

AN EXTRAORDINARY AND COMPELLING CASE FOR JUDICIAL DISCRETION: NONRETROACTIVE SENTENCING CHANGES AND COMPASSIONATE RELEASE

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INTRODUCTION

The First Step Act of 2018, among other provisions, amended the sentencing requirements for offenses regarding controlled substances.¹ It also removed a stacking provision for defendants who were found to have used a gun in relation to a drug offense.² Significantly, these changes shortened mandatory minimums faced by offenders. For example, prior to the First Step Act, a defendant convicted of three concurrently charged counts of a crime of violence or a drug trafficking crime and used, carried, or possessed a firearm in furtherance of said crime was subject to a mandatory minimum sentence of 55 years.³ Now, a conviction on the same three counts charged at the same time results in a 15-year mandatory minimum.⁴ The First Step Act contains additional criminal justice provisions, including amending the compassionate release statute; now, an incarcerated person may motion courts for modification of their sentence.⁵ Some of the sentencing changes were not made to be retroactive, which has divided courts and lead to an inequitable application of the law—some incarcerated people had their sentence reduced, while others in similar situations were denied such relief. Nonretroactive sentencing changes made by the First Step Act qualify as an extraordinary and compelling reason to grant defendant-filed motions for sentence reduction under the compassionate release statute.

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1. First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194 (2018).

2. First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194 (2018).

3. 18 U.S.C. § 924(c) (1998).

4. *Id.*

5. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194 (2018).

I. THE FIRST STEP ACT OF 2018

The Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (hereinafter the First Step Act) is a bipartisan⁶ bill enacted on December 21, 2018.⁷ This law aims to provide correctional reform by reducing recidivism, improving confinement conditions, reducing the prison population, reforming sentencing for certain drug offenses by reducing mandatory minimums, expanding the safety valve, eliminating the stacking provision imposed for use of a gun, and authorizing the retroactive application of the Fair Sentencing Act of 2010.⁸ It also reauthorizes the Second Chance Act, which provides grants for various rehabilitative and treatment programs.⁹ This Note focuses on the sentencing reforms made under Title IV of the First Step Act and their impact upon sentence reductions made under the compassionate release statute.

A. Sentencing Reforms

The First Step Act made four significant sentencing reforms.

Section 401 amends the mandatory minimum for a person who violates the Controlled Substances Act¹⁰ or Controlled Substance Import and Export Act.¹¹ The Controlled Substances Act makes it unlawful “for any person [to] knowingly or intentionally... manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or... to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”¹² Similarly, the Controlled Substance Import and Export Act makes it unlawful for a person to knowingly or intentionally import or export a controlled substance, bring or possess a controlled substance on board a vessel, aircraft, or vehicle, or manufacture, possess with intent to distribute, or distribute a controlled substance.¹³ The controlled substances listed in these Acts are heroin, cocaine and its derivatives, cocaine base, phencyclidine (PCP), lysergic acid diethylamide (LSD), fentanyl, marijuana, and methamphetamine.¹⁴

6. Senator Patrick Leahy (D-Vermont) went so far as to claim that support for the First Step Act was “not just bipartisan [but] nearly nonpartisan.” 164 CONG. REC. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy). See 164 CONG. REC. S7756-57 (daily ed. Dec. 18, 2018) (statement of Sen. Durbin) for a list of supporters of the bill.

7. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> (last visited Nov. 10, 2022).

8. NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

9. *Id.*

10. 21 U.S.C. § 801.

11. 21 U.S.C. § 960(b).

12. 21 U.S.C. § 841(a).

13. 21 U.S.C. § 960(a).

14. 21 U.S.C. §§ 841(b), 960(b).

This section added descriptions of “serious drug felony”¹⁵ and “serious violent felony”¹⁶ to the Controlled Substances Act.¹⁷ The mandatory minimum sentence for a second violation of the Controlled Substances Act decreased from 20 years to 15 years, and the mandatory minimum sentence for a third or subsequent violation decreased from life imprisonment to 15 years.¹⁸ The mandatory minimum for a violation of the Controlled Substances Import and Export Act, after a final conviction of a serious drug felony or serious violent felony, was amended from 20 years to 15 years.¹⁹ These changes were not made to be retroactive by Congress and only applied if a sentence had yet to be imposed.²⁰ After the first year of implementation, “the number of offenders who received enhanced penalties decreased by 15.2 percent.”²¹ The following table demonstrates the changes.²²

15. A serious drug felony is defined as an offense prohibited by the Controlled Substances Act, the Controlled Substances Import and Export Act, or the similar state law, where defendant was imprisoned for more than 12 months and was released within 15 years of the offense. U.S. SENT’G COMM’N AND OFF. OF EDUC. & SENT’G PRAC., ESP INSIDER EXPRESS, FIRST STEP ACT 3 (2019).

16. A serious violent felony encompasses violent offenses where the defendant was imprisoned for more than 12 months and the offense was punishable by a maximum imprisonment of 10 years or more. U.S. SENT’G COMM’N AND OFF. OF EDUC. & SENT’G PRAC., ESP INSIDER EXPRESS, FIRST STEP ACT 3 (2019). *See* 18 U.S.C. § 3559(c)(2).

17. First Step Act of 2018, Pub. L. No. 115-391, § 401(a), 132 Stat. 5194 (2018).

18. 21 U.S.C. § 841(b); First Step Act of 2018, Pub. L. No. 115-391, § 401(a), 132 Stat. 5194 (2018).

19. First Step Act of 2018, Pub. L. No. 115-391, § 401(b), 132 Stat. 5194 (2018).

20. First Step Act of 2018, Pub. L. No. 115-391, § 401(c), 132 Stat. 5194 (2018).

21. *The First Step Act of 2018 One Year of Implementation*, U.S. SENT’G COMM’N 3 (2020).

22. U.S. SENT’G COMM’N AND OFF. OF EDUC. & SENT’G PRAC., ESP INSIDER EXPRESS, FIRST STEP ACT 2 (2019).

Statutory Provision	Statutory Penalty	Enhanced Penalty Before the First Step Act	Enhanced Penalty After the First Step Act
21 U.S.C. § 841(b)(1)(A)	10-year Mandatory Minimum	<p>20-year Mandatory Minimum (after one prior conviction for a felony drug offense)</p> <p>Life (after two or more convictions for a felony drug offense)</p>	<p>15-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)</p> <p>25-year Mandatory Minimum (after two or more prior convictions for a serious drug felony or serious violent felony)</p>
21 U.S.C. § 841(b)(1)(B)	5-year Mandatory Minimum	10-year Mandatory Minimum (after one prior conviction for a felony drug offense)	10-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)
21 U.S.C. § 960(b)(1)	10-year Mandatory Minimum	20-year Mandatory Minimum (after one prior conviction for a felony drug offense)	15-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)
21 U.S.C. § 960(b)(2)	5-year Mandatory Minimum	10-year Mandatory Minimum (after one prior conviction for a felony drug offense)	10-year Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)

Section 402 amends 18 U.S.C. § 3553,²³ which relates to sentencing, by broadening the existing safety valve provision and allowing low-level nonviolent drug offenders to receive sentences that are shorter than the mandatory minimum.²⁴ In fiscal year 2018, 32.1 percent of drug trafficking offenders benefitted from the safety valve provision.²⁵ In the first year of the First Step Act (2019), 41.8 percent of drug trafficking offenders received relief from a mandatory minimum penalty; 19.2 percent of offenders were newly eligible as a result of the expanded criteria.²⁶

Section 403 of the First Step Act eliminated the stacking provision of 18 U.S.C. § 924(c), which adds a penalty for the use, carrying, or possession of a firearm during, in relation to, or in furtherance of a crime of violence or drug trafficking crime.²⁷ Before this change, the statute enhanced the minimum sentence of a concurrently charged offense. Now, the sentence shall be a term of imprisonment of not less than 25 years for a second or subsequent conviction and only after a prior conviction has become final.²⁸ The defendant must have previously been convicted of a violation, limiting the sentencing enhancement to “true repeat offenders.”²⁹ The sentencing enhancement does not “apply[] to conduct within the same indictment,”³⁰ and only applies “when the first § 924(c) conviction arises from a separate case and becomes final before the second conviction.”³¹ This change is also nonretroactive.³² The First Step Act’s implementation reduced the average sentence length of an offender convicted of multiple counts of § 924(c) offenses from 408 months in fiscal year 2018 to 281 months in fiscal year 2019.³³ This is a reduction of more than 12 years of imprisonment. The following table demonstrates the sentencing changes.³⁴

23. 18 U.S.C. § 3553.

24. First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194 (2018); NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 9 (2019). See CHARLES DOYLE, CONG. RSCH. SERV., FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS (2019) for a more detailed description of the safety valve exception.

25. *The First Step Act of 2018 One Year of Implementation*, U.S. SENT’G COMM’N 4 (2020).

26. *Id.*

27. First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194 (2018); 18 U.S.C. § 924(c).

28. 18 U.S.C. § 924(c).

29. 164 CONG. REC. S7314 (daily ed. Dec. 5, 2018) (statement of Sen. Cardin).

30. *Id.*

31. *United States v. Thacker*, 4 F.4th 569, 572 (7th Cir. 2021).

32. First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194 (2018).

33. *The First Step Act of 2018 One Year of Implementation*, U.S. SENT’G COMM’N 38 (2020).

34. *Id.* at 47; U.S. SENT’G COMM’N AND OFF. OF EDUC. & SENT’G PRAC., ESP INSIDER EXPRESS, FIRST STEP ACT 4 (2019).

§ 924(c) Counts of Conviction in the Same Indictment	Before the First Step Act	After the First Step Act
1 Count	Mandatory minimum of 5 years	Mandatory minimum of 5 years
2 Counts	Mandatory minimum of $5 + 25 = 30$ years	Mandatory minimum of $5 + 5 = 10$ years
3 Counts	Mandatory minimum of $5 + 25 + 25 = 55$ years	Mandatory minimum of $5 + 5 + 5 = 15$ years

Section 404 applies the Fair Sentencing Act of 2010 retroactively, so that courts may “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010³⁵ were in effect at the time the covered offense was committed” for those who were sentenced before 2010.³⁶ Notably, the Fair Sentencing Act reduced the sentencing disparity between the amount of crack and powder cocaine necessary to trigger the mandatory minimum sentence from a ratio of 100:1 to 18:1 and eliminated the mandatory minimum for simple possession of cocaine.³⁷ By September 30, 2020, courts granted 3,705 sentence reductions due to this provision.³⁸

B. The Compassionate Release Statute, 18 U.S.C. § 3582(c)

1. Changes Made by the First Step Act

18 U.S.C. § 3582(c), colloquially known as the compassionate release statute and referred to as such hereinafter, states: “[T]he court... may reduce the term of imprisonment... after considering the factors set forth in [18 U.S.C. § 3553(a)]... if it finds that extraordinary and compelling reasons warrant such a reduction... and that such a reduction is consistent with applicable policy conditions issued by the Sentencing Commission.”³⁹

The compassionate release statute is an exception to the rule that the court may not modify a term of imprisonment once it has been imposed.⁴⁰ Under the

35. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

36. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194 (2018).

37. *Federal Crack Cocaine Sentencing*, SENT’G PROJECT 1 (2016).

38. *U.S. Sentencing Commission First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, U.S. SENT’G COMM’N table 1 (2021).

39. 18 U.S.C. § 3582(c)(1)(A).

40. *Id.*

compassionate release statute, an incarcerated person's sentence may be reduced to time served, allowing for release from prison, or their sentence may be reduced to a shorter term of incarceration.⁴¹ To note, a sentence may also be modified if expressly permitted by statute—such as the sentencing changes made by the retroactive application of the Fair Sentencing Act—or by Rule 35 of the Federal Rules of Criminal Procedure,⁴² if the sentencing range has subsequently been lowered pursuant to 28 § U.S.C. 994(o),⁴³ or the defendant is at least 70 years of age, has served at least 30 years in prison pursuant to a sentence under 18 U.S.C. § 3559(c), and the Director of the BOP has determined that the defendant is not a danger to the safety of others or the community.⁴⁴ These sentence modifications will not be addressed here, but these approaches can be considered in conjunction with sentence reduction under the compassionate release statute. Throughout this note, the terms compassionate release and reduction in sentence are used interchangeably.

The Bureau of Prisons (“BOP”) did not adequately employ the compassionate release statute prior to the First Step Act, bringing only six percent of requests before a judge.⁴⁵ The Sentencing Commission noted this dearth of compassionate release recommendations, and “strengthened and broadened the criteria for compassionate release” in 2016, encouraging the BOP “to use its discretion consistent with this new policy so that eligible applications are reviewed by a trial judge.”⁴⁶ The changes included four categories under which an incarcerated person may be eligible for compassionate release: medical conditions, age, family circumstances, or other extraordinary and compelling reasons as determined by the Director of the BOP.⁴⁷ The only limit mentioned in this policy is that pursuant to 28 U.S.C. § 994(t), “rehabilitation of the defendant is not, *by itself*, an extraordinary and compelling reason.”⁴⁸

Congress viewed this policy recommendation as insufficient to effect change. With the First Step Act, Congress removed the sole discretion for bringing motions for sentence reductions from the Director of the BOP and placed responsibility in the hands of defendants.⁴⁹ Incarcerated people can now bring their motion for sentence reduction to the court if the Director of the BOP failed to bring a motion on the defendant's behalf or if 30 days have lapsed since receipt of the request by the warden of the defendant's facility.⁵⁰ This amendment was successful; compassionate release motions have increased since the passage of the First Step

41. 18 U.S.C. § 3582(c).

42. 18 U.S.C. § 3582(c)(1)(B).

43. 18 U.S.C. § 3582(c)(2).

44. 18 U.S.C. § 3582(c)(1)(A)(ii).

45. 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>.

46. *U.S. Sentencing Commission Approves Significant Changes to the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N (Apr. 15, 2016), <https://www.ussc.gov/about/news/press-releases/april-15-2016>.

47. U.S. SENT'G GUIDELINES MANUAL § 1B1.13, n.1 (U.S. SENT'G COMM'N 2018).

48. *Id.* at n.33 (emphasis added).

49. First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194 (2018).

50. 18 U.S.C. § 3582(c)(1)(A).

Act. In fiscal year 2018, before the passage of the First Step Act, 24 compassionate release motions were granted.⁵¹ From January 2020 through June 2021, 20,565 motions for compassionate release were brought to the district courts.⁵² Since the First Step Act, 3,753 compassionate releases/reductions in sentence have been granted, directly signaling the impact of defendant-brought motions.⁵³

2. *Application of the Compassionate Release Statute Post-First Step Act*

To grant a motion for compassionate release or sentence reduction the court must (1) consider the § 3553(a) factors,⁵⁴ (2) find that “extraordinary and compelling reasons warrant such a reduction,”⁵⁵ and (3) find “that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”⁵⁶ District court judges may grant the motion “only if all three prerequisites listed in § 3582(c)(1)(A) are satisfied; and a district court finding any of them lacking ‘do[es] not need to address the other[]’ prerequisites.”⁵⁷

a. *§ 3553(a) Factors*

Section 3553(a) factors that a court shall consider when imposing a sentence include: (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) the need for the sentence imposed,⁵⁸ (4) the available sentences, (5) the sentencing range, (6) any pertinent policy statement issued by the Sentencing Commission, (7) the need to avoid unwarranted sentence disparities,⁵⁹ and (8) the need to provide restitution.⁶⁰ The court will have considered these factors while imposing the original sentence and will consider them again along with the incarcerated person’s current circumstances when

51. U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018 ONE YEAR OF IMPLEMENTATION, U.S. - SENT’G COMM’N 47 (2020).

52. U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT CALENDAR YEARS 2020 TO 2021, U.S. SENT’G COMM’N 4 (2021).

53. *First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/index.jsp> (last -- visited Nov. 10, 2022).

54. 18 U.S.C. § 3553(a).

55. 18 U.S.C. § 3582(c)(1)(A)(i).

56. 18 U.S.C. § 3582(c)(1)(A).

57. *United States v. Little*, 2021 WL 799724 at *2 (6th Cir. 2021) (citing *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021)).

58. Erica Zunkel, *18 U.S.C. § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in “The Most Effective Manner,”* 9 NOTRE DAME J. INT’L & COMP. L. 49, 54 (2019) (The need for the sentence imposed includes “retribution, deterrence, incapacitation, and rehabilitation.”).

59. It is important to note here that the uneven consideration of the nonretroactive sentencing changes as extraordinary and compelling conflicts with the need to avoid unwanted sentence disparities. Granting a sentence reduction based on the nonretroactive sentencing changes to some defendants, but not others, leads to an avoidable sentence disparity where, under similar circumstances, the factors would not weigh in favor of sentence reduction but for the consideration of a statutory mandatory minimum sentencing change as an extraordinary and compelling reason.

60. 18 U.S.C. § 3553(a).

choosing to impose a reduced sentence. The purpose of these factors is to impose a sentence that is sufficient but not greater than necessary.⁶¹ If a judge finds that the next two elements to grant a motion for compassionate release are met but finds that the § 3553(a) factors do not weigh in favor of sentence reduction, the judge must deny the motion.⁶²

b. Extraordinary and Compelling Reasons

The next step in determining whether a motion for compassionate release should be granted is to consider the extraordinary and compelling reasons for doing so. When determining whether to bring the motion for sentence reduction, the Director of the BOP is limited to the extraordinary and compelling reasons listed in the Sentencing Guidelines Manual (medical conditions, age, family circumstances, or other extraordinary and compelling reasons as determined by the Director of the BOP). However, post-First Step Act, courts have found that combinations of the following factors that rise to the level of extraordinary and compelling warrant sentence reduction: the defendant's age and the amount of sentence served,⁶³ changes to statutory penalties and sentencing guideline ranges,⁶⁴ health concerns related to the COVID-19 pandemic,⁶⁵ the need to avoid sentencing disparities with other comparable offenders, and "a gross disparity between the sentence... received and the sentence [the defendant] would have received under the First Step Act."⁶⁶

c. Sentencing Commission Policy Statements

The third consideration imposed by the compassionate release statute is that the sentence reduction be consistent with applicable Sentencing Commission policy statements.⁶⁷ The Sentencing Commission's policy statement on compassionate release lists the following extraordinary and compelling reasons: medical condition of the defendant, age of the defendant, family circumstances, and any other extraordinary and compelling reason other than or in combination with the previous three as determined by the Director of the BOP.⁶⁸ Under the policy statement, extraordinary and compelling reasons exist under any of the circumstances mentioned; it is not necessary to find more than one reason, but more than one reason can be considered. The Sentencing Guidelines Manual indicates that "[a] reduction under this policy statement may be granted only upon

61. *Id.*

62. *See, e.g.,* United States v. Ruffin, 978 F.3d 1000, 1005 (6th Cir. 2020); United States v. Adams, 2021 WL 5851060 at *2 (6th Cir. 2021); United States v. Hughes, 2021 WL 6098424 at *2 (6th Cir. 2021).

63. United States v. Young, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020).

64. United States v. Simons, 375 F. Supp. 3d 379, 387-88 (E.D.N.Y. 2019).

65. United States v. Adeyemi, 470 F. Supp. 3d 489, 533 (E.D. Penn. 2020).

66. United States v. Redd, 444 F. Supp. 3d 717, 728-29 (E.D. Va. 2020).

67. 18 U.S.C. § 3582(c)(1)(B).

68. U.S. SENT'G GUIDELINES MANUAL § 1B1.13, n.1 (U.S. SENT'G COMM'N 2018).

motion by the *Director of the Bureau of Prisons*.”⁶⁹ After the changes made to the compassionate release statute⁷⁰ by the First Step Act⁷¹ a reduction in sentence is no longer granted “only upon motion by the Director of the Bureau of Prisons.”⁷² The Sentencing Commission’s policy statements have not been updated after the First Step Act.⁷³

II. DO NONRETROACTIVE CHANGES IN FEDERAL LAW QUALIFY AS AN EXTRAORDINARY AND COMPELLING REASON FOR SENTENCE REDUCTION?

The nonretroactive sentencing changes to the Controlled Substance Act, the Controlled Substance Import and Export Act, and the stacking provision have divided the courts when considered with the compassionate release statute. Some courts have found that an extraordinary and compelling reason exists where a defendant, if sentenced today, would receive a substantially different sentence—even if the changes are not retroactive. These changes are considered along with other extraordinary and compelling reasons. Other courts interpret the changes to prohibit consideration of the nonretroactive sentencing changes of the First Step Act when ruling on a motion for compassionate release.

A. *Nonretroactive Changes are not an Extraordinary and Compelling Reason for Compassionate Release: The Third, Fifth, Seventh, Eighth, and Eleventh Circuits*

The Third Circuit, the Fifth Circuit, the Seventh Circuit, and the Eighth Circuit have all held that nonretroactive changes do not support a finding of extraordinary and compelling reasons for compassionate release.

Eric Andrews was found guilty of committing 13 robberies, conspiring to commit the robberies, and brandishing a firearm during each of the crimes; he was sentenced to 312 years’ imprisonment in 2006.⁷⁴ His sentence was enhanced 307 years because of the stacking provision in § 924(c) for use of a firearm in a crime of violence.⁷⁵ Andrews moved for a new sentence under the compassionate release statute, noting the changes to § 924(c) mandatory minimums, the duration of his sentence, his rehabilitation, his age at the time of the offense (he was 19 years old), being charged with 13 counts, and susceptibility to COVID-19.⁷⁶ The Third Circuit affirmed the District Court’s denial of the motion because it “will not construe

69. U.S. SENT’G GUIDELINES MANUAL § 1B1.13, n.4 (U.S. SENT’G COMM’N 2018) (emphasis added).

70. 18 U.S.C. § 3582(c).

71. First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194 (2018).

72. U.S. SENT’G GUIDELINES MANUAL § 1B1.13, n.4 (U.S. SENT’G COMM’N 2018).

73. See Siobhan A. O’Carroll, “Extraordinary and Compelling” Circumstances: Revisiting the Role of Compassionate Release in the Federal Criminal Justice System in the Wake of the First Step Act, 98 WASH. U. L. REV. 1543, 1547 (2021).

74. *United States v. Andrews*, 12 F.4th 255, 257 (3d Cir. 2021).

75. *Id.*

76. *Id.* at 257-58.

Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release."⁷⁷ "Congress specifically chose not to apply the statutory change to people who had already been sentenced under the old version."⁷⁸ However, the Court did leave open consideration of the "current sentencing landscape" when weighing the § 3553(a) factors.⁷⁹

Gilberto Gomez was sentenced in November 2018 to 40 years of imprisonment on four drug trafficking charges and two counts of possession of a firearm in furtherance of a drug trafficking crime; 30 of these years came from two stacked § 924(c) charges.⁸⁰ If Gomez was sentenced after the First Step Act was signed into law, he would be subject to a mandatory minimum of five years for each of the convictions, totaling 10 years. The Court declined to reduce Gomez's sentence because "the Act itself plainly states that § 403 is not retroactive" and elected to follow other circuit courts that have rejected a retroactive application of § 403 to cases pending on direct appeal.⁸¹

The Seventh Circuit held the First Step Act's change to § 924(c) "whether considered alone or in connection with other facts and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction."⁸² Ross Thacker is serving a 33-year sentence for being convicted of armed robbery and using and carrying a firearm in furtherance of a crime of violence in 2002; he received a seven-year sentence for the first violation of § 924(c) and a consecutive 25-year sentence for the second violation due to the statutory mandatory minimum sentence in 2002.⁸³ Thacker's motion for compassionate release rested upon the changes to § 924(c) and "health-related considerations amid the COVID-19 pandemic."⁸⁴ The Court supports its holding on the basis that "[b]y its terms..., the First Step Act's anti-stacking amendment applies prospectively," which was a deliberate choice in light of retroactive application of the Fair Sentencing Act found in the same act.⁸⁵ The discretionary authority of the court does not extend to the "authority to reduce a mandatory minimum sentence on the basis that the length of the sentence itself constitutes an extraordinary and compelling circumstance warranting a sentence reduction."⁸⁶

In the Eighth Circuit, Isaac Loggins, Jr. pleaded guilty to three counts of Hobbs Act robbery and two counts of using a firearm during and in relation to the robberies; he was sentenced to 29.4 years (353 months) imprisonment, which included two consecutive sentences for the firearms offenses.⁸⁷ Loggins moved for

77. *Id.* at 261.

78. *Id.* at 257.

79. *Id.* at 262.

80. *United States v. Gomez*, 960 F.3d 173, 175 (5th Cir. 2020).

81. *Id.* at 177.

82. *United States v. Thacker*, 4 F.4th 569, 571 (7th Cir. 2021).

83. *Id.*

84. *Id.* at 572.

85. *Id.* at 573.

86. *Id.* at 574. *But see* *United States v. Black*, 999 F.3d 1071, 1076 (7th Cir. 2021) (remanding as "we are not convinced the district court recognized the full extent of its discretion" because the district court did not consider the statutory change).

87. *United States v. Loggins*, 966 F.3d 891, 892 (8th Cir. 2020).

compassionate release arguing that his rehabilitation and the fact that the law no longer calls for the stacking of consecutive sentences under § 924(c) amount to extraordinary and compelling reasons in combination.⁸⁸ The district court found that “a non-retroactive change in [the] law did not support a finding of extraordinary or compelling reasons for release,” and the appellate court affirmed this finding as “the order did not misstate the law.”⁸⁹

The Eleventh Circuit denied a motion for compassionate release including the nonretroactive statutory change in § 924(c) as an extraordinary and compelling reason because the motion did not “fall within any of the reasons that [the Sentencing Commission Policy §] 1B1.13 identifies as ‘extraordinary and compelling.’”⁹⁰ Judge Martin dissented, stating that “this result reinstates the exact problem the First Step Act was intended to remedy: compassionate release decisions had been left under the control of a government agency that showed no interest in properly administering it.”⁹¹ This approach is unique as a majority of the circuits do *not* view the Sentencing Commission’s outdated policy as guidance on the definition of extraordinary and compelling.⁹² As noted in a brief by Families Against Mandatory Minimums (“FAMM”) as Amicus Curiae Supporting Petitioner, the Eleventh Circuit’s approach to the Sentencing Commission’s policy is “out of sync with a majority of circuits.”⁹³

The circuits that have chosen to not consider the nonretroactive sentencing changes rely on Congress’s decision to make some changes retroactive and to apply the other changes prospectively.

B. Nonretroactive Sentencing Changes Qualify as an Extraordinary and Compelling Reason Weighing in Favor of Compassionate Release: The First, Second, Fourth, Ninth, Tenth, and D.C. Circuits

Some courts have held that the nonretroactive sentencing changes under the First Step Act can be an extraordinary and compelling reason weighing in favor of sentence reduction or compassionate release.

88. *Id.* at 892-93.

89. *Id.* at 893. *But see* United States v. Urkevich, No. 03CR37, 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019) (“A reduction in his sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.”), *appeal dismissed*, No. 20-1603, 2020 WL 56420 24, at *1 (8th Cir. Apr. 1, 2020).

90. United States v. Bryant, 996 F.3d 1243, 1265 (11th Cir. 2021).

91. *Id.* (Martin, J. dissenting).

92. Brief for FAMM as Amicus Curiae Supporting Petitioner at 7, Bryant v. United States, 142 S. Ct. 583 (2021) (No. 20-1732), 2021 U.S. S. CT. BRIEFS LEXIS 1805 at *12 (collecting cases) (“Eight courts of appeals have held that the Statement is not ‘applicable’ to defendant-filed motions for compassionate release.”).

93. *Id.* at *9. *See* United States v. Poindexter, No. 92-cr-20127-TLP-2, 2021 U.S. Dist. LEXIS 247994, at *16-17 (W.D. Tenn. Dec. 30, 2021) (citing United States v. Elias, 984 F.3d 516, 519-20 (6th Cir. 2021)) (“[T]he district court has full ‘discretion to define ‘extraordinary and compelling’ on their own initiative,’ and the court cannot use the Policy Statement as an independent basis to deny a defendant-filed motion.”).

In *United States v. Ruvalcaba*, the First Circuit definitively held that “a court may consider the [First Step Act]’s non-retroactive changes in sentencing law on an individualized basis, grounded in a defendant’s particular circumstances, to determine whether an extraordinary and compelling reason exists for compassionate release.”⁹⁴ José Ruvalcaba was serving a life sentence for leading a drug-trafficking conspiracy with a concurrent 20-year sentence for a money laundering conspiracy.⁹⁵ His sentence was imposed per the mandatory minimum penalty for defendants with two prior felony drug offenses. Ruvalcaba motioned for compassionate release based on the sentencing disparity; if he had been sentenced after the First Step Act, he would have only one qualifying offense with a mandatory minimum of 15 years.⁹⁶ The district court found that the First Step Act’s changes were “prospective in effect and, therefore, any ensuing disparity could not be deemed extraordinary.”⁹⁷ However, the Court of Appeals took a textual-analysis approach and found that Congress did not expressly prohibit consideration of nonretroactive sentencing changes; the only expressly prohibited reason is rehabilitation when not considered with other factors.⁹⁸ Further, even though the Sentencing Commission’s current policy on compassionate release is not applicable to defendant-brought motions under the First Step Act, the director of the BOP is permitted to determine other extraordinary and compelling reasons, without restriction.⁹⁹ The Court of Appeals also found that considering a sentencing change comports with the history and purpose of the compassionate release statute.¹⁰⁰ Ruvalcaba’s appeal was remanded to the district court for an individualized review of his circumstances including “unanticipated post-sentencing developments in the law.”¹⁰¹

The Second Circuit has remanded George Campbell’s case to the district court with instructions to consider the effect on sentencing under the current of § 924(c).¹⁰² Campbell was convicted of seven counts of § 924(c) for a 155-year sentence on these violations; all seven counts were charged in the same indictment.¹⁰³ If Campbell was sentenced today, he would be subject to a 35-year mandatory minimum.¹⁰⁴ In its remand, the court observed, “[t]he district court’s decision does not reflect that the court recognized its discretion... such that the changes in sentencing law did not constitute extraordinary and compelling reasons justifying a sentence reduction.”¹⁰⁵ However, the Second Circuit acknowledged

94. *United States v. Ruvalcaba*, 26 F.4th 14, 16 (1st Cir. 2022).

95. *Id.*

96. *Id.* at 17. In the alternative, Ruvalcaba moved for compassionate release due to his medical issues and susceptibility to COVID-19. The district court rejected this argument, and Ruvalcaba did not raise it on appeal. *Id.* at 18.

97. *Id.*

98. *Id.* at 25.

99. *Id.*

100. *Id.* at 26.

101. *Id.* at 26, 28-29.

102. *United States v. Campbell*, No. 20-4204-cr, 2022 WL 199954, at *2 (2d Cir. Jan. 24, 2022).

103. *Id.* at *1; 18 U.S.C. § 924(c) (1998).

104. 18 U.S.C. § 924(c).

105. *Campbell*, 2022 WL 199954, at *2.

that courts have the discretion to consider sentencing changes as an extraordinary and compelling reason for sentence reduction. District courts in the Second Circuit have held that a “nonretroactive intervening change in the law may constitute an extraordinary and compelling reason to reduce a sentence.”¹⁰⁶

The Fourth Circuit has also found that the First Step Act’s sentencing changes should be considered as an extraordinary and compelling reason for sentence reduction. Thomas McCoy, Keith Bryant, Craig Scott, and Kittrell Decator were convicted of robberies and firearms violations under § 924(c) when the stacking provision enhanced the defendants’ mandatory minimum sentences, resulting in sentences to imprisonment for 35 to 53 years.¹⁰⁷ The defendants moved for sentence reductions under the compassionate release statute, citing the disparity in the sentence received and the sentence Congress deemed appropriate under the First Step Act; if sentenced after the First Step Act, their sentences would be “dramatically shorter—in most cases, by 30 years.”¹⁰⁸

On review, the Fourth Circuit found that district courts “permissibly treated as ‘extraordinary and compelling reasons’ for compassionate release the severity of the defendants’ § 924(c) sentences and the extent of the disparity between the defendants’ sentences and those provided for under the First Step Act.”¹⁰⁹ The court goes on to say that “[t]he fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release.”¹¹⁰ The consideration of the First Step Act’s elimination of sentence-stacking as an extraordinary and compelling reason does not give retroactive effect to a nonretroactive law.¹¹¹ Instead, the length and disparity of the sentences are considered as one of the extraordinary and compelling reasons for “individual relief in the most grievous cases.”¹¹²

The Tenth Circuit has also held that the nonretroactive changes by the First Step Act contribute to a finding of extraordinary and compelling reasons to reduce a sentence.¹¹³ Because of the 18 U.S.C. § 924(c) stacking provision, Kepa Maumau received a sentence of 55 years when he was convicted of one count of conspiracy to commit a racketeering offense, two counts of committing violent crimes in the

106. *Speed v. United States*, No. 04-cr-336, 2021 WL 1085360, at *9 (S.D.N.Y. Mar. 22, 2021). *See also* *United States v. Marks*, 455 F. Supp. 3d 17, 25-26 (W.D.N.Y. 2020) (“Several courts have recently ruled that the *combination* of changes to the ‘stacking’ provisions of § 924(c), coupled with the defendant’s rehabilitation, establish extraordinary and compelling conditions warranting a sentence reduction. Marks deserves no less.”).

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

108. *Id.*

109. *Id.* at 286.

110. *Id.* *See also* *United States v. Redd*, 444 F. Supp. 3d 717, 729 (E.D. Va. 2020) (“[T]he First Step Act’s lack of retroactivity [does not] justify withholding sentencing relief given the overall purpose of the First Step Act amendments, which expressly allowed for the possibility for a sentence reduction based on an individualized assessment of the § 3553(a) factors and other criteria.”).

111. *McCoy*, 981 F.3d at 286.

112. *Id.* at 287.

113. *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021) (“[W]e conclude that it can only be the combination of such a sentence and a defendant’s unique circumstances that constitute ‘extraordinary and compelling reasons’ for purposes of § 3582(c)(1)(A)(i).”).

aid of racketeering, one count of Hobbs Act robbery, and three counts of using a gun during a crime of violence in 2013.¹¹⁴ When reviewing a sentence reduction, the Tenth Circuit takes an “individualized review” approach. In this case, the court affirmed Maumau’s reduced sentence and approved of the district court’s rationale. The district court found extraordinary and compelling reasons after “review of all of the circumstances of Maumau’s case” and concluded that “a combination of factors warranted relief,” including Maumau’s age at the time of sentencing, the “‘incredible’ length of his stacked mandatory sentences,” the elimination of the stacking provision under § 924(c), and “the fact that Maumau, ‘if sentenced today,... would not be subject to such a long term of imprisonment.’”¹¹⁵ Consequently, Maumau’s 55-year sentence was reduced to time served and a three-year term of supervised release.¹¹⁶

These circuits rely on an individualized approach.¹¹⁷ The sentencing changes are considered as *an* extraordinary and compelling reason rather than the *sole* reason for a sentence reduction.¹¹⁸ However, it is important to note that these changes to sentencing guidelines and mandatory minimums are not dispositive, as they would be for retroactive changes under § 404.

Neither the Ninth Circuit nor the D.C. Circuit have analogous appellate cases. District courts in the Ninth Circuit have concluded that “amendments to § 924(c) *may*—in conjunction with other factors—provide extraordinary and compelling reasons that warrant compassionate release.”¹¹⁹ One court confirmed this by concluding that “[e]ven if Congress had not intended the changes to Section 924(c) to apply retroactively across-the-board, that does not mean it did not intend courts to consider significant changes in the sentencing guidelines in determining whether compassionate release is appropriate in individual cases.”¹²⁰ The D.C. Circuit Court of Appeals found plain error where the district court considered itself bound by the Sentencing Commission’s policy statement on compassionate release motions because it was against the Circuit’s precedent in *United States v. Long*.¹²¹ Because of this, the Court of Appeals did not reach the issue of whether nonretroactive sentencing changes are an extraordinary and compelling reasons. On remand, the district court concluded that “nonretroactive changes in law can form part of—and indeed, a substantial part of—a finding that extraordinary and compelling reasons warrant reducing a defendant’s sentence.”¹²² The court cited the need to “align with separation-of-powers principles and the need to follow

114. *United States v. Maumau*, 993 F.3d 821, 824 (10th Cir. 2021).

115. *Id.* at 837.

116. *Id.* at 824. Maumau was incarcerated from August 2008 to April 2021.

117. *United States v. McCoy*, 981 F.3d 271, 275 (4th Cir. 2020).

118. *See Maumau*, 993 F.3d at 838 (Tymkovich, C.J., concurring).

119. *United States v. Gaines*, No. 99-CR-00257-1, 2020 WL 4060552, at *3 (C.D. Cal. July 20, 2020). *See also id.* at *4 (collecting cases); *United States v. Quinn*, 476 F. Supp. 3d 824, 829 (N.D. Cal. 2020).

120. *United States v. Ngo*, No. 97-CR-3397, 2021 WL 778660, at *5 (S.D. Cal. Mar. 1, 2021).

121. *United States v. Johnson*, 858 F. App’x 381, 383-84 (D.C. Cir. 2021); *United States v. Long*, 997 F.3d 342, 347 (D.C. Cir. 2021).

122. *United States v. Johnson*, No. 02-310, 2022 U.S. Dist. LEXIS 129168, at *16 (D.D.C. July 21, 2022).

legislative intent” because “nothing in the statute’s text indicates that courts may not consider nonretroactive changes in the law.”¹²³ The court also relied on *Concepcion v. United States*, as discussed below. Johnson’s original sentence was nearly 27 years.¹²⁴ He was sentenced to time-served, which was more than 20 years of incarceration, after the court engaged in a thorough analysis of his arguments—the sentencing disparity,¹²⁵ his physical condition and the threat posed by COVID-19,¹²⁶ and his rehabilitation¹²⁷—finding that extraordinary and compelling reasons and a consideration of the § 3553(a) factors warranted a sentence reduction.¹²⁸

C. *Intra-Circuit Split in the Sixth Circuit*

The Sixth Circuit is split on this issue. The following illustrates the Sixth Circuit’s differential treatment of factually similar cases decided within the same year.

Sentenced under the stacking provision previously found in § 924(c), Ian Owens was sentenced to 105 years in prison for five § 924(c) convictions, in addition to 12 years and seven months for other convictions; after resentencing, Owens was sentenced to 115 years, which was “in effect, a life sentence without the possibility of parole.”¹²⁹ This lengthy sentence came after three superseding indictments were filed when Owens chose not to cooperate or plead guilty; he instead chose to go to trial.¹³⁰ Owens filed a motion for compassionate release in 2019. In his motion, Owens listed several extraordinary and compelling reasons for release, including the First Step Act’s changes to the stacking provision, his life sentence as a penalty for choosing to go to trial, and his “remarkable rehabilitation.”¹³¹ Had Owens been sentenced after the First Step Act, he would have only been subject to 25 years of incarceration for his violations of § 924(c).¹³²

The district court did not consider the other factors Owens presented because the disparity between the sentenced Owens received and the sentence he would receive today was not an extraordinary and compelling reason meriting compassionate release.¹³³ However, the Sixth Circuit held that, “in making an individualized determination about whether extraordinary and compelling reasons merit compassionate release, a district court may include, along with other factors, the disparity between a defendant’s actual sentence and the sentence that he would receive if the First Step Act applied.”¹³⁴ The Court of Appeals remanded to the district court to consider if the combination of Owen’s rehabilitation, lengthy

123. *Id.* at *16-17.

124. *Id.* at *1.

125. *Id.* at *21-25.

126. *Id.* at *25-31.

127. *Id.* at *31-33.

128. *Id.* at *34-37.

129. *United States v. Owens*, 996 F.3d 755, 757 (6th Cir. 2021).

130. *Id.* at 757-58.

131. *Id.* at 758.

132. *Id.*

133. *Id.*

134. *Id.* at 760.

sentence, and the First Step Act's changes to § 924(c) is an extraordinary and compelling reason for compassionate release.¹³⁵

On the other side of the split is *United States v. Tomes*, *United States v. Wills*, and *United States v. Jarvis*.

John Tomes, Jr. was sentenced to 20 years in prison after pleading guilty to drug, firearm, and money laundering charges from a drug distribution and money laundering scheme.¹³⁶ Tomes was sentenced in June 2018, approximately six months before the First Step Act was enacted.¹³⁷ Tomes motioned for compassionate release, citing the presence of COVID-19 in prisons, his susceptibility to the virus due to chronic asthma, and the change in law which would result in a shorter sentence if he was sentenced today.¹³⁸ His motion was denied after a weighing of the § 3553(a) factors.¹³⁹ Upon appeal, the Sixth Circuit court considered his argument that his prior state convictions do not qualify as serious drug felonies after the First Step Act so that the mandatory minimum would no longer apply to him.¹⁴⁰ Tomes's argument failed before this court because § 401 was inapplicable to sentences imposed before the First Step Act was enacted and the court refused to "render § 401(c) useless by using § 3582(c)(1)(A) as an end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms."¹⁴¹

Jeffery Wills plead guilty to conspiring to distribute and possess with intent to distribute 50 grams or more of methamphetamine. In April 2017, Wills was sentenced to the mandatory minimum of 20 years.¹⁴² Wills filed a motion for compassionate release under the sentencing changes of § 401 of the First Step Act because his prior conviction is no longer a serious drug felony.¹⁴³ The *Wills* court clearly stated their position: § 401 of the First Step Act does not apply retroactively.¹⁴⁴ The court affirmed the denial of Wills' motion for compassionate release.¹⁴⁵

Similarly, in *United States v. Jarvis*, the court followed its reasoning in *Tomes* and *Wills*.¹⁴⁶ Jarvis's motion for compassionate release was denied because "non-retroactive changes in the law could not serve as the 'extraordinary and compelling reasons' required for a sentence reduction."¹⁴⁷ Jarvis was found guilty of five counts of using a firearm in furtherance of a crime of violence and received an 85-

135. *Id.* at 764.

136. *United States v. Tomes*, 990 F.3d 500, 501 (6th Cir. 2021).

137. *Id.* at 505.

138. *Id.* at 501. *But see* *United States v. Jarvis*, 999 F.3d 442, 446 (6th Cir. 2021) (adding that -- Tomes's "rehabilitation, strong family support, and apparently inequitable sentence were extraordinary and compelling reasons for release").

139. *Tomes*, 990 F.3d at 502, 504.

140. *Id.* at 505.

141. *Id.*

142. *United States v. Wills*, 997 F.3d 685, 686 (6th Cir. 2021).

143. *Id.* at 686-87.

144. *Id.* at 688.

145. *Id.*

146. *United States v. Jarvis*, 999 F.3d 442, 445 (6th Cir. 2021).

147. *Id.* at 442.

year sentence: the statutory minimum sentences of five years for the first conviction and 20 years each for the remaining four convictions, to be served consecutively.¹⁴⁸ Later, three of the § 924(c) convictions were vacated, reducing his sentence to 25 years for the use of a firearm—five years for the first conviction and 20 years for the second.¹⁴⁹ Today, Jarvis’s second conviction would receive a mandatory minimum of five years, rather than 20, because it is not considered a subsequent conviction after a previous conviction has become final.¹⁵⁰ Relying on *United States v. Tomes*,¹⁵¹ the *Jarvis* court focused solely on Jarvis’s argument regarding the nonretroactive statutory changes when it denied his compassionate release, limiting the effect of these changes.¹⁵²

It is notable that none of the other reasons presented by the petitioner in *Tomes* rose to the level of extraordinary and compelling: The *Tomes* Court rejected Tomes’s argument regarding the statutory changes as if it were dispositive, which was necessary when none of the other factors weighed in favor of a sentence reduction.¹⁵³ As established, nonretroactive statutory changes *alone* are not enough to warrant a sentence reduction and must be considered with the other factors to amount to an extraordinary and compelling reason.¹⁵⁴ The *Owens* court held that “in making an individualized determination about whether extraordinary and compelling reasons merit compassionate release, a district court may include, along with other factors, the disparity between a defendant’s actual sentence and the sentence he would receive if the First Step Act applied.”¹⁵⁵ The *Jarvis* Court declined to follow *Owens*.¹⁵⁶ Following *Owens*, the court should have weighed the nonretroactive changes in combination with his other arguments (COVID-19, high blood pressure, and rehabilitative efforts)¹⁵⁷ when considering if all of the factors amount to extraordinary and compelling so as to allow a sentence reduction.¹⁵⁸

The decisions in *Tomes* and *Wills* should not have precluded the court from granting Jarvis’s motion for sentence reduction. In *Tomes*, the Court relied upon the district court’s evaluation of the § 3553(a) factors to affirm because release would not “reflect the seriousness of the offense.”¹⁵⁹ It was not necessary to

148. *Id.* at 442-43.

149. *Id.* at 443.

150. *See* 18 U.S.C. § 924(c).

151. *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021).

152. *United States v. Jarvis*, 999 F.3d 442, 445 (6th Cir. 2021) (“*Tomes* binds us”).

153. *Tomes*, 990 F.3d at 504-505.

154. *United States v. Owens*, 996 F.3d 755, 759 (6th Cir. 2021). *See also* *United States v. McCall*, 20 F.4th 1108, 1112 (6th Cir. 2021).

155. *Owens*, 996 F.3d at 760.

156. *Jarvis*, 999 F.3d at 445-46.

157. *Id.* at 444.

158. *See id.* at 447 (Clay, J. dissenting) (“*Tomes* did not foreclose the conclusion that a sentencing disparity from a nonretroactive statutory change along with other grounds for release can serve as --extraordinary and compelling reasons.”).

159. *United States v. Tomes*, 990 F.3d 500, 504-05 (6th Cir. 2021). *See also* *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020) (“[A] district court may still deny relief if it finds that the ‘applicable’ § 3553(a) factors do not justify it”); *United States v. Van*, No. 06-20491, 2021 U.S. Dist. LEXIS 205691, at *15-16 (E.D. Mich. Oct. 26, 2021) (explaining that a sentence reduction may be denied where, whether under *Jarvis* or *Owens*, a defendant has not shown extraordinary and com-

consider any extraordinary and compelling reasons presented, as the § 3553(a) factors already precluded compassionate release.¹⁶⁰ In his *Jarvis* dissent, Judge Clay properly regarded the *Tomes* reasoning as dicta: the consideration of the sentencing changes was not determinative to denying *Tomes*'s motion.¹⁶¹ In contrast, the decision in *Wills* was proper as *Wills* filed his motion in sole reliance upon the changes under § 401 of the First Step Act.¹⁶² This decision was proper because nonretroactive sentencing changes cannot be the sum total of extraordinary and compelling reasons. The holding in *Owens* differs because the court properly considered all presented reasons in combination with the First Step Act's changes to § 924(c), taking a "middle path" that was still consistent with *Tomes* and *Wills*.¹⁶³

The Sixth Circuit is on the wrong side of the split. Congress has enacted only one limit as to sentence reduction: rehabilitation by itself cannot be the sole reason for a sentence reduction. If Congress did not want nonretroactive changes to mandatory minimums to be considered, they could have similarly provided. In *Tomes*, the Court stated that the changes made to the sentencing structure are not retroactive.¹⁶⁴ This is true. However, courts considering sentencing changes as one factor among many in their analysis is not equivalent to applying sentencing changes retroactively. As Shon Hopwood, Professor at Georgetown University Law Center, stated, "nothing about Congress's decision to pass prospective-only changes... prevents a judge from resentencing under the Compassionate Release Statute on the basis of extraordinary and compelling reasons."¹⁶⁵ "Congress's policy choice not to make the changes to § 924(c) categorically retroactive does not imply that district courts may not consider those legislative changes when deciding individual motions for compassionate release."¹⁶⁶ Indeed, this judicial discretion is "inherent" in the compassionate release statute, allowing a sentence reduction where there is "no statute" to afford it but "where extraordinary and compelling reasons justify that relief."¹⁶⁷

elling reasons for release.). *But see* United States v. McCall, 20 F.4th 1108, 1113 (6th Cir. 2021) ("*Tomes* never discussed whether the First Step Act's nonretroactive portions, in concert with other factors, could support a finding of extraordinary and compelling circumstances.").

160. *See* United States v. Elias, 984 F.3d 516, 519 (6th Cir. 2021) ("[D]istrict courts may deny - compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others."). *But see* United States v. Jones, 980 F.3d 1098, 1106 (6th Cir. 2020) (noting that "the sequence in which courts must fulfill these statutory requirements [in § 3582(c)(1)(A)]... is not readily apparent," and district courts should consider, in order, the (1) extraordinary and compelling reasons, (2) the applicable Sentencing Commission policy statements, (3) the applicable § 3553(a) factors).

161. United States v. Jarvis, 999 F.3d 442, 447 (6th Cir. 2021) (Clay, J. dissenting).

162. United States v. Wills, 997 F.3d 685, 686-87 (6th Cir. 2021).

163. United States v. Owens, 996 F.3d 755, 763 (6th Cir. 2021).

164. United States v. Tomes, 990 F.3d 500, 505 (6th Cir. 2021).

165. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 110 (2019).

166. United States v. Black, 999 F.3d 1071, 1075 (7th Cir. 2021).

167. *Id.* at 1075-76.

III. NONRETROACTIVE SENTENCING CHANGES QUALIFY AS AN EXTRAORDINARY AND COMPELLING REASON FOR SENTENCE REDUCTION

As the caselaw currently stands, whether nonretroactive sentencing changes qualify as an extraordinary and compelling reason for sentence reduction is dependent upon which court has jurisdiction over the incarcerated person filing a motion for compassionate release. This is a non-uniform application of the law that provides unjust outcomes. Two cases recently petitioned the Supreme Court for certiorari: *Jarvis v. United States*¹⁶⁸ and *Watford v. United States*.¹⁶⁹ Both defendants were subject to the § 924(c) stacking provisions and asked the Court whether nonretroactive changes in federal law can serve as extraordinary and compelling reasons warranting a sentence reduction under the compassionate release statute. These cases were fit for review as this split among the courts does not provide for a fair application of the law. The Court denied both petitions, leaving the courts of appeals to grapple with this question. When given the opportunity, courts should consider nonretroactive sentencing changes as an extraordinary and compelling reason for sentence reduction.

A. Sentencing Commission

The compassionate release statute points to a Sentencing Commission Policy that is now outdated. The relevant policy, § 1B1.13 of the Sentencing Guideline Manual, begins: “Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A)...”¹⁷⁰ However, after the First Step Act’s revision of the compassionate release statute, motions for compassionate release can be brought by incarcerated people directly.¹⁷¹ Defendant-brought motions now account for the majority of these motions.¹⁷² The policy statement provides extraordinary and compelling reasons for compassionate release for motions brought only by the Director of the BOP. In fact, the Sentencing Commission has conceded that “the policy statement at §1B1.13 does not reflect the First Step Act’s changes.”¹⁷³ The First Step Act did not contain any emergency directives to the Sentencing Commission to update either the Sentencing Guidelines or the policy statements.¹⁷⁴ As such, the Sentencing Commission can only make changes during their usual amendment cycle.¹⁷⁵ The Commission is made up of seven voting members, and at least four affirmative votes are required to promulgate an amendment to the

168. *Jarvis v. United States*, No. 21-568, 2022 U.S. LEXIS 123 (Jan. 10, 2022).

169. *Watford v. United States*, No. 21-551, 2022 U.S. LEXIS 378 (Jan. 10, 2022).

170. U.S. SENT’G COMM’N, U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (2018).

171. *See supra* section B.1.

172. From January 1, 2020, to June 30, 2021, 96.4 percent of granted motions for compassionate release originated by the defendant. *U.S. Sentencing Commission Compassionate Release Data Report Calendar Years 2020 to 2021*, U.S. SENT’G COMM’N 7 (2021).

173. *The First Step Act of 2018 One Year of Implementation*, U.S. SENT’G COMM’N 47 (2020).

174. *Id.*; U.S. SENT’G COMM’N AND OFF. OF EDUC. & SENT’G PRAC., ESP INSIDER EXPRESS, FIRST STEP ACT 5 (2019).

175. U.S. SENT’G COMM’N AND OFF. OF EDUC. & SENT’G PRAC., ESP INSIDER EXPRESS, FIRST STEP ACT 5 (2019); 28 USC §§ 994(a)(2), 994(t).

guidelines.¹⁷⁶ For the majority of the time after the First Step Act was passed, the Commission lacked the requisite number of voting members to promulgate a new policy. On August 5, 2022, the Senate confirmed President Biden's nominations to the Commission, enabling it to have a quorum for the first time in three years.¹⁷⁷

Notably, the provisions of the First Step Act are not dependent upon a Sentencing Commission policy to be in effect. Many courts have found that because the Sentencing Commission has failed to update its policy statement, there is no policy statement that applies after the First Step Act.¹⁷⁸ "These courts reason that in light of the congressional intent to increase the use and transparency of compassionate release, the First Step Act necessarily provides district court judges leave to depart from previous practice and consider all circumstances that may constitute 'extraordinary and compelling.'"¹⁷⁹ The Act provides that sentence reductions must only be consistent with applicable policy statements—as such, any reason for granting a motion brought by an incarcerated person does not need to be consistent with § 1B1.13 because it is inapplicable.

It is important to follow the developments provided by the Sentencing Commission going forward, now that the Commission has the quorum to vote on new policies. In the meantime, the lack of a new Sentencing Commission policy on this matter does not prevent the courts from proceeding with these motions. As the relevant Sentencing Commission policies are not applicable to the amended statutes,¹⁸⁰ courts may determine reasons that meet the level of extraordinary and compelling, including in this determination nonretroactive changes to statutory mandatory minimums.

B. Congressional Intent

Congress has long been interested in correctional and sentencing reform, whether it be budgetary, socially, or policy driven.¹⁸¹ With the First Step Act, Congress intended to make practicable and effective changes to sentencing which

176. *Organization*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Nov. 10, 2022).

177. *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/news/press-releases/august-5-2022> (last visited Nov. 10, 2022).

178. *See* *United States v. McCoy*, 981 F.3d 271, 275 (4th Cir. 2020) ("[T]reating the defendants' § 924(c) sentences as an 'extraordinary and compelling' reason for release is not inconsistent with any 'applicable policy statement' of the Sentencing Commission [as] the Commission has yet to issue a policy statement that applies to motions filed by defendants under the recently amended § 3582(c) (1)(A)."); *United States v. Hunter*, 12 F.4th 555, 561-62 (6th Cir. 2021) (quoting *United States v. Elias*, 984 F.3d at 519, 521 (6th Cir. 2021) ("'[Section] 1B1.13 is not an applicable policy statement for compassionate-release motions brought directly by inmates' and thus 'district courts are not bound by § 1B1.13 in defining extraordinary and compelling reasons for release.'")).

179. 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, 1561 (2021).

180. *See id.* at 1561-62.

181. NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019).

would begin to address racial disparities, “relieve our overcrowded prisons, redirect funding to our most pressing crime prevention efforts, make our communities safer, and ensure the integrity of our justice system.”¹⁸² Among these changes were some specifically designed to allow judges “to use their discretion to craft an appropriate sentence to fit the crime,” by changing “rigid sentences that do not fit the crimes.”¹⁸³ Congress intended for courts to “grant sentence reductions on the full array of grounds reasonably encompassed by the ‘extraordinary and compelling’ standard set forth in the applicable statute and guidelines policy statements.”¹⁸⁴ The First Step Act “allow[s] judges... to look at an individualized case and decide what is best for public safety and what is best for the community. By giving... judges this discretion, we will give them the tools to better see that justice is done.”¹⁸⁵ To be clear, these changes do not allow for an automatic sentence reduction but for the *possibility* based upon an individual review of an incarcerated person’s case. Judges may choose to reduce an incarcerated person’s sentence or deny the motion. If the motion for a reduction in sentence is denied, the sentence originally imposed remains.

The titling of the First Step Act and § 603(b), “Increasing the Use and Transparency of Compassionate Release,” signal Congress’s direct intent “to make our justice system fairer[,] our communities safer by reforming sentencing laws and providing opportunities for those who are incarcerated to prepare to reenter society successfully,”¹⁸⁶ and increase the use of compassionate release. The compassionate release statute was first passed to “enable courts to decide, in individual cases, if ‘there is justification for reducing a term of imprisonment.’”¹⁸⁷ The statute does not limit the definition of extraordinary and compelling. As Senator John Cornyn (R-Texas) keenly stated, “[t]he name [of the First Step Act] is significant because it shows that this is not a comprehensive fix for the problems of our criminal justice system but, rather, a first, critical step in the right direction.”¹⁸⁸ Senator Ben Cardin (D-Maryland) noted, “Let me be clear that this legislation is entitled the FIRST STEP Act, and it is indeed only the first step in reforming our broken criminal justice system.”¹⁸⁹ Congress intends to continue their criminal justice reform to address the inequities, injustices, and racial

182. *Senate Passes Landmark Criminal Justice Reform*, DICK DURBIN U.S. SENATOR ILL. (Dec. 19, 2018), <https://www.durbin.senate.gov/newsroom/press-releases/senate-passes-landmark-criminal-justice-reform->.

183. 164 CONG. REC. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson). Senator Dianne Feinstein (D-CA) also expressed her displeasure about “mandatory minimum sentences, particularly those that are very harsh and allow no discretion to a sentencing judge.” 164 CONG. REC. S7773 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein).

184. Hopwood, *supra* note 165, at 107.

185. 164 CONG. REC. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

186. *Durbin, Grassley Introduce Bipartisan Legislation to Advance the First Step Act’s Goals*, COMM. ON THE JUDICIARY (Mar. 26, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-legislation-to-advance-the-first-step-acts-goals>.

187. Hopwood, *supra* note 165, at 102.

188. 164 CONG. REC. S7746 (daily ed. Dec. 18, 2018) (statement of Sen. Cornyn).

189. 164 CONG. REC. S7775 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin).

disparities promulgated by mandatory minimums founded in “decades-old, misguided assumptions.”¹⁹⁰

Congress has observed the effects of the First Step Act and has introduced legislation to further its goals by the First Step Implementation Act of 2021 (hereinafter the First Step Implementation Act), “allowing courts to apply the [First Step Act] sentencing reform provisions to reduce sentences imposed prior to the enactment of the [First Step Act].”¹⁹¹ The relevant language of the proposed bill is as follows:

A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence *as if sections 401 and 403 of the First Step Act of 2018 []... were in effect at the time the covered offense was committed* if, after considering the factors set forth in section 3553(a) of title 18, United States Code, the nature and seriousness of the danger to any person, the community, or any crime victims, and the post-sentencing conduct of the defendant, the sentencing court finds a reduction is consistent with the amendments made by section 401 or 403 of the First Step Act of 2018.¹⁹²

If the First Step Implementation Act is passed, the sentencing changes made by the First Step Act will be made retroactive. It follows that the courts can now consider the sentencing changes as an extraordinary and compelling reason to further Congress’s stated goals. The proposed legislation calls for a “particularized inquiry of the facts and circumstances of the original sentencing of the defendant... including a review of any prior criminal conduct or any other relevant information from Federal, state, and local authorities.”¹⁹³ This “particularized inquiry” supports the way the First, Second, Fourth, Ninth, and Tenth Circuits have approached this change.

Congress included § 402 in the First Step Act, which expanded the use of the safety valve for judges to impose a sentence less than the mandatory minimum, further signaling their shift toward judicial discretion.¹⁹⁴ This safety valve provision is extended in the First Step Implementation Act, providing judges with further judicial discretion in sentencing.¹⁹⁵ After all, judges are more familiar with a defendant and their individual circumstances when sentencing than Congress could be when broadly legislating mandatory minimums. By providing a low mandatory minimum and expanding the ways a judge can use their discretion, Congress is giving judges the ability to provide a more just sentence that reflects our changing social norms and corrects past sentencing wrongs.

190. 164 CONG. REC. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy).

191. *Durbin, Grassley Introduce Bipartisan Legislation to Advance the First Step Act’s Goals*, COMM. ON THE JUDICIARY (Mar. 26, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-legislation-to-advance-the-first-step-acts-goals>.

192. S. 1014, 117th Cong. § 101(c) (as reported to Senate, July 12, 2021) (emphasis added).

193. *Id.* § 101(f).

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

195. S. 1014, 117th Cong. § 102 (as reported to Senate, July 12, 2021).

However, the Seventh Circuit has provided an argument against allowing courts discretion:

We see nothing preventing the next inmate serving a mandatory minimum sentence under some other federal statute from requesting a sentencing reduction in the name of compassionate release on the basis that the prescribed sentence is too long, rests on a misguided view of the purposes of sentencing, reflects an outdated legislative choice by Congress, and the like.¹⁹⁶

This court appears worried about potential violations of the separation of powers if courts are allowed broad discretion to modify sentences: Courts could effectively do away with sentencing guidelines or modify all sentences to follow new legislation.¹⁹⁷ Clemency powers would be taken from the executive branch. The Fourth Circuit rebuts this argument simply: “the defendants here... moved for compassionate release under a duly enacted congressional statute, which, in turn, authorizes the judicial branch to grant such motions.”¹⁹⁸ Congress has the authority to modify the terms of sentencing and has used this authority to do so.

C. The Supreme Court’s Decision in Concepcion

Carlos Concepcion was sentenced as a career offender to 19 years (228 months) in prison for one count of distributing five or more grams of crack cocaine.¹⁹⁹ Concepcion violated 21 U.S.C. § 841(a)(1), which was subject to the retroactive sentencing changes in the First Step Act, applying the Fair Sentencing Act of 2010 and allowing district courts to impose a reduced sentence as if the Fair Sentencing Act was in effect when the offense was committed.²⁰⁰ Changes provided by the First Step Act also removed his career offender status and his crimes were no longer considered crimes of violence.²⁰¹ The district court denied Concepcion’s motion for compassionate release, as his sentence was still within the Guidelines after the Fair Sentencing Act.²⁰² The court declined to consider any other intervening changes.²⁰³ On appeal, the First Circuit considered only whether the Fair Sentencing Act warranted a resentencing before moving to the question of whether the court had discretion to consider new factual or legal developments.²⁰⁴

The Supreme Court confirmed that federal judges have a broad sentencing discretion that is only limited when “Congress or the Constitution expressly limits

196. *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021).

197. This argument weakens when looking at the statistics: Only 3.2 percent of offenders granted relief in fiscal year 2020 were granted relief because of the length of their sentence. *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, U.S. SENT’G COMM’N 4 (2022).

198. *United States v. McCoy*, 981 F.3d 271, 288 (4th Cir. 2020).

199. *Concepcion v. United States*, 142 S. Ct. 2389, 2396 (2022).

200. *Id.* at 2396-97. *See also* First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5222 (2018).

201. *Concepcion*, 142 S. Ct. at 2393.

202. *Id.* at 2397.

203. *Id.*

204. *Id.* at 2398.

the type of information a district court may consider in modifying a sentence.”²⁰⁵ The Court noted instances where district courts have considered nonretroactive or unrelated Guidelines amendments and post sentencing rehabilitation and behavior.²⁰⁶ Even where a court cannot recalculate a Guideline range to account for nonretroactive amendments, the Court affirmed that the amendments can be considered when deciding to modify a sentence and the extent to which it is modified.²⁰⁷ The Court held that “the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act.”²⁰⁸

Concepcion was sentenced under a statute that enjoyed a retroactive sentencing change, but a consideration of other changes since his sentencing was required for a court to grant a reduction in his sentence. While the Supreme Court’s holding in this case involved different statutes and guidelines, its reasoning that district courts may consider intervening changes of law or fact in exercising their discretion in compassionate release can similarly be applied to nonretroactive sentencing changes in the First Step Act: Congress did not expressly limit the courts’ discretion in this way, so the court will engage in a robust examination of the individual at the time of re-sentencing, and the nonretroactive sentencing changes are an intervening change in law. Further, if the rationale applies to First Step Act changes, the Supreme Court was required to deny certiorari in *Jarvis* and *Watford* to avoid addressing the same question of law.

CONCLUSION

Senator Patrick Leahy (D-Vermont) said it best: “Any laws that we consider unjust today were just as unjust yesterday or a year ago or even a decade ago.”²⁰⁹ Nonretroactive changes to federal mandatory minimum sentences are an extraordinary and compelling reason for sentence reduction. To continue to meet the goals of sentencing reform and expansion of the use of the compassionate release statute, nonretroactive changes to mandatory minimums and sentencing ranges must weigh in favor of sentence reduction under the compassionate release statute. Congress is no longer comfortable imposing such punitive measures as shown by the changes made to mandatory minimums in the First Step Act. Judges can consider “what Congress has now deemed an adequate punishment for comparable... conduct” when deciding motions for compassionate release brought by an incarcerated person.²¹⁰ The current system amounts to an inequitable application of the law. Including nonretroactive sentencing changes in a consideration of extraordinary and compelling reasons for compassionate release is required if we are to move toward a more just and equitable society.

205. *Id.*

206. *Id.* at 2402-03.

207. *Id.* at 2393-94.

208. *Id.* at 2404.

209. 164 CONG. REC. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy).

210. *United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020).