No. _____

In the Supreme Court of the United States

JOHN J. WATFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may consider the 2018 amendment to the sentences mandated by 18 U.S.C. § 924(c) in determining whether a defendant has shown "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. Watford, No. 21-1361 (7th Cir.) (order granting summary affirmance issued August 2, 2021).

United States v. Watford, No. 3:97-CR-26(2) (RLM) (N.D. Ind.) (order denying motion for sentence reduction issued February 12, 2021).

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JURISDICTION

The decision of the court of appeals was entered on August 2, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act, titled "Clarification of Section 924(c) of Title 18, United States Code," states:

> (a) In General.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".
>
> (b) Applicability to Pending Cases.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Section 603 of the First Step Act states, in relevant part:

> (b) Increasing The Use And Transparency Of Compassionate Release.—Section 3582 of title 18, United States Code, is amended—
>
> > (1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "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"

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

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

18 U.S.C. § 3553(a) states, in relevant part:

> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; . . .
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

INTRODUCTION

This case squarely presents an important issue of statutory interpretation that has deeply divided the federal courts of appeals: whether a district court

may consider the First Step Act's amendment to 18 U.S.C. § 924(c), which dramatically reduced the mandatory consecutive sentences for "second or successive convictions" under that law in virtually all cases, in determining whether a sentence should be reduced under 18 U.S.C. § 3582(c)(1)(A)(i).

Three courts of appeals, including the Seventh Circuit, have answered that question in the negative. These courts have held that because the amendment to Section 924(c) was not made categorically retroactive, it cannot be considered, either standing alone or in combination with other factors, in determining whether "extraordinary and compelling reasons" warrant a sentence reduction under Section 3582(c)(1)(A)(i). Two courts of appeals have reached the opposite conclusion, correctly holding that the plain language of Section 3582(c)(1)(A)(i) permits district courts to consider the First Step Act's seismic changes to Section 924(c) when determining whether such reasons are present. Three courts of appeals have acknowledged the split of authority on this question.

The question presented concerns two important provisions of the First Step Act. The first is Section 403, which effectively reversed this Court's 1993 interpretation of 18 U.S.C. § 924(c) that led to the imposition of draconian, enhanced mandatory sentences (like the one in this case) for "second or successive" Section 924(c) convictions when the defendant had no prior conviction under that provision. The amendment put an end to the absurdly long sentences resulting from a prosecutorial practice known as "§ 924(c) stacking," which, according to three Sentencing Commission reports over a span of fourteen years, had been invoked by prosecutors for decades

in a manner that discriminated against Black men. The amendment, titled a "Clarification of Section 924(c)," made clear that the law's dramatically enhanced mandatory and consecutive sentences (20 years at the time of Petitioner's sentencing; 25 years today) would henceforth be *recidivism-based* enhancements, mandated only when Section 924(c) convictions are obtained after a prior conviction under that statute has become final. Finally, the amendment was made retroactive, but only partially so: Congress directed that it be applicable to crimes committed before the First Step Act was enacted, but only if those defendants had not yet been sentenced.

The second is Section 603(b), which amended 18 U.S.C. § 3582(c)(1)(A), the sentence-reduction law that has become known as the compassionate release statute. The amendment removed the Bureau of Prisons (the "BOP") as the gatekeeper for such motions, and empowered defendants to make them directly, because the BOP had too infrequently opened the gate, improperly curtailing the sentence reduction authority that Congress gave district courts. *See, e.g.*, DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").[1] The title of Section 603(b) explained its purpose: it was aimed at "Increasing the Use and Transparency of Compassionate Release. *See* 164 Cong. Rec. S7774 (daily ed.

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[1] DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, (2013), https://oig.justice.gov/reports/2013/e1306.pdf.

Dec. 18, 2018) (statement of Sen. Cardin) ("[T]his legislation includes several positive reforms from the House-passed FIRST STEP Act. . . . The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.").

As relevant here, Section 3582(c)(1)(A)(i) authorizes a sentence reduction when a district court, after considering the factors set forth in 18 U.S.C. § 3553(a), finds that "extraordinary and compelling reasons warrant such" relief and that "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." This latter requirement has its roots in the Sentencing Reform Act of 1984, which directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). Critically, in that same statute, Congress demonstrated its ability to place particular factors out of bounds. Specifically, it noted that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.* Nothing in Section 3582 itself, the First Step Act, or any other statute otherwise limits the factors a district court may consider in determining whether extraordinary and compelling reasons warrant a sentence reduction.

In recent months, however, the Third, Sixth, and Seventh Circuits have engrafted onto Section 3582(c)(1)(A)(i) just such a limitation; they have held that district courts are prohibited from considering the 2018 amendment to Section 924(c) in deciding whether to reduce the draconian sentences produced by stacking. Their rationale: Because Congress chose not to make the amendment to Section 924(c) categorically retroactive for *all* of the more than

2,500 inmates serving stacked Section 924(c) sentences, its dramatic revision to that sentencing regime cannot be considered in *any* such case, even on a compassionate release motion.

Not only does this aggressive, judicially created amendment to Section 3582(c)(1)(A)(i) find no support in the text of any relevant statute, but also it goes far beyond Section 994(t)'s limitation on considering rehabilitation *alone*. These three courts of appeals have not merely held that the amended Section 924(c) sentencing regime cannot, standing alone, warrant a reduction (as is the case for rehabilitation), they have directed that it cannot be considered *at all*, even in combination with other relevant factors on a case-by-case basis. The result is perverse. In considering whether to reduce sentences that often equate to life without parole, district judges in those circuits must ignore that fact that both Congress and President Trump deemed § 924(c) stacking so obviously excessive that they acted to make sure no one in the same circumstances would ever again be subjected to them. It is difficult to conjure a factor more relevant to determining whether an indefensible mandatory sentence should be reduced than the fact that it is decades (sometimes centuries) longer than the mandatory sentence that would be applicable today, especially when the harshness of that repudiated regime was visited upon defendants in a racially discriminatory fashion. That is precisely the absurdity that the Fourth and Tenth Circuits have pointed out in correctly holding that, when deciding whether extraordinary and compelling reasons warrant a sentence reduction, a district court may consider the amendment to Section 924(c).

This case offers an ideal vehicle to resolve the circuit split on this issue. Both the district court and the Seventh Circuit considered and addressed the issue, and it is cleanly presented here. There are no threshold issues that would preclude this Court from reaching the question presented, and the district court made it clear that Petitioner will walk out of prison—more than thirty years before his projected release date—if this threshold legal issue is resolved in his favor. Pet. App. 35a ("If there were any legal authority to do so, this court—this judge—would order [Petitioner] released from prison."). Finally, timely resolution of the conflict is particularly important because similar sentence reduction motions are currently being filed in substantial numbers around the country. This Court should grant certiorari and reverse the decision below.

STATEMENT

1. In 1984, Congress amended 18 U.S.C. § 924(c) as part of the Comprehensive Crime Control Act. In relevant part, it revised Section 924(c) such that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years." Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, § 1005(a), 98 Stat. 2138-2139. In 1988, Congress amended Section 924(c) yet again by replacing the 10-year sentence for a "second or subsequent conviction" with a 20-year sentence. Pub.L. No. 100-690, § 6460, 102 Stat. 4373 (1988).

In 1993, this Court considered whether a defendant's second through sixth convictions under Section 924(c), all obtained in the same proceeding as

his first, constituted "second or subsequent conviction[s]" within the meaning of that provision. *Deal v. United States*, 508 U.S. 129 (1993). This Court answered the question in the affirmative. Five years later, Congress increased the mandatory minimum penalty for second or subsequent convictions under Section 924(c) from 20 to 25 years. Pub. L. No. 105–386, 112 Stat. 3469 (1998).

In the years that followed *Deal*, the practice of § 924(c) stacking attracted significant criticism. The Judicial Conference of the United States urged Congress on multiple occasions to amend the draconian penalties it produced.[2] On one such occasion, the Chair of the Criminal Law Committee described Section 924(c) as one of the "most egregious mandatory minimum provisions that produce the unfairest, harshest, and most irrational results in the cases sentenced under their provisions."[3]

The Sentencing Commission also has repeatedly reported that the enhanced sentences for "second or successive" convictions under Section 924(c) were disproportionately invoked by prosecutors against Black defendants, and went so far on one of those

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[2] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ("MANDATORY MINIMUM REPORT") 360–361, n.904 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf..

[3] *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism and Homeland Security of H. Comm. on the Judiciary*, 111th Cong. 60-61 (2009) (statement of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States).

occasions as to call upon Congress to "eliminate the 'stacking' requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other." *See* MANDATORY MINIMUM REPORT at 368; *see also* U.S. SENT'G COMM'N., FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 90 (2004) ("If a sentencing rule has a disproportionate impact on a particular demographic group, however unintentional, it raises special concerns about whether the rule is a necessary and effective means to achieve the purposes of sentencing."); U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018) ("Black offenders were convicted of a firearms offense carrying a mandatory minimum more often than any other racial group. . . . The impact on Black offenders was even more pronounced for offenders convicted either of multiple counts under section 924(c) or offenses carrying a mandatory minimum penalty under the Armed Career Criminal Act.").

Finally, in 2018, the First Step Act put an end to *Deal*'s interpretation of the law. Section 403, titled "Clarification of Section 924(c)," re-wrote that provision so that the enhanced mandatory sentences are mandated only by a Section 924(c) conviction that occurs after a prior such conviction has become final. The amendment was made retroactive, but only partially so: Congress directed that the new regime was applicable to convictions under Section 924(c) based on conduct committed before the date of enactment,

but only if the sentence on such a conviction had not yet been imposed.

2. In the Comprehensive Crime Control Act of 1984, Congress abolished federal parole and created a "completely restructured guidelines sentencing system." S. Rep. No. 225, 98th Cong., 1st Sess. 52, 53 n.196 (1983). Having eliminated parole as a "second look" at lengthy sentences, Congress recognized the need for an alternative:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55–56 (emphasis added). Put differently, the statute replaced the Parole Commission's opaque review of every federal sentence with a much narrower judicial review of cases presenting "extraordinary and compelling reasons" for relief from unusually long prison terms. By lodging that authority in federal district courts, this change kept "the sentencing power in the judiciary[,] where it belongs." *Id.* at 52, 53 n.196, 121.

But the law also established a gatekeeper—the authority could be exercised only upon a motion by the Director of the BOP. Unsurprisingly, the BOP

too rarely exercised this power, leaving the sentence reduction authority visited upon judges by Congress dramatically underutilized.[4] In response, Congress amended Section 3582(c)(1)(A) in Section 603 of the First Step Act. Under the amended statute, defendants are permitted to present compassionate release motions to the sentencing court on their own if the BOP declines to make a motion on their behalf within 30 days of being asked to do so. 18 U.S.C. § 3582(c)(1)(A).

3. In May 1997, Petitioner and Ricky Anderson committed two bank robberies and attempted a third. No one was physically injured during the robberies, no guns were discharged, and the banks "lost less than $10,000 in the three charged events." Pet. App. 35a. Petitioner only brandished a firearm during one of the three robberies.

In June 1997, Petitioner and Anderson were indicted on two counts of aggravated bank robbery, one count of attempted aggravated bank robbery, and one count of carrying a firearm in connection with a crime of violence under 18 U.S.C. § 924(c). In August of that year, Anderson agreed to plead guilty to all four counts and cooperate against Petitioner. The government then filed a superseding indictment against Petitioner, adding two additional counts of carrying a firearm in connection with a crime of violence under Section 924(c). Petitioner went to trial, was convicted of all counts, and was sentenced to a

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[4] *See, e.g.*, DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."), https://oig.justice.gov/reports/2013/e1306.pdf.

total of 802 months—more than 66 years—imprisonment. On Counts 1, 3, and 4 (the bank robbery counts), the district court imposed concurrent terms of 262 months. On Count 2 (the first Section 924(c) count), the court imposed a mandatory, consecutive term of 60 months. On each of Counts 5 and 6 (the stacked Section 924(c) counts), the court imposed mandatory, consecutive terms of 240 months.

On October 15, 2020, after the district court denied his initial *pro se* motion for a sentence reduction, Petitioner asked Warden Angela Owens at FCI Memphis to move for relief on his behalf. When Warden Owens failed to respond, Petitioner again moved in the district court for compassionate release based upon a review of his individual circumstances, including: (1) his age at the time of the offense conduct; (2) his rehabilitation and education while incarcerated; (3) his medical issues, which put him at risk for COVID-19; (4) the mandatory sentence the district court was forced to impose that amounted to what is essentially a life sentence; (5) the substantial prison term he had already served (more than 23 years); (6) the release of his equally culpable co-defendant from prison almost a decade prior in January 2012; (7) the career offender enhancement he received that would not apply today; and (8) the fact that Congress has made clear that his excessive sentence based on § 924(c) stacking should never have been imposed.

After briefing, the district court denied Petitioner's motion, finding that the reasons put forth in support of a sentence reduction—including the amendment to the sentences mandated by 18 U.S.C. § 924(c)—were not "extraordinary and compelling."

See Pet. App. 14a. Still, the district court also made clear that it "would order compassionate release if it had jurisdiction to do so," and explained that "[i]f there were any legal authority to do so, this court—this judge—would order Mr. Watford released from prison." Pet. App. 35a.

The Seventh Circuit affirmed, applying its recent precedent holding "that a reason for a sentence reduction under § 3582(c)(1)(A)(i) 'cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c).'" Pet. App. 2a (quoting *United States v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021)).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split concerning whether a district court may consider the First Step Act's amendment to Section 924(c) in determining whether a defendant sentenced under the pre-amendment regime has shown "extraordinary and compelling reasons" warranting a possible sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

This case meets all of the Court's criteria for granting certiorari. First, the question presented concerns an intractable, acknowledged circuit split on a recurring question of statutory interpretation that only this Court can resolve. Second, the Seventh Circuit's conclusion that a district court is prohibited from considering that a defendant is serving a sentence decades longer than the one Congress believes is appropriate, is incorrect. The holdings of the Third, Sixth, and Seventh Circuits cannot be reconciled with the plain text of Section 3582(c)(1)(A)(i),

and the limitation those holdings engraft onto the law also undermines a clear purpose of that provision. Third, the question presented is important and will profoundly affect a large number of defendants who are serving indefensible sentences that current law would not permit. Fourth, this case is an ideal vehicle.

A. The Question Presented Concerns an Intractable, Acknowledged Circuit Split on a Recurring Question Only This Court Can Resolve.

Five courts of appeals have considered whether the 2018 amendment to Section 924(c) can be considered in determining whether extraordinary and compelling reasons warrant a reduction in sentence pursuant to Section 3582(c)(1)(A)(i) where the defendant was sentenced under the pre-amendment regime. Those decisions have produced an active 3-2 circuit split. This Court should grant review to resolve the conflict.

1. Three Courts of Appeals Have Held District Courts Cannot Consider the First Step Act's Changes to Section 924(c).

Three courts of appeals have held that a district court is prohibited from considering the First Step Act's amendment to Section 924(c) in determining whether "extraordinary and compelling reasons" warrant a sentence reduction on a defendant-filed compassionate release motion.

In *United States v. Jarvis*, a divided panel of the Sixth Circuit affirmed the district court's conclusion that a defendant's stacked, mandatory Section 924(c) sentences that could not be imposed today cannot be considered as grounds for a sentence reduction, even in combination with other bases for relief. 999 F.3d 442, 442 (6th Cir. 2021). The court reasoned that a contrary conclusion would render "useless" Congress's decision that the amendment would not apply to cases in which sentence had already been imposed at the time of enactment. *Id.* at 443. The Sixth Circuit acknowledged a split with the Fourth and Tenth Circuits, *id.* at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."), but concluded that the applicable law "does not permit us to treat the First Step Act's non-retroactive amendments, whether by themselves or together with other factors, as 'extraordinary and compelling' explanations for a sentencing reduction," *id.* at 445.[5]

In *Thacker*, the Seventh Circuit reached the same conclusion. 4 F.4th 569. There, the panel ex-

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[5] The majority acknowledged that a different panel of the Sixth Circuit had reached the opposite result the month before in a published opinion affirming a sentence reduction that was in part based on Section 403 of the First Step Act. *See id.* at 445 (citing *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021)). The *Jarvis* majority concluded that *Owens* conflicted with an earlier-decided case holding "that a non-retroactive First Step Act amendment fails to amount to an 'extraordinary and compelling' explanation for a sentencing reduction." *Id.* (citing *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021)). But as the *Jarvis* dissent correctly observed, "nothing in *Tomes* precludes a district court from considering a sentencing disparity due to a statutory amendment along with other grounds for release." *Id.* at 450 (Clay, J., dissenting).

plained that "the discretionary authority conferred by § 3582(c)(1)(A) . . . cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively." *Id.* at 574. The court also expressed "broader concerns with allowing § 3582(c)(1)(A) to serve as the authority for relief from mandatory minimum sentences" based on "principles of separation of powers." *Id.* The court acknowledged the circuit split on this question, observing that "courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release." *Id.* at 575; *see also id.* ("The Fourth Circuit, on the one hand, takes the view that the sentencing disparity resulting from the anti-stacking amendment to § 924(c) may constitute an extraordinary and compelling reason for release.").

And in *United States v. Andrews*, the Third Circuit adopted the same rule, concluding that "[t]he nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release." 12 F.4th 255, 261 (3d Cir. 2021). The Third Circuit reasoned that "Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced," declining to "construe Congress's nonretroactivety directive as simultaneously creating an extraordinary and compelling reason for . . . release." *Id.* The Third Circuit "join[ed] the Sixth and Seventh Circuits," and acknowledged a split with the Tenth and Fourth Circuits. *Id.*

2. Two Courts of Appeals Have Held District Courts May Consider the First Step Act's Changes to Section 924(c).

Two courts of appeals have held, in clear conflict with the Third, Sixth, and Seventh Circuits, that district courts may consider the disparity between the mandatory sentences imposed and the mandatory sentences applicable under current law in deciding whether extraordinary and compelling reasons warrant a reduction.

The Fourth Circuit was the first to establish this rule in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). The defendants in that case had been charged with multiple Section 924(c) counts and sentenced to between 35 and 53 years of imprisonment, largely due to stacking. *Id.* at 274. Each defendant's motion for compassionate release relied heavily on the severity of the sentences then mandated by Section 924(c) and the First Step Act's fundamental changes to those sentences, as well as his exemplary conduct while incarcerated. *Id.* The district courts granted each defendant a sentence reduction, and the Fourth Circuit affirmed. *Id.* at 288. In so doing, the panel held that district courts may treat "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." *Id.* at 286. It further explained that Congress's decision "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." *Id.* The court

found "nothing inconsistent about Congress's paired First Step Act judgments: that 'not *all* defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *Id.* at 287 (citation omitted).

In similar circumstances, and based on the same reasoning, the Tenth Circuit affirmed a sentence reduction in *United States v. Maumau*. 993 F.3d 821 (10th Cir. 2021). The court explained that district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" including "the 'incredible' length of [] stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c); and the fact that [the defendant], if sentenced today, . . . would not be subject to such a long term of imprisonment." *Id.* at 834, 837 (citation omitted).

3. The Circuit Conflict Will Not Resolve Without a Decision From This Court.

This split among the circuits is entrenched and unlikely to resolve without action by this Court. The Third, Sixth, and Seventh Circuits have explicitly recognized the circuit split. *See Andrews*, 12 F.4th at 261 ("We join the Sixth and Seventh Circuits in reaching this conclusion."); *Jarvis*, 999 F.3d at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."); *Thacker*, 4 F.4th at 575 ("[W]e are not the only court to deal with this issue. In fact, it has come up across the country, and courts have come to principled and sometimes different conclusions as to

whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release."). The Sixth Circuit recently denied rehearing en banc, *see* Order, *United States v. Jarvis*, No. 20-3912 (6th Cir. Sep. 8, 2021), ECF No. 41, and the Seventh Circuit stated in *Thacker* that "[n]o judge in active service requested to hear [the] case *en banc*," 4 F.4th at 576. There is no realistic prospect that the circuit conflict will resolve without the Court's intervention, and thus the issue need not percolate further. Five courts of appeals have addressed the question presented, and the arguments on both sides have been fully aired.

Finally, this Court's review is especially necessary because the holdings of the Third, Sixth, and Seventh Circuits undermine the explicit goal of Section 603 of the First Step Act to increase the use of compassionate release. Leaving this split unresolved will exacerbate one of the very problems the First Step Act was designed to correct, and will cause defendants within the Third, Sixth, and Seventh Circuits to be unable to obtain sentence reductions that similarly situated defendants in the Fourth and Tenth Circuits can receive.

B. The Decision Below is Incorrect.

The Seventh Circuit's decision in this case fundamentally misunderstands the nature and purpose of Section 3582(c)(1)(A) and the scope of the authority Congress granted to district courts under that framework. Relying on its prior decision in *Thacker*, the court summarily affirmed the district court's denial of Petitioner's compassionate release motion and reiterated that Congress's clarification of the penalty

scheme in Section 924(c) cannot be considered, either alone or in conjunction with other reasons, as the basis for a sentence reduction. That holding is plainly incorrect.

First, it places out of bounds one of the most "extraordinary and compelling reasons" one could imagine when it comes to deciding whether circumstances "justify a reduction of an unusually long sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 55–56, 121 (1983). As the Fourth Circuit correctly pointed out in *McCoy*, the First Step Act's amendment to Section 924(c) is "not just any sentencing change, but an exceptionally dramatic one" because it eliminated a misuse of Section 924(c)'s recidivist enhancements that for decades produced unusually cruel sentences that were decades longer "than what Congress has now deemed an adequate punishment for comparable . . . conduct." 981 F.3d at 285 (quoting *United States v. Redd,* 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)). In other words, it is precisely the type of change in the law that should weigh heavily in a judicial "second look" under Section 3582(c)(1)(A).

Second, the Seventh Circuit's holding—"that a reason for a sentence reduction under § 3582(c)(1)(A)(i) 'cannot include, whether alone or in combination with other factors, consideration of the First Step Act's Amendment to § 924(c),'" Pet. App. 2a (quoting *Thacker*, 4 F.4th at 576))—arrogated to the court a power only Congress possesses. The text of the relevant statutes provides no support for the decision to place this particular factor out of bounds. The error is placed in even sharper relief by the fact that the legislative framework shows that Congress knows well how to do exactly that; 28 U.S.C. § 994(t) specifically provides that "[r]ehabilitation of the de-

fendant alone shall not be considered an extraordinary and compelling reason." The Seventh Circuit not only erred by adding another factor to the out-of-bounds list, but also exacerbated that error by extending it beyond any sensible purpose. Rather than merely holding that the amendment to Section 924(c) cannot, standing alone, be the basis of a sentence reduction, the court held that a district court cannot consider *at all* the fact that Congress deemed the sentences previously mandated by that provision to be so obviously excessive they will never again be imposed.

Third, the ruling below precludes consideration of a number of related bases for sentence reductions that are "extraordinary and compelling." For example, it ignores the grossly disproportionate nature of the sentences that the old Section 924(c) regime mandated as compared to the average sentences imposed for crimes like murder.[6] It ignores the racially disparate deployment of these draconian provisions by prosecutors for decades, a problem heralded by the Sentencing Commission repeatedly until Section 924(c) was amended in 2018.[7] Under the Seventh

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[6] From 2015 to 2020, the average federal sentence for murder was 264 months. *See* U.S. SENT'G COMM'N, INTERACTIVE DATA ANALYZER, https://ida.ussc.gov/analytics/saw.dll?Dashboard; *see also, e.g.*, *United States v. Decator*, 452 F. Supp. 3d 320, 326 (D. Md. 2020) (granting release and noting that defendant's 633-month sentence is "roughly twice as long as federal sentences imposed today for murder").

[7] *See* U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 90, 131 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; MANDATORY MINIMUM REPORT at ch. 9 http://www.ussc.gov/research/congressional-reports/ 2011-

Circuit's rationale, these entirely valid bases for a sentence reduction are similarly off limits. Only Congress has the authority to do that.

The lower court's judicial amendment to Section 3582(c)(1)(A)(i) was impermissible, and that is enough to require reversal. In addition, its rationale was wrong. The Seventh Circuit's decision was based on its view that allowing district judges to consider a dramatic legislative change no one could truly ignore would be "at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively." *See Thacker*, 4 F. 4th at 574. But there is no sense in which allowing courts to consider the prospective outlawing of onerous mandatory sentences is "at odds" with a decision not to make the change categorically retroactive to every prior case. The same Congress that elected against full retroactivity used the same statute to open a different (if narrower) window for potential relief by amending Section 3582(c)(1)(A) to afford defendants direct access to courts to seek sentence reductions based on extraordinary and compelling reasons like this change. There is "nothing inconsistent about Congress's paired First Step Act judgments: that 'not *all* defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'"

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report-congress-mandatory-minimum-penalties-federal-criminal-justice-system; U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24–25 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

McCoy, 981 F.3d at 287 (citation omitted); *see also Maumau*, 993 F. 3d at 837 (affirming compassionate release based on district court's "individualized review of all the circumstances," including "'the First Step Act's elimination of sentence-stacking under § 924(c)'") (citation omitted).

For the foregoing reasons, the approach adopted by the Fourth and the Tenth Circuits is the only one consistent with the text and purpose of Section 3582(c)(1)(A). As those courts have described, there is nothing in the statutory text that supports the crabbed view of the breadth of a district court's discretion adopted by the Third, Sixth, and Seventh Circuits, especially in the context of a statutory scheme that was created precisely to allow judges to take a second look at unusually long sentences after some time had passed. Just as nothing in the statute *compels* a sentence reduction in every case involving § 924(c) stacking under the old regime, there is no textual basis for *precluding* a reduction based, at least in part, on those seismic, and long overdue, changes to the law.

C. The Issue is Important and Recurring.

The question of whether a district court may consider the 2018 amendment to Section 924(c) in determining whether "extraordinary and compelling reasons" warrant the reduction of an unusually long sentence imposed based on the pre-amendment regime is an important and recurring question of federal law. District courts across the country have granted a large number of sentence reductions based in part on the unfairness of lengthy sentences that

would be substantially shorter today, and new motions are being filed every day.

Among the harms caused by the holding below, and similar ones in the Third and Sixth Circuits, is that the outcome of motions based on virtually indistinguishable grounds, stemming from essentially identical conduct, now depends entirely on the circuit in which a defendant was convicted. In the Fourth and Tenth Circuits, district courts are reducing these indefensible sentences by decades or centuries, and defendants are being released from prison. In the Third, Sixth, and Seventh Circuits, defendants like Petitioner will die in prison instead, or be released at extremely advanced ages. These unwarranted disparities in outcomes across circuits warrant review of the issue presented by this Court.

D. This Case Presents an Ideal Vehicle.

This case squarely and cleanly presents the issue that has divided the circuit courts. It is therefore an ideal vehicle for resolving the question presented.

Petitioner raised the question presented throughout the proceedings below. *See* Pet. App. 2a, 11a. He argued in the district court that a sentence reduction was appropriate due to the severity of his Section 924(c) sentences and the disparity between the mandatory sentence imposed and one he would face today, and the district court squarely decided the issue in the government's favor. *See* Pet. App. 14a–15a. Petitioner raised the issue again in the Seventh Circuit, which also squarely decided it in the government's favor. Pet. App. 2a ("But we have since confirmed that a reason for a sentence reduction under § 3582(c)(1)(A)(i) 'cannot include, whether alone

or in combination with other factors, consideration of the First Step Act's amendment to § 924(c).'") (quoting *Thacker*, 4 F.4th at 576).

If Petitioner prevails in this Court, he will likely be released on remand pursuant to a sentence reduction order that will give him back more than three decades of his life. Even as it denied the motion, the district court criticized Petitioner's sentence as "an example of the Draconian nature of the sentencing law of that age, and a manifestly unreasonable sentence by today's standards." Pet. App. 35a. The court stated that if Congress's changes to Section 924(c) could be considered an extraordinary and compelling reason, it "would order compassionate release." Pet. App. 6a; *see also* Pet. App. 35a ("If there were any legal authority to do so, this court—this judge—would order Mr. Watford released from prison.").

Timely resolution of the conflict is important. Compassionate release motions are being filed and decided on a seemingly daily basis in the district courts. While other petitions presenting this issue may be filed in the future, there is no reason for this Court to delay—and every reason for it to move swiftly—to resolve this circuit split. The longer this Court waits, the more judicial resources will be wasted if the Court rejects the Seventh Circuit's position. And defendants like Petitioner, whose motions for a sentence reduction have been denied pursuant to the flawed rubric established by the court below and in two other circuits, will continue to serve excessively long prison terms.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2021

APPENDIX

[UNPUBLISHED]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS 60604

No. 21-1361

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

JOHN J. WATFORD,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:97-cr-26(2) RLM

Submitted July 26, 2021
Decided August 2, 2021

Before FRANK H. EASTERBROOK, DIANE P. WOOD and MICHAEL Y. SCUDDER, Circuit Judges.

ROBERT L. MILLER, JR., Judge.

ORDER

John Watford appeals the denial of his motion seeking compassionate release based on an amendment in the First Step Act of 2018 limiting the circumstances in which enhanced sentences may be imposed for multiple violations of 18 U.S.C. § 924(c). *See* Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221–22. This amendment would hypothetically have reduced Watford's sentence for his three § 924(c) convictions from 45 years' imprisonment to 15, but the change is not retroactive. *Id.* Watford nevertheless argued that the amendment and his personal characteristics were together "extraordinary and compelling reasons" for a reduced sentence under 18 U.S.C. § 3582(c)(1)(A)(i). The district court concluded that it lacked the authority to grant compassionate release based on the amendment.

Watford has moved twice for summary reversal, suggesting the district judge's decision was contrary to our precedent. But we have since confirmed that a reason for a sentence reduction under § 3582(c)(1)(A)(i) "cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c)." *United States v. Thacker*, No. 20-2943, 2021 WL 2979530, at *6 (7th Cir. July 15, 2021). The government has thus suggested summary affirmance is instead appropriate.

We agree with the government. Watford argues that *Thacker* does not control because he did not rely solely on the amendment, but we also precluded combining the amendment with other factors. The

district judge could grant Watford's motion only if his other reasons were "extraordinary and compelling" independent of the amendment. They were not. Watford pointed to his age at the time of the offense, the sheer length of time he has served and will serve, and his codefendant's much shorter sentence. These factors are no reason to reduce a sentence because they were known at the time it was imposed. He otherwise relies on his rehabilitation while in prison. But even assuming rehabilitation can support compassionate release in the abstract, we conclude it did not do so here. The district judge's opinion makes clear that he considered Watford's efforts to be commendable but not extraordinary. The judge noted that Watford had multiple significant infractions while in prison, even if none in the last decade. He weighed this history against Watford's efforts to gain educational and job skills but could say only that Watford "appears to pose a lower than average risk of crime today." That conclusion was not an abuse of discretion.

Accordingly, the motion for summary reversal is DENIED and the district court's judgment is summarily AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CAUSE NUMBER**
	)	**3:97-CR-26(2) RLM**
JOHN JOSE WATFORD	)	
	)	
Defendant.	)	

OPINION AND ORDER DENYING COMPASSIONATE RELEASE

This is John Watford's second motion for compassionate release. The court denied his first, understanding that it sought benefit of the First Step Act's retroactivity provisions. [Doc. No. 295]. This motion seeks release under the First Step Act's provision that an inmate, not just the Bureau of Prisons, can seek compassionate release. To win compassionate release, an inmate must first show that (1) he has exhausted his administrative options within the Bureau of Prisons, and (2) extraordinary and compelling reasons support compassionate release. If he makes such a showing, the court has discretion, after considering the statutory sentencing

factors in 18 U.S.C. § 3553(a), to order the inmate's release.

Mr. Watford contends that the sheer unreasonableness of his sentence (when evaluated by modern standards) amounts to a sufficient extraordinary and compelling reason. This court reads the statute differently. The bulk of Mr. Watford's sentence (45 years) consists of sentences under 18 U.S.C. § 924(c) that were "stacked," meaning each the sentence on one count lengthened the sentences on the others. While the First Step Act clarified the proper way of dealing with multiple counts of conviction under § 924(c), section 403(b) of the Act specified that the clarification didn't apply retroactively to defendants like Mr. Watford. As this court reads the First Step Act, a court can't effectively convert the non-retroactivity provision into an extraordinary ground for compassionate release, even if yesterday's way of applying § 924(c) produced a manifestly unreasonable sentence by today's standards. Mr. Watford also cited his health and the COVID-19 pandemic as grounds for compassionate release, but he doesn't have any conditions that place him at greater risk than other inmates.

Our court of appeals hasn't decided whether a sentence's unreasonableness can alone amount to grounds for compassionate release, and might disagree with this reading of the First Step Act; some other circuit courts read the law as Mr. Watford does. Given that possibility, this opinion goes on to evaluate the statutory sentencing factors, and to conclude that while Mr. Watford's 802-month sentence was mandatory at the time of sentencing, it

is extraordinarily unreasonable today. This court would order compassionate release if it had jurisdiction to do so.

I. FACTS

John Watford, now aged forty-eight, is serving an 802-month sentence at the Federal Correctional Institution in Memphis, Tennessee. He was convicted of three counts of aggravated bank robbery, which accounted for 262 months of his sentence, and three counts of carrying a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c), which produced the remaining 540 months of his sentence.

A little before 11:00 a.m. on May 2, 1997, Mr. Watford and Ricky Anderson entered a Sobieski Federal Savings and Loan branch in South Bend. Mr. Watford went to the teller with a plastic grocery bag while Mr. Anderson waited at the door and ordered the tellers to put money (but no dye packs) in the bag. Mr. Anderson displayed the only handgun the tellers saw. The robbers fled with just under 7,000 federally insured dollars.

Mr. Watford and Mr. Anderson returned to the same Sobieski Federal branch two and a half weeks later. This time each had and displayed a handgun, and each approached the tellers, telling them to give them money with no dye packs. They took a little over $2,000.00.

They tried to rob the Elcose Federal Credit Union in Elkhart, Indiana, the next day. Mr. Anderson had a handgun. They left with nothing.

Mr. Watford and Mr. Anderson didn't limit their activity to the Northern District of Indiana. Two days before their first Sobieski robbery, they robbed

an Indianapolis branch of the National Bank of Detroit. Mr. Anderson was armed, and they left with a little over $1,700.00. A week after the attempted Elcose robbery, they robbed the Star Financial Bank in Anderson and stole about $20,000. Both men might have been armed.

Mr. Watford has moved for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The government opposes his motion.

A court considering a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) must decide whether the movant has exhausted his remedies within the Bureau of Prisons, 18 U.S.C. § 3582(c)(1)(A), decide whether "extraordinary and compelling reasons" warrant the relief sought, 18 U.S.C. § 3582(c)(1)(A)(i), and consider the sentencing factors set forth in 18 U.S.C. § 3553(a)(1)(A)(iii). Until the Sentencing Commission updates the pertinent application notes to include prisoner-initiated applications, district judges must apply the statutory criteria of extraordinary and compelling reasons. *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020).

II. EXHAUSTION

A petitioner for compassionate release must first exhaust his remedies within the Bureau of Prisons. *See United States v. Sanford*, 2021 WL 236622 (7th Cir. Jan. 25, 2021). Mr. Watford made his compassionate release request to the warden of his institution on October 15, 2020, and the warden didn't respond within thirty days, so Mr. Watford has exhausted his administrative remedies for purposes of a motion for compassionate release.

III. EXTRAORDINARY AND COMPELLING REASONS

A. THE APPLICABLE LAW

Mr. Watford and the government disagree about what can or must be shown to satisfy the requirement of extraordinary and compelling reasons for compassionate release. Mr. Watford maintains that his 1998 sentence is unreasonable when seen through the lenses of 2021 sentencing law, and that the unreasonableness of his sentence can constitute an extraordinary and compelling reason for compassionate release. The government contends that the application notes to U.S.S.G. § 1B1.13 define extraordinary and compelling reasons. Neither side agrees with the other.

1. THE GOVERNMENT'S ARGUMENT: APPLICATION NOTES ARE LIMITING

The government maintains its position, apparently to preserve the issue for appeal, that the application notes to U.S.S.G. § 1B1.13 contain the only permissible definition of extraordinary and compelling reasons. Section 3582(c) of Title 18 limits a court's power to modify a sentence to three situations:

- when the Sentencing Commission has reduced a sentencing range and made its amendment retroactive, 18 U.S.C. § 3582(c)(2);
- when allowed by a statute or Fed. R. Crim. P. 35, 18 U.S.C. § 3582(c)(1)(B); and
- when the court finds that extraordinary and compelling reasons warrant a reduction, "and

> that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .” 18 U.S.C. § 3582(c)(1)(A).

The only policy statements addressing compassionate release are those accompanying U.S.S.G. § 1B.13, the government's argument goes, so a compassionate release order can issue only if it consistent with those policy statements.

The government cites several cases in which circuit and district courts agreed with that position, but district courts in this circuit must reject the government's position. In *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020), our court of appeals recognized that while the Sentencing Commission has issued policy statements to address motions or determinations by the Director of the Bureau of Prisons, the First Step Act authorized—for the first time—prisoners to file compassionate release motions with the court. The policy statement in U.S.S.G § 1B1.13 is self-limiting because it begins with “Upon motion of the Director of the Bureau of Prisons . . . .” Having lacked a quorum for the last few years, the Sentencing Commission hasn't issued any policy statement to address the meaning of extraordinary and compelling when a prisoner makes the motion.

When dealing with an inmate-generated motion for compassionate release, district courts in this circuit “must operate under the statutory criteria—extraordinary and compelling reasons—subject to deferential appellate review.” *United States v. Gunn*, 980 F.3d at 1180.

The *Gunn* holding undercuts the value of the government's cited case law. For example, the Court of Appeals for the Tenth Circuit decided in *United States v. Saldana*, that the district court should have dismissed for want of jurisdiction a compassionate release petition based on rehabilitation and changes in sentencing law "[b]ecause Mr. Saldana is unable to show that he satisfied 'one of the specific categories authorized by section 3582(c) . . . .'" 807 Fed. Appx. 816, 820 (10th Cir. 2020) (quoting *United States v. Brown*, 556 F.3d 1108, 1113 (10th Circuit 2019)). The *Gunn* court held that other paths are available to a petitioner.

The district court's holding in *United States v. Dodd* flowed from its understanding that "[t]he Commission's policy statements . . . are binding concerning what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)." 471 F. Supp. 3d 750, 754 (E.D. Tex. 2020). *Gunn* holds otherwise. The holding in *United States v. Brown* was based on the district court's conclusion that, "The Court agrees with the reasoning of those courts that have found that applying the policy statement . . . to motions filed by defendants, just as it applies § 1B1.13 to motions filed by the BOP, is proper absent any authoritative indication to the contrary." 2020 WL 3511584 at *5 (E.D. Tenn. June 29, 2020). Again, *Gunn* requires a different approach.

The court agrees with Mr. Watford that the application note to U.S.S.G. § 1B1.13 doesn't provide the complete definition of extraordinary and compelling reasons as the First Step Act uses that phrase in 18 U.S.C. § 3582(c)(1)(A).

2. MR. WATFORD'S ARGUMENT: SENTENCE UNREASONABLENESS AS GROUNDS FOR RELEASE

Mr. Watford argues, with the government disagreeing, that a sentence's unreasonableness can itself be an extraordinary and compelling reason for purposes of compassionate release. His argument about unreasonableness flows from § 403(b) of the First Step Act, which clarified the law.

When Mr. Watford was sentenced in 1998, a person's first conviction under § 924(c) required a sentence of at least five years, which had to be consecutive to any other sentence. That's true today, too. The minimum penalty increased from five years to twenty years (now twenty-five) for each subsequent offense. Mr. Watford was convicted of three separate armed robberies in the spring of 1997; each robbery count carried a § 924(c) count. In 1998, the law was understood to mean that a "second or subsequent offense" was one committed after the first. So the § 924(c) count relating to the first robbery for which Mr. Watford was convicted (the May 2, 1997, robbery of the Sobieski Savings and Loan) required at least a five-year sentence, which had to be served consecutively to all other sentences. The § 924(c) count on the second charged and convicted robbery (the May 19, 1997, robbery of the Sobieski Savings and Loan) amounted to the second offense, requiring at least twenty more years to be added to the other sentences. And the § 924(c) count on the third charged attempted robbery (the May 20, 1997, robbery of the Elcose Federal Credit Union) amounted to a third offense, requiring still another twenty years (at least) to be added to the other

sentences. *See United States v. Bennett*, 908 F.2d 189, 194 (7th Cir. 1990). So under the law as it was understood in 1998, the three convictions under § 924(c) added forty-five years to Mr. Watford's sentence,—two-thirds of Mr. Watford's sentence.

Section 403 of the First Step Act clarified Congressional intent. Congress said that by "subsequent offense," it meant offenses committed after another § 924(c) conviction. One court described the change as "an extraordinary development in American criminal jurisprudence. A modern-day dark ages—a period of prosecutorial 924(c) windfall courts themselves were powerless to prevent—had come to an end." *United States v. Haynes*, 456 F. Supp. 3d at 502. Congress specifically made its clarification non-retroactive, so § 403(b) of the First Step Act doesn't directly benefit Mr. Watford. Today's courts focus on the dates of the convictions and not the dates of the crimes. Had that been the law when Mr. Watford was sentenced in 1998, the court would have had to impose three five-year terms, consecutively to each other as well as to the bank robbery sentences—fifteen years instead of forty-five.

Mr. Watford contends that application of the pre-First Step Act understanding produced a sentence that is unreasonable today. That unreasonableness, he contends, constitutes an extraordinary and compelling reason for compassionate release.

The Fourth Circuit Court of Appeals agrees with Mr. Watford. In *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), the court upheld compassionate release orders from two district courts based exclusively on the unreasonableness (by

contemporary standards) of the sentences and the circumstances surrounding those circumstances. Sentences under § 924(c) had greatly increased both of the sentences at issue. The court of appeals decided that since no policy statement limited the scope of possible reasons, "district courts are 'empowered . . . to consider any extraordinary and compelling reason for release that a defendant might raise.'" *Id*. at 284 (quoting *United States v. Zullo*, 976 F.3d 228, 230 (2nd Cir. 2020)).

Mr. Watford also cites *United States v. Haynes*, 456 F. Supp. 3d 496 (E.D.N.Y. 2020), which offers facts very similar to this case. Kevin Haynes was sentenced in 1994 to 558 months' imprisonment. The sentence included 480 months—forty years—on second and third § 924(c) counts that were added after Haynes rejected a plea offer (Mr. Watford's submission reports the same chronology, and assumes the same motivation, in his case). The government declined the district court's invitation to trigger a non-First Step Act process that would allow Mr. Haynes to be resentenced in accordance with the First Step Act's non-retroactive clarification that multiple § 924(c) counts in one indictment weren't to be deemed "second or subsequent" for an offender who had never been convicted of the crime before. Anticipating the eventual reasoning of the Fourth Circuit in *United States v. McCoy*, the *Haynes* court decided that the unreasonableness of the original sentence is enough to constitute an extraordinary and compelling reason to grant compassionate release.

This court isn't persuaded that the approach taken in the *McCoy* and *Haynes* cases works in this

circuit. Our court of appeals directed district courts to apply the extraordinary and compelling reasons test as statutory criteria. *United States v. Gunn*, 980 F.3d at 1180. With no Sentencing Commission policy statements to guide the district courts in deciding what amounts to an adequate reason in a case brought by an inmate, courts must consider the entire statute in defining extraordinary and compelling.

The First Step Act:

- gave prisoners the right to ask courts for compassionate release, and
- clarified that § 924(c) convictions weren't to be stacked as courts had been doing, but
- provided that the anti-stacking provision wouldn't be retroactive,

and so provided no basis for revisiting a sentence under 18 U.S.C. § 3582(c)(2) (providing that a sentence can be modified when the Sentencing Commission makes an amendment retroactive). Mr. Watford's reading of the First Step Act would dilute the meaning of the non-retroactivity provision in § 403(b) of the First Step Act: it would make everything potentially retroactive at the sentencing court's discretion.

Further, it seems challenging to construct an explanation of how a sentence that complies with the First Step Act, but doesn't apply the anti-stacking provision retroactively, can be called extraordinary in any ordinary sense of the word. Many inmates have stacked § 924(c) sentences that were imposed before the First Step Act, and the non-retroactivity provision denies relief to all of them. And if Congress considered a sentence based on stacked § 924(c)

counts to be a compelling reason for compassionate release, it's hard to imagine why it made § 403(b) non-retroactive.

This court respectfully disagrees with the *McCoy* and *Haynes* courts. It's too great a reach to hold that a sentence's unreasonableness amounts to an extraordinary and compelling reason for compassionate release if that unreasonableness flows entirely from stacked sentences under § 924(c).

Still, the reasonableness of a sentence might play a part in deciding a motion for compassionate release. Compassionate release requires findings of exhaustion and extraordinary or compelling reasons; without those findings, the court has no authority to order compassionate release. Findings of exhaustion and extraordinary or compelling reasons give a court discretion to order compassionate release, but the statute also requires the court to consider the consistency of compassionate release with the sentencing factors in 18 U.S.C. § 3553(a); significant changes in sentencing law inevitably come into play at that point.

B. EXTRAORDINARY AND COMPELLING REASONS: MR. WATFORD'S RISKS OF COVID-19

Nothing in the First Step Act limits a compassionate release motion to circumstances relating to COVID-19, but the risk of COVID-19 is the only factor other than his sentence's unreasonableness to which Mr. Watford points. Mr. Watford's submission doesn't show that he faces greater risks from COVID-19 that most other inmates do.

The Bureau of Prisons has undertaken impressive efforts to keep inmates and staff safe from the coronavirus despite the inability of any prison to impose social distancing or alcohol-based hand sanitizer recommendations. The Bureau of Prisons' efforts have been more successful in some institutions than in others, but the recent national surge in cases hit federal penal institutions particularly hard. According to statistics posted by the Bureau of Prisons, 897 inmates at FCI Memphis have been tested for COVID-19, with 384, or 43 percent, testing positive.[1] FCI Memphis's reported population is 1,027.[2] Miami-Dade County, Florida, where Mr. Watford proposes to live with his mother, recently reported that well under 10 percent of people tested are showing positive for COVID-19.[3]

Mr. Watford points to his history of asthma, his obesity, and medical emergencies he suffered in December 2018 and August 2020.

The Centers for Disease Control have posted lists of conditions that can increase a person's risk of severe illness or death from COVID-19.[4] Because our

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[1] https://www.bop.gov/coronavirus/index.jsp (last accessed February 11, 2021).

[2] https://www.bop.gov/locations/institutions/mem/index.jsp (last accessed February 9, 2021).

[3] https://covidactnow.org/us/florida-fl/county/miami_dade_county/?s=1592532 (last accessed February 11, 2021).

[4] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last accessed February 8, 2021).

understanding of COVID-19 is incomplete, the CDC has one list of conditions known to increase the risk of severe illness from COVID-19 and another list of conditions that might place a person at increased risk before severe illness.

Mr. Watford has a body mass index of 35. Depending on its severity, the CDC lists obesity as a factor that is known to, or might, increase a person's risk from COVID-19. But obesity doesn't much set Mr. Watford apart from the rest of the nation's prisoners: almost three quarters of federal and state prison inmates are overweight, obese, or morbidly obese.[5]

Mr. Watford went to the medical staff at the United States Prison in McCreary, Kentucky on December 4, 2018, when he was light headed, dizzy, and visibly sweating. The medical personnel told Mr. Watford "he had [no] objective data pointing to any major issues but if symptoms persist he could sign up for sick call." [Doc. No. 306-1, at 49]. Mr. Watford retuned to the medical personnel eight days later with breathing issues and a racing heart beat. The medical personnel determined he was suffering from tachycardia and asthma; they told him to rest and use his inhaler as needed.

Mr. Watford returned to the medical personnel two days later with breathing and heart problems. The medical staff thought he might be suffering a heart attack, and sent him to an off-site hospital, Lake Cumberland Regional Hospital in Somerset, Kentucky, which in turn sent him by helicopter to

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[5] https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf (last visited February 3, 2021).

the University of Tennessee Medical Center for more specialized care. Doctors found he was suffering from a bilateral saddle embolism with right-side heart strain visible on an ultrasound. Mr. Watford was placed in intensive care. Medical records reflect that he was coughing up blood. Doctors performed an embolectomy, removing an embolism from Mr. Watford's lung. Ever since, Mr. Watford has been prescribed a medicine called Apixaxban used to prevent blood clots arising from atrial fibrillation, and he still takes that medicine. The medical records seem to indicate that Mr. Watford's breathing problems stemmed from the embolism, rather than from his asthma.

Mr. Watford was diagnosed with another pulmonary embolism in March 2020. Anticoagulation therapy was prescribed and continues, with Mr. Watford having reported mild occasional symptoms. BOP medical staff saw Mr. Watford last August for swollen knees, shortness of breath, heavy sweating, blood clots and elevated blood pressure.

The CDC lists moderate to severe asthma as a condition that might increase a person's risk from COVID-19. The government notes that the American Association of Retired Persons has published an article ("COVID-19 Risks to People With Asthma Much Lower Than Expected"), but that article hasn't led the CDC to remove asthma from its list. Mr. Watford's medical records don't appear to show an ongoing problem with asthma. It appears that Mr. Watford was diagnosed with asthma many years ago, and the medical records contain several references to Mr. Watford's use of an inhaler. But while Mr. Watford was told to continue using the inhaler after

the embolectomy soon to be discussed, nothing in the medical records connects his asthma to the embolism.

Mr. Watford suffered another incident in December, 2020, in which he was found semi-responsive in his cell and taken to an emergency room. He recovered with a dose of Narcan, and the doctors diagnosed a drug overdose. The records don't identify the drug that caused Mr. Watford's problem that night. The medical records stop there, so the court can't know if his prescriptions have been changed.

In sum:

- Mr. Watford faces an elevated risk of COVID-19 because he is in prison, but that's true of every federal inmate;
- Mr. Watford is obese, and the CDC recognizes obesity as a condition that does or might increase one's risk from COVID-19, but that's true of around 75 percent of inmates;
- Mr. Watford suffers from asthma, which the CDC lists as a factor that might increase the risk from COVID-19, but this record doesn't allow a finding of its severity or even whether it has caused Mr. Watford a problem in recent years; and
- Mr. Watford has suffered from embolisms and tachycardia, which are matters of concern because the CDC list suggests anything affecting the heart or lungs might be a matter of concern, but the CDC doesn't specifically identify either as a factor the might increase the risk from COVID-19.

Mr. Watford hasn't shown an extraordinary and compelling reason for compassionate release. As the court reads the First Step Act, a court has no power to order any federal inmate released without an extraordinary and compelling reason. So the court must deny Mr. Watford's motion. But because reasonable minds can, and have, differed on this issue, the court will also discuss the factors that would affect the decision whether to exercise discretion—if the court had any—to grant compassionate release to Mr. Watford.

IV. DISCRETION: SENTENCING FACTORS

A grant of compassionate release would effectively convert Mr. Watford's 802-month sentence to one of time served, or about twenty-three-and-a-half years of actual time served. Such a sentence would be consistent with sentencing law as it is understood today.

A. Changes in the Law

Federal sentencing laws have changed, or are understood differently, in several ways that would produce a radically different sentence for Mr. Watford and his crimes today. The First Step Act's changes to § 924(c), discussed in Part II-A-2 of this opinion, are the most significant to Mr. Watford's sentence, but there have been others, as well.

- Mr. Watford was sentenced before the United States Supreme Court decided that the sentencing guidelines were advisory rather than mandatory. *United States v. Booker*, 543 U.S. 220, 258-266 (2005). When Mr. Watford

was sentenced, the court had to choose a sentence within the guideline range unless something unique to the case took the case out of the "heartland" of cases of its sort. *See*, *e.g.*, *United States v. Jones*, 278 F.3d 711, 716 (7th Cir. 2002) ("After choosing the applicable sentencing range, the district court could apply an upward departure if it found that Jones' behavior was outside of the 'heartland' of conduct embodied by Guideline § 2J1.5."). So Mr. Watford didn't ask for, and the court didn't consider, a sentence below the guideline range. The court imposed the most lenient sentence it was authorized to give.

The guidelines are no longer binding on a sentencing court. The guidelines are understood to be advisory: today's sentencing courts seek a sentence that is reasonable within the meaning of 18 U.S.C. § 3553(a), looking first within the range the Sentencing Guidelines recommended, but are free to look outside the advisory range, as well. *See United States v. Carter*, 961 F.3d 953, 955 (7th Cir. 2020) ("The Sentencing Guidelines are no longer binding, but the correct calculation of a defendant's guideline range is 'the starting point and the initial benchmark' for federal sentencing.'").

- When Mr. Watford was sentenced in 1998, the law was understood to mean that, when deciding the sentence for the underlying felony (the crime in furtherance of which the firearm was used or carried), the sentencing court had to ignore the impending overlay of five (or

forty-five) more years under § 924(c). So even had this court been free to look outside the guideline range for a reasonable sentence, the court couldn't have judged "reasonableness" with an eye toward the forty-five years that had to be added because of the stacked § 924(c) counts. *See United States v. Ikegwuoni*, 826 F.3d 408, 410 (7th Cir. 2016) (citing *United States v. Roberson*, 474 F.3d 432, 436 (7th Cir. 2007)).

The Supreme Court rejected that doctrine in *Dean v. United States*, 137 S.Ct. 1170, 1176-1177 (2017) ("Nothing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count."). That holding, like the First Step Act's anti-stacking provision, isn't retroactive, *Worman v. Entzel*, 953 F.3d 1004 (7th Cir. 2020), so it doesn't offer any direct help to Mr. Watford. But *Dean* would apply to a defendant being sentenced today.

- The firearm penalty would have only been one non-guideline factor a sentencing court would address today. In 1998, once it was established that the guidelines required a sentence of 802 to 867 months and that there were no grounds for a downward departure, a sentencing judge disinclined to impose a sentence longer than 802 months didn't need to discuss statutory sentencing factors commonly discussed today. Those factor include the nature and circumstances of the crimes, the defendant's

history and characteristics, the need for the sentence to reflect the seriousness of the crime, protect the public from the defendant, promote respect for the law, and deter the defendant and others from committing such crimes. 18 U.S.C. §3553(a). Today, any or all of those factors could warrant a sentence below or far below (or above) the advisory guideline range.

- Finally, when Mr. Watford was sentenced in 1998, his base offense catapulted from 25 to 34 because he had two prior felony convictions for what were at the time crimes of violence that qualified him for treatment as a career offender: Mr. Watford was convicted of burglary of a dwelling in Florida in 1990 and aggravated assault in Pennsylvania in 1995. Mr. Watford wouldn't be a career offender under today's version of the sentencing guidelines. In 2016, Amendment 798 to the guidelines removed "residential burglary" from the list of specific crimes that constitute crimes of violence under U.S.S.G. § 4B1.2.

  A career offender's criminal history is VI, regardless of his actual past. U.S.S.G. § 4B1.1(b). At the 1998 sentencing, the court said that if Mr. Watford weren't a career offender, he would have been in criminal history category VI on the strength of his earned criminal history points. [Doc. No. 99 at 4 n.2]. That wouldn't be true today. In 1998, two criminal history points were assessed because a probation violation warrant was outstanding while he was robbing the banks,

and another point was assessed because he robbed the banks less than two years after his aggravated assault conviction. The guidelines don't assess criminal history points for those factors today. Under today's sentencing laws, Mr. Watford would be assigned to criminal history category V.

B. TODAY'S SENTENCING GUIDELINES

Today's search for a reasonable sentence would begin with the Sentencing Guidelines. *Gall v. United States*, 552 U.S. 38, 49 (2007). The jury found Mr. Watford guilty of two counts of aggravated bank robbery, one count of attempted aggravated bank robbery, and three corresponding § 924(c) counts of using or carrying a firearm in furtherance of crimes of violence. The three robbery counts would be "grouped" and treated as a single offense for guideline purposes because they involved transactions connected by a common criminal objective. U.S.S.G. § 3D1.2(b). The base offense level for each of the robbery counts is 20. U.S.S.G. § 2B3.1(a). Each offense level would be increased by two levels because Mr. Watford and his confederate took or tried to take money from a financial institution. The offense levels wouldn't be enhanced for firearm involvement because of the firearms because of the separate § 924(c) firearms offenses, so the base offense level for each robbery offense would be 22. Each robbery would be a "unit" for guideline purposes; with three units, Mr. Watford's offense level would be increased by three levels, to level 25.

At criminal history category V and offense level 25, the guidelines would recommend a sentencing

range of 110 to 137 months for Mr. Watford on the robbery counts.

That leaves the § 924(c) counts. Without the stacking used in 1998, each count would carry a mandatory minimum sentence of five years consecutive to all other sentences, for a total of fifteen years in addition to whatever sentences were imposed on the robbery counts. The government argues that a firearm was brandished in each robbery, not simply possessed, so the government could have charged Mr. Watford with three counts of brandishing under § 924(c), with each such count punishable by a mandatory minimum consecutive sentence of seven years, for a total of twenty-one years. Maybe so, but Mr. Watford himself only had a gun during the second robbery. A jury properly instructed on accessory law might be willing to find Mr. Watford "used" the firearms his confederate possessed, but that he didn't "brandish" what he possessed only constructively. We can't know. In any event, the record now before the court includes only convictions for carrying, not brandishing.

With fifteen years, or 180 months, added to the 110 to 137 month advisory range for the robberies, the guidelines would recommend an aggregate sentencing range of 290 to 317 months. In 1998, Mr. Watford faced a sentence of 802 to 867 months. Today's advisory range would be about forty-four years shorter than what Mr. Watford faced in 1998.

C. THE STATUTORY SENTENCING FACTORS

A sentencing court in 2021 would turn from the guideline calculation to the sentencing factors in 18 U.S.C. § 3553(c), which this court would also have to

consider in deciding whether to grant compassionate release.

1. NATURE AND CIRCUMSTANCES OF THE OFFENSES, § 3553(A)(1)

The facts of Mr. Watford's crimes are recounted in Part I of this opinion. About the only mitigating aspect of the crimes' nature and circumstances is that Mr. Watford and Mr. Anderson didn't steal as much money in the Northern District of Indiana as some bank robbers do.

Mr. Watford and Mr. Anderson took a little under $9,000 in the two completed charged robberies. Nobody was injured, no shots were fired. Mr. Watford didn't accept any responsibility in 1998. He denied everything and was convicted at a trial in which the prosecutor, among other things, demonstrated that the robber in each charged robbery wore the same very distinctive athletic shoes that were identical to what Mr. Watford wore to trial one day. As part of his compassionate release submissions in 2020 and 2021, Mr. Watford convincingly expressed remorse for his actions.

2. THE DEFENDANT'S HISTORY AND CHARACTERISTICS, § 3553(A)(1)

Mr. Watford was twenty-five years old when he was sentenced. He had two children, aged five and two. Mr. Watford quit school in the eleventh grade and hadn't had a job in three years. He told the probation officer that he used cocaine and marijuana every day; he appears to have been ordered to treatment in another case but never showed up. In

his recent filings, Mr. Watford says he was an addict in 1997 and the robberies were to let him buy drugs.

3. NEED TO DETER CRIMINAL CONDUCT BY DEFENDANT AND OTHERS, § 3553(A)(2)(B)

Armed robbery is a very serious crime that calls for serious penalties to deter the robber and other potential robbers. This factor supported a significant sentence in 1998 and still does. Mr. Watford has been imprisoned for these crimes for nearly half his life. Judicial experience produces little expertise on what's needed to deter people, so the Sentencing Commission's expertise, demonstrated through the advisory range, ordinarily is the only indication a judge has of how great or small a sentence will deter. In 1998, the guidelines required an aggregate sentence of 835 months give or take about three years; today they recommend a range with a mid-point of 304 months, give or take fifteen months.

4. PUBLIC PROTECTION FROM THE DEFENDANT, § 3553(A)(2)(C)

Mr. Watford was a dangerous young man in 1998. He was a thief and a burglar as a juvenile, with adjudications for shoplifting, grand theft (twice), and burglary. He continued his career as a burglar and a thief after turning eighteen, with adult convictions for burglary of a dwelling, burglary of a structure (the structure was a house), grand theft, motor vehicle theft, and criminal conversion. He also expanded into violence, with convictions for aggravated assault and misdemeanor battery. After five adult felony convictions, Mr. Watford moved into

armed robberies with Mr. Anderson, committing the three charged, and two uncharged, robberies in Indiana in a one-month period from the end of April to the end of May 1998. The protection of the public demanded that Mr. Watford be isolated for a long time.

It's now a long time later, and if allowed to consider compassionate release, the court would have to evaluate the risk Mr. Watford poses to the public today. Mr. Watford argues that he poses a much lower risk today than he seemed to in 1998 because he was only twenty-five (he started his bank robbery spree on the day after he turned twenty-five) and, based on twenty-first century studies, his brain wasn't fully developed. The studies that Mr. Watford cites provide virtually no support for the proposition that the average male brain is still developing abilities such as risk evaluation, decision making, and judgment at or after age twenty-five.[6] Each brain is different, but the studies that have found their way into the first page or two of Google indicate that the average male human brain is fully developed for these purposes by the age of twenty-five, though probably not much before.[7] The court

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[6] See James C. Howell et al., Bulletin 5: Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know 17 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242935.pdf; MacArthur Found. Rsch. Network on L. and Neuroscience, How Should Justice Policy Treat Young Offenders?, 2 Law and Neuro (Feb, 2017), http://www.lawneuro.ord/adol_dev_brief.pdf.

7 Mental Health Daily: At What Age is the Brain Fully Developed?, https://mentalhealthdaily.com/2015/02/18/at-what-

can't confidently find mitigation in Mr. Watford's age at the time of these crimes.

At age forty-eight today, Mr. Watford might be thought to be reaching the time in life in which people age out of criminal activity, but the government cites persuasive studies for the proposition that offenders who have committed gun-related crimes engage in serious conduct and recidivate far more deeply into life than other offenders.[8] The passage of time might affect the need to protect the public, but Mr. Watford's age—either now or when he was robbing banks—doesn't.

Still, it's been a long time since Mr. Watford committed a felony. During his decades in prison, Mr. Watford has had no serious disciplinary infractions. Some of his less serious infractions can't be called entirely minor — e.g., possessing a dangerous weapon (2003, 2008, 2011) fighting with another person (2003, 2010, 2012), and bribing a staff member (2003). Still, the only offense of any sort he's had since 2012 was letting another inmate take his turn on the phone in July 2014, and there have been no offenses at all since then.

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age-is-the-brain-fully-developed/#:~:text=For%20some%20people%2C%20brain%20development%20may%20be%20complete,for%20when%20the%20brain%20has%20likely%20become%20mature (last accessed February 8, 2021); NPR: Brain Maturity Extends Well Beyond Teen Years, https://www.npr.org/templates/story/story.php?storyId=141164708 (last accessed February 8, 2021).

[8] Recidivism Among Federal Firearms Offenders, https://www.ussc.gov/research/research-reports/recidivism-among-federal-firearms-offenders.

Mr. Watford has taken a basketful of educational and personal improvement courses—more than one might expect of an inmate who would be eighty-three when released from prison. He earned his GED. He has learned marketable skills such as cooking, commercial trucking, forklift operation, industrial sewing, building trades, and computer skills. He has taken personal development courses such as astronomy, business, ceramics, creative writing, finance, job search and interview skills, legal research, public speaking, parenting, real estate, and resume writing.

If released today, Mr. Watford would return to society with far more life and job skills than when he went into prison. As dangerous a man as he was when he was sentenced in 1998, he appears to pose a lower than average risk of crime today.

5. KINDS OF SENTENCES AVAILABLE, 3553(A)(3)

This wasn't a concern in 1998, when the sentencing guidelines were understood to be mandatory. The only kind of sentence available for Mr. Watford was a sentence between 802 and 867 months' imprisonment, and the court added a three-year supervised term. Authority to grant compassionate release would leave the court a binary choice: the court could either leave Mr. Watford in custody to serve the rest of his sentence, or could effectively commute the sentence to time served and start Mr. Watford on either his original three-year supervised release term or an extended supervised term.

6. THE RANGE RECOMMENDED BY THE SENTENCING GUIDELINES, § 3553(A)(4)(A)

The mandatory guidelines range was 802 to 867 months under 1998 sentencing law; the advisory guideline range is 290 to 317 months under the law as it's understood today.

7. NEED TO REFLECT THE SERIOUSNESS OF THE OFFENSES, § 3553(A)(2)(A)

This factor ordinarily overlaps and virtually duplicates that analysis of the nature and circumstances of the offense. This record presents no basis to distinguish those two factors. Mr. Watford's crimes are very serious, and demand a substantial sentence.

8. NEED TO PROMOTE RESPECT FOR THE LAW, § 3553(A)(2)(A)

The public expects significant sentences for armed bank robbers, especially for those who committed three armed bank robberies, and especially those who committed three armed bank robberies after five previous and unrelated felony convictions. Mr. Watford received a significant sentence, consistent with the law as it existed and was understood at the time in 1998. A significant sentence under the law as it exists and is understood today would be considerably less than what Mr. Watford received in 1998.

Under neither 1998 law nor 2021 law could the public expect a death sentence for an offender such as Mr. Watford, and the law for which the sentence

should promote respect for includes the First Step Act's provisions for compassionate release.

9. NEED TO PROVIDE JUST PUNISHMENT FOR THE OFFENSES, § 3553(A)(2)(A)

This factor frequently overlaps and virtually duplicates that analysis of the nature and circumstances of the offense. This record provides no basis on which to distinguish the two factors. The offenses included no mitigation that would call for a different analysis.

10. THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES, § 3553(A)(6)

Two types of disparities are apparent. Ricky Anderson chose to plead guilty and testify against Mr. Watford, and he pleaded guilty before a superseding indictment added stackable § 924(c) counts to the second Sobieski Federal robbery and the attempted Elcose robbery. Mr. Anderson received an aggregate 200-month sentence—602 months less than what Mr. Watford received. Mr. Watford points to this as a disparity. It's a troubling difference: Mr. Anderson displayed a gun in all five robberies while Mr. Watford did so only in two, so Mr. Anderson appears to have been more culpable but received less than a quarter of what Mr. Watford got. But while troubling, it's not an unwarranted disparity. Mr. Anderson was convicted of three bank robbery charges but only one § 924(c) count, and he accepted responsibility for the crimes when he pleaded guilty. The sentencing guidelines, which were equally binding when Mr. Anderson was sentenced, produced

the disparity between the Anderson and Watford sentences.

But this case presents another troubling disparity. This disparity, too, might not be strictly unwarranted, but is much closer to the concept. If a defendant identical in all respects to John Watford committed crimes identical in all respects to what Mr. Watford did twenty-four years ago and appeared in a federal court for sentencing today, and if the guideline range presented a reasonable sentence, his sentence would be 305 months, give or take a year. That hypothetical defendant would be released from prison before 2050—and John Watford would still have years to serve. Mr. Watford could welcome that person into the prison and wish the person well as he left after completing his prison sentence. That disparity might not be "unwarranted" in the sense federal sentencing law uses the term—each sentence would have been properly calculated under then-prevailing law—but no other word in the English language better describes it.

Accounting for good time, Mr. Watford already has served the equivalent of a twenty-seven-year sentence, or 324 months.

11. THE NEED TO PROVIDE RESTITUTION TO ANY VICTIMS, § 3553(A)(7)

Mr. Watson and Mr. Anderson were both ordered to make restitution to Sobieski Federal. The parties' submissions don't mention those obligations, so the court assumes restitution has been made.

12. NEED TO PROVIDE REHABILITATIVE TREATMENT, § 3553(A)(2)(D)

Mr. Watford didn't appear to present a particular need for rehabilitative treatment in 1998, and the same statement seems appropriate today.

D. THE EXERCISE OF DISCRETION, IF THERE WERE ANY

Nearly all of the statutory sentencing factors lead to the conclusion that an 802-month sentence for Mr. Watford's crimes is excessive as we understand the law in 2021. It would remain to consider whether the compassionate release motion should be granted.

Even with authority to grant Mr. Watford relief, the court couldn't revise his existing sentence to fit what might be reasonable under today's sentencing law. Granting a motion for compassionate release effectively converts a sentence to time served, with supervision to follow. A court ordinarily would hesitate because Mr. Watford hasn't served even half his sentence. Mr. Watford calculates that with good time credit, he has served the equivalent of a twenty-seven-year sentence so far, which translates to 324 months. The sentencing guidelines would recommend an aggregate sentence of 290 to 317 months, so Mr. Watford already has served longer than the guidelines would recommend. Given that, and given all the circumstances discussed in this opinion, the court would grant Mr. Watford's motion for compassionate release—if it had the authority to do so.

V. CONCLUSION

John Watford committed two armed bank robberies and one attempted armed bank robbery with an accomplice in 1997. This court—this judge—sentenced him to 802 months for his crimes. Mr. Watford received an extra two decades in prison for the robbery in which he was armed, and an extra two and a half decades for the crimes in which he wasn't shown to have been armed. No guns were fired, even in the two uncharged robberies. Tellers suffer emotional harm from the armed robbers, but no one was physically injured in the charged or uncharged robberies. Banks lost less than $10,000 in the three charged events. The sentence of sixty-six years and eight months was the low end of the binding guideline range, an example of the Draconian nature of the sentencing law of that age, and a manifestly unreasonable sentence by today's standards. If there were any legal authority to do so, this court—this judge—would order Mr. Watford released from prison. But a court's belief that a defendant's release would serve justice doesn't give the court the power needed to act. That power must come from the law. This opinion is meant to explain both why the court can't grant relief under 18 U.S.C. § 3582(c)(1)(A), and why it would grant relief if it could.

Mr. Watford exhausted his administrative remedies, but hasn't shown that an extraordinary and compelling reason justifies compassionate release. He must show both for the court to grant relief. Accordingly, the court DENIES his motion for compassionate release. [Doc. No. 304].

SO ORDERED this **12th** day of **February, 2021**.

/s/ Robert L. Miller, Jr
Robert L. Miller, Jr., Judge
United States District Court