 motions and “extraordinary or compelling reasons” in the rejection of 4,016 motions.¹⁴¹ The wardens only provided minimal reasoning for their rejections, leaving inmates without the

¹³⁷ Alison K. Guernsey, *The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?*, U.S. HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY SUBCOMM. ON CRIME, TERRORISM, AND HOMELAND SEC. (Jan. 21, 2022), <https://law.uiowa.edu/sites/law.uiowa.edu/files/2022-01/Guernsey%20-%20Written%20Testimony%20-%20House%20Judiciary%20Committee%20-%20201-20-22%20-%20FINAL.pdf>.

¹³⁸ Blakinger & Neff, *supra* note 126. Interestingly, the BOP does not produce data on the number of compassionate release requests denied by the BOP but granted by the court upon the motion of an inmate. Letter from Ken Hyle to Honorable Brian Schatz and Honorable Mike Lee (Dec. 2018), <https://inquest.org/wp-content/uploads/sites/3/2021/07/response-from-bop-re.-compassioante-release-during-covid-4.16.21.pdf>.

¹³⁹ Blakinger & Neff *supra* note 126.

¹⁴⁰ *Id.*

¹⁴¹ *U.S. Sentencing Commission Compassionate Release Data Report*, U.S. SENT’G COMM., Sept. 2022, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf>.

knowledge necessary to petition a favorable motion to the court.¹⁴² Further, even the BOP's General Counsel, Ken Hyle, admitted in a letter to the DOJ that "the BOP does not track the specific reasons a warden recommended approval of a compassionate release request," and only to "some extent" does the BOP record the reason for a warden's denial.¹⁴³

The BOP also shows their lack of recordkeeping and transparency by inaccurate or incomplete COVID-19 data.¹⁴⁴ The BOP did not provide accurate data about the number of deaths of prisoners in federal custody or the infection rates in facilities.¹⁴⁵ A BOP spokesperson told The Marshall Project that the "COVID-19 infection data the BOP reports does not include anyone who caught COVID-19 in prison but who was then released."¹⁴⁶ The BOP has instead been "undercounting the infection rate by thousands" by letting the total number of infected people drop each day.¹⁴⁷

In addition to issues with the cumulative infection numbers, the daily infection numbers also appear inaccurate and reports show the BOP failed to take proper care of their inmates during the pandemic.¹⁴⁸ The BOP daily infection numbers appear incorrect partly because

¹⁴² *See id.*

¹⁴³ Letter from Ken Hyle to Honorable Brian Schatz and Honorable Mike Lee, *supra* note 138, at 3. Hyle stated that the BOP ordinarily only grants a request when the inmate meets the applicable BOP compassionate release criteria. *Id.* However, this lends itself to the issue of the BOP possibly erroneously granting compassionate release. *See id.*

¹⁴⁴ Guernsey, *supra* note 138.

¹⁴⁵ *Id.* at 2–15.

¹⁴⁶ *Id.* at 7.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 8–9.

“infection-rate data is only as good as the BOP’s testing.”¹⁴⁹ Due to the lack of accurate recordkeeping of infections, the BOP failed to keep inmates in their facilities safe since they also did not record which inmates needed specialized care.¹⁵⁰ Additionally, during the pandemic, the BOP failed to provide appropriate medical care to its inmates.¹⁵¹ A lawsuit against a correctional facility in North Carolina alleged that treatment is basically nonexistent, and “hospital transfers do not occur until individuals ‘are already experiencing respiratory failure.’”¹⁵² The Eighth Amendment to the U.S. Constitution states that people should not be inflicted with cruel and unusual punishments;¹⁵³ but by not providing basic medical care in their facilities, the BOP fails to uphold this constitutional standard.¹⁵⁴

¹⁴⁹ *Id.* at 8. According to the BOP, there were “7,738 coronavirus cases among the approximately 134,896 individuals in BOP custody along with 1,996 cases among federal correctional facility staff,” however, the “BOP seems to be underreporting COVID deaths and infection rates to the public, so these numbers may not be entirely accurate.” *Statement of Jesselyn McCurdy, Managing Director of Government Affairs and Sakira Cook, Senior Director, Justice Program The Leadership Conference on Civil and Human Rights*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS. 1, 3 (Feb. 10, 2022), <https://civilrightsdocs.info/pdf/policy/letters/2022/02102022%20Leadership%20Conference%20Statement%20for%20the%20Record%20HJC%20BOP%20Oversight%20Hearing.pdf>.

¹⁵⁰ *Statement of Jesselyn McCurdy, Managing Director of Government Affairs and Sakira Cook, Senior Director, Justice Program The Leadership Conference on Civil and Human Rights*, *supra* note 150 at 1–3. As of February 2, 2022, the BOP reported that 284 people died in their custody due to the pandemic, and “[c]ountless complaints, lawsuits, and personal accounts sadly point to severe inadequacies in the bureau’s response, causing needless pain, illness, and death.” *Id.* at 1.

¹⁵¹ *Id.* at 1–3.

¹⁵² *Id.* at 3; *See Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. 2020).

¹⁵³ U.S. CONST. amend. VIII.

¹⁵⁴ *Do Inmates Have Rights? If So, What Are They?*, HG.ORG LEGAL RES., <https://www.hg.org/legal-articles/do-inmates-have-rights-if-so-what-are-they-31517> (last visited Feb. 24, 2023). The Eighth Amendment did not define what constitutes “cruel and unusual punishment,” however, the Supreme Court has said that “[p]risoners are entitled to receive medical care and mental health treatment.” *Id.*; *Estelle v. Gamble*, 429 U.S. 97 (1976). In this case, the Supreme Court held that “[d]eliberate

Finally, wardens' may experience conflicts of interest which present issues for inmates due to the daily interactions wardens have with the inmates, as well as the wardens' many roles in the prison.¹⁵⁵ The warden is a biased party in charge of discipline in the prison facilities, and there is a conflict of interest when an agency responsible for prosecuting individuals is the same agency that controls the granting of clemency.¹⁵⁶ The BOP is the warden's employer, whose stated mission "to protect society by confining offenders" is contrary to the purpose of compassionate release.¹⁵⁷ Further, the BOP belongs to the DOJ, and is subject to DOJ prosecutorial interests like "longer sentences, mandatory punishments, and fewer routine grants of clemency."¹⁵⁸ Additionally, before the enactment of the FSA when the BOP had sole discretion over motions for compassionate release, the BOP denied and ignored many of the motions, which could be attributed to bias and conflicts of interest.¹⁵⁹ One reason the USSC created the FSA was to reform the criminal justice system, and they did this by addressing the BOP's lack of response to compassionate release motions.¹⁶⁰ For example, the September 2021

indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment." *Id.*

¹⁵⁵ O'Carroll, *supra* note 11, at 1564.

¹⁵⁶ *Prison Warden Career, Job, Degrees and Training Information*, CRIM. JUST. PROFILES (Jan. 23, 2019), <https://www.criminaljusticeprofiles.org/prison-warden.html>.

¹⁵⁷ O'Carroll, *supra* note 11, at 1564.

¹⁵⁸ *Id.*

¹⁵⁹ Greenblatt, *supra* note 53, at 142–43.

¹⁶⁰ *The Federal Bureau of Prisons' Compassionate Release Program*, *supra* note 22; Wayne Boatwright, *Federal Compassionate Release During COVID-19 Pandemic (the GOOD, the BAD, the UGLY)*, THE MEDIUM (June 23, 2022), <https://medium.com/illumination/federal-compassionate-release-during-covid-19-pandemic-the-good-the-bad-the-ugly-9b173256f5f>.

Sentencing Commission Report detailed that 96.1% of defendants filed compassionate release motions themselves, with only 1% of motions filed by the Director of the BOP.¹⁶¹ Congress intended the BOP “drive the process of Compassionate Release as an administrative solution,” however, based on the data, the main way federal prisoners obtain compassionate release is by directly petitioning the court.¹⁶² Direct petition creates additional problems for inmates because inmates are not guaranteed access to counsel and must petition complicated motions on their own.¹⁶³

B. Inmates’ Lack of Counsel for Compassionate Release Motions

The creation of FSA highlighted issues regarding inmates without court-appointed attorneys, as well as the adversarial nature the inmates experience petitioning to the courts.¹⁶⁴ Inmates petitioning directly to sentencing courts after receiving a rejection from the BOP may face an adversarial contest with the government.¹⁶⁵ Additionally, inmates’ lack of a right to counsel poses problems because inmates may experience issues presenting their case.¹⁶⁶ Because many inmates have physical and mental disabilities making self-representation difficult,

¹⁶¹ *U.S. Sentencing Commission Compassionate Release Data Report*, *supra* note 101.

¹⁶² Boatwright, *supra* note 160.

¹⁶³ O’Carroll, *supra* note 11, at 1555.

¹⁶⁴ *Id.* at 1555–66.

¹⁶⁵ *Id.* at 1563. With this new form of compassionate release, the adversarial nature makes it so “on one side, [is] the petitioning inmate, and on the other, [is] the DOJ defending the BOP’s administrative denial of the petition.” *Id.* at 1555.

¹⁶⁶ *Id.* at 1555–60.

courts should provide access to a court-appointed attorney to inmates petitioning for release.¹⁶⁷ Further, compassionate release cases are complex, involving a great deal of documentation and difficult legal principles, so providing appointed counsel assists in “lessening the imbalance between the petitioner and the government.”¹⁶⁸

Providing inmates with court-appointed counsel is ideal for a few reasons. For one, although providing inmates with a free attorney may lead to an increase in taxes, reducing the federal prison population would also save taxpayer money in the long term.¹⁶⁹ Furthermore, this is the correct course of action because compassionate release is an important stage in a criminal case, where the defendants should still enjoy their constitutional right to counsel.¹⁷⁰ Additionally, lack of access to counsel will negatively affect poor and Black people, who experience disproportionately high rates of poverty and incarceration.¹⁷¹ In sum, inmates petitioning for compassionate release without counsel will inevitably have a difficult time stating their claims, and many experience race and class-based discrimination.¹⁷² Due to these

¹⁶⁷ Sady & Daily, *supra* note 46, at 2. The author notes the Supreme Court “recognized that the Sixth Amendment right to counsel extends to post-sentencing proceedings related to the underlying judgment in *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).” *Id.* Scholars also note “the compassionate release petition is a critical stage of a criminal case where the constitutional right to counsel should apply.” O’Carroll, *supra* note 11, at 1556.

¹⁶⁸ O’Carroll, *supra* note 11, at 1557.

¹⁶⁹ *Id.* at 1544 n.17.

¹⁷⁰ *Id.* at 1556.

¹⁷¹ *See generally* Boatwright, *supra* note 160; *see also* Starr & Rehavi, *supra* note 10, at 1320.

¹⁷² Boatwright, *supra* note 160; *see U.S. Sentencing Commission Compassionate Release Data Report*, *supra* note 101.

inevitable drawbacks, those petitioning for compassionate release should have access to a court-appointed attorney so the process is fair for everyone.¹⁷³

III. Executive Branch and U.S.S.C Solutions

The Executive Branch and the Sentencing Commission should expand compassionate release by redefining the catch-all “other reasons” provision¹⁷⁴ to allow for more specific examples and reduction for revisions in sentencing laws. However, Congress should still allow courts some discretion for reasons that do not neatly fit within the new definition. Additionally, the warden should not be the first person to analyze a compassionate release claim; the Executive Branch should instead assign a neutral third party to first review these motions. The warden is not a neutral party, and therefore may show bias when analyzing a release motion. This role should be performed by third parties—like other administrative agencies—that solely focus on the adjudication of compassionate release motions.

A. Sentencing Commission Should Redefine and Expand Definitions

The Sentencing Commission should redefine and expand the “other reasons” provision by providing more specific examples that all judges must abide to. Additionally, the Sentencing Commission should grant courts the power to interpret and apply discretion to this phrase, permitting circumstances that definitions do not address. Clearly defining the rule will bring uniformity to the courts. This uniformity will create more equity for all people applying for release, conform with Congressional intent, correct egregious sentences, and help with inconsistencies in application.

¹⁷³ See generally Boatwright, *supra* note 160.

¹⁷⁴ U.S.S.G. §1B1.13

1. Redefinition and Discretion to the Courts Conforms with Congress's Intent

Some circuits already apply their own broadened view of compassionate release and have explained how this angle better fulfills Congress's intent.¹⁷⁵ These circuits and line of cases state that it is up to the federal judge, not the BOP, to define "extraordinary and compelling circumstances" and reduce a sentence.¹⁷⁶ Although increased judicial discretion favors a defendant in some circuits,¹⁷⁷ if judges have too much discretion and not enough structure from the guidelines, they will not favor the defendant and instead will turn to the BOP for guidance.¹⁷⁸ For example, the Eleventh Circuit held in *United States v. Bryant* that the FSA did not "shift authority from the Commission to the courts to define [the] phrase [extraordinary and compelling]."¹⁷⁹ This disagreement between the circuits and need to avoid inconsistency in application indicates the USSC's need to redefine "extraordinary and compelling"—specifically

¹⁷⁵ *Federal Compassionate Release Full Steam Ahead with McCoy Decision*, BROWN LAW, <https://cjbrownlaw.com/federal-compassionate-release-full-steam-ahead-with-mccoy-decision/> (last visited Feb. 26, 2023).

¹⁷⁶ *Id.* If an inmate makes a motion for compassionate release in a "district court in the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, or D.C. Circuits, the court would [be] able to make an individualized determination about whether [the inmate's] circumstances qualified as extraordinary and compelling." Comment, *Eleventh Circuit Creates Circuit Split by Holding that the FIRST STEP Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, *supra* note 57, at 1189.

¹⁷⁷ Comment, *Eleventh Circuit Creates Circuit Split by Holding that the FIRST STEP Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, *supra* note 57, at 1189.

¹⁷⁸ *Id.* at 1186.

¹⁷⁹ *Id.* (quoting *United States v. Bryant* 996 F.3d 1243, 1263 (11th Cir. 2021)).

the “other reasons” provision under Application Note 1(D).¹⁸⁰ Until as recently as March 2023, the USSC sought public comment to redefine the rule¹⁸¹ and proposed guidelines taking out the following language: “[a]s determined by the Director of the Bureau of Prisons.”¹⁸² Statistics show that the Director of the BOP rarely files compassionate release motions; thus, eliminating this language would benefit defendants.¹⁸³ The USSC must define the “other reasons” provision with clarity by providing more specific examples and allowing reductions for revisions in sentencing law. However, the USSC should make clear that this definition is not exhaustive, and courts may exercise some discretion to broaden the rule. The USSC should clearly define “other reasons” to address inconsistencies and confusion in the courts' application. Furthermore, the USSC should broaden the scope of "other reasons" to align with Congress's intent and ensure fairness and equitable outcomes for all inmates.

It is important that the USSC redefine Application Note 1(D) for clarity while retaining court discretion because courts must be able to analyze all the unique facts and circumstances of a case.¹⁸⁴ The court applied this specific discretion in *United States v. McCoy*.¹⁸⁵ In 1995,

¹⁸⁰ *Id.*; U.S.S.G. 1B1.13.

¹⁸¹ *Proposed Amendments to the Sentencing Guidelines, supra* note 40, at 7.

¹⁸² *Id.* The notice for comment options are if 1) “the defendant presents any other circumstance or a combination of circumstances similar” to the circumstances previously stated; 2) because the defendant’s circumstances have changed, “it would be inequitable to continue the defendant’s imprisonment;” and 3) “[t]he defendant presents an extraordinary and compelling reason other than, or in addition to, the circumstances [previously stated].” *Id.*; see also *United States Sentencing Commission 2022-2023 Amendment Cycle, supra* note 68.

¹⁸³ See *U.S. Sentencing Commission Compassionate Release Data Report, supra* note 101.

¹⁸⁴ See generally *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020).

¹⁸⁵ *McCoy*, 981 F.3d 271 (4th Cir. 2020).

Thomas McCoy pled guilty to armed robbery.¹⁸⁶ The strict guidelines required the judge to give him the mandatory sentence of 35 years.¹⁸⁷ However, after the court sentenced McCoy, Congress enacted the FSA, allowing defendants to file their motions directly to the federal court.¹⁸⁸ After considering McCoy’s unique circumstances, including his “youth at the time of the offenses, . . . lack of significant prior criminal history, . . . exemplary behavior and rehabilitation in prison, . . . and . . . already-substantial years of incarceration,” the district court found he qualified for compassionate release and reduced his sentence to time-served.¹⁸⁹ The circuit court affirmed and found it was not improper for the court to assess the defendant’s case on an individual basis for compassionate release.¹⁹⁰

The *McCoy* court explained that the court, instead of the BOP, should have some discretion when assessing and evaluating the defendant’s circumstances because of the purpose and Congressional intent behind the FSA.¹⁹¹ The court emphasized that because the BOP used their compassionate release power so rarely, Congress needed to change the rule.¹⁹² In a 2013 report, the DOJ’s Inspector General found that only twenty-four inmates on average were

¹⁸⁶ *Id.*: *Federal Compassionate Release Full Steam Ahead with McCoy Decision*, *supra* note 175.

¹⁸⁷ *Federal Compassionate Release Full Steam Ahead with McCoy Decision*, *supra* note 175

¹⁸⁸ *McCoy*, 981 F.3d at 274 (4th Cir. 2020).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 274–75.

¹⁹¹ *Id.* at 275–76

¹⁹² *Id.* at 276.

released each year.¹⁹³ Further, the report stated that the BOP poorly handled these motions and “failed to establish timeliness standards for reviewing prisoner requests, causing delays so substantial that inmates sometimes died awaiting final BOP decisions.”¹⁹⁴ Finally, the court noted that Congress created the FSA with the intent of providing more discretion to courts and allowing some leniency to defendants.¹⁹⁵ Furthermore, *McCoy* explained that the purpose of compassionate release and the FSA is to allow the court to grant more motions, not less, and to allow the court, rather than the BOP, the discretion to analyze the facts of the case.¹⁹⁶

A Southern District of Texas case, *United States v. Cantu*, also shows the congressional intent behind the enactment of the FSA—the expansion and utilization of compassionate release.¹⁹⁷ In *Cantu*, the court found that based on Congress’s intent, the court has the authority to determine what “extraordinary and compelling” means.¹⁹⁸ The court made this finding by looking at one of the main purposes behind the FSA—allowing defendants to bring motions instead of just the BOP.¹⁹⁹ The court stated that before the FSA, “it made sense that the BOP would have to determine any extraordinary and compelling reasons” because only the BOP could

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* The court stated that the purpose of changing the rule was to “creat[e] an avenue for defendants to seek relief directly from the courts,” and that by creating the First Step Act, Congress created “an ‘incremental change,’ expanding the ‘discretion [of the courts] to consider leniency.’” *Id.* (quoting *United States v. Brooker* 976 F.3d 228, 230 (2nd Cir. 2020)).

¹⁹⁶ *Id.* at 283–84.

¹⁹⁷ *United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

bring a motion for reduction of a sentence.²⁰⁰ However, now that defendants can bring motions on their own behalf, they do not need the BOP's interpretation.²⁰¹ Therefore, the court used its own definition of extraordinary and compelling, by analyzing the circumstances of Mr. Cantu's case,²⁰² and granted his release.²⁰³ Because many courts are using their own interpretation of the term extraordinary and compelling, or deferring to the BOP, inconsistencies exist in the application of compassionate release, and therefore the USSC should step in to define.

1. Redefinition to allow for Reductions for Revision of Sentences

In addition to Congress's intent, the *McCoy* court exemplifies another situation when courts grant compassionate release—when a defendant's sentence is egregiously long and deserves another look.²⁰⁴ Congress created compassionate release due to the reality that a defendant's circumstances may have changed since the time of sentencing, and therefore a court should re-evaluate their sentence.²⁰⁵ Originally, the BOP mostly utilized compassionate release

²⁰⁰ *Id.* at 351.

²⁰¹ *Id.*

²⁰² *Id.* Because the statute does not define “or place any limits on—what ‘extraordinary and compelling reasons’ might warrant such a reduction,” the court was able to put in its own definition and interpretation of the phrase. *Id.* The court stated that *Black's Law Dictionary* defines extraordinary as “[b]eyond what is usual, customary, regular, or common,” and “extrapolating from its definition of ‘compelling need,’ a compelling reason is one ‘so great that irreparable harm or injustice would result if [the relief] is not [granted].’” *Id.*

²⁰³ *Id.* at 355.

²⁰⁴ *See McCoy*, 981 F.3d at 274.

²⁰⁵ *The Answer Is No: Too Little Compassionate Release in US Federal Prisons*, *supra* note 4. Because “lawmakers recognized that circumstances could arise that would render a final sentence unjust or unfair,” Congress included “safety valves” in the SRA, “authorizing federal courts to revisit sentences in a few specific situations and to reduce them if appropriate.” *Id.*

for the purpose of reducing sentences of terminally ill inmates, and extraordinary and compelling circumstances usually applied to defendants with a short time to live or with an extreme health problem.²⁰⁶ However, courts should grant compassionate release also when an inmate has an egregiously long sentence that may be the product of past racial bias or outdated laws.²⁰⁷

For example, the defendant in the *McCoy* case petitioned for a shorter sentence because he believed his sentence was long and unnecessary.²⁰⁸ The court found that if sentenced today, McCoy would receive two hundred months less in his sentence, and that Congress would view his past sentence as dramatically unfair.²⁰⁹ The court granted McCoy's sentence reduction, because the court found if an enormous disparity exists between a defendant's past sentence and a sentence defendant would receive today, then the extraordinary and compelling circumstances provision applies.²¹⁰ McCoy's petition differs from those seeking early release based on preexisting health conditions, or health conditions that have worsened in jail, because McCoy petitioned an unfair and extreme sentence.²¹¹ Although the circuit McCoy petitioned used a

²⁰⁶ *Id.* The Marshall Project states that "Congress created compassionate release as a way to free certain inmates, such as the terminally ill, when it becomes 'inequitable' to keep them in prison any longer." Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles#:~:text=Congress%20created%20compassionate%20release%20as,them%20in%20prison%20any%20longer.>

²⁰⁷ *Id.*

²⁰⁸ McCoy, 981 F.3d at 285. The court stated that Congress would likely find McCoy's sentence unfair because of a 200-month disparity between McCoy's sentence and the sentence he would receive today. *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Federal Compassionate Release Full Steam Ahead with McCoy Decision*, *supra* note 175.

broad view of compassionate release, not all circuits do, which results in an unequal application of compassionate release.²¹²

A court is permitted to reduce an unfair and extremely long sentence under compassionate release; ;however, the USSC has not explicitly defined this circumstance, and courts are not applying the standard with an even-hand.²¹³ Receiving a sentence reduction from the court for an extreme sentence was not possible for Thomas Bryant, in *United States v. Bryant*, because the Eleventh Circuit did not take the broad view of compassionate release.²¹⁴ The court convicted Bryant, similarly to McCoy, before the FSA, in 1997.²¹⁵ Bryant received a sentence of 292 months' imprisonment, followed by a consecutive 300 months, for multiple drug and gun offenses.²¹⁶ The court analyzed the statutory background of compassionate release and the FSA; however, the Eleventh Circuit came out differently than the Fourth Circuit in *McCoy*.²¹⁷ The court stated that the SRA did not put the courts in charge of defining extraordinary and compelling circumstances that may lead to early release.²¹⁸ The court said that instead, the SRA

²¹² *Id.*

²¹³ See generally *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, *supra* note 19.

²¹⁴ *United States v. Bryant*, 996 F.3d 1243, 1248 (11th Cir.), cert. denied, 211 L. Ed. 2d 363, 142 S. Ct. 583 (2021).

²¹⁵ *Id.*

²¹⁶ *Bryant*, 996 F.3d at 1248. Bryant was a former cop who abused the position and “worked with other officers to help traffic cocaine,” “acted as the cocaine couriers’ personal security detail,” and “sold cocaine and stolen guns himself.” *Id.*

²¹⁷ *Id.* at 1249.

²¹⁸ *Id.*

had the Commission define extraordinary and compelling reasons for a sentence reduction, along with the criteria and a list of specific examples.²¹⁹ The court ultimately did not grant a sentence reduction because the court found a reduction for this reason was not consistent with the Commission’s policy statement that defined “extraordinary and compelling reasons.”²²⁰ The court reasoned that the specific list of examples was exhaustive, even though other courts have found an inequitable sentence warrants release.

Because of the Eleventh Circuit’s analysis of what the Commission meant by “extraordinary and compelling reasons,” Bryant was unable to receive a sentence reduction.²²¹ Bryant’s main argument was that due to a non-retroactive sentencing change, he could not obtain a change in his sentence, but this non-retroactivity created an extraordinary and compelling circumstance for him.²²² The court looked to the 1984 Sentencing Reform Act for guidance, and found that the statute’s purpose “was to limit discretion and to bring certainty and uniformity to sentencing.”²²³ These findings led the court to conclude the FSA only changed who could file the motions, adding the defendant to the rule, not who could define what “extraordinary and compelling” meant.²²⁴ Therefore, according to the Eleventh Circuit, only the BOP can determine

²¹⁹ *Id.*

²²⁰ *Id.* The court went on to state that “[t]he answer to whether the Commission’s definition of ‘extraordinary and compelling reasons’ binds district courts is clear.” *Id.* at 1251.

²²¹ *Id.* at 1265.

²²² *Id.* at 1257.

²²³ Comment, *Eleventh Circuit Creates Circuit Split by Holding that the FIRST STEP Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, *supra* note 57, at 1185.

²²⁴ *Id.* at 1186.

the reasons for extraordinary and compelling circumstances, beyond what is already explicitly defined.²²⁵ By putting the defining power back in the BOP's hands, the Eleventh Circuit has created further confusion on the BOP's role in compassionate release motions, and the USSC must define the rule to eliminate further inconsistency.²²⁶

Because of the circuit split, the USSC should redefine the compassionate release rule and put forth clear guidance for the courts to follow, allowing for a reduction based on a revision of sentencing laws. The current circuit split is troublesome because inmates may be denied release based on what court hears their claim, or where they are located geographically.²²⁷ As of now, courts reviewing motions from inmates sentenced in Alabama, Georgia, and Florida are more likely to deny motions than courts in other states, because of how the Eleventh Circuit decided to analyze the rules.²²⁸ Inmates with similar circumstances in different states should not have different outcomes simply because they are not in a circuit that looks at the broad reading of compassionate release. The USSC should better define compassionate release and should specifically broaden the rule to allow motions regarding sentencing disparities, so inconsistencies with cases like *Bryant* are less frequent.

The USSC providing a broader definition of the “other reasons” to allow reductions for sentence disparities will allow courts to grant more compassionate release motions, which aligns

²²⁵ *Id.* The court states that only the BOP can determine reasons beyond “an inmate’s age, health, or family circumstances” to justify compassionate release. *Id.*

²²⁶ *Id.* at 1187.

²²⁷ *Id.* at 1189.

²²⁸ *Id.*

with Congress’s intent and will lead to more consistent and reliable outcomes by the courts. Many district courts are now allowing sentencing disparities to constitute “extraordinary and compelling reasons” for reducing a sentence.²²⁹ These decisions are consistent with congressional intent, because Congress “explicitly repudiated now-defunct mandatory minimums and consecutive sentence mechanisms” by creating criminal justice reform that goes against such harsh sentencing.²³⁰ Because practices like stacked sentencing and mandatory minimums are no longer the norm, a long sentence that uses one of those tactics should qualify as “extraordinary and compelling.”²³¹ Further, these courts are of the opinion that Congress’s intent for the FSA was to provide more second looks for deserving individuals, and that compassionate release can play a crucial role in that.²³² Society would benefit from courts providing more opportunities for second looks at inmates’ sentences because this would incentivize inmates in federal prisons to start rehabilitation, and comply with BOP rules and standards.²³³

1. Additional Reasons for Expansion

The USSC should expand compassionate release because it is the just and equitable thing to do for all inmates in the criminal justice system; however, there are also economic benefits to

²²⁹ Greenblatt, *supra* note 53, at 179. The analysis states that “[a]n increasing number of district courts—most notably the Western District of New York, the Southern District of Iowa, the District of Arizona, the Southern District of Texas, and the District of Nebraska—have concluded that sentencing disparities can constitute extraordinary and compelling circumstances urging compassionate relief.” *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 180.

²³² *Id.* at 185; *See United States v. Brown*, 411 F. Supp. 3d 446, 454 (S.D. Iowa 2019).

²³³ Greenblatt, *supra* note 53, at 190.

this strategy.²³⁴ Long prison sentences do not deter crime,²³⁵ and sometimes can do more harm than good.²³⁶ For example, studies show that for those convicted of a crime, longer sentences produce very little deterrent effect, whereas short to moderate sentences better deter defendants.²³⁷ Also, any benefit derived from long term incarceration pales in comparison to the social and economic losses that will inevitably occur due to this long sentence.²³⁸

For instance, the National Institute of Corrections reported that the annual cost of incarcerating individuals with illnesses over the age of 55 costs on average two to three times more than younger and healthier inmates.²³⁹ Further, the DOJ has reported that facilities with the highest amount of aging inmates “spent five times more per inmate on medical care—and 14 times more per inmate on medication—than institutions with the lowest percentage of aging

²³⁴ Andreea Matei, *States Could Save Lives by Expanding Compassionate Release during COVID-19 and Beyond*, URB. INST. (June 24, 2020), <https://www.urban.org/urban-wire/states-could-save-lives-expanding-compassionate-release-during-covid-19-and-beyond>.

²³⁵ *National Institute of Justice Five Things about Deterrence*, U.S. DEP’T OF JUST., OFFICE OF JUST. PROGRAMS NAT’L. INST. OF JUST. (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>. Although “[p]rison is an important option for incapacitating and punishing those who commit crimes, but the data shows long prison sentences do little to deter people from committing future crimes.” *Id.*

²³⁶ Matei, *supra* note 234.

²³⁷ *National Institute of Justice Five Things about Deterrence*, *supra* note 235.

²³⁸ *Id.*

²³⁹ *Prison Health Care: Costs and Quality*, THE PEW CHARITABLE TRS. (2017), https://www.pewtrusts.org/-/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf“Pew%20costs%20and%20quality. Even more recently, reports have shown that the difference may be even wider. *Id.*

inmates.”²⁴⁰ Typically, aging inmates received long sentences at a younger age,²⁴¹ so applying broadened compassionate release standards could comply both with the medical prong of the rule and allow courts to take a second look at longer sentences to ensure they are fair and just. Additionally, for the amount the government is spending on aging and sick prisoners, the quality of medical care remains poor, and fails to consistently meet constitutional standards.²⁴² Due to the amount of money spent on aging prisoners whom the courts could release and rehabilitate, broadening compassionate release can assist in reducing spending.

B. Solutions to the BOP and Warden

1. Judicial Oversight and Discretion

The warden and the BOP showed through their underutilization of compassionate release motions and lack of recordkeeping that Congress and the Executive Branch must take action to improve the system. One way to improve the compassionate release process is by increased oversight into BOP determinations after the BOP denies or ignores a request by an inmate.²⁴³ Congress’s intent to allow courts to exercise discretion over the BOP originated at the passage of the SRA in 1984.²⁴⁴ Senate reports from this time state that legislators intended compassionate

²⁴⁰ *Id.*

²⁴¹ *Old Behind Bars: The Aging Prison Population in the United States*, HUM. RTS. WATCH (Jan. 27, 2012), <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states>. A report on the number of older inmates noted that “older inmates are serving longer sentences on average: 66 percent of older inmates were serving a maximum sentence of 10 years or more while 58 percent of younger inmates were serving maximum sentences of less than 10 years,” and that “[t]wenty-one percent of older inmates were serving life sentences, compared to only 8.2 percent of younger inmates.” *Id.*

²⁴² *Id.*

²⁴³ Greenblatt, *supra* note 53, at 142.

²⁴⁴ *Id.*

release to act as a safety valve for sentence reductions by allowing a second look in particularly compelling circumstances, which would keep the “sentencing power in the judiciary where it belongs.”²⁴⁵ However, after Congress passed the SRA, the USSC struggled to define “extraordinary and compelling,” and therefore the courts applied compassionate release inconsistently.²⁴⁶ Because of this lack of clarity, Congress gave the BOP free reign to apply compassionate release how they saw fit, which led to a narrow interpretation and the BOP filing very few compassionate release cases.²⁴⁷

To better satisfy Congress’s intent, judges should interpret specific cases when they do not fit into the definitions provided by the USSC, and courts and the Executive Branch should oversee the BOP to ensure fulfillment of its duties. Judges must oversee the BOP and tell them what the law is—which in turn is based on how the USSC defines extraordinary and compelling—and not leaving it in the hands of the Director of the BOP to define.²⁴⁸ The USSC should redefine “extraordinary and compelling”²⁴⁹ in order to provide more clarity, but should also leave some discretion to the judges for the “other reasons”²⁵⁰ provision. Judges should then use their experience and expertise to analyze the facts and come to a conclusion about an

²⁴⁵ *Id.* at 147 (quoting S. REP. NO. 98-225, at 52, 53 n.196).

²⁴⁶ *Id.* at 148.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 202.

²⁴⁹ *Id.* at 148.

²⁵⁰ *Id.* at 149.

inmate’s compassionate release case.²⁵¹ The USSC can do this by leaving a phrase like “but not limited to” in the “other reasons” provision to allow judicial discretion and interpretation of the specific circumstances for that defendant.²⁵² The courts, unlike the BOP, are a disinterested party that can provide its expertise in analyzing the law and the facts of the case fairly instead of relying on opinions by the BOP. No two defendants or circumstances are exactly alike, so the USSC should leave some judicial discretion in the “other reasons” provisions in order to allow defendants relief who may have an extraordinary and compelling reason for a sentence reduction but may not fit into the mold of the specific rules.²⁵³

2. A Neutral Third Party instead of the Warden

Based on the warden’s lack of transparency, potential bias, and underutilization of compassionate release motions, Congress should not have the compassionate release process begin with the warden. The BOP and warden displayed their lack of transparency by underreporting COVID-19 cases and with medical issues, and with their infrequent use of compassionate release power.²⁵⁴ The reasoning behind wardens’ lack of proactivity is not clear, whether it is understaffing, lack of clarity with the rules and procedures, or other reasons preventing wardens from fulfilling their job duties.²⁵⁵ Regardless of the reasoning, this failure by

²⁵¹ Hamilton, *supra* note 9, at 1776.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *FAMM submits testimony in advance of Senate Judiciary Committee hearing on oversight of the Federal Bureau of Prisons*, *supra* note 129.

²⁵⁵ Blakinger & Neff, *supra* note 126.

the wardens is at the expense of inmates, who deserve humane treatment in their facilities and an opportunity to present their reasoning for a sentence reduction to the court.²⁵⁶ The wardens' lack of timeliness with claims and reasoning for rejections prevents inmates from receiving a second look at their sentence.²⁵⁷ Further, this lack of clarity and proactivity from the wardens actively prohibits inmates from a possible early release.

Because of the reasons stated above, Congress should assign a neutral third party within the BOP to first analyze a defendant's compassionate release motion, including looking at the defendant's medical records, rehabilitation programs, behavior in prison, and the unique circumstances that led them to apply for compassionate release motion. The COVID-19 pandemic showed the importance of compassionate release, and how quickly the number of claims can increase,²⁵⁸ so this neutral third party should strictly oversee compassionate release claims. Because compassionate release is often the only way a prisoner can receive a second look at his or her sentence,²⁵⁹ having a neutral third party analyze these claims and provide a more thorough examination and explanation of their findings appropriately addresses the issue.

Many agencies use the approach of a neutral third party within the agency to assess whether the agency should award benefits to a member.²⁶⁰ For example, the U.S. Department of

²⁵⁶ *See generally id.*

²⁵⁷ *See generally id.*

²⁵⁸ *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, *supra* note 8.

²⁵⁹ *See supra* notes 24–28.

²⁶⁰ *See VA Benefits and Health Care*, U.S. DEP'T OF VETERANS AFFS., <https://www.va.gov/> (last visited Mar. 13, 2023); *See also Program Operations Manual System*, SOCIAL SECURITY ADMIN. (Feb. 20, 2014),

Veteran Affairs (VA) uses this style with their process of regional officers adjudicating claims to assign benefits to veterans.²⁶¹ A VA's adjudication of a disability claim will initially take place at the veteran's Regional Office (RO), where the office will gather medical data, missing records, and evidence in order to assist with the claim.²⁶² A regional office exists in every state, and regional officers are solely charged with administering services to veterans, allowing expertise and focus on the veterans' claims.²⁶³ The Social Security Administration (SSA) also uses the neutral third party approach, where the SSA adjudicator's exclusive role is to approve or disapprove applications for Social Security benefits.²⁶⁴ The SSA adjudicator also is responsible for assisting with the Social Security application and explaining eligibility requirements, so an individual can make informed decisions regarding their application.²⁶⁵ Further, these agencies' particularized roles in the adjudication of members' claims and in assisting members to receive benefits provides impartiality and fair-mindedness, which allows for a more equitable operation.

The BOP granting compassionate release for an inmate is a benefit, similar to benefits other agencies provide to their members.²⁶⁶ Like other agencies, the third party for the BOP should solely adjudicate compassionate release motions, provide neutrality, have no connection or relationship with the inmate, and hold specific expertise in this area. The third party should

²⁶¹ *VA Benefits and Health Care, supra* note 260.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Program Operations Manual System, supra* note 260.

²⁶⁵ *Id.*

²⁶⁶ *See VA Benefits and Health Care, supra* note 260.

remain in the BOP and under the DOJ, but should operate out of an office that is not within the prison, unlike the warden, who interacts with inmates regularly. Further, having a neutral third party review compassionate release motions exclusively will allow more thorough examination of the defendant's reasoning and record, and will prevent any bias.

If the third party denies a compassionate release motion, there is a higher likelihood the inmate will comply with the request and accept the result, because of the third party's neutrality in making the decision. Finally, a few selected officers of the BOP dedicated only to the adjudication of compassionate release motions and the interpretation of the extraordinary and compelling factors will create a record of judicial review, which will allow courts to apply the factors and analyze situations with ease.²⁶⁷ With a record of judicial review, compassionate release motions and cases will not overwhelm the courts. When an inmate does motion to the court after the BOP rejects a claim, the court will have a record to reference, and more uniformity, which will result in consistent outcomes.

The process for applying for compassionate release under this model should remain the same as structured under the FSA, except the first review will go to the third party. If the third party accepts the defendant's claim, then the claim can go through the Director of the BOP, who can then accept or reject the claim, and if the Director rejects the claim, then the prisoner can petition the court. If the third party denies the defendant's claim, then the defendant can petition straight to the court after the third party provides reasoning for the rejection. This third party should be well-staffed and resourced so that they can hear claims immediately. The USSC can

²⁶⁷ See Peter Constable Alter, *A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U.C. IRVINE L. REV. 1045, 1077 (2020).

take out the provision that states that a defendant must wait thirty days if the warden ignores the claim.²⁶⁸ Under this new model, the third party should hear claims in ten days and give their answer to the defendant within those ten days, because time is sensitive for some inmates. The third party will only review compassionate release cases, and therefore can provide faster responses.

1. Record Management by the BOP

Additionally, the third party should give ample reasoning and feedback about the denial of a claim and the inmate's next steps to have their claim heard by the sentencing court. The Executive Branch will oversee the third party and the BOP to ensure timely review of cases and feedback, requiring recordkeeping similar to that of the Department of Health and Human Services (HHS).²⁶⁹ At HHS, the agency develops a policy for records management to ensure the accurate recording and preserving of records.²⁷⁰ This policy consists of a detailed report on how the HHS plans to manage, maintain, and dispose of records within the federal agency.²⁷¹ The report presented their Electronic Recordkeeping System, which allows the agency to better record their activities and file records for storage for efficient and effective retrieval.²⁷² The BOP, like HHS, should develop a recordkeeping policy for compassionate release, which

²⁶⁸ *See supra* note 59.

²⁶⁹ *HHS Policy for Records Management*, U.S. DEP'T OF HEALTH AND HUM. SERVICES (May 2020), <https://www.hhs.gov/web/governance/digital-strategy/it-policy-archive/hhs-ocio-policy-for-records-management.html#1>.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

includes detailed instruction on how to store records for easy accessibility. This will then allow an administrator in the Executive Branch to audit the BOP's compassionate release findings and records, to ensure the BOP is complying with compassionate release standards, and allow accurate data keeping.

Congress should require the third party to submit monthly reports on the data surrounding the compassionate release motions in their facilities: the number of inmates who are applying, the number of inmates making it past the first round with the third party, and the reasoning for why inmates are or are not receiving compassionate release. The BOP will submit this report through their data keeping system, which will include all of the records stated above. This structure will allow more fairness and equity to inmates because third parties will allow more expertise and time to devote to compassionate release claims, and the executive branch will have the ability to oversee the BOP's records and data on compassionate release in their facilities.

II. Conclusion

Compassionate release alone cannot fix the problem of mass incarceration, however, it is a mechanism in our laws that the Executive Branch should aim to improve.²⁷³ Compassionate release is an important safety valve in the Federal Sentencing Guidelines that gives those inmates who have certain “extraordinary and compelling circumstances” or egregious sentences another chance to have their sentences looked at, and hopefully reduced.²⁷⁴ For some inmates, a grant of compassionate release provides the only way to receive an early release.²⁷⁵ For those with long

²⁷³ O'Carroll, *supra* note 11, at 1563.

²⁷⁴ Vijay Das & David A. Love, *It's Time for Compassionate Release*, TRUTHOUT (Jan. 23, 2019), <https://truthout.org/articles/its-time-for-compassionate-release/>.

²⁷⁵ *See supra* notes 24–28.

sentences, compassionate release allows another look to examine if the court would impose the same punishment today.²⁷⁶ Although Congress intended for more inmates to file motions when Congress enacted FSA, reality shows inmates still face obstacles when applying for release.²⁷⁷

The problem lies in the lack of clarity around the term “extraordinary and compelling,” and who defines it—the BOP or the court. Congress charged the USSC with defining the term, but the USSC’s current definition has resulted in confusion and inconsistency for the courts.²⁷⁸ As the *Cantu* court states, “very little guidance exists on what constitutes extraordinary and compelling reasons warranting a sentence reduction under U.S.S.G § 1B1.13 cmt. n.1(D)—only the BOP was previously empowered to seek such relief, and it rarely did so.”²⁷⁹ Without this guidance, courts lack uniformity interpreting the phrase, with some courts using their discretion and viewing the facts of the specific case,²⁸⁰ while other courts defer to how the BOP defines the phrase.²⁸¹

More specifically, the USSC should define with clarity the provision under Application Note 1(D) for “other reasons,” while allowing some discretion to judges to apply a fact-specific analysis of each case. The USSC must spell out a more-sound rule with factors and specific

²⁷⁶ See *supra* Section IV.

²⁷⁷ Haley, *supra* note 30, at 2022.

²⁷⁸ See *supra* Section III.

²⁷⁹ United States v. Cantu, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019).

²⁸⁰ United States v. McCoy, 981 F.3d 271, 274 (4th Cir. 2020).

²⁸¹ United States v. Bryant, 996 F.3d 1243, 1248 (11th Cir. 2021).

examples the court can easily apply, and expand the rule to allow for sentence reductions for revisions to sentencing laws. However, the courts can use their discretion to decide if an extraordinary or compelling circumstance exists beyond the definition provided by the USSC, if a circumstance does not fit neatly into the one provided. A court should only utilize their discretion to broaden the definition when an inmate's circumstance appears extraordinary and compelling.

Finally, the BOP and the warden should play a less crucial role in the compassionate release process. The warden harbors a conflict of interest when applying compassionate release motions because wardens interact with prisoners daily. Thus, the most viable solution comes in the form of a neutral third party analyzing compassionate release claims instead of the warden. Congress should ensure the third party's only task is to assist and analyze compassionate release claims, resulting in quick, detailed responses. The Executive Branch should oversee that this process is done properly by requiring that the Director submit monthly reports and have a policy for records management.

Compassionate release is a crucial part of our criminal justice system and Congress should administer it thoughtfully. If the USSC provides clear guidelines and examples of "extraordinary and compelling circumstances," specifically, the "other reasons" provision, allows reductions for revisions in sentencing laws, and leaves discretion to courts for circumstances not clearly defined, more uniformity and consistency will result for those applying for compassionate release. Additionally, if Congress establishes neutral third parties within the BOP to first hear claims instead of the warden, and the Executive Branch increases oversight

over the BOP by requiring submissions of accurate record keeping, compassionate release will be a more fair and just process, like Congress intended.