ORIGINAL

No: 21-8034

In the
Supreme Court of the United States

ROBERT LAWRENCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Eleventh Circuit has rendered a decision in *United States v. Bryant,* 996 F.3d 1243 (11th Cir. 2021) limiting the First Step Act's application of Title 18 U.S.C. § 3582 on defendant filed motions. That decision is in direct conflict with eight other Circuit Court of Appeals addressing the same question. With the summary of the Bryant decision explained, the following question is presented for review:

Is the Eleventh Circuit's decision in *United States v. Bryant*, 996 f.3d 1243 (11th Cir. 2021) correct in determining that Section 1B1.13 of the United States Sentencing Guidelines is an "applicable" policy statement that binds a district court on a defendant filed motion for compassionate release under 18 U.S.C. § 3582(c)(1)(a), as amended by the first step act of 2018.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Middle District Florida.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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Robert Lawrence, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is unpublished decision in *United States v. Lawrence,* No. 21-10962, 2022 U.S. App. LEXIS 4710 (11th Cir. Feb. 22, 2022) is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Middle Distict of Florida (Lazzara, R.), whose judgment was appealed to be reviewed, is an unpublished opinion in *United States v. Lawrence,* No. 8:15cr508 (M.D. Fla. March 9, 2021) is a marginal order reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on Febraury 22, 2022.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Title 18 U.S.C. § 3582 states in relevant part:

a) Factors To Be Considered in Imposing a Term of Imprisonment.—

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the

defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the

Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) Notification Requirements.—

(1) Terminal illness defined.—

In this subsection, the term "terminal illness" means a disease or condition with an end-of-life trajectory.

(2) Notification.—The Bureau of Prisons shall, subject to any applicable c confidentiality requirements—

(A) in the case of a defendant diagnosed with a terminal illness—

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

(3) Annual report.—Not later than 1 year after December 21, 2018, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.

(e) Inclusion of an Order To Limit Criminal Association of Organized Crime and Drug Offenders.—

The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

Id. Title 18 U.S.C. § 3582.

STATEMENT OF THE CASE

In 2016, Lawrence pleaded guilty to one count of being a felon in possession of a firearm and one count of possession with intent to distribute marijuana. The district court sentenced him to a total of 180 months' imprisonment to be followed by five years' supervised release. In November 2020, Lawrence filed a motion for compassionate release, citing medical issues, rehabilitation, family circumstances, and the COVID-19 pandemic as "extraordinary and compelling reasons." First, he argued that he suffers from asthma, which requires him to use two inhalers on a daily basis, and that he has a growing tumor in one lung.[1] He maintained that in combination these medical conditions "place him [in] danger of death in the event he contracts the COVID-19 virus." He emphasized that, due to the pandemic, he was unable to see an outside medical provider for his conditions, and although he used two inhalers daily, the Bureau of Prisons ("BOP") did "not have control of the asthma situation." He noted that, although he had already contracted the virus once and survived, he was still at great risk due to his medical issues and that multiple

[1] Lawrence submitted medical records in support of these diagnoses. These records indicated that Lawrence was prescribed two inhalers for asthma. He also has a "6mm nodule on right lung" which the prison monitored every 6 months with a CT scan. *United States v. Lawrence*, No. 21-10962, 2022 U.S. App. LEXIS 4710, at *2 n.11 (11th Cir. Feb. 22, 2022)

staff and prisoners had tested positive for the virus and some had died. Second, he argued that the 18 U.S.C § 3553(a) factors, particularly his rehabilitation, weighed in favor of granting his motion.

The district court entered an endorsed order denying Lawrence's motion "because, as pointed out by the Government, he has failed to establish that his current medical conditions rise to the level of extraordinary and compelling reasons justifying his compassionate release." The district court did not explain its reasoning further. Lawrence appealed. The Eleventh Circuit relying on *United States v. Bryant,* 996 F.3d 1243, 1251 (11th Cir. 2021) determined:

> The Sentencing Commission defines "extraordinary and compelling reasons" for purposes of § 3582(c)(1)(A) in Application Note 1 to U.S.S.G. § 1B1.13. See U.S.S.G. § 1B1.13 cmt. (n.1); see also *Bryant*, 996 F.3d at 1247, 1262-63. Pursuant to this definition, there are four circumstances under which "extraordinary and compelling reasons exist": (A) the defendant suffers from (i) "a terminal illness," or (ii) a permanent health condition "that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility from which he or she is not expected to recover"; (B) the defendant is "at least 65 years old," "is experiencing a serious [age-related] deterioration in physical or mental health," and "has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less"; (C) the defendant's assistance is needed in caring for the defendant's minor child, spouse, or registered partner due to (i) "[t]he death or incapacitation of the caregiver of the defendant's minor child or minor children" or (ii) "[t]he incapacitation of the defendant's spouse or registered partner"; and (D) there exist "other" extraordinary and compelling reasons "[a]s determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 cmt. (n.1 (A)-(D)). We have held that "district courts are bound by the Commission's definition of 'extraordinary and compelling reasons' found in 1B1.13." *Bryant,* 996 F.3d at 1262. Thus, in order to show that his medical conditions were "extraordinary and compelling reasons" to warrant a sentence reduction, Lawrence had to show that they were terminal or diminished his

ability to provide self-care in prison and that he is not expected to recover from those conditions. See U.S.S.G. § 1B1.13, cmt. (n.1(A)).

Id. United States v. Lawrence, No. 21-10962, 2022 U.S. App. LEXIS 4710, at *5-7 (11th Cir. Feb. 22, 2022).

The Eleventh Circuit's *Bryant* determined that "Lawrence's failure to establish that his medical conditions diminished his ability to self-care or that his conditions were terminal, as is required to demonstrate extraordinary and compelling reasons" exclusively and affirmed. *Id.* at *7. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

IS THE ELEVENTH CIRCUIT'S DECISION IN *UNITED STATES V. BRYANT,* 996 F.3D 1243 (11TH CIR. 2021) CORRECT IN DETERMINING THAT SECTION 1B1.13 OF THE UNITED STATES SENTENCING GUIDELINES IS AN "APPLICABLE" POLICY STATEMENT THAT BINDS A DISTRICT COURT ON A DEFENDANT FILED MOTION FOR COMPASSIONATE RELEASE UNDER 18 U.S.C. § 3582(C)(1)(A), AS AMENDED BY THE FIRST STEP ACT OF 2018.

This case presents the urgent issue of defendants' eligibility for reduction in sentence (colloquially known as "compassionate release") following the changes to § 3582(c)(1)(A) by the First Step Act of 2018 ("FSA"). The Eleventh Circuit held that a pre-FSA Policy Statement issued by the U.S. Sentencing Commission (the "Commission"), U.S.S.G. § 1B1.13 (the "Statement"), is "applicable" to defendant-filed motions for compassionate release. Defendants who do not satisfy the Statement's narrow list of "extraordinary and compelling" reasons are ineligible for release under that holding.

The Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits disagree. They have held that district courts are free to exercise discretion to grant compassionate release to defendants for any "extraordinary and compelling" reason, so long as the reduction is "warranted" after reconsideration of the § 3553(a) factors. The conflict is substantial.

Granting certiorari in this case is crucial to promote nationwide uniformity in this important aspect of federal sentencing. See S. Ct. R. 10(a). Since the FSA expanded compassionate release, courts nationwide have granted thousands of reductions. U.S. Sentencing Commission Compassionate Release Data Report, Calendar Year 2020 (June 2021).

A. The Circuits are Divided on Whether the Statement is "Applicable" to Defendant-Filed Motions.

1. Eight Circuits Have Concluded that the Statement is Not "Applicable"

Eight courts of appeals have held that the Statement is not "applicable" to defendant-filed motions for compassionate release. See *Brooker*, 976 F.3d at 235 (2d Cir.); *McCoy*, 981 F.3d at 282 (4th Cir.); *United States v. Shkambi*, 993 F.3d 388, 392-393 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109-1111 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180-1181 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *Long*, 997 F.3d at 355

(D.C. Cir.). As those circuits recognize, the FSA's purpose was to remove BOP from its role as a "gatekeeper over compassionate release petitions," *McCoy*, 981 F.3d at 276, and "shift discretion" to the courts to grant release, *Brooker*, 976 F.3d at 230; see also *Long*, 997 F.3d at 348; *McGee*, 992 F.3d at 1041-1042; *Aruda*, 993 F.3d at 801-802. Because the Statement antedates the FSA, and by its terms applies only to motions brought by BOP, it is not "applicable" to motions brought by federal defendants. *McGee*, 992 F.3d at 1047-1051; *McCoy*, 981 F.3d at 280-284; *Gunn*, 980 F.3d at 1180; *Jones*, 980 F.3d at 1109-1011; *Brooker*, 976 F.3d at 235-237; *Aruda*, 993 F.3d at 801-802; *Shkambi* , 993 F.3d at 392-393. The Eleventh Circuit has decided otherwise.

2. The Eleventh Circuit has Concluded that the Statement is "Applicable"

The Eleventh Circuit disagreed. It looked to the "two main dictionary definitions" of "applicable"--"capable of being applied" and "relating to" or "relevant"--and held that the Statement satisfied both. *Id.* at 1247. The Statement's definition of "extraordinary and compelling" was "capable of being applied" to defendant-filed motions because courts had done so since the FSA's passage. The Statement's definition was also "relevant" because several courts that had found the Statement inapplicable had suggested that district courts might find it "helpful" or "relevant" when deciding defendant-brought motions. *Id.* However, Judge Martin argued in dissent that the majority's dictionary-based reasoning proves both "too

little" and "too much." *Id.* at 1270. (Martin, J., dissenting). First, the majority's position required it to ignore what the Statement and its application notes expressly say about when it applies: "[u]pon motion of the Director of the Bureau of Prisons." *Id.* at 1247. Second, offering "relevant" guidance is not the same thing as being binding. "Although other provisions may be 'relevant,'" that does not mean they are "applicable." *Id.*

B. The Eleventh Circuit's decision creates an unfair discrepancy across the nation and deprives thousands of individuals of the opportunity for second looks.

Federal criminal sentencing is inherently retrospective. But many of the goals of sentencing--rehabilitation, just punishment, deterrence--implicate prospective concerns. Compassionate release gives courts an opportunity to take a second look at sentences to account for unusual and changed circumstances. This consideration--sure to arise thousands more times as individuals make use of the FSA's recently enacted provisions--is well within judges' core competence. As the Commission has noted, "[t]he court is in a unique position to determine whether the circumstances warrant a reduction." U.S.S.G. § 1B1.13 & comment. (nn.1, 4); U.S.S.G. Amend. 799 (Nov. 1, 2016).

At sentencing, judges consider the nature and circumstances of the crime committed, the defendant's role in the offense, and the criminal history of the defendant, among other things. See 18 U.S.C. § 3553; Federal Sentencing

Guidelines Manual (2018). They rely on guidance reflecting society's *current* understanding of criminal culpability and punishment. But what judges can't confidently measure at sentencing is an individual's capacity for change. See Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 83, 85 (2019). Even people who commit serious crimes are not beyond rehabilitation.[7] The availability of a second chance through compassionate release can incentivize individuals serving seemingly hopeless sentences to rehabilitate themselves in ways they might otherwise never have attempted. See *id.* at 97.

Compassionate release allows judges to make individualized determinations for select persons when Congress has declined to make sentencing changes broadly retroactive. Allowing judges the discretion to recognize extraordinary and compelling reasons beyond those articulated in the Statement permits, for deserving individuals, the harmonization of new views on criminal punishment

[7] See, *e.g., United States v. Jackson*, 3:90-cr-85-MOC-DCK, 2021 WL 2226488, at *5-6 (W.D.N.C. June 2, 2021) (numerous letters of recommendation from BOP staff praising "the level of growth and maturity that I have found rare in this environment and in my opinion very commendable"); Michael Gordon, *After 30 years, have 3 NC crack gang members repaid their debt? A judge to decide.*, Charlotte Observer, May 12, 2021, https://bit.ly/3ehjXzw; *United States v. Clausen*, No. Cr. 00-291-2, 2020 WL 4260795, at *8 (E.D. Pa. July 24, 2020) (finding "remarkable [*16] record of rehabilitation" despite " *de facto* life sentence" documented by seventeen letters of recommendation from BOP staff). Professor Hopwood himself was convicted of bank robbery and served a lengthy sentence. But he later graduated from law school, clerked on the D.C. Circuit, and became a member of the Georgetown Law Center faculty and the Bar of this Court.

with old sentences. This case presents an ideal vehicle for the Court to provide needed guidance to incarcerated persons and practitioners hoping to take advantage of the FSA's opportunity for second chances. It is vital that practitioners understand what circumstances judges may consider extraordinary and compelling. It is equally crucial that persons across the nation--no matter their place of sentencing--have equal grounds of consideration.

1. The Eleventh Circuit's opinion is out of sync with a majority of circuits and harms those whose circumstances merit reconsideration.

In recent years, judges have applied their discretion to many persons worthy of compassionate release for reasons beyond those articulated in the Statement. The Eleventh Circuit's rule would bar consideration of all the extraordinary and compelling circumstances detailed below. It would therefore deprive all the featured individuals of any opportunity even to seek compassionate release from the courts. That result is neither just nor consistent with Congress's intent.

a. Ruling below bars consideration of excessive sentences and changed mandatory minimums as extraordinary and compelling reasons.

For years, Congress ratcheted up the penalties for federal criminal defendants, but the pendulum has begun to swing the other way. In 2005, this Court made the once-binding federal guidelines "effectively advisory." *United States v. Booker*, 543 U.S. 220, 245 (2005). As a result, sentencing has recalibrated to emphasize

judicial discretion and defendants' individual circumstances. See *Rita v. United States*, 551 U.S. 338, 347-348 (2007); *Gall v. United States*, 552 U.S. 38, 49-50 (2007). In addition, Congress has taken important, though still insufficient, steps to shorten draconian mandatory minimums and narrow their applicability. For those entering the criminal justice system today, these changes have been crucial. For those already behind bars, however, they have been largely unhelpful. "This discrepancy is a purely arbitrary byproduct of the points in time at which the offense conduct was prosecuted and [the] Defendant was sentenced; it has no basis in the offense conduct itself, in the character of the Defendant, or even in the policy goals of sentencing espoused by our criminal justice system." *United States v. Ledezma-Rodriguez*, 472 F. Supp. 3d 498, 501 (S.D. Iowa 2020).

Unsurprisingly, courts have recognized that non-retroactive changes to mandatory minimums and other sentencing laws can contribute to extraordinary and compelling reasons for release.[8] An example illustrates why. Juan Ledezma-

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[8] See, *e.g., McCoy*, 981 F.3d at 286 (affirming compassionate release for defendants who were convicted of stacked 924(c) offenses in their youth and, if sentenced today, would receive sentences that are decades shorter); *Maumau*, 993 F.3d at 837 (affirming compassionate release for a defendant because of his "young age at the time of sentencing; the incredible length of his stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c); and the fact that" he "would not be subject to such a long term of imprisonment" if sentenced today) (internal quotation marks omitted); *United States v. McPherson*, 454 F. Supp. 3d 1049, 1053 (W.D. Wash. 2020) (granting compassionate release to defendant who had served 26 years of a stacked § 924(c) [*20] sentence for which he would only receive 15 years today; "It is

Rodriguez was born in Mexico in 1973 and exhausted the educational opportunities available to him by the sixth grade. *Ledezma-Rodriguez*, 472 F. Supp. 3d at 500. Eventually, he moved to the United States, got married, and had three children. *Ibid.* Like most criminal defendants, Ledezma-Rodriguez made mistakes. He committed two minor drug offenses (for which he served a combined total of 90 days) and was charged with a third offense for "suppl[ying] methamphetamine and cocaine" in the late 1990s. *Id.* at 500, 504. His entry into the United States (and later reentries) were also unlawful. *Id.* at 500. Still, Ledezma-Rodriguez was a "non-violent, low-level offender" with no ties to "drug cartels" or other "large-scale criminal organizations." *Ibid.* Nevertheless, the government filed notices under 21 U.S.C. § 851 identifying his previous minor drug convictions. *Ibid.* Thus, when the district court sentenced Ledezma-Rodriguez for his third offense, 21 U.S.C. § 841 required it to sentence him to life in prison. *Ibid.* As the court put it, Ledezma-Rodriguez's "life sentence for low-level, non-violent drug trafficking" was "manifestly unjust" and "would be laughable if only there w[as not a] real p[erson] on the receiving end." *Id.* at 500-501, 504 (alterations in original).

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extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson."). But see *United States v. Jarvis*, 999 F.3d 442, 445-446 (6th Cir. 2021) (discussing split in authority in the Sixth Circuit over whether a non-retroactive change in sentencing law can contribute to the "extraordinary and compelling" reasons for compassionate release).

The years that followed saw important changes. Congress amended § 841 so that only prior "serious drug felon[ies]," for which the defendant has served more than a year of imprisonment, could trigger the two-strike penalty. See *id.* at 504-505. Neither of Ledezma-Rodriguez's prior offenses would qualify, so if sentenced today he'd be subject only to a 10-year mandatory minimum for his drug offense. Ledezma-Rodriguez also turned his life around. He obtained the equivalent of a high school diploma, made extensive use of his prison's programing, and maintained an entirely clean record for six years, "no small feat in a closely monitored federal prison." *Id.* at 505. He is "no longer the same person." *Ibid.*

The district judge, haunted by Ledezma-Rodriguez's sentence, did not give up either. In 2016, he wrote a letter in support of clemency and in 2017 urged the U.S. Attorney to move to vacate Ledezma-Rodriguez's convictions. *Id.* at 501. In 2020, Ledezma-Rodriguez moved for compassionate release and the district court granted it. *Id.* at 509. As the court movingly put it (*id.* at 505):

> [A] life sentence is objectively inhumane here. Yes, Defendant had a habit of selling narcotics in his teens and twenties. He also snuck into the United States multiple times. But he is hardly alone on either front, and most people guilty of similar crimes do not face life in prison. * * * [T]here is not a district judge in this country who would see Defendant's record and conclude a life sentence is appropriate. The Court understands the importance of finality in criminal proceedings. Even so, justice has a role, too.

The Eleventh Circuit's Bryant decision would preclude relief, irrespective of the inamtes rehabilitation.

b. The *Bryant* decision bars consideration of medical or family reasons, beyond those articulated in the statement, as extraordinary and compelling reasons

The Statement lists specific categories of medical and family circumstances that may qualify for compassionate release. But judges have found that individuals who do not meet the Statement's criteria may still demonstrate extraordinary and compelling family or medical circumstances. For example, inadequate medical care for individuals with many non-terminal illnesses may constitute extraordinary and compelling circumstances, even though the Statement does not list those conditions.

For example, Angela Beck was sentenced to 14 years in prison for conspiracy to distribute methamphetamine. *United States v. Beck*, 425 F. Supp. 3d 573, 575 (M.D.N.C. 2019). While there, she discovered lumps in her breast. Though the prison doctor recommended a surgical consult to assess her for breast cancer, BOP waited two months to take her to a surgeon. *Ibid.* The consult suggested cancer, and doctors repeatedly told BOP that Ms. Beck needed a biopsy within two months. *Ibid.* But BOP waited another eight months before taking her for a biopsy. *Ibid.* The biopsy confirmed that she had cancer. Her breast and pectoral muscle had to be removed. Yet BOP's delay in treatment continued. BOP waited six weeks to take Ms. Beck for a postoperative visit, even though BOP personnel knew her cancer had spread to her lymph nodes. BOP waited another five months to

schedule an oncology appointment. "[S]eventeen months passed between the time medical care providers at the prison learned about the lumps in Ms. Beck's left breast, and the time [BOP] allowed her to consult with a medical oncologist." *Id.* at 576 (citation omitted). The court, in granting Ms. Beck compassionate release, noted that BOP's "abysmal" care and "grossly inadequate treatment" "increased the risk that Ms. Beck's cancer has spread or will recur and has compromised her prospects for survival." *Id.* at 580-581. As the court stated, "one certainly hopes that [BOP]'s gross mismanagement of medical care for an inmate's deadly disease is extraordinary." *Id.* at 581.[10] The *Bryant* decision would have tied the court's hands and precluded it from even *considering* compassionate release, because--without consideration of BOP's inadequate care -- Ms. Beck did not suffer from a "terminal illness" or "serious * * * medical condition" from which "she [wa]s not expected to recover." U.S.S.G. § 1B1.13 n.1(A)(i)-(ii); see *Beck*, 425 F. Supp. 3d at 581-582.

Similarly, Lawrence suffers from asthma which is only complicate by a growing tumor on his right lung. *United States v. Lawrence*, No. 8:15-cr-00508

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[10] Similarly, another court stated that it refused to "play Russian roulette" with a person's life. *United States v. McCall*, 465 F. Supp. 3d 1201, 1209 (M.D. Ala. 2020); see *id.* at 1205, 1207 (granting compassionate release to defendant with sickle cell disease who contracted COVID-19 because BOP was "completely unequipped" to treat Mr. McCall and he had "pain symptoms" of a "life-threatening nature" that "continue to go essentially untreated").

(M.D.FL. DE:142 at 2).[2] Although the government agrees that the tumor exists and that Lawrence receives care for the tumor, the record does not establish that the District Court (although it relied on the government's statements) that it considered the asthma, the tumor, *nor the Bureau of Prison's* ("BOP") inability to care for Lawrence's medical condition if he is infected with COVID-19. *Id.* (DE:152, Endorsed Order Denying 18 U.S.C. § 3582). In essence, *even if the court did not agree with the government's posisiton*, it was precluded from granting relief in light of *Bryant.* That position is troubling.

Courts have also held that being the only caretaker for an elderly and dying parent, a family circumstance not listed in the Statement, can be an extraordinary and compelling circumstance. For example, Eric McCauley was serving 23 years in prison for conspiracy to distribute marijuana. He explained to the court that his stepfather, a Vietnam veteran disabled by exposure to Agent Orange, suffered from diabetes, heart disease, cancer, chronic obstructive pulmonary disease, stenosis, and bronchitis, and his mother, who had previously taken care of his step-father, had just been diagnosed with Parkinson's Disease. *United States v. McCauley*, No. 07-cr-04009-SRB-1, 2021 WL 2584383, at *2 (W.D. Mo. June 23, 2021). Given Mr. McCauley's caretaking responsibilities, along with his 12 years of time served and rehabilitation, the court found his circumstances extraordinary and

[2] *United States v. Lawrence*, No. 8:15-cr-00508 (M.D.FL).

compelling.[3] Judges apply their discretion not only to determining whether extraordinary and compelling reasons exist, but also to tailoring an appropriate remedy. *E.g., Walker*, 2019 WL 5268752, at *3 (granting early release to a re-entry residential facility with limited travel and supervisory conditions set by BOP); *United States v. Rodriguez*, 424 F. Supp. 3d 674, 675, 683 (N.D. Cal. 2019) (determining that BOP's mishandling of physical therapy for spinal injuries was "extraordinary" but denying motion without prejudice based on representations by the Government that the defendant would imminently receive medical care). Recognizing a court's ability to grant compassionate release on appropriate terms allows a nuanced consideration of both the person's rehabilitation and her limitations. But the Eleventh Circuit's across-the-board rule improbably attributes to Congress a desire to foreclose such consideration.

c. The *Bryant* decision bars consideration of trial penalties as extraordinary and compelling reasons

Judges have found that an excessively long sentence imposed as a "trial penalty" can constitute an extraordinary and compelling reason for compassionate

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[3] [11] See also *United States v. Walker*, No. 1:11 CR 270, 2019 WL 5268752, at *2-3 (N.D. Ohio Oct. 17, 2019) (granting compassionate release because Mr. Walker would "aid his terminally ill mother" "both emotionally [*29] and financially," with an "unusual and lucrative job opportunity" to be an executive producer for a movie based on his best-selling book written while in prison); *Cruz*, 2021 WL 1326851, at *10 (defendant "could assist his mother," who suffered from terminal lung disease and had six months left to live, "in a way that no other person currently can").

release. A "trial penalty" is "the practice of punishing defendants for exercising their constitutional right to trial by jury" by ensuring that the sentence imposed after a trial is significantly longer than the sentence the defendant would have received had he pled guilty. *United States v. Cabrera*, No. 10-cr-94-7 (JSR), 2021 WL 1207382, at *5 (S.D.N.Y. Mar. 31, 2021).

Due to "mandatory minimums, sentencing guidelines, and simply [her] ability to shape whatever charges are brought[, the prosecutor] can effectively dictate the sentence by how [s]he [*25] drafts the indictment." Jed S. Rakoff, Why the Innocent Plead Guilty and the Guilty Go Free 25 (2021). Especially when a plea offer would have guaranteed a lower sentence, the prosecutor has already indicated what she believes would be an appropriate sentence for the offenses. *See United States v. Haynes*, 456 F. Supp. 3d 496, 517-518 (E.D.N.Y. 2020) (reducing defendant's sentence because defendant had already served time "far beyond what the United States Attorney determined was a suitable sentencing range when offering Haynes a plea" "all because Haynes chose a trial over a plea and the prosecution retaliated"). *United States v. Sims*, No. 3:98-cr-45, 2021 WL 1603959 (E.D. Va. Apr. 23, 2021), provides a tragic example. In 1997, 21-year-old Jermaine Jerrell Sims sold guns to two men who then used them to commit armed robbery and murder. *Id.* at *1. He rejected a plea deal that would have resulted in a maximum sentence of three years. After being convicted at trial, he received a

mandatory sentence of life imprisonment. *Ibid.* "Sims received a life sentence for an act the government thought deserved a maximum of three years." *Id.* at *6. The district judge opined at sentencing that Sims' sentence "amounted to cruel and unusual punishment" and then spent years lobbying the Office of the Pardon Attorney on Sims' behalf. *Id.* at *1.

Rather than give up hope at the prospect of life in federal prison, Sims "spent his time pursuing every opportunity to improve his mind and character" and maintained an immaculate disciplinary record. *Id.* at *5. In granting Sims' motion for compassionate release, the judge concluded that "Sims' service of more than two decades of incarceration for a case the government deemed worthy of no more than three years in prison, his young age at the time of his arrest, his institutional record, [and] his personal growth and rehabilitation * * * establish extraordinary and compelling reasons justifying a sentence reduction." *Id.* at *7. In light of *Bryant*, the District Court cannot consider such an issue for relief.

d. The Eleventh Circuit's B*ryant* decision bars consideration of sentence disparities with co-defendants as extraordinary and compelling reasons.

Courts have also determined that disparities between the sentences of similarly situated codefendants can support a finding of extraordinary and

compelling reasons for release.[4] Take Eric Millan. In 1991, he was charged with leading a large heroin distribution conspiracy in the Bronx and Manhattan called "Blue Thunder." *United States v. Millan*, No. 91-CR-685 (LAP), 2020 WL 1674058, at *2 (S.D.N.Y. Apr. 6, 2020). Millan was sentenced to mandatory life in prison under 21 U.S.C. § 848(b) for engaging in a continuing criminal enterprise. *Id.* at *3-4. Over the next three decades, Millan sat behind bars while his co-defendants had their life sentences reduced and left prison. Over time, his sentence grew increasingly "out-of-line with those of his codefendants." *Id.* at *15.

Nevertheless, Millan did not let that, or his original criminal conduct, define him. "Despite having had no realistic hope of release," Millan spent the next nearly three decades reforming himself. *Id.* at *8. His accomplishments are nothing short of remarkable: Millan completed 7,600 hours of programming and apprenticeships;

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[4] See, *e.g.*, *United States v. Edwards*, CR No. PJM 05-179, 2021 WL 1575276, at *2 (D. Md. Apr. 22, 2021) (granting compassionate release to middling supplier of drugs because of the "striking disparity" between his sentence and the "violent 'ringleader' of a drug trafficking organization," who, unlike the defendant, was able to receive the benefit of several retroactive changes in sentencing law); *United States v. Minicone*, No. 5:89-CR-173, 2021 WL 732253, at *3-5 (N.D.N.Y. Feb. 25, 2021) (granting compassionate release to elderly defendant whose sentence was out of step with his co-defendant and which the sentencing judge had tried three times to reduce (and been reversed each time) pre- *Booker*); *United States v. Price*, 496 F. Supp. 3d 83, 89-90 (D.D.C. 2020) (granting compassionate release to defendant who received a longer sentence than the more culpable ring leader of the drug conspiracy and whose equally culpable peers in the conspiracy had all already received compassionate release).

he earned an Associate's Degree in business administration; he worked a full-time job as an assistant to five successive prison factory managers; he participated in at-risk youth and suicide prevention programs for more than twenty years; and he became a leader in his church and a man of deep faith. *Id.* at *9-14. Millan's son credits his father--over the course of "faithful[]" weekly calls from prison--with steering him away from a life of crime and considers his father his best friend. *Id.* at *1.

Ultimately, the district court concluded that the sentencing disparity, *Millan's* rehabilitation, his "extraordinary character," "his leadership in the religious community at FCI Fairton," and "his dedication to work with at-risk youth and suicide prevention" all constituted extraordinary and compelling reasons for his release. *Id.* at *15. In light of *Bryant*, the District Court could not even consider Lawrences' post-conviction rehabilitation efforts. However, had Lawrence been convicted in another Circuit, his changes of release would have been substantially higher.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Eleventh Circuit.

Done this 19 day of May 2022.

Respectfully submitted,

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