LIBERTY UNIVERSITY

Helms School of Government Undergraduate Law Review

Volume 3 Article 5

Drawing the Line: How the Lower Courts Must Adapt to Using Non-Retroactive Changes in Law When Granting Sentence Reductions in Light of Amended Guidelines

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NOTE

DRAWING THE LINE: HOW THE LOWER COURTS MUST ADAPT TO USING NON-RETROACTIVE CHANGES IN LAW WHEN GRANTING SENTENCE REDUCTIONS IN LIGHT OF AMENDED GUIDELINES

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ABSTRACT

The United States Courts of Appeals have been divided on whether non-retroactive amendments can be used to reduce an inmate's sentence under United States Sentencing Guidelines § 1B1.13 in light of the First Step Act. Before the United States Supreme Court's intervention, the Sentencing Commission acted to amend the First Step Act, clarifying that a non-retroactive change in law may be used as an extraordinary and compelling reason for sentence reduction when the sentence is "unusually long." The lower federal courts have begun to implement this amendment when granting sentence reductions. However, with these amended guidelines, ambiguity remains regarding how courts must determine whether a sentence is "unusually long." Ultimately, the courts must look to U.S. Supreme Court precedent to discipline their inquiries.

I. INTRODUCTION

The First Step Act was enacted in 2018 and prompted an immense shift toward criminal justice reform. This bipartisan piece of legislation was a tremendous step in the right direction towards combating unduly harsh sentencing practices that were implemented in previous decades. The Act specifically sought to reduce excessively harsh sentences for certain drug offenses, but attempts at implementation revealed that its terms were not

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entirely clear. While the Act undoubtedly applied to future sentences after its enactment, courts have been hesitant to apply its terms to past sentences.

Nonetheless, after its implementation, inmates began moving for sentence reductions under the statute, claiming that these changes in law rose to the standard of extraordinary and compelling under Federal Sentencing Guidelines § 1B1.13. This influx of requests before the federal courts created a split amongst the United States Courts of Appeals, with half of the circuits considering non-retroactive law when granting a sentence reduction and the other half strictly rejecting the notion. This split created a significant imbalance amongst inmates seeking relief. With all but two circuits weighing in on the debate, the United States Sentencing Commission (USSC) further clarified its statute in November of 2023, circumventing the need for Supreme Court intervention. Even still, Supreme Court precedent on criminal sentencing practices should be considered by the district courts when reevaluating their holdings in light of these statutory changes.

II. THE HISTORY BEHIND THE FIRST STEP ACT

Criminal Justice reform has been making its greatest strides within recent decades. Efforts delegated towards criminal sentencing policies have shown to be prudent in combating unduly harsh sentencing practices. These practices arose from the 1960s when Congress began taking substantial strides towards their war on crime. Lawmakers imposed two policies that sought to deter criminal behavior. First, Congress established mandatory minimum sentence guidelines for federal judges, limiting discretionary sentencing and requiring a definitive amount of time to be served for certain actions.[1] Second, another policy shift known as "charge stacking," essentially compelled prosecutors to pursue multiple charges stemming from the same incident.[2] These sentencing practices have had far reaching consequences on the integrity of the American judicial system—particularly the startling contrast of incarceration rates and sentence terms between white Americans and minorities under the same statute.[3] While these practices were in effect for decades, both political parties have recognized this disparity since the

[1] Anthony Passela, *Stacking the Deck: How the Eighth Circuit's Decision in United States v. Crandall Threatens the First Step Act's Bipartisan Criminal Justice Reforms*, 68 VILL. L. REV. 97, 98 (2023).

[2] *Id.* at 99.

[3] *Id.* at 100.

turn of the twenty-first century. Ultimately the First Step Act (FSA) was passed to combat these unduly harsh sentencing practices.[4]

The FSA was passed in 2018. At the time, President Donald Trump signed into law this "sweeping criminal justice reform bill designed to promote rehabilitation, lower recidivism, and reduce excessive sentences in the federal prison system."[5] This act was prompted by a sixty-three-year-old inmate named Alice Marie Johnson who had written a letter to President Trump while incarcerated.[6] Johnson was an African-American great-grandmother who had been charged with and found guilty of nonviolent federal drug crimes. As a result, Johnson was serving a life sentence without the opportunity for parole.[7] Johnson, in her letter, wrote: "I am closer to heaven than to [E]arth. I'm a broken woman. More time in prison cannot accomplish more justice."[8] In response, President Donald Trump commuted her sentence and Johnson was released on parole. This led to bipartisan support for substantial prison reform, ultimately leading to Congress's enactment of the FSA.

One purpose of the FSA was to increase the use of compassionate release and to reduce unusually long federal criminal sentences. Specifically, § 401 of the Act changed the severity of sentencing enhancements for repeat drug offenders.[9] With the passage of this Act, prisoners also gained the ability to file their own motions for compassionate release.[10] The FSA implemented a several-step approach to criminal justice reform within the federal court system. First, the FSA disposed of the practice of mandatory charge-stacking for sentences after the FSA's implementation:

> [B]efore the First Step Act, offenders who otherwise qualified for the ten-year mandatory minimum penalty were subject to an enhanced mandatory minimum penalty of 20 years if they had one qualifying prior conviction, and a mandatory term of life imprisonment (LWOP) if they had

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[4] Ashley Nellis, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, The Sentencing Project, (Aug. 22, 2023), https://www.sentencingproject.org/about/?gad_source=1&gclid=Cj0KCQjw2a6wBhCVARIsABPeH1tHDfrg54QTZiFuPoJNjJ3oUjTTpe6Y4jng4ovGSPjHeNs1j7Lr-oMaAi98EALw_wcB.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] First Step Act, 18 U.S.C. § 3582(c)(1)(A) (2018).

[10] *Id.*

> two qualifying prior convictions. See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)-(H). The First Step Act reduced the 20-year mandatory minimum penalty for offenders with one prior qualifying offense to 15 years, and the life mandatory minimum penalty for offenders with two or more prior qualifying offenses to 25 years. Pub. L. No. 115-391, § 401.[11]

Furthermore, the FSA implemented and expanded the opportunity for compassionate release under 18 U.S.C. § 3582 (c)(1)(A). Under this new Act, prisoners were able to file their own motion for compassionate release rather than relying on the Director of the Bureau of Prisons (DOP) to bring a motion before the court. Previously, the DOP was able to bring forth a request for compassionate release for specific and narrowly defined circumstances such as the age, health, or family circumstances of the inmate.[12] However, the FSA's modification allowing for prisoner-initiated motions allowed for a much greater influx for these requests before the federal courts.

The FSA provides that a court "may reduce [a prisoner's] term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction."[13] The inquiry is twofold, asserting that even if an "extraordinary and compelling reason" is present, the court must also determine whether "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."[14]

With the passage of the FSA, the USSC amended § 1B1.13 of the Federal Sentencing Guidelines in response to these changes in policy. Section 1B1.13 specifically sets forth the USSC's requirements and standards when it comes to granting an inmate compassionate release. With the amendment to these guidelines, the Commission clarified their views on "extraordinary and compelling reasons" that warrant a sentence reduction.[15] Furthermore, they added a new ground called "unusually long sentence[s]."[16] Originally, the

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[11] Petition for Writ of Certiorari at 5, Jerry L. Brown v. United States (2023) (No. 23-88).

[12] 18 U.S.C. § 3582(c)(1)(A).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Amendment to Federal Sentencing Guidelines § 1 (United States Sentencing Comm'n 2023) (revising 18 U.S.C. § 3582(c)(1)(A)) (hereinafter U.S.S.C. Amendment).

First Step Act was silent on using non-retroactive changes in law to warrant a sentence reduction under the standard of "extraordinary and compelling."[17] However, the USSC's amendment to the Act in November of 2023 has clarified multiple areas of ambiguity.

Since modifying the policy under the FSA, compassionate release "permits non-retroactive changes in law . . . to be considered extraordinary and compelling reasons warranting a sentence reduction, but only in narrowly circumscribed circumstances."[18] In meeting these circumstances, (i) the defendant must be "serving an unusually long sentence"; (ii) the defendant must have "served at least ten years of the sentence"; and (iii) "an intervening change in the law [must] ha[ve] produced a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed."[19] This modification to the statute has clarified the guidelines for federal courts when exercising their discretion under compassionate release.

III. THE HISTORIC DIVISION AMONGST THE FEDERAL CIRCUIT COURTS

The First Step Act, as its title denotes, truly was a first step towards substantial criminal justice reform. However, upon its passing and its impact upon new sentencing practices, this Act in its original form did not retroactively correct or overturn the sentences of prisoners who were convicted under similar practices in the past (specifically in the areas of mandatory minimum sentencing and charge stacking practices). The Act's lack of retroactivity left prisoners sentenced under these harsh policies turning "to compassionate release as a means of bringing their cases to the courts."[20] This has, in turn, historically resulted in substantial amounts of litigation at the federal circuit courts over whether to grant sentence reductions, specifically when considering non-retroactive changes in case law in granting sentence reductions under compassionate release. The United States Courts of Appeals have come to disparate conclusions on this issue. The First, Second, Fourth, and Ninth Circuits have held that a court can consider non-retroactive changes in case law when granting compassionate release, while the Sixth, Seventh, and Eighth Circuits have held that they cannot be considered.

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[17] 18 U.S.C. § 3582(c)(1)(A).

[18] U.S.S.C. Amendment at 5.

[19] *Id.*

[20] Passela, *supra* note 1, at 102.

Every circuit, barring the Second and the Eleventh, has examined the issue and come to its conclusion. Recent decisions have merely substantiated this continued divide:

> The decision [*United States v. McCall,* 56 F.4th 1048, 1070 n.4 (6th Cir. 2022) (en banc) (Moore, 9 J., dissenting)] 'further entrenches the circuit split' over whether a non-retroactive change in law is categorically ineligible for consideration as an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A).[21]

As each circuit published their opinion, they repeatedly acknowledged the conflict as yet have continually rejected the holdings of other courts.[22] This split prompted further clarification and action from the USSC, resulting in recent statutory changes.

A. *The Sixth, Seventh, and Eighth Circuits Have Held that Non-Retroactive Changes in Case Law Cannot Be Considered.*

In *United States v. Thacker,* the Seventh federal circuit court addressed whether non-retroactive changes in case law can be considered in granting an individual a sentence reduction.[23] The court considered whether it may utilize the FSA's non-retroactive case law in granting a sentence reduction under the standard of "extraordinary and compelling" within the Federal Sentencing Guidelines § 1B1.13.[24] *Thacker* was one of the first decisions regarding this issue of law in light of the FSA and paved the way for decisions from other circuit courts.

Ross Thacker received a thirty-three year sentence in federal prison for armed robberies he had committed in 2002.[25] Thacker's sentences were "stacked penalties - imposed to run consecutively to one another - for two convictions under 18 U.S.C. § 924(c) for using and carrying a firearm during two of the robberies."[26] He received 7 years for one conviction and his second

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[21] Petition for Writ of Certiorari at 8, Jerry L. Brown v. United States (2023) (No. 23-88)

[22] *Id.* at 9.

[23] *See* United States v. Thacker, 4 F.4th 569 (7th Cir. 2021).

[24] *Id.* (citing First Step Act, 18 U.S.C. § 3582(c)(1)(A) (2018)).

[25] *Id.* at 571-2.

[26] *Thacker*, 4 F.4th 569 at 571.

conviction carried a mandatory sentence of 25 years, bringing his overall time to just over 32 years.[27]

Following Thacker's conviction, the FSA was passed. This altered the mandatory imposition of 25 years for the second conviction Thacker had received.[28] Thacker asserted that this change in case law arose to the standard of "extraordinary and compelling" within the Federal Sentencing Guidelines § 1B1.13 to warrant a sentence reduction.[29] If Thacker had been sentenced after the FSA became law, "he would have faced a 14-year mandatory minimum—7 years for each of his two § 924(c) convictions for brandishing a firearm during an armed robbery."[30] However, instead of this sentence, "Thacker faced a 32-year sentence for his two § 924(c) convictions. That 18-year difference understandably means all the world to Thacker."[31] The gross disproportionality of the compared sentences constituted the grounds on which Thacker sought relief.[32] However, the district court denied Thacker's motion, asserting that they lacked the authority or discretion to reduce his sentence. The district court held that the amendment had only applied prospectively and therefore could not constitute an extraordinary or compelling reason to warrant a sentence reduction.[33]

Thacker appealed this ruling and the issue of law came before the United States Court of Appeals for the Seventh Circuit. Ultimately, the Seventh Circuit affirmed the district court.[34] Since the statute lacked express language allowing its retroactive application, the court asserted that it had no authority to do so: "The discretion conferred by the compassionate release statute does not include authority to reduce a mandatory minimum sentence on the basis that the length of the sentence itself constitutes an extraordinary and compelling circumstance warranting a sentencing reduction."[35] The court asserted that Congress made plainly clear in § 403(b) of the FSA that the amendment to 18 U.S.C. § 924(c) "shall apply to any offense that was committed before the date of the enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."[36] By its terms,

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[27] *Thacker*, 4 F.4th 569 at 572.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* (citing 18 U.S.C. § 3582(c)(1)(A) (2018)).

[33] *Id.*

[34] *Id.* at 574.

[35] *Id.*

[36] *Thacker*, 4 F.4th 569 at 573 (citing First Step Act, 18 U.S.C. § 3582(c)(1)(A) (2018)).

then, the FSA's anti-stacking amendment applied prospectively.[37] Since Congress did not include language for its retroactive application, the court was not able to consider the changes within the FSA.

The court further asserted that Congress's language within the statute was deliberate in this area, and that the language specifying prospective application was done intentionally. The court reasoned that, since Congress highlighted specifically what sections may apply retroactively, their absence of this language within other sections must have been deliberate.

For example, in § 404, Congress permitted defendants who were

> sentenced before the Fair Sentencing Act of 2010 to benefit from that law's sentencing reform—including the elimination of mandatory minimum sentences for simple possession and the increased threshold quantity of crack cocaine necessary to trigger mandatory penalties. Congress made those changes retroactive. These distinctions matter, and they are ones reserved for Congress to make.[38]

The court went as far as asserting that applying § 403 retroactively would "unwind and disregard" Congress's direction.[39] While the court recognized that there is general discretionary authority within the statute, this authority does not allow the court to contradict Congress's intentional prospective application language within the sentencing guidelines. The court emphasized that "there is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute."[40] Ultimately, in determining whether to grant a sentence reduction to a prisoner, such non-retroactive changes cannot constitute reasons warranting a sentencing reduction.[41]

Following *Thacker,* the United States Court of Appeals for the Eighth Circuit in *United States v. Crandall* agreed with the Seventh Circuit's holding.[42] The defendant had a criminal history of two burglary convictions

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[37] *Id.* at 574.
[38] *Id.* at 573.
[39] *Id.*
[40] *Id.* at 574.
[41] *Id.* at 576.
[42] *United States v. Crandall*, 25 F.4th 582, 585–86 (8th Cir. 2022) at 583.

and one theft conviction before 1989.[43] In 1989, Crandall was convicted of two counts of bank robbery, one count of conspiracy to commit armed bank robbery, two counts of using and carrying a firearm during and in relation to a bank robbery, one count of unlawful possession of a firearm during and in relation to a bank robbery, one count of unlawful possession of a firearm as a convicted felon, and one count of unlawful possession of an unregistered firearm.[44] Under the sentencing guidelines imposed at that time, the district court deemed Crandall a career offender and sentenced him to 262 months for bank robbery and gun possession charges. Additionally, the court imposed mandatory consecutive terms of 60 months and 240 months for the two offenses of using and carrying a firearm during a crime of violence under 18 U.S.C. § 924(c).[45] Crandall's overall sentence initially totaled 562 months, but the court in 2005 reduced his sentence to 526 months.[46]

In 2020, Crandall filed a motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), asserting that an "extraordinary and compelling reason" was present to warrant a sentence reduction.[47] Crandall asserted that the prison sentence for his offenses would be "significantly shorter" had he been sentenced under current law.[48] Crandall pointed to a provision of the FSA that eliminated the mandatory consecutive sentences for multiple firearms under 18 U.S.C. § 924(c).[49] However, the district court held that non-retroactive changes in law cannot constitute an extraordinary and compelling reason for reducing a sentence, stating that the court was "highly skeptical of expanding the compassionate release system into, essentially, a discretionary parole system."[50] The court asserted that the provision of "extraordinary and compelling" was expressly limited to the age, health, family, or personal/individualized circumstances of the defendant as explicitly noted by Congress's language.

Crandall appealed the issue before the Eighth Circuit, asserting that the district court may treat non-retroactive changes in the law as extraordinary and compelling reasons for reducing a sentence. Crandall argued that his sentence, when calculated at the time of appeal, would be 220

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[43] *Crandall*, 25 F.4th 582, at 583.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 584.
[50] *Id.*

to 245 months since he would not qualify as a career offender and the current law does not impose mandatory consecutive sentences for two firearms convictions under 18 U.S.C. § 924(c).[51] Crandall cited to the Fourth Circuit decision of *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020) (holding that "the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an 'extraordinary and compelling' reason for relief under § 3582(c)(1)(A)") and the Tenth Circuit's decision in *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021) (affirming the finding of "extraordinary and compelling reasons" based on a defendant's youth at the time of sentencing, the length of his "stacked" mandatory sentences under § 924(c)) in support of his position.[52]

However, the Eighth Circuit looked to the rationale of the Sixth Circuit in coming to its decision, with the Sixth Circuit ruling that a non-retroactive change in the law cannot be extraordinary or compelling. The Sixth Circuit stated that reducing a sentence based on a non-retroactive change in the law "would amount to an impermissible 'end run around Congress's careful effort to limit the retroactivity of the First Step Act's Reforms.'"[53] Ultimately, the Eighth Circuit in *Crandall* found itself in agreement with the Sixth Circuit, reasoning that non-retroactive contemporary sentencing practices do not establish an "extraordinary and compelling reason" for reducing a previously imposed sentence. The court strictly asserted that "[t]he compassionate release statute is not a freewheeling opportunity for resentencing based on prospective changes in sentencing policy or philosophy."[54] Using this reasoning, Crandall was denied relief.

B. *The First, Second, Fourth, and Ninth Circuits Have Held That Non-Retroactive Changes in Law Can Be Permissibly Considered When Granting a Sentence Reduction Under the Compassionate Release Statute.*

United States v. Ruvalcaba held that non-retroactive changes may be considered when granting compassionate release.[55] In 2009, Jose Ruvalcaba

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[51] *Crandall*, 25 F.4th 582, at 584.

[52] *Id.* at 585.

[53] *Crandall*, 25 F.4th 582, 585–86, (citing United States v. Tomes, 990 F.3d 500, 505 (6th Cir. 2021)). *See* United States v. Jarvis, 999 F.3d 442, 444 (6th Cir. 2021).

[54] *Crandall*, 25 F.4th 582, at 586.

[55] *See* United States v. Ruvalcaba, 26 F.4th 14 (1st Cir. 2022).

received a life sentence for leading a drug-trafficking conspiracy.[56] Ruvalcaba was tried and found guilty of a conspiracy to distribute and possession with the intent to distribute over 500 grams of methamphetamine (21 U.S.C. § 846) and conspiracy to launder money (18 U.S.C. § 1956(h)).[57] He was ultimately sentenced to life imprisonment based on trafficking of drugs as well as a 240-month sentence for money laundering.[58] Ruvalcaba had two previous felony charges on his record prior to being tried in 2009.[59] Both felony charges were drug-related convictions.[60] At the time of his sentencing, Congress had passed a law that enhanced a mandatory minimum penalty for defendants with two prior "felony drug offense[s]."[61] The court reflected this mandatory penalty within Ruvalcaba's life sentence.[62]

While Ruvalcaba was serving this sentence in 2018, Congress passed the FSA. Under the FSA, Congress reduced certain enhanced mandatory minimum penalties (pursuant to § 841(b)(1)(A)).[63] Instead of imposing a mandatory minimum for life imprisonment, this provision was altered to "an incarcerative term of twenty-five years."[64] The Act also changed the prior convictions from "felony drug charges" to "serious drug charge[s]" and/or "serious violent charge[s]."[65]

Ruvalcaba asserted that these changes within the FSA constituted "extraordinary and compelling" reasons for his release. Ruvalcaba argued that, had he been sentenced after the enactment of the FSA, he would have had a singular prior offense that qualified for sentencing purposes and would only have been subject to a fifteen-year mandatory minimum. Ruvalcaba reasoned that "[h]is life sentence was so much more draconian that, in his view, the resultant sentencing disparity was 'extraordinary and compelling'."[66] Additionally, the FSA allowed prisoners to file their own motions for compassionate release, leading Ruvalcaba to move for compassionate release under § 3582(c)(1)(A)(i). Ruvalcaba asserted that these changes constituted extraordinary and compelling reasons for

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[56] *Id.* at 16.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*, citing section 841(b)(1)(A). *See* 21 U.S.C. § 841(b)(1)(A) (2006) at 16.
[63] First Step Act, 18 U.S.C. § 3582(c)(1)(A) (2018).
[64] First Step Act, 18 U.S.C. § 3582(c)(1)(A) (2018), § 401(a)(1), 132 Stat. at 5220.
[65] *Id.*
[66] *Ruvalcaba*, 26 F.4th 14 at 17.

compassionate release.[67] The district court refused to grant his requested relief.[68]

Ruvalcaba appealed this decision to the United States Court of Appeals for the First Circuit on the grounds of the gross disproportionality of his sentence. The court found in favor of Ruvalcaba and overturned the district court's decision.[69] The circuit court carefully considered whether the changes within the FSA could be used to grant a sentence reduction under § 1B1.13 and whether the FSA non-retroactive amendments rose to the standard of compelling and extraordinary under Federal Sentencing Guidelines § 1B1.13. The court ultimately held that it did have the authority to grant such a reduction.[70]

The standard the court adopted for this analysis was that they must find both that (1) the defendant had an "extraordinary and compelling" reason for a sentence reduction (18 U.S.C. § 3582(c)(1)(A)(i)), and (2) that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."[71] The court also considered any applicable § 3553(a) factors to "determine whether, in its discretion, the reduction is warranted in whole or in part under the particular circumstances of the case."[72]

The court first looked to the history of the sentencing guidelines themselves. Following the initial issuance of the policy statement, the USSC later identified "extraordinary and compelling" reasons within § 1B1.13, including "medical conditions; age; family circumstances; and a catch-all for other reasons deemed appropriate by the BOP."[73] The court noted that neither the policy statement nor the commentary explicitly stated whether non-retroactive changes in sentencing law may be grounds for an extraordinary and compelling reason for compassionate release.

In looking at the plain text of § 1B1.13, the court noted it was last modified in November of 2018, which was before the First Step Act was passed that allowed prisoner-initiated motions for compassionate release.

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[67] *Id.* at 16.

[68] *Id.*

[69] *Id.* at 17.

[70] *Id.*

[71] *Id.*, citing § 3582(c)(1)(A).

[72] *Id.* at 19, (citing United States v. Saccoccia, 10 F.4th 1, 4 (1st Cir. 2021) (omission in original) (quoting Dillon v. United States, 560 U.S. 817, 827, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010))).

[73] *Ruvalcaba*, 26 F.4th 14 at 20.

The question was then "whether this policy statement is 'applicable' to motions of a type that did not exist when it was written. To resolve this question, we turn principally to the language of the policy statement itself."[74] The court determined that the absence of any statement on behalf of Congress does not suggest that the current policy statements subsequently apply to prisoner-initiated motions for compassionate release.

The court asserted that "[n]owhere has Congress expressly prohibited district courts from considering non-retroactive changes in sentencing law."[75] No provision in the First Step Act indicates "Congress meant to deny the possibility of a sentence reduction, on a case-by-case basis, to a defendant premised in part on the fact that he may not have been subject to a mandatory sentence of life imprisonment had he been sentenced after passage of the FSA."[76] Ultimately, the court declined to assume that the non-retroactive nature of § 403(a) meant that Congress explicitly intended to place a "categorical and unwritten exclusion" on what may be considered as extraordinary and compelling reasons under the Sentencing Guidelines.[77]

In *United States v. Chen*, the United States Court of Appeals for the Ninth Circuit was presented with the issue of whether it could consider non-retroactive changes in sentencing law when granting a sentence reduction under compassionate release.[78] In 2008, Chen was convicted of six drug-related counts and two counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i).[79] Other than juvenile offenses, Chen had no prior crimes on his record.[80] At the time he was sentenced, § 924(c) imposed a mandatory minimum sentence of 5 years for a defendant's first § 924(c) conviction, and a mandatory minimum sentence of 25 years "in the case of a second or subsequent" § 924(c) conviction. [81] The district court ultimately sentenced Chen to a total of 408 months imprisonment: 48 months for the six drug offenses, 60 months for his first § 924(c) conviction, and a stacked 300 months for his second § 924(c) conviction.[82]

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[74] *Id.*

[75] *Id.* at 25.

[76] *Id.*

[77] *Id.* at 26.

[78] *United States v. Chen*, 48 F.4th 1092, 1093 (9th Cir. 2022).

[79] *Id.*

[80] *Id.*

[81] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138, 2138–39 (as amended by Pub. L. No. 105-386, 112 Stat. 3469 (1998)).

[82] *Chen*, 48 F.4th 1092 at 1094.

However, in 2018, the FSA was passed, altering the stacked sentences within these statutes. In effect, "§ 403(a) of the First Step Act ended § 924(c) stacking because first-time offenders no longer receive stacked sentences for multiple § 924(c) convictions in the same proceeding."[83] However, in passing this Act, Congress limited its application to defendants who are yet to be sentenced for their § 924(c) convictions: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."[84] On this basis, Chen was refused relief by the district court.

Following the passing of the FSA, Chen filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A).[85] Chen asserted that the changes to § 924(c) stacked sentencing rose to the standard of extraordinary and compelling reasons for granting him a sentence reduction under compassionate release.[86] Chen reasoned that "if sentenced today, his second § 924(c) conviction would only require a 60-month sentence, instead of the 300 months he received in 2008."[87] The district court denied Chen's motion, asserting that Congress's language within the First Step Act intentionally made those changes retroactive rather than non-retroactive.[88]

The Ninth Circuit ultimately overturned the district court's ruling.[89] The circuit court looked specifically to the plain text of the statute in assessing whether non-retroactive changes could be considered. The court's inquiry was "limited to the relationship, or lack thereof, between § 3582(c)(1)(A)'s extraordinary and compelling reasons element and the Sentencing Commission's policy statements in defendant-filed motions."[90] The statute explicitly states limits on "extraordinary and compelling" reasons for motions by the Federal Bureau of Prisons (BOP), including: 1) medical conditions of the defendant; 2) age of the defendant; 3) family circumstances; or 4) any other extraordinary and compelling reason as determined by the

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[83] *Id.*
[84] *Id.* (citing Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5221–22)
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Chen*, 48 F.4th 1092 at 1092.
[90] *Id.* at 1095.

BOP Director.[91] Therefore, district courts are bound by these limits when the BOP Director brings forth a motion for compassionate release.

However, in citing *United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021), the court asserted that the USSC's policy statement does not limit defendant-filed motions in the same manner that they limit motions filed by the BOP Director.[92] Since there is no binding policy statement limiting the circumstances of what constitutes "extraordinary and compelling" in regard to Chen's specific circumstances, the court considered itself capable of considering non-retroactive changes in sentencing law.[93] In following the precedent set in *Aruda*, the court concluded that "district courts are empowered to consider any extraordinary and compelling reason for release that a defendant might raise."[94] Therefore, what constitutes "extraordinary and compelling" lies directly within the district court's discretion.[95]

The court asserted that "the question before us is whether that discretion extends to considering § 403(a)'s changes to stacked sentencing, or whether non-retroactive changes in sentencing law present an exception to the general principle that district courts may consider 'any' extraordinary and compelling reason."[96] Congress only directly addressed this inquiry twice. First, the district court's discretion was bound by applicable policy statements from the USSC.[97] Second, Congress asserted that rehabilitation alone cannot be considered extraordinary and compelling.[98] With these provisions, the court reasoned that there is no express or direct limitation from Congress on Chen's circumstances.

In looking to other federal courts that have weighed in on this issue, specifically *Crandall*, the court recognized that "[t]he compassionate release statute is not a freewheeling opportunity for resentencing based on prospective changes in sentencing policy or philosophy."[99] The Court instead analyzed Chen's circumstances in light of the First, Fourth, and Tenth Circuit holdings. These courts held that "district courts may consider § 403(a)'s non-retroactive changes to penalty provisions, in combination with other factors,

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[91] *Id.*, at 1095 (citing 18 U.S.C. § 3582(c)(1)(A) (2018)).
[92] *Id.*, at 1095 (citing United States v. Aruda, 993 F.3d 797, 799 (9th Cir. 2021)).
[93] *Id.*
[94] *Id.* at 1095 (citing *Aruda*, 993 F.3d 797).
[95] *Id.* at 1095.
[96] *Id.*
[97] See 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t).
[98] *Id.*
[99] *Chen*, 48 F.4th 1092, 1097 (citing *Crandall*, 25 F.4th 582, 586).

when determining whether extraordinary and compelling reasons for compassionate release exist in a particular case."[100] The reasoning asserted by these courts was:

> (1) none of the statutes directly addressing "extraordinary and compelling reasons" prohibit district courts from considering non-retroactive changes in sentencing law; and (2) a sentence reduction under § 3582(c)(1)(A) based on extraordinary and compelling reasons is entirely different from automatic eligibility for resentencing as a result of a retroactive change in sentencing law.[101]

Without these prohibitions, the federal courts enjoy discretion when determining whether to grant a sentence reduction for non-retroactive changes in case law.

Ultimately, the court in *Chen* joined the First, Fourth, and Tenth Circuits in holding that non-retroactive changes in sentencing law, in light of other factors, may be considered when analyzing extraordinary and compelling reasons for sentence reductions.[102] The court asserted, "[t]here is no textual basis for precluding district courts from considering non-retroactive changes in sentencing law when determining what is extraordinary and compelling."[103] In light of the lack of limitations imposed by Congress and the general discretion possessed by the court, the decision in *Chen* further entrenched the split between the United States Courts of Appeals.[104]

IV. THE SENTENCING COMMISSION'S REVISION TO THE STATUTE IN LIGHT OF THE CIRCUIT SPLIT

With the entrenched split between the United States Courts of Appeals, the USSC attempted to remedy the issue by amending the FSA. The USSC articulates: "The amendment expands the list of specified extraordinary and compelling reasons and retains the 'other reasons' basis for a sentence reduction to better account for and reflect the plain language

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[100] *Ruvalcaba*, 26 F.4th 14; *Maumau*, 993 F.3d 82; *McCoy*, 981 F.3d 271.

[101] *Chen*, 48 F.4th 1092 at 1097.

[102] *Id.*

[103] *Id.* at 1098.

[104] *Chen*, 48 F.4th 1092 at 1098.

of section 3582(c)(1)(A), its legislative history, and decisions by courts made in the absence of a binding policy statement."[105] The remedied language of the First Step Act attempted to address when a district court can and cannot properly consider non-retroactive changes in sentencing law. They did so by adding sections titled "Unusually Long Sentences" and "Limitation On Changes in Law":

> The fifth modification to the list of specified extraordinary and compelling reasons appears in new subsection (b)(6) ("Unusually Long Sentence") and permits non-retroactive changes in law (other than non-retroactive amendments to the Guidelines Manual) to be considered extraordinary and compelling reasons warranting a sentence reduction, but only in narrowly circumscribed circumstances. Specifically, where (a) the defendant is serving an unusually long sentence; (b) the defendant has served at least ten years of the sentence; and (c) an intervening change in the law has produced a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, the change in law can qualify as an extraordinary and compelling reason after the court has fully considered the defendant's individualized circumstances.[106]

The language of the amended First Step Act on November 13, 2023, has resolved some of the ambiguity regarding the interpretation of the statute. The USSC has clarified from its previous language that, in certain circumstances, non-retroactive changes in law can be used in considering a sentence reduction. However, the statute's language still leaves much discretion for the courts to consider regarding what qualifies as an "unusually long sentence."[107] While the Supreme Court did not have to resolve the circuit split due to this action from the amended guidelines, the Court's precedent can still provide basis within this area of the statute by guiding the district court's inquiry regarding whether an "unusually long sentence" and a "gross disparity" is present.[108] By turning to Supreme Court precedent, lower courts may conduct their inquiries with consistency.

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[105] U.S.S.C. Amendment at 3.

[106] *Id.* at 5.

[107] U.S.S.C. Amendment at 5.

[108] *Id.*

V. THE IMPACT THIS REVISION WILL LIKELY HAVE AT THE LOWER COURTS

In light of the USSC's revisions, district courts have begun to analyze compassionate release motions under the "unusually long sentence" portion of the statute. In *United States v. Harper*, the district court employed the new provision of the statute in its analysis. In *Harper,* the defendant filed a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). Harper was tried and convicted in 2005 for committing three bank robberies, brandishing a weapon during the robberies (924(c) convictions), and for his status as a felon in possession of a firearm.[109] Due to his criminal history and the guidelines in effect when he was sentenced, the Defendant received a sentence of 1,044 months (87 years) behind bars. Of the 87 years he received, 57 years came from the three § 924(c) convictions and the first § 924(c) conviction counted as his first conviction. The second and third counts, although in the same case, qualified as his "second and subsequent" provisions of § 924(c).[110] This charge-stacking required the court to impose two mandatory 25-year consecutive sentences to run after Harper completed time for the other convictions he had received. The court noted that, "Congress has since amended § 924(c) to prevent stacking and the lengthy mandatory sentences that resulted" to avoid unduly harsh sentences."[111]

Harper moved for a sentence reduction for extraordinary and compelling reasons pursuant to § 3582(c)(1)(A)(i), arguing that two extraordinary and compelling reasons justify a reduction: his unusually long sentence and "other reasons."[112] However, the court only found it necessary to analyze his claim regarding the unusually long sentence.[113] The court, in looking to the language of the FSA's provision for "unusually long sentences," employed a three step analysis: (1) whether there is an unusually long sentence present to grant relief under, (2) whether the defendant has served at least 10 years of his sentence, and (3) whether the change in the law

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[109] United States v. Harper, No. CV 1:04-CR-00218-SDG, 2024 WL 1053547, at *1 (N.D. Ga. Mar. 11, 2024).

[110] *Harper*, 2024 WL 1053547, at *1.

[111] *Id.*

[112] *Id.* at *3 (citing U.S.S.G. § 1B1.13).

[113] *Id.* at *5.

produced a gross disparity between the time the defendant was sentenced and the time they would serve if sentenced today.[114]

In determining whether to grant relief, the court looked to the plain text of §1B1.14(b)(6):

> "If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances."[115]

The court, when looking at Harper's circumstances, recognized his sentence as "objectively long," reasoning that "87 years is, for the majority of people, a literal and figural lifetime."[116] The district court made a point to reject the government's argument that it was not unusually long because it was within the sentencing guidelines at the time Harper was convicted. Instead, the court looked towards statistics for all inmates: "[D]ata show that between fiscal year 2013 and fiscal year 2022, fewer than 12 percent (11.5%) of all offenders were sentenced to a term of imprisonment of ten years or longer."[117] The court noted that the term "usually" requires a comparator, and since the USSC did not specifically state what the courts must compare it to, the court looked to the general inmate population, "assum[ing] that the comparator set is 'all offenders,' not just those offenders convicted under the same statute as Harper."[118] Recognizing that Harper's sentence was in fact objectively "unusually long," the court also recognized that Harper had served at least ten years of his sentence. Therefore, the court was left with one point of inquiry to grant Harper relief: whether the change would cause a "gross disparity between the sentence initially imposed and the sentence that would be imposed today."[119]

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[114] *Id.*

[115] U.S. Sent'g Guidelines Manual § 1B1.13(b)(6) (U.S. Sent'g Comm'n 2018).

[116] *Harper*, 2024 WL 1053547, at *5.

[117] *Id.*

[118] *Id.*

[119] *Harper*, No. CV 1:04-CR-00218-SDG, 2024 WL 1053547, at *6.

The court then analyzed whether the change to § 924(c) would cause a gross disparity between Harper's initial sentence and the sentence he would receive today. The court noted that

> Congress amended § 924(c) in § 403 of the FSA to prohibit "stacking" of § 924(c) charges arising from the same crime. It did not make this amendment retroactive. For Harper, this means that the then-mandatory double 25-year consecutive sentences he received for his second and third § 924(c) convictions could not be imposed today.[120]

The court reasoned that the amendment to the guidelines certainly resulted in a gross disparity of 87 years between Harper's initial sentence and the sentence he would receive today being at least 50 years less than what he received. The court did not look to anything else in its rationale, asserting that the court need only look to the amended statute itself: "A 50-year difference is an undeniably gross disparity. So, having concluded that all clauses of § 1B1.12(b)(6) cut in favor of Harper, his unusually long sentence combined with the change in law provides a legal basis for this Court to reduce his sentence."[121]

VI. SUPREME COURT PRECEDENT PROVIDES A LEGAL FRAMEWORK FOR THE LOWER COURTS

District courts have begun adapting to the discretion permitted within the revised FSA in light of its recently amended sentencing guidelines. The district court in *Harper* found the amended statute the defendant was sentenced under to be itself enough to demonstrate that the defendant qualified for compassionate release under the "unusually long sentence" portion of the FSA.[122] However, district courts may struggle to draw a line on what sentences qualify as "unusually long."[123] In determining whether a "gross disparity" exists between the sentence the Defendant received and the sentence, they would likely receive in light of a change of law.[124]

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[120] *Id.*
[121] *Id.*
[122] *Harper*, No. CV 1:04-CR-00218-SDG, 2024 WL 1053547, at *6.
[123] *Id.*
[124] *Id.*

The United States Supreme Court's decision in *Solem v. Helm,* 463 U.S. 277 (1983) provides a basis for district courts to evaluate whether a sentence is "unusually long" in instances where the disparity is not so clear.[125] The specific language of the FSA instructs the court to consider whether a sentence is unusually long: "only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time of the motion."[126] *Solem v. Helm* put forth several factors for the court to consider that can guide the inquiry of the lower courts when assessing whether a sentence is unusual and/or grossly disproportionate.[127]

In *Solem*, the respondent was convicted of uttering a "no account" check for $100 in South Dakota state court.[128] The maximum punishment for his offense was five years imprisonment with a $5,000 fine. However, the respondent was ultimately sentenced to life imprisonment without the possibility of parole under South Dakota's recidivist statute due to having six prior felony convictions (three convictions for third-degree burglary and convictions for obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated).[129] The sentence was affirmed by South Dakota Supreme Court and habeas relief was sought within the United States Court of Appeals for the Eighth Circuit. Respondent contended that his sentence was cruel and unusual under both the Eighth and Fourteenth amendment. The Eighth Circuit ultimately reversed the district court's denial of habeas relief. The issue was then appealed to the U.S. Supreme Court.[130]

The U.S. Supreme Court held that "The Eighth Amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[131] While the question within *Solem* specifically regarded the Eighth Amendment cruel and unusual punishment clause, the Court still had to determine what constitutes a "cruel" and "unusual" sentence, and the rationale employed by the Court can serve as a guidepost for future district and federal courts when analyzing whether a sentence reduction should be granted under the "unusually long sentence" provision.

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[125] *See* Solem v. Helm, 463 U.S. 277, (1983).
[126] First Step Act, 18 U.S.C. § 3582(c)(1)(A) (2018).
[127] *Solem,* 463 U.S. 277 at 290-292.
[128] *Id.* at 277.
[129] *Id.*
[130] *Id.*
[131] *Id.*

In order to determine whether a sentence is unusual or grossly disproportionate, the Court in *Solem* asserted that its analysis should be guided by "objective criteria."[132] These criteria consist of the following three factors put forth by the Court: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[133] The last two factors are specifically tailored to determine whether a sentence was unusual.

The second two factors both compare the sentence at hand with different sentences for the same crime. Specifically, *Solem* calls for the court to perform an interjurisdictional and intra-jurisdictional analysis. Just as the district court noted in *Harper*, determining whether a sentence is unusual requires a comparator.[134] This notion is also present in *Solem*, with the Court stating, "Courts are also able to compare different sentences. For sentences of imprisonment, the problem is one of line-drawing. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts."[135] While the analysis in *Solem* was used for purposes of assessing Eighth Amendment claims, its principles may still be utilized and referenced by the courts when attempting to determine whether a sentence is "unusually long" and whether a change in law produces a "gross disparity" under the FSA.[136]

When looking to compare a sentence to sentences imposed on other criminals in the same jurisdiction, the Court in *Solem* reasoned that "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[137] The Court in *Solem* looked to other offenses that imposed life sentences at the time the Defendant was sentenced to life for uttering a "no account" check.[138] These offenses included: murder, treason, first-degree manslaughter, first-degree arson, and kidnapping. The Court noted that "[n]o other crime was punishable so severely on the first offense."[139] Crimes such as attempted

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[132] *Solem,* 463 U.S. 277 at 292.

[133] *Id.* at 290-292.

[134] *Harper*, No. CV 1:04-CR-00218-SDG, 2024 WL 1053547, at 5.

[135] *Solem,* 463 U.S. 278 (citing *Cf. Barker v. Wingo,* 407 U. S. 514 (1972)).

[136] First Step Act, Public Law 115 § 391 (2018).

[137] *Solem,* 463 U.S. 277 at 291.

[138] *Id.*

[139] *Id.* at 298.

murder, placing an explosive on an aircraft, and first-degree rape were only class 2 felonies.[140]

The Court noted that the respondent's habitual offender status "complicate[d]" their analysis and that § 22-7-8, when the respondent was sentenced, authorized life imprisonment for criminals with three prior convictions (regardless of the nature of the crimes committed).[141] Ultimately, the Court concluded that the respondent, with his crime of uttering a no-account check, was less deserving of punishment than those who commit murder, treason, first-degree manslaughter, first-degree arson, or kidnapping.[142] Yet under the statute, "Helm [was] treated in the same manner as, or more severely than, criminals who have committed far more serious crimes."[143] The Court also noted that it did not appear that any other habitual offender other than the respondent had received the maximum sentence of life in prison for similar crimes.[144] This interjurisdictional comparison shed light on how unusual and disproportionate Helm's sentence was.

The Court then looked to perform an intra-jurisdictional analysis, comparing the sentence imposed on Helm to sentences imposed for the same crime in other jurisdictions. The Court found that there was only one other state in which the Defendant could have received a life sentence without parole for his offense.[145] The Court asserted that "[a]t the very least, therefore, it is clear Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances."[146] Furthermore, the Court in *Solem* recognized that no other defendant in Nevada with a record similar to the respondent had received such a severe sentence due to the nature of the respondent's minor criminal record.[147]

Ultimately, using both interjurisdictional and intra-jurisdictional sentencing comparisons, the Court held that the respondent's sentence for his convictions was cruel and unusual under the Eighth Amendment.[148] While the court in *Harper* looked to the sentence itself and to the average

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[140] *Id.*
[141] *Id.*
[142] *Id.* at 299.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 299-300.
[147] *Solem,* 463 U.S. 277 at 300.
[148] *Id.* at 303.

time served by the general population of inmates within America, courts should perhaps employ a similar interjurisdictional and intra-jurisdictional analysis to that in *Solem*. This would provide district courts with objective criteria to reference, rather than solely the sentence itself or the average time served by the general inmate population.

VII. APPLYING THE STANDARD IN *SOLEM* TO THE AMENDED FIRST STEP ACT

When lower courts look to grant compassionate release under the FSA's amended guidelines, they are to assess: (1) whether there is an unusually long sentence present to grant relief under, (2) whether the defendant has served at least 10 years of his sentence, and (3) whether the change in the law produced a gross disparity between the time the Defendant was sentenced and the time they would serve if sentenced today.[149] When looking at the first and third points of inquiry, *Solem* can guide the lower courts.

In assessing whether the sentence is unusually long, the courts should utilize an interjurisdictional and intra-jurisdictional analysis like that employed in *Solem*. In *Harper*, it was easier to assess that an 87-year sentence was objectively unusual, especially when compared to the general inmate population.[150] However, it may not be as clear in every case that arises, and a more specific standard than a comparison to the general population of inmates should be followed, especially when dealing with crimes that naturally carry more lengthy sentences. A comparative analysis between the sentence a defendant received and what inmates are currently being sentenced to in light of a change within the law, both within the jurisdiction and outside of the jurisdiction, would guide the inquiries of the lower courts. Specifically, when looking at current sentencing practices within the same jurisdiction, the lower courts should consider what sentences inmates are currently receiving for similar crimes and what crimes currently carry a sentence similar to the defendant's. If more serious crimes than what the defendant has committed carry a similar length of sentence, just as the Court considered in *Solem*, this provides further basis for the lower courts to deem the sentence as unusual rather than only looking at the sentence at face value. Furthermore, looking to other jurisdictions, such as current sentencing

[149] First Step Act, Public Law 115 § 391 (2018).

[150] *Harper*, 2024 WL 1053547, at *1.

practices in state or federal jurisdictions, allows the lower courts to determine if a particular sentence is unusually long.

The analysis is similar when the courts consider whether the change in law would produce a "gross disparity."[151] While the analysis of the Court in *Solem* was slightly different than what is required for granting a sentence reduction under the FSA, the Court still provided rationale that the lower courts may apply. When the Court in *Solem* was assessing if a sentence was grossly disproportionate, it asserted "no single criterion can identify when a sentence is . . . grossly disproportionate. But a combination of objective factors can make such analysis possible."[152] In looking at the criteria set forth in *Solem*, lower courts may be better able to draw the line on whether a change in law does in fact produce a gross disparity between the sentence received by the defendant and what the defendant would have been sentenced to in light of the changes.

VIII. CONCLUSION

Lower courts must look to United States Supreme Court's precedent as a guide when granting sentence reductions under the USSC's amended guidelines. While these amended guidelines resolved the circuit split that was divided over whether courts could use non-retroactive changes in law when granting a sentence reduction, it ultimately left the courts with some ambiguity for determining whether a sentence is unusually long and deserving of relief. With this newfound discretion through a recently added provision, lower courts have begun to grant sentence reductions. However, lower courts must look at how U.S. Supreme Court precedent has determined whether a sentence is unusual or grossly disproportionate to keep compassionate release consistent throughout the federal judiciary. Guidance from U.S. Supreme Court precedent will aid lower courts in determining where to draw the line under the amendment guidelines for compassionate release.

[151] First Step Act, Public Law 115 § 391 (2018).

[152] *Solem,* 463 U.S. 277 at n.17.