No. 20-1732

# In the Supreme Court of the United States

THOMAS BRYANT, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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

## BRIEF FOR FAMM AS AMICUS CURIAE SUPPORTING PETITIONER


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### INTEREST OF AMICUS CURIAE[1]

Amicus FAMM is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the ensuing inflexible and excessive penalties. Founded in 1991 as Families Against Mandatory Minimums, FAMM currently has 75,000 members nationwide. By mobilizing incarcerated persons and their families adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part

[1] Counsel of record for all parties received ten days' notice of and consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party's counsel contributed money for this brief's preparation or submission; and no person or entity—other than amicus and its counsel—contributed money for this brief's preparation or submission.

through education of the general public and through selected amicus filings in important cases.

FAMM submits this brief in support of petitioner in recognition of the power of second chances. The Eleventh Circuit's interpretation of the First Step Act prevents thousands of incarcerated persons prosecuted in Florida, Georgia, and Alabama from qualifying for compassionate release based on reasons district courts may consider elsewhere. FAMM has great interest in ensuring that those prosecuted in those three States may, like those in others, avail themselves of the opportunity for compassionate release to the fullest extent.

## INTRODUCTION

Our criminal justice system evolves in response to changes in how we, as a society, perceive criminal acts and the appropriate penalties for them. Like the system, the individuals penalized also can evolve and mature. The importance of giving those individuals meaningful second chances cannot be overstated.

Take Tarra Simmons. Drug and alcohol abuse led to her imprisonment on narcotics charges. After her release, she graduated from law school, became a civil rights attorney, and, in 2020, was elected to the Washington state legislature.[2] Or John Gargano, who went from serving a 30-year sentence as a first-time non-violent drug offender to graduating from New York University's School of Professional Studies with a scholarship. He recently became general manager

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[2] Cathy Free, *She is a former addict and prisoner. She was just elected to the state house in Washington*, Wash. Post, Nov. 7, 2020, https://perma.cc/4TP2-KWDM.

of a fine dining restaurant in New York City.[3] Or Marcus Bullock, who at age 15 was convicted as an adult for armed carjacking. On his release, he rose to become owner of his own contracting business and started Flikshop, a business to facilitate family communication with incarcerated loved ones and prevent recidivism.[4] Flikshop recently received a $250,000 grant from Boeing to expand its workforce development offerings for those released from prison.[5] "Compassionate release" and other second-look mechanisms give courts the opportunity to consider, sometimes long after sentencing, whether defendants deserve the opportunity to re-enter society and become valued members of their communities like Ms. Simmons, Mr. Gargano, and Mr. Bullock.

The issue presented by the petition is not whether petitioner or any other individual should or will be released. Instead, it is only whether judges *may consider individuals like petitioner for a sentence reduction*. In every case, a district judge must determine that the individual presents extraordinary and compelling circumstances and that, in light of the factors outlined under 18 U.S.C. § 3553(a), a sentence reduction is "warrant[ed]." 18 U.S.C. § 3582(c)(1)(A)(i). That judgment is subject to

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[3] Alex Traub, *How a Former Drug Dealer Charts a Path for New York's Renewal*, N.Y. Times, May 20, 2021, https://perma.cc/NJZ6-JZ2-5.

[4] Trung T. Phan, *He was facing life in prison. Now, he's the CEO of the 'Instagram for the Incarcerated'*, The Hustle, Jan. 30, 2021, https://perma.cc/GUS8-9YB-G.

[5] Michaela Althouse, *With support from Boeing, Flikshop's Marcus Bullock is helping returning citizens find work in the gig economy*, Technical.ly, June 7, 2021, https://perma.cc/W9AY-EBY2.

appellate review for abuse of discretion. There is thus no reason to worry that reversing the Eleventh Circuit would open the jailhouse doors. But there is every reason to worry that the Eleventh Circuit's idiosyncratic rule will keep individuals behind bars unnecessarily, at great cost to their families, their communities, and society. This brief illustrates those harms.

## SUMMARY OF ARGUMENT

This case presents the urgent issue of defendants' eligibility for reduction in sentence (colloquially known as "compassionate release") following the changes to § 3582(c)(1)(A) by the First Step Act of 2018 ("FSA"). The Eleventh Circuit held that a pre-FSA Policy Statement issued by the U.S. Sentencing Commission (the "Commission"), U.S.S.G. § 1B1.13 (the "Statement"), is "applicable" to defendant-filed motions for compassionate release. Defendants who do not satisfy the Statement's narrow list of "extraordinary and compelling" reasons are ineligible for release under that holding. The Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits disagree. They have held that district courts are free to exercise discretion to grant compassionate release to defendants for any "extraordinary and compelling" reason, so long as the reduction is "warranted" after reconsideration of the § 3553(a) factors. See Pet. 12.

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

be ineligible for compassionate release under decision below and highlights the widespread injustice of its approach, which is a compelling reason for this Court to resolve this circuit split on a recurring and important issue.

## ARGUMENT

### I. BACKGROUND

#### A. The History Of Compassionate Release

In 1984, as part of the Sentencing Reform Act, Congress did away with parole and strictly limited the ability of courts to revisit finalized sentences. One exception was a process known as compassionate release. Compassionate release allows a court to reduce a sentence, after reconsidering the § 3553(a) factors, if it finds that (1) "extraordinary and compelling reasons warrant such a reduction," and (2) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i). Section 3582(c)(1)(A) does not define "extraordinary and compelling reasons" for release. A separate statute directs the Commission to "describe" those reasons. 28 U.S.C. § 994(t).

Originally courts could consider only compassionate release motions filed by the Bureau of Prisons ("BOP"). But BOP "used that power so 'sparingly'" that "an average of only 24 imprisoned persons were released each year by BOP motion." *United States* v. *McCoy*, 981 F.3d 271, 276 (4th Cir. 2020). In 2018, frustrated with BOP's obstinance, Congress passed and the President signed the First Step Act, which removed BOP as the gatekeeper. The FSA empowered federal defendants to bring (and courts to consider) compassionate release motions on

their own behalf. See Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

**B. The Commission's Policy Statement**

For 20 years, the Commission failed to promulgate any guidance under § 994(t). In 2007, well before the FSA's passage, the Commission issued the original Statement. It parroted the pre-FSA requirements of the compassionate release statute, among them that BOP file the motion. See U.S.S.G., Amends. 683 (2006), 698 (2007).

As later amended, the Statement included several application notes (revised three times between 2010 and 2018). See U.S.S.G. § 1B1.13 (p.s.). One such note sets out a limited set of suggested "extraordinary and compelling" reasons for release: (A) the medical condition of the defendant, (B) the age of the defendant, (C) the defendant's family circumstances (all further limited in sub-parts), and (D) "other reasons" "[a]s determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13, n.1.

Another application note, promulgated in 2016, explains that a "reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13, n.4. It also encourages "the Director to file more compassionate release motions, [because] '[t]he court is in a unique position to determine whether the circumstances warrant a reduction.'" *United States* v. *Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (quoting U.S.S.G. § 1B1.13, n.4). The first words of the Statement itself are "Upon motion of the Director of the Bureau of Prisons." The Commission has been unable to amend the Statement to account for defendant-filed motions since the passage of the FSA because it lacks a voting

quorum. See *United States* v. *Long*, 997 F.3d 342, 348 (D.C. Cir. 2021).

## II. THE CIRCUITS ARE DIVIDED ON WHETHER THE STATEMENT IS "APPLICABLE" TO DEFENDANT-FILED MOTIONS

### A. Eight Circuits Have Concluded That The Statement Is Not "Applicable"

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

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

Accordingly, courts in those circuits retain discretion to identify extraordinary and compelling reasons for release, at least until the Commission

issues a new policy statement that is "applicable" to defendant-brought motions.[6] See *Jones*, 980 F.3d at 1108-1012; *McCoy*, 981 F.3d at 284; *United States* v. *Maumau*, 993 F.3d 821, 837 (10th Cir. 2021); *Brooker*, 976 F.3d at 230; *Gunn*, 980 F.3d at 1180-1181.

**B. The Eleventh Circuit Has Concluded That The Statement Is "Applicable"**

The Eleventh Circuit disagreed. Pet. App. 1a-38a. It looked to the "two main dictionary definitions" of "applicable"—"capable of being applied" and "relating to" or "relevant"—and held that the Statement satisfied both. *Id*. at 13a. The Statement's definition of "extraordinary and compelling" was "capable of being applied" to defendant-filed motions because courts had done so since the FSA's passage. *Ibid*. The Statement's definition was also "relevant" because several courts that had found the Statement inapplicable had suggested that district courts might find it "helpful" or "relevant" when deciding defendant-brought motions. *Id*. at 14a-15a.

However, Judge Martin argued in dissent that the majority's dictionary-based reasoning proves both "too little" and "too much." *Id*. at 48a (Martin, J., dissenting). First, the majority's position required it to ignore what the Statement and its application notes expressly say about when it applies: "[u]pon motion of the Director of the Bureau of Prisons." *Id*. at 46a. Second, offering "relevant" guidance is not the same

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[6] Section 994(t) calls for the Commission to create a non-binding and non-exclusive Statement. Thus, FAMM does not understand § 3582(c)(1)(A)'s instruction that sentence reduction decisions be "consistent with" an applicable statement to require strict compliance with a Statement's terms. Rather, such decisions must not be contradicted by any "applicable" statement.

thing as being binding. "Although other provisions may be 'relevant,'" that does not mean they are "applicable." *Id*. at 49a.

## III. THE ELEVENTH CIRCUIT'S DECISION CREATES AN UNFAIR DISCREPANCY ACROSS THE NATION AND DEPRIVES THOUSANDS OF INDIVIDUALS OF THE OPPORTUNITY FOR SECOND LOOKS

### A. The Petition Presents An Important And Recurring Question

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

At sentencing, judges consider the nature and circumstances of the crime committed, the defendant's role in the offense, and the criminal history of the defendant, among other things. See 18 U.S.C. § 3553; Federal Sentencing Guidelines Manual (2018). They rely on guidance reflecting society's current understanding of criminal culpability and punishment. But what judges can't confidently measure at sentencing is an individual's capacity for change. See Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 83, 85 (2019).

Even people who commit serious crimes are not beyond rehabilitation.[7] The availability of a second chance through compassionate release can incentivize individuals serving seemingly hopeless sentences to rehabilitate themselves in ways they might otherwise never have attempted. See *id*. at 97.

At sentencing, federal judges also cannot predict how society's attitudes toward punishment and culpability may change. Over the last few decades, Congress has enacted several measures that reduce sentences prospectively. See, *e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (reducing threshold for crack cocaine sentences); First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221-5222 (reducing mandatory minimum sentence for first offenders of 18 U.S.C. § 924(c) offenses). As Congress legislates to account for changed views on punishment, many individuals are left serving federal prison sentences far longer than society deems necessary for the same conduct today.

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

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

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

### B. The Eleventh Circuit's Opinion Is Out Of Sync With A Majority Of Circuits And Harms Those Whose Circumstances Merit Reconsideration

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

### *1. The Ruling Below Bars Consideration Of Excessive Sentences And Changed Mandatory Minimums As Extraordinary And Compelling Reasons*

For years, Congress ratcheted up the penalties for federal criminal defendants, but the pendulum has begun to swing the other way. In 2005, this Court made the once-binding federal guidelines "effectively advisory." *United States* v. *Booker*, 543 U.S. 220, 245 (2005). As a result, sentencing has recalibrated to emphasize judicial discretion and defendants' individual circumstances. See *Rita* v. *United States*, 551 U.S. 338, 347-348 (2007); *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007). In addition, Congress has taken important, though still insufficient, steps to shorten draconian mandatory minimums and narrow their applicability. See p. 10, *supra*.

For those entering the criminal justice system today, these changes have been crucial. For those already behind bars, however, they have been largely unhelpful. "This discrepancy is a purely arbitrary by-product of the points in time at which the offense conduct was prosecuted and [the] Defendant was sentenced; it has no basis in the offense conduct itself, in the character of the Defendant, or even in the policy goals of sentencing espoused by our criminal justice system." *United States* v. *Ledezma-Rodriguez*, 472 F. Supp. 3d 498, 501 (S.D. Iowa 2020).

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

[8] See, *e.g.*, *McCoy*, 981 F.3d at 286 (affirming compassionate release for defendants who were convicted of stacked 924(c) offenses in their youth and, if sentenced today, would receive

illustrates why. Juan Ledezma-Rodriguez was born in Mexico in 1973 and exhausted the educational opportunities available to him by the sixth grade. *Ledezma-Rodriguez*, 472 F. Supp. 3d at 500. Eventually, he moved to the United States, got married, and had three children. *Ibid.* Like most criminal defendants, Ledezma-Rodriguez made mistakes. He committed two minor drug offenses (for which he served a combined total of 90 days) and was charged with a third offense for "suppl[ying] methamphetamine and cocaine" in the late 1990s. *Id.* at 500, 504. His entry into the United States (and later reentries) were also unlawful. *Id.* at 500. Still, Ledezma-Rodriguez was a "non-violent, low-level offender" with no ties to "drug cartels" or other "large-scale criminal organizations." *Ibid.*

Nevertheless, the government filed notices under 21 U.S.C. § 851 identifying his previous minor drug convictions. *Ibid.* Thus, when the district court

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sentences that are decades shorter); *Maumau*, 993 F.3d at 837 (affirming compassionate release for a defendant because of his "young age at the time of sentencing; the incredible length of his stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c); and the fact that" he "would not be subject to such a long term of imprisonment" if sentenced today) (internal quotation marks omitted); *United States* v. *McPherson*, 454 F. Supp. 3d 1049, 1053 (W.D. Wash. 2020) (granting compassionate release to defendant who had served 26 years of a stacked § 924(c) sentence for which he would only receive 15 years today; "It is extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson."). But see *United States v. Jarvis*, 999 F.3d 442, 445-446 (6th Cir. 2021) (discussing split in authority in the Sixth Circuit over whether a non-retroactive change in sentencing law can contribute to the "extraordinary and compelling" reasons for compassionate release).

sentenced Ledezma-Rodriguez for his third offense, 21 U.S.C. § 841 required it to sentence him to life in prison. *Ibid.* As the court put it, Ledezma-Rodriguez's "life sentence for low-level, non-violent drug trafficking" was "manifestly unjust" and "would be laughable if only there w[as not a] real p[erson] on the receiving end." *Id.* at 500-501, 504 (alterations in original).

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

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

> [A] life sentence is objectively inhumane here. Yes, Defendant had a habit of selling narcotics in his teens and twenties. He also snuck into the United States multiple times. But he is hardly alone on either front, and

> most people guilty of similar crimes do not face life in prison. * * * [T]here is not a district judge in this country who would see Defendant's record and conclude a life sentence is appropriate. The Court understands the importance of finality in criminal proceedings. Even so, justice has a role, too.

#### *2. The Decision Below Bars Consideration Of The Immaturity Of Youth As An Extraordinary And Compelling Reason*

A growing body of research on the adolescent brain reveals that youthful offenders possess common characteristics of immaturity, susceptibility, salvageability, and dependence. *United States* v. *Ramsay*, No. 96-cr-1098 (JSR), 2021 WL 1877963, at *7 (S.D.N.Y. May 11, 2021). And we now understand that the distinguishing characteristics of youth "do not disappear when an individual turns 18." *Roper* v. *Simmons*, 543 U.S. 551, 574 (2005).

This Court has recognized that the Eighth Amendment requires sentencing courts to consider offenders' relative youth when imposing severe sentences. See, *e.g.*, *Jones* v. *Mississippi*, 141 S. Ct. 1307, 1314 (2021) (emphasizing that "youth matters in sentencing"). Allowing courts to revisit exceptionally long sentences imposed on youthful offenders makes sense. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1014 (2003). Pre-*Booker*, however, the guidelines barred judges from considering a defendant's youth at the time of the offense. Even today, mandatory minimum sentences fail to account

for developing minds and characters of defendants who are barely over 18.

Accordingly, many courts have recognized that a defendant's youth at the time of her offense may contribute to a finding of extraordinary and compelling reasons.[9] An example is *United States* v. *Ramsay*, 2021 WL 1877963. Andrew Ramsay suffered horrific physical and sexual abuse throughout his childhood. *Id*. at *1-2. Never knowing who his father was, he was shunted from home to home in Jamaica and the United States. *Ibid*. At 17, he fell in with a Bronx gang. When he was 18, the leader of his gang ordered him to kill the leader of a rival gang. *Id*. at *2. Ramsay followed the rival gang leader to a party, but the intended victim was surrounded by a crowd of partygoers. *Id*. at *3. Ramsay fired into the crowd, killing two bystanders. *Ibid*. He was sentenced to mandatory life in prison. *Ibid*.

When the court sentenced Ramsay in 1998, it was not permitted to consider Ramsay's youth. *Id*. at *1. Despite the grim prospect of spending virtually his

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[9] See, *e.g.*, *Brooker*, 976 F.3d at 238 (holding defendant's "age at the time of his crime[, between 17 and 20,] * * * might perhaps weigh in favor of a sentence reduction"); *McCoy*, 981 F.3d at 286 (noting that "defendants' relative youth—from 19 to 24 years old—at the time of their offenses, [was] a factor that many courts have found relevant under § 3582(c)(1)(A)(i)"); *United States* v. *Eccleston*, No. CR 95-0014 JB, 2021 WL 2383520, at *5 (D.N.M. June 10, 2021) ("Because S. Eccleston was eighteen when he committed the offense, his brain was not developed fully and his impulse control was below that of an older adult."); *United States* v. *Cruz*, No. 3:94-CR-112 (JCH), 2021 WL 1326851, at *5 (D. Conn. Apr. 9, 2021) (defendant "20 weeks past his eighteenth birthday exhibits the same hallmark characteristics of youth that make those under 18 less blameworthy for criminal conduct than adults").

entire adulthood in prison, Ramsay made an incredible transformation into a mature and compassionate adult. *Id*. at *4. Over nearly three decades of incarceration, he took advantage of educational and vocational programming, donated to charity, received accolades for his BOP jobs, and served as a role model to others. *Id*. at *4-5.

In granting Ramsay's motion, the court considered developments in neuroscience and our understanding of the adolescent brain. *Id*. at *8-12. Ramsay's offense contained all the hallmarks of an immature adolescent brain: "a split-second, hot-headed choice made in the presence of peers." *Id*. at *14. Ramsay's youth, in conjunction with his abusive upbringing, constituted extraordinary and compelling reasons for compassionate release. *Id*. at *15.

***3. The Decision Below Bars Consideration Of Trial Penalties As Extraordinary And Compelling Reasons***

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

Due to "mandatory minimums, sentencing guidelines, and simply [her] ability to shape whatever charges are brought[, the prosecutor] can effectively dictate the sentence by how [s]he drafts the indictment." Jed S. Rakoff, *Why the Innocent Plead*

*Guilty and the Guilty Go Free* 25 (2021). Especially when a plea offer would have guaranteed a lower sentence, the prosecutor has already indicated what she believes would be an appropriate sentence for the offenses. See *United States* v. *Haynes*, 456 F. Supp. 3d 496, 517-518 (E.D.N.Y. 2020) (reducing defendant's sentence because defendant had already served time "far beyond what the United States Attorney determined was a suitable sentencing range when offering Haynes a plea" "all because Haynes chose a trial over a plea and the prosecution retaliated").

*United States* v. *Sims*, No. 3:98-cr-45, 2021 WL 1603959 (E.D. Va. Apr. 23, 2021), provides a tragic example. In 1997, 21-year-old Jermaine Jerrell Sims sold guns to two men who then used them to commit armed robbery and murder. *Id.* at *1. He rejected a plea deal that would have resulted in a maximum sentence of three years. After being convicted at trial, he received a mandatory sentence of life imprisonment. *Ibid.* "Sims received a life sentence for an act the government thought deserved a maximum of three years." *Id.* at *6. The district judge opined at sentencing that Sims' sentence "amounted to cruel and unusual punishment" and then spent years lobbying the Office of the Pardon Attorney on Sims' behalf. *Id.* at *1.

Rather than give up hope at the prospect of life in federal prison, Sims "spent his time pursuing every opportunity to improve his mind and character" and maintained an immaculate disciplinary record. *Id.* at *5. In granting Sims' motion for compassionate release, the judge concluded that "Sims' service of more than two decades of incarceration for a case the government deemed worthy of no more than three years in prison, his young age at the time of his arrest,

his institutional record, [and] his personal growth and rehabilitation * * * establish extraordinary and compelling reasons justifying a sentence reduction." *Id*. at *7.

#### *4. The Decision Below Bars Consideration Of Medical Or Family Reasons, Beyond Those Articulated In The Statement, As Extraordinary and Compelling Reasons*

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

Angela Beck was sentenced to 14 years in prison for conspiracy to distribute methamphetamine. *United States* v. *Beck*, 425 F. Supp. 3d 573, 575 (M.D.N.C. 2019). While there, she discovered lumps in her breast. Though the prison doctor recommended a surgical consult to assess her for breast cancer, BOP waited two months to take her to a surgeon. *Ibid.* The consult suggested cancer, and doctors repeatedly told BOP that Ms. Beck needed a biopsy within two months. *Ibid.*

But BOP waited another eight months before taking her for a biopsy. *Ibid.* The biopsy confirmed that she had cancer. Her breast and pectoral muscle had to be removed. Yet BOP's delay in treatment continued.

BOP waited six weeks to take Ms. Beck for a post-operative visit, even though BOP personnel knew her

cancer had spread to her lymph nodes. BOP waited another five months to schedule an oncology appointment. "[S]eventeen months passed between the time medical care providers at the prison learned about the lumps in Ms. Beck's left breast, and the time [BOP] allowed her to consult with a medical oncologist." *Id.* at 576 (citation omitted).

The court, in granting Ms. Beck compassionate release, noted that BOP's "abysmal" care and "grossly inadequate treatment" "increased the risk that Ms. Beck's cancer has spread or will recur and has compromised her prospects for survival." *Id.* at 580-581. As the court stated, "one certainly hopes that [BOP]'s gross mismanagement of medical care for an inmate's deadly disease is extraordinary." *Id.* at 581.[10] The holding below would have tied the court's hands and precluded it from even *considering* compassionate release, because—without consideration of BOP's inadequate care—Ms. Beck did not suffer from a "terminal illness" or "serious * * * medical condition" from which "she [wa]s not expected to recover." U.S.S.G. § 1B1.13 n.1(A)(i)-(ii); see *Beck*, 425 F. Supp. 3d at 581-582.

Courts have also held that being the only caretaker for an elderly and dying parent, a family circumstance not listed in the Statement, can be an extraordinary and compelling circumstance. Eric McCauley was

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

serving 23 years in prison for conspiracy to distribute marijuana. He explained to the court that his stepfather, a Vietnam veteran disabled by exposure to Agent Orange, suffered from diabetes, heart disease, cancer, chronic obstructive pulmonary disease, stenosis, and bronchitis, and his mother, who had previously taken care of his step-father, had just been diagnosed with Parkinson's Disease. *United States* v. *McCauley*, No. 07-cr-04009-SRB-1, 2021 WL 2584383, at *2 (W.D. Mo. June 23, 2021). Given Mr. McCauley's caretaking responsibilities, along with his 12 years of time served and rehabilitation, the court found his circumstances extraordinary and compelling.[11]

Judges apply their discretion not only to determining whether extraordinary and compelling reasons exist, but also to tailoring an appropriate remedy. *E.g.*, *Walker*, 2019 WL 5268752, at *3 (granting early release to a re-entry residential facility with limited travel and supervisory conditions set by BOP); *United States* v. *Rodriguez*, 424 F. Supp. 3d 674, 675, 683 (N.D. Cal. 2019) (determining that BOP's mishandling of physical therapy for spinal injuries was "extraordinary" but denying motion without prejudice based on representations by the Government that the defendant would imminently receive medical care). Recognizing a court's ability to

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

grant compassionate release on appropriate terms allows a nuanced consideration of both the person's rehabilitation and her limitations. But the Eleventh Circuit's across-the-board rule improbably attributes to Congress a desire to foreclose such consideration.

#### *5. The Decision Below Bars Consideration Of Sentence Disparities With Co-Defendants* As *Extraordinary And Compelling Reasons*

Courts have also determined that disparities between the sentences of similarly situated co-defendants can support a finding of extraordinary and compelling reasons for release.[12] Take Eric Millan. In 1991, he was charged with leading a large heroin distribution conspiracy in the Bronx and Manhattan called "Blue Thunder." *United States* v. *Millan*, No. 91-CR-685 (LAP), 2020 WL 1674058, at *2 (S.D.N.Y. Apr. 6, 2020). Millan was sentenced to mandatory life in prison under 21 U.S.C. § 848(b) for engaging in a continuing criminal enterprise. *Id.* at *3-4.

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

Over the next three decades, Millan sat behind bars while his co-defendants had their life sentences reduced and left prison. Over time, his sentence grew increasingly "out-of-line with those of his co-defendants." *Id.* at *15.

Nevertheless, Millan did not let that, or his original criminal conduct, define him. "Despite having had no realistic hope of release," Millan spent the next nearly three decades reforming himself. *Id.* at *8. His accomplishments are nothing short of remarkable: Millan completed 7,600 hours of programming and apprenticeships; he earned an Associate's Degree in business administration; he worked a full-time job as an assistant to five successive prison factory managers; he participated in at-risk youth and suicide prevention programs for more than twenty years; and he became a leader in his church and a man of deep faith. *Id.* at *9-14. Millan's son credits his father—over the course of "faithful[]" weekly calls from prison—with steering him away from a life of crime and considers his father his best friend. *Id.* at *1.

Ultimately, the district court concluded that the sentencing disparity, Millan's rehabilitation, his "extraordinary character," "his leadership in the religious community at FCI Fairton," and "his dedication to work with at-risk youth and suicide prevention" all constituted extraordinary and compelling reasons for his release. *Id.* at *15.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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