

PROCEDURAL PITFALLS: THE ELEVENTH CIRCUIT HOLDS THAT THE SENTENCING COMMISSION’S POLICY STATEMENT ON SENTENCE REDUCTION IS BINDING ON DEFENDANT-FILED MOTIONS

Abstract: On May 7, 2021, in *United States v. Bryant*, the United States Court of Appeals for the Eleventh Circuit held that the U.S. Sentencing Commission’s policy statement in Section 1B1.13 of the U.S. Sentencing Guidelines binds defendant-filed motions for compassionate release. In its Application Notes, the policy statement provides four “extraordinary and compelling circumstances” that warrant a sentence reduction. Application Note 1(D) is the “catch-all provision” because it states that judges may grant compassionate release for “other reasons” not specifically listed in the preceding Application Notes. Application Note 1(D) states that the Director of the Bureau of Prisons (BOP) defines all “other reasons” under the catch-all provision that qualify an inmate for compassionate release. Before 2018, only the Director of the BOP could file compassionate release motions under 18 U.S.C. § 3582(c)(1)(A). The First Step Act of 2018 amended the statute to allow defendants to file motions too. Because the policy statement still begins with the phrase “upon motion of the Director of the BOP,” courts have since questioned whether it also applies to defendant-filed motions. In a departure from the holdings of the United States Court of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Ninth and D.C. Circuits, the Eleventh Circuit decided that the policy statement and its corresponding Application Notes apply to defendant-filed motions for compassionate release. Under this interpretation, only the BOP defines the “other reasons” that warrant compassionate release pursuant to Application Note 1(D). This Comment argues that the Eleventh Circuit was incorrect in its interpretation because it disregarded the plain text of the policy statement and erroneously considered the legislative intent of a different statute.

INTRODUCTION

A major flaw in the American criminal justice system currently is and historically was sentence length disparity for similar, or even identical, federal law violations.¹ Overincarceration is another major problem in the United

¹ See Joshua M. Divine, *Booker Disparity and Data-Driven Sentencing*, 69 HASTINGS L.J. 771, 778–80 (2018) (recounting a study conducted by Marvin Frankel, a judge for the U.S. District Court for the Southern District of New York, that revealed overwhelming disparities in sentencing prior to federal statutory attempts to alleviate the problem). In the study, Frankel created and distributed hypothetical cases to various federal judges. *Id.* at 779. In 80% of such cases, judges diverged on whether

States, with rates of imprisonment far surpassing those observed historically in the United States and currently in similar nations.² These issues strike at the heart of American policy because any prison sentence eviscerates freedom: a core value of United States politics and culture.³ In response, policymakers routinely struggle to reconcile concerns about sentencing disparities and high

to imprison the defendant at all. *Id.* at 779–80. In one example, the judges gave sentences that varied from three years to twenty years. *Id.* at 780. From the colonial era to the turn of the twentieth century, judges had unbridled discretion in sentencing as long as the sentences were within the statutory guidelines, which created large disparities. *Id.* at 778. In addition to sentence length disparities, there are racial disparities in incarcerated populations as well. *See Statistics: Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [<https://perma.cc/JB6R-GED3>] (Mar. 5, 2022) (stating that white inmates account for almost 58% of the federal inmate population and Black inmates make up approximately 38%); *Statistics: Staff Ethnicity/Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_staff_ethnicity_race.jsp [<https://perma.cc/SD5W-NQSW>] (Apr. 9, 2022) (reporting that approximately 62% percent of the prison staff is white and 21% is Black).

² *See Key Statistics: Total Correctional Population*, BUREAU OF JUST. STAT. (May 11, 2021), <https://bjs.ojp.gov/data/key-statistics> [<https://perma.cc/RZ3Q-D5HE>] (detailing the incarceration population of recent decades); *see also* Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> [<https://perma.cc/ZKZ8-24WN>] (“Though only 5 percent of the world’s population lives in the United States, it is home to 25 percent of the world’s prison population.” (quoting Sen. Rand Paul)). In 2018, 1,464,400 inmates were in prison, which excludes those on parole, in jail (used for shorter sentences whereas prisons are for longer sentences), or on probation. *Key Statistics: Total Correctional Population*, *supra* (hover mouse pointer over 2018 on the x-axis of the graph). In 1990, that number was 773,900—approximately half. *Id.* Nevertheless, 2014–2020 saw a decrease in the federal prison population. *See Statistics: Past Inmate Population Totals*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp [<https://perma.cc/BNC3-J7DL>] (listing the annual changes in the prison population); John Gramlich, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/AAT4-NNNG>] (reporting that from 2006–2008, one thousand people were incarcerated per every one hundred thousand people, but in 2019, only 810 people were incarcerated per every one hundred thousand).

³ *See* Salil Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2122–23 (2020) (arguing that the government can only infringe upon fundamental rights if there is a “compelling state interest” and that “freedom from physical restraint” is a fundamental right (first citing *Reno v. Flores*, 507 U.S. 292, 302 (1993); then citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); then citing *Turner v. Rogers*, 564 U.S. 431, 445 (2011), *superseded by regulation*, Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,496 (Dec. 20, 2016) (revising 45 C.F.R. § 303.6(c)(4)); then citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), *superseded by regulation*, 8 C.F.R. § 241.14 (2022); and then citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997))). At least one commentator has argued that it is possible to interpret “freedom from physical restraint” to mean freedom from confinement. *See id.* (quoting *Flores*, 507 U.S. at 302) (equating freedom of restraint to freedom from confinement). Even the United States’ founding documents—the Declaration of Independence, the Constitution, and the Bill of Rights—are organized around the concept of freedom and are together referred to as the “Charters of Freedom.” *America’s Founding Documents*, U.S. NAT’L ARCHIVES, <https://www.archives.gov/founding-docs> [<https://perma.cc/EJB7-LF2M>] (Feb. 17, 2022).

prison populations with concerns about public safety.⁴ For example, Congress recently passed the First Step Act of 2018 (FSA) to battle overincarceration by expanding defendants' access to compassionate release motions.⁵ On May 7, 2021, in *United States v. Bryant*, the United States Court of Appeals for the Eleventh Circuit became the first circuit to interpret the FSA in a comparatively limited manner.⁶

Part I of this Comment discusses the evolution of compassionate release law as well as the facts and procedural history of *Bryant*.⁷ Part II details the circuit split between the Eleventh Circuit and all other circuits that have heard the issue.⁸ Lastly, Part III argues that the Eleventh Circuit erred in its holding because it overlooked both the plain text of the FSA and Congress's primary intention of reducing federal prison populations by addressing sentence disparities.⁹

⁴ See NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019), <https://crsreports.congress.gov/product/pdf/R/R45558> [<https://perma.cc/TEF9-PLVG>] (stating that the First Step Act of 2018 (FSA) was the product of years of congressional dialogue on how to decrease the number of inmates in federal prison while conserving an appropriate level of public safety). Similarly, Congress passed the Sentencing Reform Act of 1984 (SRA) to reduce sentence length disparities. See Divine, *supra* note 1, at 780 (explaining that Congress wanted to “rationalize” sentencing by providing uniform guidelines (citing Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 751 (2006))); see also Sentencing Reform Act (SRA) of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, 1987 (18 U.S.C. § 3551 note (Short Title)). See generally John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2468–86 (2021) (providing an overview of the history of compassionate release law).

⁵ See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified as amended at 18 U.S.C. § 3582); JAMES, *supra* note 4, at 1 (stating that Congress enacted the FSA to decrease the number of inmates in federal prison). Congress could expand sentence reduction by allowing defendants to file their own motions because the Bureau of Prisons (BOP) rarely did so. See *United States v. Bryant*, 996 F.3d 1243, 1249–50 (11th Cir.) (explaining that expanding the universe of people who can file sentence reduction motions increases inmates’ access to those motions), *cert. denied*, 142 S. Ct. 583 (2021). “Compassionate release” is a form of sentence reduction that a court may grant pursuant to 18 U.S.C. § 3582(c)(1)(A). See *id.* at 1243 (stating the terms under which a court can grant a compassionate release sentence reduction motion); 18 U.S.C. § 3582(c)(1)(A). This Comment uses “compassionate release” and “sentence reduction” motions interchangeably.

⁶ See 996 F.3d at 1265 (Martin, J., dissenting) (characterizing the Eleventh Circuit’s interpretation as narrow). The *Bryant* court held that even though defendants can now file compassionate release motions, the Sentencing Commission’s policy statement defining the circumstances under which a court could grant inmates early release still binds such defendants. *Id.* (majority opinion). All other circuits to hear this issue have held that defendant-filed motions need not comply with the Sentencing Commission’s policy statement, which increases the court’s discretion. See *id.* at 1269 (Martin, J., dissenting) (explaining that the FSA was meant to increase judicial discretion); see, e.g., *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020) (explaining that Congress intended to remove the BOP’s control over sentence reduction motions after the BOP failed as a “gatekeeper” for compassionate release motions).

⁷ See *infra* notes 10–41 and accompanying text.

⁸ See *infra* notes 42–79 and accompanying text.

⁹ See *infra* notes 80–95 and accompanying text.

I. THE LEGAL AND FACTUAL LANDSCAPE OF *UNITED STATES V. BRYANT*

In 2021, in *United States v. Bryant*, the United States Court of Appeals for the Eleventh Circuit created a circuit split by holding that the U.S. Sentencing Commission's policy statement is binding on defendants who file compassionate release motions themselves.¹⁰ Consequently, Application Note 1(D) of the policy statement in Section 1B1.13 of the U.S. Sentencing Guidelines, which allows the Director of the Bureau of Prisons (BOP) to define "extraordinary and compelling reasons" for compassionate release in addition to those specifically listed in the three preceding Application Notes, is also binding on defendant-filed motions.¹¹ Section A of this Part summarizes the evolution of compassionate release as the Sentencing Reform Act of 1984 (SRA) and the First Step Act of 2018 (FSA) define it.¹² Section B discusses the facts and procedural history of *Bryant*.¹³

A. Legal Background

Prior to the 1980s, because only statutory maximums and minimums constrained them, judges exercised broad discretion in setting sentence lengths.¹⁴

¹⁰ 996 F.3d at 1265 (Martin, J., dissenting) (stating that the Eleventh Circuit is the sole federal appellate court to hold that the Bureau of Prison's (BOP) definition of other "extraordinary and compelling" reasons in Application Note 1(D) of the policy statement in § 1B1.13 of the U.S. Sentencing Guidelines applies to both defendant- and BOP-filed sentence reduction motions). Originally, only the Director of the BOP could file compassionate release motions; defendants did not have the ability to do so. *Id.* at 1266; *see also* 18 U.S.C. § 3582(c)(1)(A) (1988), *amended by* First Step Act § 603(b)(1) (allowing defendants to file compassionate release motions).

¹¹ *See* 996 F.3d at 1264–65 (holding that (1) the Sentencing Commission's policy statement still applies to a sentence reduction motion that either a defendant or the BOP files, and (2) as applied to the defendant's case, the last "catch-all" or "other" category of "extraordinary and compelling" reasons for compassionate release neither changes nor conflicts with the newer requirements of the FSA). Per Application Note 1(D), the BOP must define any reasons for compassionate release, not the sentencing court. *See generally* *Justice Manual: Organization and Functions Manual: 8. Bureau of Prisons*, U.S. DEP'T OF JUST., <https://www.justice.gov/jm/organization-and-functions-manual-8-bureau-prisons> [<https://perma.cc/95LT-2A3V>] (providing a non-exhaustive list of the various responsibilities of the BOP, such as "contract[ing] with state and local authorities," releasing policy statements regarding sentence reduction as required by 18 U.S.C. § 3582(c)(1)(A), providing "litigation support for the [U.S.] Attorney's Office," and crafting "procedures for hospitalization" for certain defendants); *About the Commission*, U.S. SENT'G COMM'N, <https://www.ussc.gov> [<https://perma.cc/RD73-F8S2>] (stating that the Sentencing Reform Act (SRA) of 1984 created the U.S. Sentencing Commission as a "bipartisan, independent [judicial] agency . . . to reduce sentencing disparities and promote transparency and proportionality in sentencing").

¹² *See infra* notes 14–29 and accompanying text.

¹³ *See infra* notes 30–41 and accompanying text.

¹⁴ *See Bryant*, 996 F.3d at 1248 (quoting *Dorszynski v. United States*, 418 U.S. 424, 431 (1974), *superseded by statute*, Sentencing Reform Act (SRA) of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 28 U.S.C.)) (explaining that if sentencing judges assigned sentences that were within statutory guidelines, there would be no need for appellate review); *cf.* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993) (explaining that only statutory

Unfortunately, this discretion led to widespread sentence disparities because each court could decide sentences for similar crimes differently as long as the sentence lengths met statutory guidelines.¹⁵ The SRA sought to provide consistency in sentencing by creating and allocating authority to the U.S. Sentencing Commission.¹⁶ The SRA mandated that the newly-created Sentencing Commission publish a policy statement, found in Section 1B1.13 of the U.S. Sentencing Guidelines Manual, to create unmodifiable uniform guidelines for defendants found guilty of violating any federal statute.¹⁷ This prohibition on court-altered sentences had several exceptions, however, because the SRA amended 18 U.S.C. § 3582(c)(1)(A), the statute governing sentences and sentence reductions, by granting courts the power to decrease a prison sentence for “extraordinary and compelling reasons.”¹⁸

Consequently, the SRA required the Sentencing Commission to publish a policy statement that defines “extraordinary and compelling reasons” that qualify inmates for a sentence reduction.¹⁹ Courts would then follow these defini-

maximums, not minimums, bound sentencing judges, and thus they could impose any sentence or fine up to the maximum).

¹⁵ See *United States v. Irey*, 612 F.3d 1160, 1180 (11th Cir. 2010) (en banc) (stating that as long as judges gave sentences that were within “statutory boundaries, they had unbridled discretion to arrive at any sentence they pleased” (quoting *Dorszynski*, 418 U.S. at 431)).

¹⁶ Sentencing Reform Act (SRA) of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1987, 2017 (codified as amended at 28 U.S.C. §§ 991–998); see *Bryant*, 996 F.3d at 1248 (stating that the SRA eliminated the previous parole system and forbade courts from changing sentences after imposition); *Irey*, 612 F.3d at 1182–83 (explaining that the 2003 amendments to the SRA furthered the goal of sentence uniformity by enabling appellate judges to examine thoroughly any sentences that departed from the Guidelines and requiring courts to vacate sentences that grossly deviated from the Guidelines). Before the SRA’s passage, defendants under comparable circumstances frequently received different sentences because different judges imposed different sentence lengths. See *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985–1986, Part IV: Sentencing, Probation, and Parole*, 75 GEO. L.J. 1129, 1129–30 (1987) (explaining the criticisms of judicial discretion in sentencing).

¹⁷ U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2018); see *Bryant*, 996 F.3d at 1248 (explaining that the SRA formed the Sentencing Commission and granted it the authority to “create a comprehensive system of sentencing guidelines” to realize the goal of sentence uniformity (citing *Peugh v. United States*, 569 U.S. 530, 535 (2013))).

¹⁸ *Bryant*, 996 F.3d at 1249; see 18 U.S.C. § 3582 (describing three avenues for early release and detailing the procedures to pursue said avenues). In addition to “extraordinary and compelling reasons,” there are two exceptions to the prohibition on sentence modification. § 3582(c). A judge could reduce an inmate’s sentence if either a statute or Rule 35 of the Federal Rules of Criminal Procedure authorizes the modification. § 3582(c)(1)(B). Rule 35 of the Federal Rules of Criminal Procedure states that the court can reduce a sentence due to “arithmetical, technical, or other clear error” or if “within one year of sentencing . . . the defendant . . . provided substantial assistance in investigating or prosecuting another person.” FED. R. CRIM. P. 35(a)–(b)(1).

¹⁹ § 3582; see *Bryant*, 996 F.3d at 1248 (explaining that Congress “created the U.S. Sentencing Commission . . . to create a comprehensive system of sentencing guidelines” (citing *Peugh*, 569 U.S. at 535)).

tions to determine whether to grant a motion for a sentence reduction.²⁰ Two decades after the SRA's passage, the Sentencing Commission provided four specific reasons that qualified as "extraordinary and compelling" in their policy statement: (1) fatal illness; (2) inability to care for oneself while incarcerated due to a chronic health ailment or aging; (3) "death or incapacitation" of the sole caretaker of a minor related to the defendant; and, pertinently, (4) "[a]s determined by the Director of the [BOP]," for any other "extraordinary or compelling reason."²¹

Previously, 18 U.S.C. § 3582(c)(1)(A) only allowed the Director of the BOP to file sentence reduction motions.²² The BOP seldom filed sentence reduction motions for qualifying inmates.²³ In response, Congress drafted the FSA and expanded 18 U.S.C. § 3582(c)(1)(A) to allow defendants, as well as the BOP, to file compassionate release motions.²⁴

²⁰ See *Bryant*, 996 F.3d at 1249 (listing four reasons for a compassionate release granted for "extraordinary and compelling" reasons).

²¹ *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(A)). The above factors could only reduce a sentence if the defendant is not a danger to society. See U.S. SENT'G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.4 (equating "danger to society" to "a danger to the safety of any other person or to the community"). The United States District Court for the Southern District of Florida held that the prefatory language in the policy statement, which has not been changed despite the First Step Act's enactment, is implicitly invalidated because of its reliance on effectively out-of-date language. *United States v. Cano*, No. 95-00481, 2020 WL 7415833, at *3 (S.D. Fla. Dec. 16, 2020).

²² 18 U.S.C. § 3582(c)(1)(A) (1988), *amended by* First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5239; *Bryant*, 996 F.3d at 1266 (Martin, J., dissenting).

²³ *Bryant*, 996 F.3d at 1249. The BOP's exclusive right to file sentence reduction motions was problematic because the BOP almost never filed motions, even when defendants had "extraordinary and compelling" grounds warranting compassionate release. *Id.* Thus, qualifying inmates could not pursue an option for early release otherwise granted to them. *Id.* (quoting EVALUATION & INSPECTIONS DIV., OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REP. NO. I-2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013) [hereinafter 2013 COMPASSIONATE RELEASE PROGRAM REPORT], <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/64FB-4369>]). The Department of Justice investigated this problem and found that: (1) the BOP did not sufficiently instruct staff on compassionate release processes; (2) the BOP had no time requirements, which are particularly necessary for medical release requests involving an inmate who is terminally ill; (3) the BOP lacked processes to notify prisoners about compassionate release; and (4) the BOP lacked any system to oversee inquiries for compassionate release, timeliness standards, or the consistency of decisions with BOP policy. 2013 COMPASSIONATE RELEASE PROGRAM REPORT, *supra*, at 11; see also Michael Doering, Comment, *One Step Forward: Compassionate Release Under the First Step Act*, 2020 WIS. L. REV. 1287, 1294 (stating that the BOP rarely filed motions where the defendant did not have a fatal illness).

²⁴ 18 U.S.C. § 3582(c)(1)(A) (2018); First Step Act § 603(b)(1); see *Bryant*, 996 F.3d at 1258–59 (explaining that Congress intended to terminate the BOP's monopoly on filing sentence reduction motions by making them accessible to defendants). Since the FSA amended § 3582(c)(1)(A), the statute now reads:

[T]he court, upon motion of the Director of the [BOP], or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant's behalf or the lapse of 30 days from the re-

Even with these changes, Congress still required the Sentencing Commission to publish a policy statement defining “extraordinary and compelling reasons.”²⁵ The policy statement, as amended in 2016, still lists four reasons that a court may release a prisoner for “extraordinary and compelling” circumstances.²⁶ Further, the Sentencing Commission’s policy statement still begins with the following introductory phrase: “[u]pon motion of the Director of the [BOP],” even though both the BOP and *defendants* can now file sentence reduction motions.²⁷ Furthermore, Application Note 1(D) provides that the *Di-*

ceipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment

§ 3582(c)(1)(A) (emphasis added). For a detailed discussion of how circuit courts have interpreted the FSA’s resentencing mandates, see Matthew A. Baker, Comment, *Scratching the “8-Ball”: The Fourth Circuit’s Approach to the First Step Act Misses the Mark*, 63 B.C. L. REV. E. SUPP. II-1 (2022), <https://lawdigitalcommons.bc.edu/bclr/vol63/iss9/5/> [<https://perma.cc/W639-TLUE>].

²⁵ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1; *Bryant*, 996 F.3d at 1249–50. The full list of reasons that warrant a sentence reduction include:

[T]o the extent that they are applicable . . . (1)(A) extraordinary and compelling reasons warrant the reduction; or (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned; (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and (3) the reduction is consistent with this policy statement.

U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13.

²⁶ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13; *Id.* cmt. n.1. In 2016, the Sentencing Commission edited their policy statement to be less restrictive. See *Bryant*, 996 F.3d at 1249–50 (detailing the differences in the earlier and later policy statements). First, the medical category “no longer requires ‘a specific prognosis of life expectancy.’” *Id.* at 1249 (quoting U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(A)(i)). Second, age can be an “extraordinary and compelling” reason if “the defendant is at least 65 years old and has served the lesser of 10 years or 75 percent of his sentence.” *Id.* at 1250 (citing U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(B)). Third, the edited statement expands “family circumstances” to permit a defendant to qualify if they “become[] the only potential caregiver for a minor child or for a spouse.” *Id.* (emphasis omitted) (citing U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(C)). The edited policy statement did not change the final, “catch-all” provision; it reads: “As determined by the Director of the [BOP], there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).” *Id.*; U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(D).

²⁷ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13. The policy statement’s reference to the Director of the BOP suggests that only BOP-filed motions need to follow the definitions set out in § 1B1.13. See *id.* (beginning the policy statement with the phrase “[u]pon motion of the Director of the [BOP]”); *Bryant*, 996 F.3d at 1247 (questioning whether § 1B1.13’s new statutory scheme renders the policy statement applicable only to BOP-filed motions). In fact, the U.S. District Court for the Southern District of Florida concluded that because the policy statement still uses this phrasing in direct contravention of the FSA’s statutory language, the policy statement is impliedly repealed. See *United States v. Cano*, No. 95-00481, 2020 WL 7415833, at *3 (S.D. Fla. Dec. 16, 2020) (citations omitted) (“The very first words of the Guideline are ‘[u]pon motion of the Director of the Bureau of Prisons’ And this is precisely the requirement that the First Step Act expressly removed. . . . We could, therefore, read the Guideline as in effect abolished.”). Ultimately, the court decided not to invalidate the policy statement entirely on the basis of this issue, but instead chose to apply it “only to

rector of the BOP may reduce sentences if there is an “extraordinary and compelling reason” in addition to or other than the reasons the policy statement already enumerates.²⁸ Courts now must determine whether defendant-filed motions must also follow the Sentencing Commission’s policy statement and, accordingly, the BOP-supplied definition of “extraordinary and compelling” circumstances in Application Note 1(D).²⁹

B. Facts and Procedural History of United States v. Bryant

Thomas Bryant is a former law enforcement officer who was convicted of several drug and weapon charges.³⁰ In 2020, the United States District Court for the Southern District of Georgia sentenced Bryant to life plus twenty-five years, which the court later modified to nearly forty-nine years, comprised of two shorter but successive terms.³¹ Although Bryant filed a motion for com-

those motions that the BOP has made.” *Id.*; see also *infra* Part II (discussing the debate among circuit courts as to whether defendant-filed motions fall within the scope of the policy statement).

²⁸ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(D). If the Sentencing Commission’s policy statement is binding on both defendant- and BOP-filed motions, the BOP would define the fourth catch-all category for all motions. *Bryant*, 996 F.3d at 1264. If this language only applied to BOP-filed motions, then defendant-filed motions would not have to adhere to the BOP’s definition. See U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(D) (stating that the BOP defines the catch-all category of extraordinary and compelling reasons).

²⁹ See *Bryant*, 996 F.3d at 1247 (analyzing whether the introductory language of § 1B1.13 precludes the policy statement from applying to non-BOP filed motions); see also *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (same), *cert. denied*, No. 21-1208, 2022 WL 994375 (Apr. 4, 2022); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (same); *United States v. Aruda*, 993 F.3d 797, 801 (9th Cir. 2021) (same); *United States v. Shkambi*, 993 F.3d 388, 388 (5th Cir. 2021) (same); *United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (same); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (same); *United States v. Jones*, 980 F.3d 1098, 1105–06 (6th Cir. 2020) (same); *United States v. Brooker*, 976 F.3d 228, 234–35 (2d Cir. 2020) (same). The Eleventh Circuit broke the inquiry into two questions: (1) is the policy statement binding on defendant-filed motions generally; and (2) specifically, is the BOP’s definition of the “other” or “catch-all” category in Application Note 1(D) binding or does this clause conflict with the FSA, which would mean the FSA preempts it? *Bryant*, 996 F.3d at 1247–48; U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(D).

³⁰ *Bryant*, 996 F.3d at 1247–48; see also Petition for a Writ of Certiorari at 7, *Bryant v. United States*, 142 S. Ct. 583 (2021) (No. 20-1732), 2021 WL 2435779, at *7 (stating that the “[p]etitioner was charged with and convicted . . . of conspiring to distribute cocaine, possessing cocaine with intent to distribute, receiving stolen firearms, selling firearms to a drug addict, and using or carrying a firearm during a drug-trafficking crime”). In 1994, the Federal Bureau of Investigation sent undercover agents to ask the defendant to furnish “police protection” while the agents ostensibly transported cocaine shipments. Petition for a Writ of Certiorari, *supra*, at 7. Bryant agreed to this proposition and he was subsequently charged and convicted at a jury trial. *Id.*

³¹ *Bryant*, 996 F.3d at 1265 (Martin, J., dissenting); see Petition for a Writ of Certiorari, *supra* note 30, at 7–8 (detailing the history of Bryant’s case). The prosecution charged Bryant with “two [firearm] offenses” that “required consecutive sentences.” *Bryant*, 996 F.3d. at 1266 (Martin, J., dissenting). These “stacked” sentences are no longer allowed under the law due to the FSA, which Bryant argued was one of the “extraordinary and compelling” circumstances that warranted compassionate release under the “catch-all” category. *Id.*

passionate release reconsideration, he lost his case on January 27, 2020, due to a timeliness issue.³² He then appealed to the Eleventh Circuit.³³

Bryant argued on appeal that his situation warranted a compassionate release under the “catch-all” category of “extraordinary and compelling reasons” because the minimum sentence for his crimes was now much shorter, his prison record was pristine, and some of his co-conspirators received shorter prison terms.³⁴ 18 U.S.C. § 3582(c)(1)(A), however, still mandated that the Sentencing Commission publish an applicable policy statement that defines “extraordinary and compelling.”³⁵ If the court were to determine that the policy statement binds defendant-filed motions, the BOP would define what qualifies as “extraordinary and compelling” in the “catch-all” provision pursuant to Application Note 1(D).³⁶ Bryant, however, argued that the plain text of the statute renders the policy statement applicable only to BOP-filed motions, and not to defendant-filed motions, because the policy statement is premised on a BOP-filed motion per the statute’s text.³⁷

The government, by contrast, argued that this language does not exclude defendant-filed motions from the policy statement’s reach.³⁸ The government contended that the FSA only terminated the BOP’s exclusive control on filing,

³² United States v. Bryant, No. CR 497-182, 2020 WL 421186, at *1 (S.D. Ga. Jan. 7, 2020). The United States District Court for the Southern District of Georgia concluded that the defendant endorsed his sentence reduction motion on October 18, 2019, two days after the time limit for such motions expired on October 16, 2019. *Id.*

³³ *Bryant*, 996 F.3d at 1247.

³⁴ See *id.* at 1250–51 (detailing Bryant’s arguments that his circumstances warranted compassionate release under the “catch-all” category of “extraordinary and compelling” circumstances). Bryant provided three reasons: (1) had a court sentenced Bryant at the time of the appeal, the mandatory minimum prison term would be shorter; (2) unlike his co-conspirators, Bryant exercised his right to a jury trial and consequently received a much longer term of imprisonment than his co-conspirators; and (3) Bryant maintained an exceptional prison record. *Id.*

³⁵ *Id.* at 1247 (quoting 28 U.S.C. § 994(t)); see also U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. background (clarifying that 28 U.S.C. § 994(a)(2) provides the baseline rule that the Commission must issue policy statements, whereas § 994(t) specifically requires the Commission to define what “extraordinary and compelling reasons” means).

³⁶ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(D) (“As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).” (emphasis added)).

³⁷ See *Bryant*, 996 F.3d at 1247–48 (quoting U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13) (stating that the court must decide whether defendant-filed motions are within the policy statement’s scope after the textual statutory changes). Under 18 U.S.C. § 3582(c)(1)(A), courts can reduce sentences for “extraordinary and compelling reasons” if and only if the reduction is “consistent with [an] applicable policy statement[] issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A); *Bryant*, 996 F.3d at 1247. The applicable policy statement that defines “extraordinary and compelling” is § 1B1.13. See *Bryant*, 996 F.3d at 1247 (explaining that § 1B1.13 is the applicable policy statement for sentence reduction motions).

³⁸ See *Bryant*, 996 F.3d at 1252–54 (recounting the government’s assertion that the text does not limit the policy statement’s scope and that this interpretation still achieves Congress’s intent by increasing inmate access to sentence reduction motions).

and thus the BOP, pursuant to Application Note 1(D), would still define “extraordinary and compelling” circumstances in the “catch-all” provision.³⁹ The Eleventh Circuit agreed with the government by holding that the policy statement is binding for both defendant- and BOP-filed motions.⁴⁰ Although Bryant petitioned for a writ of certiorari to the United States Supreme Court, the Court denied review and left the Eleventh Circuit’s holding intact.⁴¹

II. THE ELEVENTH CIRCUIT CREATES A SPLIT

The United States Court of Appeals for the Eleventh Circuit is the only circuit to hold that the Sentencing Commission’s policy statement, and thus the Director of the Bureau of Prisons’ (BOP) definitions in Application Note 1(D), is applicable to both defendant- and BOP- filed motions.⁴² Other circuits interpreted the text of “[u]pon motion of the Director of the [BOP]” literally and concluded that the Sentencing Commission’s policy statement only binds BOP-filed motions.⁴³ The majority of circuits allow the district courts to decide what “extraordinary and compelling” means for defendant-filed motions instead.⁴⁴ Section A of this Part describes the Eleventh Circuit’s analysis of the First Step Act (FSA).⁴⁵ Section B discusses how the United States Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits considered the same issue.⁴⁶

³⁹ *Id.* at 1252.

⁴⁰ *Id.* at 1262.

⁴¹ *Bryant v. United States*, 142 S. Ct. 583 (2021) (denying certiorari).

⁴² *Bryant*, 996 F.3d at 1257 (noting that the majority expressed concern that giving judges more discretion to decide compassionate release for defendant-filed motions would return the criminal justice system to its condition before Congress passed the Sentencing Reform Act of 1984 (SRA), when sentence lengths for similar crimes varied drastically).

⁴³ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13; *see Bryant*, 996 F.3d at 1247; *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (holding that the policy statement is not binding on defendant-filed motions), *cert. denied*, No. 21-1208, 2022 WL 994375 (Apr. 4, 2022); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (same); *United States v. Aruda*, 993 F.3d 797, 801 (9th Cir. 2021) (same); *United States v. Shkambi*, 993 F.3d 388, 388 (5th Cir. 2021) (same); *United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (same); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (same); *United States v. Jones*, 980 F.3d 1098, 1105–06 (6th Cir. 2020) (same); *United States v. Brooker*, 976 F.3d 228, 234–35 (2d Cir. 2020) (same).

⁴⁴ *See supra* note 43 and accompanying text (listing the circuits that have held that the policy statement is not binding on defendant-filed motions resulting in the sentencing courts having the discretion to define “extraordinary and compelling” circumstances, instead of the BOP, pursuant to Application Note 1(D) of the policy statement).

⁴⁵ *See infra* notes 47–68 and accompanying text.

⁴⁶ *See infra* notes 69–79 and accompanying text.

A. The Eleventh Circuit Reasoned That the Policy Statement Is Binding on Defendant- and BOP-Filed Sentence Reduction Motions

In 2021, in *Bryant v. United States*, the Eleventh Circuit, by applying a textualist analysis and examining congressional intent, became the first circuit to hold that the Sentencing Commission's policy statement binds both BOP- and defendant-filed motions.⁴⁷ The Eleventh Circuit first considered the plain text of 18 U.S.C. § 3582(c)(1)(A).⁴⁸ It used the dictionary definition of "applicable" to interpret the requirement that the Sentencing Commission publish an "applicable policy statement[]." ⁴⁹ The court noted that it must interpret the statutory language as composed at the time the policy statement effectuated.⁵⁰ Thus, the court concluded that the introductory language, premised on the assumption that the Director of the BOP would be the person filing the motion, was irrelevant because the BOP was the sole authority who could do so at that time.⁵¹

Next, the Eleventh Circuit considered Congress's intent by discussing the statutory text and structure.⁵² The court observed 18 U.S.C. § 3582(c)(1)(A)'s directive to the Sentencing Commission to publish a policy statement, its overall purpose of increasing sentence uniformity, and its similar structure to other guidelines.⁵³ The court concluded that together, these factors favored a reading of the text as binding upon both defendant- and BOP-filed motions.⁵⁴

⁴⁷ *Bryant*, 996 F.3d at 1265 (Martin, J., dissenting); see also *id.* at 1247 (majority opinion).

⁴⁸ *Id.* at 1252–54.

⁴⁹ See *id.* at 1252 (quoting 18 U.S.C. § 3582(c)(1)(A)) (analyzing the word "applicable"). In *Bryant*, the Eleventh Circuit started with the dictionary definition of "applicable" and found two possible meanings: "capable of being applied" and "relating to" or "relevant." *Id.* at 1252–53. (first quoting *Applicable*, BLACK'S LAW DICTIONARY (11th ed. 2019); then quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105 (Philip Babcock Gove ed., 1986); and then quoting *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020)). The *Bryant* court reasoned that the policy statement at § 1B1.13 was obviously "capable of being applied to defendant-filed reduction motions." See *id.* at 1253 (explaining that the policy statement can apply "regardless of who filed" the motion). Similarly, the court reasoned, § 1B1.13 is related or relevant to defendant-filed motions as well as BOP-filed motions. *Id.* at 1253. Thus, the *Bryant* court concluded that the dictionary definitions of "applicable" in U.S.C. § 3582(c)(1)(A)'s reference to an "applicable policy statement[]" were compatible with § 1B1.13 because § 1B1.13 was "capable of being applied" and "related to" either BOP- or the defendant-filed compassionate release motions. See *id.* at 1253–54 (finding that either dictionary definition of applicable supports applying the policy statement to defendant-filed motions).

⁵⁰ See *Bryant*, 996 F.3d at 1260 (stating that a "fundamental canon of statutory construction" is interpreting statutory language based on its "'ordinary meaning at the time' of enactment" (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019))).

⁵¹ See *id.* at 1259–60 (concluding that the introductory language "[u]pon the motion of the director of the [BOP]" is a prefatory clause that does not carry interpretive weight because no one but the BOP could file sentence reduction motions when the statute took effect).

⁵² See *id.* at 1254–59 (analyzing congressional intent).

⁵³ See *id.* (quoting *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7–8, (2011)) (explaining that a statute's text must be "considered 'in conjunction with [its] purpose and context'"). Although a statute's purpose cannot override the plain meaning of its text, it can be used to understand

The *Bryant* court also relied on other interpretive tools.⁵⁵ The Eleventh Circuit concluded that the title of the Sentencing Commission's policy statement, "Reduction of Imprisonment Under 18 U.S.C § 3582(c)(1)(A)" indicates the Sentencing Commission's obligation to define "extraordinary and compelling" for *all* motions because it lacks any limiting language.⁵⁶ The court also reasoned that the same words must be interpreted consistently with each usage and thus "applicable policy statement[]" and "extraordinary and compelling" should have identical meanings without consideration of who files the sentence reduction motion.⁵⁷ Furthermore, the court concluded that Congress purposefully left the statutory text alone because the BOP currently defines "extraordinary and compelling," and if Congress wanted the sentencing courts to do so instead, it would have explicitly stated that intent.⁵⁸

Although the Eleventh Circuit acknowledged that § 3582(c)(1)(A) begins by mentioning BOP-filed motions, it explained that this is a prefatory, not an operative, clause and thus should be given no interpretive weight.⁵⁹ When the

the language. *See id.* at 1256 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 4, at 63 (2012)) (stating that courts prefer the interpretation that effectuates, not frustrates, the text's purpose). The court described two significant contextual considerations. *See id.* at 1255–56. First, 18 U.S.C. § 3582(c)(1)(A) explicitly instructs the Commission to publish an "applicable policy statement[]" that characterizes what "extraordinary and compelling" means. *Id.* at 1255. Second, § 1B1.13 fits in with the "structure of the Sentencing Guidelines as a whole." *See id.* at 1255–56. (reasoning that because the structures align with one another, the policy statement is applicable to all motions filed, irrespective of their origin). Thus, the court explained that the contextual factors support applying § 1B1.13 to defendant-filed motions because the statute directs the Sentencing Commission to issue a statement on the matter. *See id.* (explaining that Congress's direction to publish a policy statement and the fact the policy statement fits within all the guidelines signifies that it has a broad scope). Understanding that Congress's purpose in enacting the SRA was to increase uniformity and decrease discretion in sentencing, the court concluded that Congress did not intend for sentencing courts to define "extraordinary and compelling" on an ad hoc basis because different courts could define the "catch-all" category differently, yielding non-uniform sentencing outcomes. *See id.* at 1257 (explaining the court's concern with judicial discretion in sentencing).

⁵⁴ *See id.* at 1256 ("Interpreting [§] 1B1.13 as an applicable policy statement for all Section 3582(c)(1)(A) motions is not only a textually permissible interpretation, it is the better one.").

⁵⁵ *See id.* at 1258–59 (explaining that the court relied on the title of the policy statement, the assumption that same words have the same meaning, and intentional omissions of Congress).

⁵⁶ *See id.* at 1258 (stating that the broad title of the policy statement indicates its broad scope); *see also* U.S. SENT'G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 (providing the title of the policy statement).

⁵⁷ *See Bryant*, 996 F.3d at 1258 (explaining that when a word is used multiple times throughout the policy statement, it must be assigned the same meaning because varying the definition of "extraordinary and compelling" based on who files the sentence reduction motion would violate established maxims of interpretation).

⁵⁸ *See id.* at 1258–59 (stating that if Congress wanted to change who defined "extraordinary and compelling," they would have explicitly done so).

⁵⁹ *See id.* at 1260–61 (concluding that this prefatory clause's only purpose is to encourage the BOP to increase the number of motions they file because the BOP failed to file very many in the first place); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (stating that a "prefatory clause does not limit or expand the scope of the operative clause" (first citing *FORTUNATIS DWARRIS*

policy statement was published, the BOP filed *all* motions, so the language was merely meant to orient the reader to the time when the statute was enacted and encourage the BOP to file more motions.⁶⁰ The Eleventh Circuit reached an identical conclusion for Application Note 4, which states that a BOP-filed motion alone can confer a “reduction under [the] policy statement.”⁶¹ In doing so, the court concluded that the other circuits erroneously gave functional meaning to a prefatory clause.⁶²

Lastly, the Eleventh Circuit acknowledged that Congress intended to expand the use of sentence reduction motions, but clarified that it only meant to expand the base of people who are eligible to file those motions, not to extend to courts the discretion to define the circumstances under which they can be filed.⁶³ The Eleventh Circuit deduced that Congress allowed defendants to file motions in order to achieve its goal of increasing sentence reduction motions.⁶⁴ The court reasoned that taking away the BOP’s exclusive access met Congress’s intentions because the BOP rarely filed sentence reduction motions.⁶⁵

WITH PLATT POTTER, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 268–69 (1871); and then citing THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42–45 (2d ed., 1874))).

⁶⁰ See *Bryant*, 996 F.3d at 1260–61 (stating that the language was meant to resolve the BOP’s chronic under-filing of sentence reduction motions and to orient the reader to the time of policy statement’s enactment for interpretative purposes).

⁶¹ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.4; see *Bryant*, 996 F.3d at 1260 (noting that the court used a similar analysis for another Application Note). Application Note 4 states that “[a] reduction under this policy statement may be granted only upon motion by the Director of the [BOP] pursuant to 18 U.S.C. § 3582(c)(1)(A).” U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, at § 1B1.13 cmt. n.4. The court reasoned that the language of Application Note 4 illustrates how essential it is that the BOP actually file sentence reduction motions. See *Bryant*, 996 F.3d at 1260 (explaining that this provision was meant to encourage the BOP to file more sentence reduction motions by emphasizing their role linguistically in the policy statement).

⁶² See *Bryant*, 996 F.3d at 1260 (stating that the other circuits retrospectively revised 18 U.S.C. § 3582(c)(1)(A) because the statutory text should be interpreted in light of the plain meaning of the language as it was understood at the time that Congress wrote it). The court explained that the language must be interpreted with an understanding that there was initially no distinction between motions filed by defendants or the BOP, because the BOP was the only entity that could file sentence reduction motions before Congress passed the FSA. See *id.* (concluding that there was no reason to differentiate).

⁶³ See *id.* at 1261 (reasoning that expanding who can file sentence reduction motions aligns with congressional intent).

⁶⁴ See *id.* (stating that Congress only meant to increase the number of motions filed and allowed defendants to file motions in order to accomplish that goal).

⁶⁵ See *id.* (explaining that permitting defendants to file their own sentence reduction motions terminates the BOP’s monopoly on such motions). One of the main concerns prior to the FSA’s enactment was that the BOP did not, in fact, file sentence reduction motions for qualifying inmates. See 2013 COMPASSIONATE RELEASE PROGRAM REPORT, *supra* note 23, at 1 (claiming that under the BOP’s management, eligible inmates were not likely to be considered for early release). The official report stated that the Compassionate Release Program was “poorly managed,” “implemented inconsistently,” and frequently resulted in “eligible inmates not being considered for release and in termi-

The Eleventh Circuit rejected Bryant's argument that the FSA clashes with and thus preempts the language in Application Note 1(D) because Congress designed the FSA to terminate the BOP's control on sentence reduction motions.⁶⁶ The court explained that the FSA's expansive purpose was still accomplished by removing the BOP's monopoly on filing sentence reduction motions.⁶⁷ Thus, the court held that Application Note 1(D), which instructs the BOP to define all other "extraordinary and compelling reasons" not listed in the previous sections, is binding with the rest of the policy statement on all defendant-filed motions.⁶⁸

B. The Majority of Circuits Hold That the Policy Statement Only Binds BOP-Filed Motions

Nine other circuit courts of appeals have held that defendant-filed motions are not bound by the Sentencing Commission's policy statement and thus are not constrained by the BOP's definition of "extraordinary and compelling" in Application Note 1(D).⁶⁹ These courts base their holdings on the maxim of statutory interpretation which states that if the text is clear it controls.⁷⁰ According to the majority of courts, the text "[u]pon motion of the [BOP]" clearly

nally ill inmates dying before their requests were decided." *Id.* at i. Thirteen percent of inmates died while waiting for compassionate release approval from the BOP. *Id.* at iii (citing the BOP's own case files).

⁶⁶ See *Bryant*, 996 F.3d at 1263 (explaining Bryant's contention that Congress actually intended to eliminate the BOP's ability to file compassionate release motions altogether, instead of merely allowing others to file alongside the BOP); U.S. SENT'G GUIDELINES MANUAL *supra* note 17, at § 1B1.13 cmt. n.1(D) ("As determined by the Director of the [BOP] there exists in the Defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").

⁶⁷ See *Bryant*, 996 F.3d at 1263–64 (agreeing with the government's assertion that requiring both defendant- and BOP-filed motions to comply with the Sentencing Commission's definition of "extraordinary and compelling" aligns with the FSA's goal to expand access to filing sentence reduction motions).

⁶⁸ U.S. SENT'G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.1(D); *Bryant*, 996 F.3d at 1264–65.

⁶⁹ See *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (holding that the policy statement does not apply to defendant-filed motions), *cert. denied*, No. 21-1208, 2022 WL 994375 (Apr. 4, 2022); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (same); *United States v. Aruda*, 993 F.3d 797, 801 (9th Cir. 2021) (same); *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021) (same); *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (same); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (same); *United States v. Jones*, 980 F.3d 1098, 1110 (6th Cir. 2020) (same); *United States v. Brooker*, 976 F.3d 228, 234–35 (2d Cir. 2020) (same).

⁷⁰ See, e.g., *Andrews*, 12 F.4th at 259 (explaining that because the text is unambiguous, it controls and thus expressly constrains the policy statement's applicability to BOP-filed motions only). See generally Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 10 (2000) (explaining that Congress's meticulous drafting guides judges' interpretation because judges assume that each word is intentional).

limits the policy statement's applicability to *only* BOP-filed motions.⁷¹ Courts adopting the majority view also considered the text of Application Note 4, which states that “[a] reduction *under this policy statement* may be granted *only upon motion by the Director of the Bureau of Prisons*.”⁷² For example, based on this language, the United States Court of Appeals for the Second Circuit concluded that a defendant-filed motion is not the same thing as a BOP-filed motion, and therefore the policy statement, by its own terms, cannot be applicable.⁷³ Other courts analyze the issue similarly.⁷⁴ Additionally, the majority of courts express concern that the Sentencing Commission is presently without a quorum and could not amend the policy statement anytime soon even if it wanted to.⁷⁵

The majority of circuits also reasoned that Congress intended to expand who could file sentence reduction motions *and* to allow courts to define “extraordinary and compelling reasons.”⁷⁶ The majority decided that Congress intentionally left the language “[u]pon motion of the Director of the [BOP]” in 18 U.S.C. § 3582(c)(1)(A) to take away the BOP’s exclusive control over defining the circumstances that qualify as “extraordinary and compelling” after observing the BOP’s failure to file compassionate release motions over many years.⁷⁷ Therefore, it was actually Congress’s intent “to remove the BOP [fully] from [its] gatekeeping role,” both in filing motions and defining “extraordinary and compelling” circumstances.⁷⁸ Thus, these circuits reasoned that in-

⁷¹ U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13; *see, e.g., Brooker*, 976 F.3d at 236.

⁷² *E.g., Brooker*, 976 F.3d at 236 (emphasis added) (quoting U.S. SENT’G GUIDELINES MANUAL, *supra* note 17, at § 1B1.13 cmt. n.4).

⁷³ *See id.* (explaining that the plain text of the policy statement precludes it from being applicable to defendant-filed motions).

⁷⁴ *See supra* note 69 and accompanying text (explaining that the majority of courts take a textual approach and interpret the language “[u]pon motion of the [BOP]” as limiting the policy statement’s applicability to only BOP-filed motions).

⁷⁵ *See, e.g., Brooker*, 976 F.3d at 234 (explaining the absence of a quorum for the Sentencing Commission and thus that it is unable to publish an updated policy statement in the near future, meaning that the introductory language “[u]pon motion of the BOP” remains in place for now). The Second Circuit reasoned that the policy statement is obviously outdated and cannot be binding. *See id.* at 233–34 (stating that the policy is outdated because it has not changed in light of the new statutory amendments); *see also* *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (explaining that the Sentencing Commission is unable to revise its policy statement in light of the FSA without a quorum).

⁷⁶ *See, e.g., Brooker*, 976 F.3d at 237. The Second Circuit thus concluded that “[w]hen the BOP fails to act, Congress made the courts the decision maker as to compassionate release.” *Id.* at 236; *see also* *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021) (explaining that Congress intended to expand who could file a compassionate release motion, but it also wanted to keep intact the “catch-all” or “other” category for “extraordinary and compelling” circumstances). Courts must define this broader “catch-all” category because the Sentencing Commission cannot publish another policy statement until it has a quorum. *E.g., Brooker*, 976 F.3d at 234.

⁷⁷ *Brooker*, 976 F.3d at 236.

⁷⁸ *See* *United States v. McCoy*, 981 F.3d 271, 277–78 (4th Cir. 2020) (emphasis omitted) (citing *McCoy v. United States*, No. 03-cr-197, 2020 WL 2738225, at *4 (E.D. Va. May 26, 2020), *aff’d*, 981

interpreting the statute to keep the BOP in control contravenes both the text and congressional intent.⁷⁹

III. THE ELEVENTH CIRCUIT'S APPROACH CIRCUMVENTS THE RULES OF STATUTORY INTERPRETATION AND MISUNDERSTANDS CONGRESSIONAL INTENT

This Comment argues that the majority of circuits were correct in their approach because they focused foremost on the clear text and subsequently accurately deciphered legislative intent.⁸⁰ The United States Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits all stated that if the written language of a statute or functional equivalent like a policy statement is clear, courts have no choice but to follow it.⁸¹ The language of the policy statement is clear because it explicitly states that it

F.3d at 271) (reasoning that if § 1B1.13 were binding, then Application Note 1(D) would delegate the interpretive authority to the BOP, which would be a flawed policy due to the BOP's demonstrated reluctance to file sentence reduction motions).

⁷⁹ See, e.g., *McGee*, 992 F.3d at 1050 (explaining that to understand the policy statement as binding on all motions regardless of who filed them would "clearly undercut[] not only Congress's intent to expand the use of compassionate release, but also the Sentencing Commission's intent to recognize a 'catch-all' category of cases in addition to those that fall within the narrow confines of the first three categories of cases" (footnote omitted)); *McCoy*, 981 F.3d at 277–78, 283 (suggesting that the Sentencing Commission would likely not have included the qualifying language, "[a]s determined by the Director of the [BOP]" if it had written Application Note 1(D) after Congress expanded the universe of potential compassionate release movants to include defendants); *United States v. Jones*, 980 F.3d 1098, 1110 (6th Cir. 2020) ("Congressional intent further dissuades us from enforcing the black letter of Application Note 1's catch-all provision as written . . ."); *Brooker*, 976 F.3d at 234–36 (noting that the plain text of 18 U.S.C. § 3582(c)(1)(A) directs "courts to consider only 'applicable' guidelines," and that Application Note 1(D)'s reference to the Director of the BOP limits its applicability to motions the BOP has filed).

⁸⁰ See *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (holding that because the text clearly makes the policy statement inapplicable to defendant-filed motions, there is no need to decipher intent), *cert. denied*, No. 21-1208, 2022 WL 994375 (Apr. 4, 2022); *United States v. Long*, 997 F.3d 342, 355–56 (D.C. Cir. 2021) (same); *Gunn*, 980 F.3d at 1180 (same); *United States v. Aruda*, 993 F.3d 797, 801 (9th Cir. 2021) (explaining that because the text is clear, it controls and thus expressly limits the policy statement's applicability to motions filed by the BOP only, which aligns with congressional intent); *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021) (same); *McGee*, 992 F.3d at 1042–44 (same); *McCoy*, 981 F.3d at 282–83 (same); *Jones*, 980 F.3d at 1105–06, 1110 (same); *Brooker*, 976 F.3d at 234–36 (same). Text is the starting point of statutory interpretation. See *Brooker*, 976 F.3d at 234–35 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020)) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

⁸¹ See *King v. Burwell*, 576 U.S. 473, 475 (2015) (explaining that if the text is clear and unambiguous, the court has no choice but to enforce its language). Therefore, the clear text of the policy statement itself tells the reader whether it applies. See *Aruda*, 993 F.3d at 801 (stating that the policy statement is clear and thus controls); *Shkambi*, 993 F.3d at 392 (same); *McGee*, 992 F.3d at 1042 (same); *McCoy*, 981 F.3d at 282 (same); *Gunn*, 980 F.3d at 1180 (same); *Jones*, 980 F.3d at 1105–06 (same); *Brooker*, 976 F.3d at 234–35 (same).

only applies to motions the Director of the Bureau of Prisons (BOP) files.⁸² The opening clause of § 1B1.13 limits its scope to BOP-filed motions and Application Note 4 states that only the BOP can file motions under “this policy statement.”⁸³ Thus, the scope of the policy statement extends only to motions by the Director of the BOP.⁸⁴ Consequently, the policy statement is not binding on any other motions, specifically those that defendants themselves file.⁸⁵

Furthermore, Congress could have deleted “[u]pon motion of the Director of the [BOP]” when they passed the First Step Act (FSA), but they intentionally left this limiting language in.⁸⁶ Congress chooses every word cautiously, so courts should give the utmost deference to the statute’s language.⁸⁷ The Eleventh Circuit essentially revised the statute by deleting unambiguous text that states that the policy statement is only applicable to BOP-filed motions.⁸⁸ The Eleventh Circuit’s interpretation therefore violates one of the most sacred tenets of statutory interpretation.⁸⁹

The majority of circuits correctly interpreted Congress’ broad intent.⁹⁰ Congress intended to expand both who could *file* sentence reduction motions

⁸² See *supra* note 81 and accompanying text (explaining the majority of circuits’ dual textualist and internationalist reasoning).

⁸³ SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13 cmt. n.4; see *Aruda*, 993 F.3d at 801 (quoting *McCoy*, 981 F.3d at 284) (stating that because of Application Note 4, “[t]here is as of now no ‘applicable’ policy statement governing compassionate-release motions filed by defendants under the recently amended § 3582(c)(1)(A), and as a result, district courts are ‘empowered . . . to consider *any* extraordinary and compelling reason for release that a defendant might raise’” (alterations in original)); *Shkambi*, 993 F.3d at 392 (stating that Application “note [4] expressly limits the policy statement’s applicability to motions filed by the BOP”); *McCoy*, 981 F.3d at 282 (stating that Application Note 4 supports that Application Note 1(D) limits the policy statement’s scope to BOP-filed motions).

⁸⁴ *E.g.*, *Brooker*, 976 F.3d at 236.

⁸⁵ See *supra* note 69 and accompanying text (listing the courts that have held that BOP-filed motions are not binding on defendants).

⁸⁶ 18 U.S.C. § 3582(c)(1)(A); see *Molot*, *supra* note 70, at 10 (explaining that Congress’s meticulous drafting guides judges’ interpretation because judges assume that each word is intentional).

⁸⁷ See *Molot*, *supra* note 70, at 10 (explaining that congressional drafting controls judicial analysis). Because the Legislature carefully chose to leave the BOP-predicating language in the FSA, it must have intended to remove the BOP completely from defendant-filed motions. See *Brooker*, 976 F.3d at 236 (stating that “[a]fter watching decades of the BOP Director’s failure to bring any significant number of compassionate release motions before the courts, Congress allowed people seeking compassionate release to avoid BOP”). Therefore, the Eleventh Circuit, in deciding to keep the BOP in its “gatekeeper role” by allowing them to define the “catch-all” category, contradicts congressional intent. See *United States v. Bryant*, 996 F.3d 1243, 1263 (11th Cir.) (stating that Congress intended for the BOP to remain in its “gatekeeper role”), *cert. denied*, 142 S. Ct. 583 (2021).

⁸⁸ See *Bryant*, 996 F.3d at 1265 (holding that the policy statement applies to both BOP- and defendant-filed motions, regardless of the plain text).

⁸⁹ See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) (stating that courts “do[] not revise legislation”); see also *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020) (stating that the court should “preserv[e] as much of § 1B1.13 that can be saved”).

⁹⁰ *United States v. McGee*, 992 F.3d 1035, 1042, 1050 (10th Cir. 2021) (explaining that Congress intended both to expand the use of compassionate release by permitting defendants to file sentence reduction motions and increase how often they were successful by allowing courts, not the BOP, to

as well as who *defined* “extraordinary and compelling” circumstances.⁹¹ Because the BOP rarely filed sentence reduction motions for those who qualified, Congress aimed to remove them completely from the equation by leaving in “upon the motion.”⁹²

Furthermore, by passing the FSA, legislators aimed to battle mass incarceration, not sentence disparity.⁹³ The Eleventh Circuit confused the Sentencing Reform Act (SRA)’s focus on sentence disparity with the FSA’s focus on reducing the number of inmates in federal prisons.⁹⁴ Therefore, the Eleventh Circuit was incorrect in assuming that Congress had the same goal in enacting the SRA and the FSA, and erroneously read that flawed understanding of legislative intent into 18 U.S.C. § 3582(c)(1)(A)’s already clear text.⁹⁵

define the “catch-all” category); *United States v. McCoy*, 981 F.3d 271, 277–78 (4th Cir. 2020) (stating that the interpretation the Eleventh Circuit employs thwarts congressional intent because the BOP still approves compassionate release through its definitions); *Jones*, 980 F.3d at 1110 (quoting *Brooker*, 976 F.3d at 236) (noting that Congress “made the courts the decision maker as to compassionate release”).

⁹¹ See *McGee*, 992 F.3d at 1050 (explaining that because the BOP failed to file sentence reduction motions, Congress sought: (1) to increase the number of compassionate release motions by allowing defendants to file their own; and (2) to increase grants of sentence reduction motions by allowing courts to define the “catch-all” category).

⁹² See *McCoy*, 981 F.3d at 276 (stating that Congress intended to remove the BOP from its “gatekeeper role” because it rarely filed compassionate release motions for qualifying defendants (citing *McCoy v. United States*, No. 03-cr-197, 2020 WL 2738225, at *4 (E.D. Va. May 26, 2020), *aff’d*, 981 F.3d at 271). Therefore, including the words “[u]pon motion of the Director of the [BOP]” in the policy statement limits the policy statement’s applicability to only BOP-filed motions. *Id.* at 282; SENT’G GUIDELINES MANUAL, *supra* note 17, § 1B1.13.

⁹³ See *JAMES*, *supra* note 4, at 1 (stating that the FSA “was the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population while also creating mechanisms to maintain public safety”).

⁹⁴ See *United States v. Bryant*, 996 F.3d 1243, 1272–73 (11th Cir.) (Martin, J., dissenting) (explaining that the Eleventh Circuit focused on the concerns about sentencing disparities underlying the Sentencing Reform Act of 1984 instead of the FSA and worried that the criminal justice system would produce the kind of arbitrary sentencing that existed before the SRA if courts had discretion to define the “catch-all category” of “extraordinary and compelling”), *cert. denied*, 142 S. Ct. 583 (2021); *JAMES*, *supra* note 4, at 1 (stating that the FSA’s purpose is “to reduce the size of the federal prison population”). The Eleventh Circuit stated that “[i]nterpreting [§] 1B1.13 as inapplicable to defendant-filed Section 3582(c)(1)(A) motions would return us to the pre-SRA world of disparity and uncertainty. Except worse.” *Bryant*, 996 F.3d at 1257 (majority opinion). In doing so, the Eleventh Circuit confused the purpose of the SRA (alleviating sentence disparity) with the purpose of the FSA (reducing the population of federal prisons). See *id.* at 1272–73 (Martin, J., dissenting) (explaining that the SRA and the FSA had two different purposes and the Eleventh Circuit erroneously considered the SRA’s purpose in its analysis); see *JAMES*, *supra* note 4, at 1 (stating that Congress only intended for the FSA to decrease the number of inmates in federal prisons).

⁹⁵ *Bryant*, 996 F.3d at 1273 (Martin, J., dissenting). Ironically, the population of federal prisons is at its lowest since 1995. Gramlich, *supra* note 2.

CONCLUSION

The United States Court of Appeals for the Eleventh Circuit recently interpreted the Sentencing Commission's policy statement in light of the changes the First Step Act (FSA) made to 18 U.S.C. § 3582(c)(1)(A). The court held that the policy statement applies to motions both the Director of the Bureau of Prisons (BOP) files and defendants themselves file. Under the Eleventh Circuit's logic, Application Note 1(D), which allows the BOP to define the "catch-all" category's qualifications, is likewise binding and keeps the BOP in its "gatekeeper role." The court's novel interpretation created a circuit split because the United States Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits held that the Sentencing Commission's policy statement is only applicable to BOP-filed motions. The Eleventh Circuit's interpretation was erroneous, however, because it mistakenly ignored the policy statement's plain language and confused the FSA's expansive legislative intent of reducing federal population with the Sentence Reduction Act's goal of lessening sentence disparity. Therefore, courts that have yet to decide the issue should adopt the nine-circuit majority's approach.

ALLISON CHENEY