

# Like They're Waiting for you to Die: Development of the Inadequate Medical Care Doctrine from District Court to United States Sentencing Commission

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Angela Beck was serving a sentence for convictions of conspiracy to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime.<sup>1</sup> Ms. Beck was 47 years old and had served roughly half of her sentence when, in the fall of 2017, she noticed a lump in her left breast.<sup>2</sup> With a family history of breast cancer, she immediately sought medical attention. The doctor at the Bureau of Prisons (BOP) recommended imaging and consultation with a surgeon.<sup>3</sup> It took two months for those appointments.<sup>4</sup> By the time imaging was conducted, it revealed a high likelihood of cancer.<sup>5</sup>

Ms. Beck needed a biopsy, and she needed it promptly. Typically, a biopsy should be performed within two months of an identified abnormality.<sup>6</sup> But the BOP waited eight months to biopsy the lump in her breast.<sup>7</sup> The biopsy revealed extensive breast cancer. Surgery was recommended, but once again, the BOP delayed, waiting two extra months.<sup>8</sup> Over a year after Ms. Beck's cancer was discovered, a surgeon finally was able to remove her entire left breast and part of her chest muscle, confirming that Ms. Beck had metastatic breast cancer.<sup>9</sup> The surgeon directed BOP

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<sup>1</sup> United States v. Beck, 425 F. Supp. 3d 573, 575 (M.D.N.C. 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

to bring Ms. Beck back the week following surgery to check on her status.<sup>10</sup> BOP waited six weeks.<sup>11</sup>

When Ms. Beck was brought back to the surgeon, he recommended that she be taken to an oncologist to determine a chemotherapy course.<sup>12</sup> Once again, BOP delayed her care for months.<sup>13</sup> In April of 2019, nearly 17 months after the diagnosis, Ms. Beck was taken to a medical oncologist. But the oncologist determined it was too late to begin chemotherapy. To be effective, the chemotherapy would have needed to start almost immediately after the surgery.<sup>14</sup> A radiation oncologist also determined that it was too late to begin radiation treatment for Ms. Beck.<sup>15</sup>

In January 2019, Ms. Beck found new lumps,<sup>16</sup> this time in her right breast.<sup>17</sup> Once again, BOP delayed the medical care that Ms. Beck desperately needed to determine whether these lumps were also cancerous.

Through counsel, Ms. Beck brought a compassionate release motion that was one of the first of its kind—a motion arguing that medical neglect by the BOP was an extraordinary and compelling circumstance justifying a reduction in her sentence.<sup>18</sup> Her motion was granted based, in part, on the fact that “the quality of treatment BOP has provided Ms. Beck for her cancer has been abysmal.”<sup>19</sup> The court also noted that, because “BOP has not acknowledged deficiencies” in the care Ms. Beck received, “BOP is unlikely to meet its constitutional obligations in the future. As long as she stays in BOP custody, she faces a substantial likelihood of substandard medical care for her life-threatening disease.”<sup>20</sup>

The court observed that:

“[w]hile a standard case of properly-treated breast cancer may not qualify as a ‘terminal illness’ under Subdivision A [of the compassionate release policy statement], Ms. Beck has not received proper treatment, and it is questionable that BOP will provide

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<sup>10</sup> *Id.* at 576.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 577.

<sup>19</sup> *Id.* at 581.

<sup>20</sup> *Id.*

appropriate medical care for this life-threatening disease going forward, at least not without court oversight.”<sup>21</sup>

In an interview after she was released from prison, Ms. Beck said that when you're in prison with a serious health condition, it feels “like they're waiting for you to die.”<sup>22</sup>

Typically, compassionate release motions<sup>23</sup> can only be granted if the ground for an extraordinary and compelling circumstance comports with the policy statement in USSG §1B1.13.<sup>24</sup> The policy statement does include a ground for relief for individuals who have a terminal illness.<sup>25</sup> But as the court noted, although the diagnosis of breast cancer on its own is not terminal, the substandard care that Ms. Beck received made an otherwise non-terminal health condition life-threatening.<sup>26</sup> Typically, a judge could not go outside the bounds of the policy statement. But this case was decided during a time in which there was no binding policy statement directing courts on what could constitute an extraordinary and compelling circumstance. As such, the judge in this case had the flexibility to use her discretion to determine that the inadequate medical care was surely extraordinary and compelling.

The court's analysis in *Beck* was both pioneering and prophetic. The decision was one of the first, if not the first, to release someone based on the substandard level of care provided by BOP. And it was prophetic because in the years that followed, more courts began to scrutinize the adequacy of care provided to prisoners as a possible reason to reduce someone's sentence. From one judge's bold decision, others followed, eventually leading the Sentencing Commission to take note. Included in amendments to the 2023 sentencing guidelines is a provision finding it to be extraordinary and compelling when the BOP provides inadequate medical care for a serious health condition. The development of this doctrine evidences the courts and agency working as they should—identifying trends in the courts and responding at the agency level.

This article will explore the development of the inadequacy of medical care doctrine, from one judge's decision to the Sentencing Commission including this factor as an enumerated ground for compassionate release in the sentencing

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<sup>21</sup> *Id.*

<sup>22</sup> Interview with Angela Beck, STATESVILLE RECORD & LANDMARK, at 01:18 (Jul. 19, 2019), [https://statesville.com/interview-with-angela-beck/html\\_a313fbd0-268b-5e3d-94c2-d554f9a51914.html](https://statesville.com/interview-with-angela-beck/html_a313fbd0-268b-5e3d-94c2-d554f9a51914.html) [<https://perma.cc/AUR2-2A3F>].

<sup>23</sup> We are referring to this as compassionate release, the colloquial term, but it is specifically a motion for a reduction in sentence. As the Second Circuit has explained: “It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions.” *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

<sup>24</sup> 18 U.S.C. § 3582(c)(1)(A)(ii).

<sup>25</sup> U.S. SENT'G GUIDELINES MANUAL §1B1.13 cmt. n. 1(A)(i) (U.S. SENT'G COMM'N 2018).

<sup>26</sup> *Beck*, 425 F. Supp. 3d at 583.

guidelines. It will set the stage by reviewing the BOP's history of inadequate medical care and history of neglecting compassionate release requests. This failure on the part of BOP led to the dramatic changes in the First Step Act which opened the door for more compassionate release litigation. The article will then discuss how COVID changed everything and taught judges about the use of compassionate release as a lifeline for medically vulnerable people. It will then present and analyze some recent litigation that has raised issues of inadequate medical care. Finally, the article will end in the present—reflecting on the current, 2023, sentencing guidelines which include a ground for compassionate release based on inadequate medical care.

## I. BOP'S HISTORY OF NEGLECT

### A. *Failure to Provide Adequate Medical Care*

It is no secret that prisons are overcrowded and understaffed. And these staffing issues are even worse for medical personnel. An Office of the Inspector General Report noted that “recruitment of medical professionals is one of the BOP's greatest challenges and staffing shortages limit inmate access to medical care, result in an increased need to send inmates outside the institution for medical care, and contribute to increases in medical costs.”<sup>27</sup>

These staffing issues become more serious when viewed in light of the aging and chronically ill prison population. According to BOP data, incarcerated people who are 50 years or older are the fastest growing population in federal prisons.<sup>28</sup> Aging in prison disproportionately requires intensive medical care compared to younger prison populations.<sup>29</sup> But even putting aside the issues of aging in prison, many people in federal prison have a chronic health condition. One study found that roughly forty percent of the federal prison population has a chronic medical condition.<sup>30</sup> Of those people, nearly fourteen percent had not received any kind of medical evaluation while in federal custody.<sup>31</sup>

According to the Office of the Inspector General, BOP is not able to provide the health services required to address the needs of the aging, and this surely extends to the health needs of the chronically ill as well. A clinical director of a federal

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<sup>27</sup> OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MEDICAL STAFFING CHALLENGES, at i (2016).

<sup>28</sup> OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS, at i (2016).

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Wilper, Andrew P. et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 Am. J. of Pub. Health 666, 666 (2009).

<sup>31</sup> *Id.* at 669.

medical center<sup>32</sup> reported that “only 80 percent of that institution’s health services positions are staffed and that the vacancies limit the number of inmates . . . the institution can treat.”<sup>33</sup> And at a non-medical center, another staff member reported that the clinic at that institution was “over a thousand inmates behind” in terms of providing health care.<sup>34</sup>

Due to the inadequate staffing and poor-quality care, some BOP institutions seek health care services from outside institutions such as local clinics and hospitals. But this too is a problem. As evidenced by Ms. Beck’s story, wait times to see outside clinicians can be exorbitant, often exacerbating otherwise treatable health conditions. Data from one BOP facility averaged a wait time of 114 days to see outside medical specialists.<sup>35</sup> And the wait time was even higher, 256 days, for people waiting to see outside specialists for routine appointments.<sup>36</sup>

One news outlet reported on three incarcerated people who died from medical neglect.<sup>37</sup> All three people were housed at FCI Aliceville, a federal women’s prison in Alabama.<sup>38</sup> The families of the deceased described monthslong waits for doctor’s appointments, as well as skepticism and even retaliation from staff for advocating for themselves on the inside.<sup>39</sup>

As one can imagine, the already grim state of health care in prisons unraveled even more during the COVID-19 pandemic. Prison environments are a petri dish for COVID. It is impossible to isolate and maintain practices that many people maintain in the free world to prevent the spread of COVID-19. But it wasn’t just the threat of COVID-19 that impacted prisoners. Because of COVID-19, the prison lockdowns, and the staffing shortages, people with non-COVID medical needs had treatment delayed or their needs unmet. One individual in federal prison reported that he was

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<sup>32</sup> Federal medical centers are federal prisons that house people with the highest level of care needed. Prisoners are classified into four groups of care—care levels 1-4. People who are care level 4 require services that can only be provided at a federal medical center. These are the sickest people in federal prison. Many people who are category 4 require cancer treatment, dialysis, major surgical treatment, etc. See FED. BUREAU OF PRISONS, CLINICAL GUIDANCE: CARE LEVEL CLASSIFICATIONS FOR MEDICAL AND MENTAL HEALTH CONDITIONS OR DISABILITIES (2019).

<sup>33</sup> OFF. OF THE INSPECTOR GEN., *supra* note 27, at 17.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 18.

<sup>36</sup> *Id.*

<sup>37</sup> C.J. Ciaramella, *These Women Received a Death Sentence for Being Sick in Prison*, REASON (June 30, 2020), <https://reason.com/2020/06/30/these-women-received-a-death-sentence-for-being-sick/> [<https://perma.cc/LD79-F586>].

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

put in isolation after being exposed to COVID.<sup>40</sup> Isolation here meant solitary confinement. And while he was in solitary confinement, he did not receive his catheter or his asthma medication.<sup>41</sup>

### B. *Failure to Act on Compassionate Release Motions*

The Sentencing Reform Act of 1984 eliminated federal parole and created the U.S. Sentencing Commission.<sup>42</sup> By eliminating parole, the Sentencing Reform Act “in essence, eliminated indeterminate sentencing at the federal level.”<sup>43</sup> But there was one safety net available to individual sentenced in the federal system. Congress permitted sentencing courts to consider reducing an individual’s sentence if the prisoner presented “extraordinary and compelling reasons.”<sup>44</sup> This became colloquially known as compassionate release.

From the beginning, Congress delegated the role of designing and implementing compassionate release to the Sentencing Commission and to the BOP. Congress then instructed the Sentencing Commission to elucidate what circumstances would constitute extraordinary and compelling reasons that might warrant a reduced sentence.<sup>45</sup> For its part, the BOP was asked to identify people in custody who would likely meet the criteria set out by the Sentencing Commission. The government would subsequently file a motion in court before the individual’s sentencing judge, seeking a reduced motion. But things did not go as planned.

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<sup>40</sup> Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed to Get Out*, NPR (Mar. 7, 2022, 5:00 AM), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get-> [<https://perma.cc/GQ39-XA7L>]; Edward Helmore, *US Prison deaths Soared by 77% During Height of COVID-10 crisis, study finds*, THE GUARDIAN (Dec. 3, 2023), <https://www.theguardian.com/us-news/2023/dec/03/us-prison-deaths-covid-19-study> [<https://perma.cc/Y8B2-SSML>] (The study also found that pandemic-related lockdowns and restrictions on movement, including isolation, visitor prohibitions and solitary confinement in place of medical isolation, designed to mitigate infection had “increased stress, mental health challenges, and violence exacerbating the risk of deaths due to unnatural causes, such as drug overdoses, suicide, and violence”.)

<sup>41</sup> *Id.*

<sup>42</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

<sup>43</sup> LISA M. SEGHELLI, CONG. RSCH. SERV., RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 4 (2009).

<sup>44</sup> 18 U.S.C. § 3582(c)(1)(A)(i).

<sup>45</sup> 28 U.S.C. § 994(t).

For starters, the Sentencing Commission took over twenty years before it published the first version of a sentencing guideline that expanded on the criteria for a sentencing reduction. In the meantime, BOP published its own criteria.<sup>46</sup>

BOP took a “conservative approach” to compassionate release, reserving it for individuals “with a terminal illness and a life expectancy of 6 months or less.”<sup>47</sup> BOP was also the sole gatekeeper of compassionate release. In other words, BOP had sole discretion over whether or not to bring a motion to reduce an individual’s sentence.<sup>48</sup> And BOP rarely used that discretion.<sup>49</sup> In a 2013 Office of the Inspector General Report, between 2006 and 2011, thirteen percent of people who requested compassionate release died while waiting for BOP to respond to their request.<sup>50</sup> And between 2013 and 2017, BOP approved only six percent of the 5,400 applications it received.<sup>51</sup> In sum, during that time period, 266 people who requested compassionate release died in custody.<sup>52</sup>

Not only did BOP fail to act on requests for compassionate release, but the Office of the Inspector General found widespread problems with the BOP’s management of the compassionate release program for people who might be eligible. The OIG highlighted four failures: (1) BOP failed to provide guidance to staff regarding the BOP’s own criteria for compassionate release; (2) BOP had no timeline for reviewing compassionate release requests, and timeframes for compassionate release requests do not take into account a person’s acute medical circumstances; (3) There were no formal procedures in place to inform incarcerated people about the compassionate release program; and (4) BOP had no system to track compassionate release requests, including whether the decisions made by at each institution were consistent with each other and consistent with BOP policy.<sup>53</sup>

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<sup>46</sup> OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM (2013), <https://oig.justice.gov/reports/2013/e1306.pdf>

<sup>47</sup> *Id.* at 60.

<sup>48</sup> For clarity, if the request was approved by the Warden, the application gets passed to the BOP central office, which has a medical director review the records. The Deputy Attorney General may object to the sentence reduction request even if the BOP Director approves it. If the request is approved, it is sent to the sentencing judge who can rule on the motion.

<sup>49</sup> *See id.* at 1 (observing that only 24 people were released each year, on average); *see also id.* at 22 (finding that between 2006 and 2011 only two non-medical compassionate release requests were received and reviewed by BOP and both were denied).

<sup>50</sup> *Id.* at 11.

<sup>51</sup> Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018) <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles> [<https://perma.cc/SW8P-MP86>].

<sup>52</sup> *Id.*

<sup>53</sup> OFF. OF THE INSPECTOR GEN., *supra* note 45, at 11.

The OIG report helped fuel interest in compassionate release and the lack of action by BOP. In 2016, the Sentencing Commission took a bold stance in its policy statement when it scolded the BOP for its dereliction of duty in failing to act on compassionate release cases.<sup>54</sup>

## II. THE FIRST STEP ACT – A RESPONSE TO BOP’S FAILURE TO ACT

The BOP’s failure to effectively oversee and implement compassionate release for incarcerated people led Congress to pass the First Step Act of 2018. A group of bipartisan senators introduced a piece of legislation, known as the GRACE Act, which was folded into the First Step Act’s larger criminal justice reform initiatives.<sup>55</sup> The GRACE Act removed the stronghold that BOP had over incarcerated people’s compassionate release requests by modifying 18 U.S.C § 3582(c)(1)(A). The new text that was included in the First Step Act reads: “or, upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or upon expiration of the 30-day period beginning on the date on which the defendant submitted a request for a sentence reduction under this subsection, whichever is earlier.”

This language change may seem subtle. But the consequences were significant. Rather than waiting with no known end-date for the BOP to respond to a prisoner’s request, incarcerated people now have the ability to go directly to court after 30 days of waiting, regardless of whether the BOP responds at all. The timing of the First Step Act and the increased use of compassionate release could not have been more fortuitous. As COVID-19 savaged the federal prisons, the entire landscape for sentencing reduction motions soon changed.

## III. THE COVID PANDEMIC ALTERED THE COMPASSIONATE RELEASE LANDSCAPE

The First Step Act was transformative. A safety valve that was a pipe dream for people in federal prison became a lifeline for those who most needed it. BOP was removed from its gatekeeper role, which it had held for almost two decades, and federal defendants for the first time were able to file sentence reduction motions directly with the district courts.<sup>56</sup> In the first year after the First Step Act was enacted,

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<sup>54</sup> The Commission wrote in the policy statement, “[a] reduction under this policy statement may be granted only on motion by the Director of the Bureau of Prisons . . . . The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1.” U.S. SENT’G GUIDELINES MANUAL §1B1.13 cmt. n. 4 (U.S. SENT’G COMM’N 2018).

<sup>55</sup> GRACE Act, S. 2471, 115th Cong. (2018).

<sup>56</sup> See OFF. OF THE INSPECTOR GEN., *supra* note 45, at i (“In the Sentencing Reform Act of 1984, Congress authorized the Director of the Federal Bureau of Prisons (BOP) to request that a federal judge reduce an inmate’s sentence for “extraordinary and compelling” circumstances.”).



courts granted 145 motions for compassionate release, compared to 24 grants from the previous year.<sup>57</sup> Two-thirds of those motions were filed by the incarcerated person. While a five-fold increase may, at first glance, seem momentous, a more significant transformation was yet to come. By fiscal year 2020, the numbers had swelled even more. Over 1,800 people were granted a reduced sentence, a twelvefold increase from the first year of the First Step Act.<sup>58</sup>

A number of issues led to the exponential increase in grants in such a short period of time. First, prior to the passage of the FSA, sentence reduction motions were a rare occurrence. With an average of twenty-four grants a year,<sup>59</sup> very few judges had experience with the compassionate release process and, as a result, very little case law had developed. Moreover, because only the BOP could bring a motion before 2018, the vast majority of federal criminal defense attorneys had limited experience with this sentence reduction mechanism. With the lack of significant case law in this area and a lack of expertise, it is unsurprising that so few motions were filed and granted immediately after the passage of the FSA.

However, “[t]his drought of compassion concluded in 2020, when the forces of law and nature collided.”<sup>60</sup> By March 2020, the novel coronavirus had arrived in the United States.<sup>61</sup> At the same time, federal prisoners and their advocates realized that the FSA’s provision allowing federal prisoners to file their own § 3582(c)(1)(A) motions “coupled with COVID-19’s pernicious presence in federal prisons” provided a powerful tool to save lives. By September 2020,<sup>62</sup> there had been a “massive upswing in imprisoned persons seeking compassionate release,”<sup>63</sup> with federal district courts reviewing 7,014 motions.<sup>64</sup>

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<sup>57</sup> JULIE ZIBULSKY & CHRISTINE KITCHENS, U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 6 (2020) [hereinafter First Step Act Year One Report].

<sup>58</sup> JULIE ZIBULSKY ET AL., U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 3 (2022).

<sup>59</sup> From 2006-2011, the BOP approved an average of only 24 requests per year in a program that was “poorly managed” and resulted “in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided.” OFF. OF THE INSPECTOR GEN., *supra* note 45, at i.

<sup>60</sup> *United States v. Jones*, 980 F.3d 1098, 1100 (6th Cir. 2020).

<sup>61</sup> WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> [<https://perma.cc/3CYC-8HGY>] (classifying the new strain of coronavirus which causes COVID-19 as a pandemic).

<sup>62</sup> Fiscal Year 2020 covers the period between October 2019 to September 2020. *See* JULIE ZIBULSKY ET AL., *supra* note 57, at 10.

<sup>63</sup> *Jones*, 980 F.3d at 1100.

<sup>64</sup> JULIE ZIBULSKY ET AL., *supra* note 57, at 3.

Due to this burst in litigation, the compassionate release doctrine rapidly took shape in 2020 and 2021. The initial § 3582(c)(1)(A) COVID motions focused on the threat of COVID to sick and elderly prisoners in the carceral environment. The motions often sought relief grounded in the enumerated factors described in the commentary of §1B1.13—either serious medical condition or, if applicable, the age of the defendant.<sup>65</sup> These arguments, however, began to propel a more fundamental argument: whether the §1B1.13 policy statement applied to defendant-filed compassionate release motions at all. Specifically, defendants began to argue that the FSA had made material changes to § 3582(c)(1)(A) by removing BOP as the sole gatekeeper and allowing defendants to file their own § 3582(c)(1)(A) motions. However, the Commission did not update its policy statement under §1B1.13 to reflect those changes.<sup>66</sup> Indeed the Commission *could not* update §1B1.13 because it had lacked a quorum of voting members since January 2019.<sup>67</sup> As a result, §1B1.13 still referred in multiple places to BOP having the exclusive authority to bring a compassionate release motion before the district court.<sup>68</sup> Due to this inherent conflict between §1B1.13 and the FSA, every circuit court but one ultimately determined that §1B1.13 was no longer binding to defendant-filed motions.<sup>69</sup> Without a binding policy statement—and its descriptions of extraordinary and

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<sup>65</sup> See, e.g., *United States v. Dunlap*, 458 F. Supp. 3d 368, 370 (M.D.N.C. 2020) (“COVID-19 is especially dangerous for both the elderly and those with severe chronic medical conditions. . .” and granting release for 77-year old with deteriorating health in prison population with high presence of COVID); *United States v. Rainone*, 468 F. Supp. 3d 996, 999 (N.D. Ill. 2020) (“[T]he Court finds that the COVID-19 pandemic, [the defendant’s] relatively advanced age [of 65], and other health problems are circumstances that would allow the Court to use its discretion to grant a sentence reduction.”).

<sup>66</sup> *Brooker*, 976 F.3d at 234.

<sup>67</sup> Nate Raymond, *U.S. Senate Committee Advance Nominees to Restock Sentencing Panel*, REUTERS, July 21, 2022, <https://www.reuters.com/legal/government/us-senate-committee-advances-nominees-restock-sentencing-panel-2022-07-21/> [<https://perma.cc/B992-B624>] (“The commission lost its quorum in January 2019, a month after former Republican President Donald Trump signed into law the First Step Act, bipartisan legislation aimed at easing harsh sentencing for nonviolent offenders and at reducing recidivism.”). See also *United States v. McCoy*, 981 F.3d 271, 276 (4th Cir. 2020) (“The Commission first issued [§1B1.13] in 2006 and last updated it in November 2018, before the First Step Act.”).

<sup>68</sup> *United States v. Almontes*, No. 3:05-CR-58, 2020 WL 1812713, at \*3 (D. Conn. Apr. 9, 2022) (noting that two clauses in §1B1.13 “still require that the Director of the BOP be the one to bring a motion for relief under section 3582(c)(1)(A)” even though “the FSA altered section 3582(c)(1)(A) directly and eliminated that requirement by allowing a defendant him- or herself to bring such a motion under certain circumstances.”).

<sup>69</sup> See *United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *Brooker*, 976 F.3d at 235–36; *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108–09 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021).

compelling reasons—district courts were freed “to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release”<sup>70</sup> Nothing in the “now-outdated version of Guideline §1B1.13” limited the district court’s discretion.<sup>71</sup>

#### IV. THE DEVELOPMENT OF NOVEL COMPASSIONATE RELEASE ARGUMENTS

In the absence of an applicable policy statement in most federal districts, federal prisoners and their lawyers had the opportunity to develop creative and compelling arguments outside of the enumerated factors described in §1B1.13. In addition to arguments about the dangers of COVID-19 to vulnerable prisoners,<sup>72</sup> even more innovative arguments began to develop. These included: prisoners suffering from PTSD that had been exacerbated by pandemic lockdowns;<sup>73</sup> sexual abuse of prisoners by corrections officers;<sup>74</sup> changes in the law that would result in lower sentences today;<sup>75</sup> co-defendant disparities that arose after sentencing;<sup>76</sup> saving the life of another person while in prison;<sup>77</sup> halfway house restrictions that prevented a

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<sup>70</sup> Brooker, 976 F.3d at 237.

<sup>71</sup> *Id.*

<sup>72</sup> See e.g., United States v. Hodge, No. 6:17-CR-051, 2021 WL 1169896, at \*4 (E.D. Ky. Mar. 26, 2021) (holding that significant health conditions that make defendant among the most vulnerable to COVID-19 infection in BOP was an extraordinary and compelling reason).

<sup>73</sup> United States v. Pina, No. 18-CR-179 (JSR), 2020 WL 3545514, at \*3 (S.D.N.Y. June 29, 2020) (granting compassionate release due to increased vulnerability to post-traumatic stress disorder (“PTSD”) due to prison lockdown during pandemic).

<sup>74</sup> United States v. Brice, No. 13-CR-206-2, 2022 WL 17721031, at \*5 (E.D. Pa. Dec. 15, 2022) (holding that sexual abuse by corrections officer met extraordinary and compelling reason requirement).

<sup>75</sup> United States v. Vaughn, No. 00-CR-0126-006-CVE, 2021 WL 2953176, at \*3 (N.D. Okla. July 9, 2021) (holding that mandatory life sentence in drug case that would not apply today constituted extraordinary and compelling reasons along with other factors).

<sup>76</sup> United States v. Conley, No. 11 CR 0779-6, 2021 WL 825669, at \*4 (N.D. Ill. Mar. 4, 2021) (defendant was one of the least culpable members of conspiracy but received a sentence twice as long due to disreputable law enforcement tactics”).

<sup>77</sup> See United States v. Pimental-Quiroz, No. CR12-5204 RJB, 2021 WL 915141, at \*4 (W.D. Wash. Mar. 10, 2021) (“[Mr. Pimental-Quiroz] put himself at risk when he assisted a female corrections officer who was being assaulted by a mentally ill inmate.”); see also United States v. Meeks, No. 1:97-CR-00169-4, 2021 WL 9928774, at \*3 (N.D. Ill. Dec. 15, 2021) (recognizing as extraordinary and compelling that the individual saved the life of a fellow inmate who was attempting suicide).

defendant from obtaining needed medical care;<sup>78</sup> unwarranted reincarceration after release to home confinement;<sup>79</sup> and changing social norms as to marijuana.<sup>80</sup>

Along with these novel arguments, relying on the seminal decision in *Beck*,<sup>81</sup> more prisoners began to successfully argue that the BOP's indifference to a prisoner's urgent medical needs constituted an extraordinary and compelling reason. In April 2020, following the guidance set forth in *Beck*, a district court granted compassionate release for Raphael Almontes after the BOP repeatedly delayed surgery to treat his serious spinal condition.<sup>82</sup> Prior to entering prison in 2005, Mr. Almontes had broken his neck requiring "vertebrae fusion surgery."<sup>83</sup> In 2015, while still in prison, his condition began to deteriorate to such a degree that a spine specialist recommended an MRI.<sup>84</sup> The BOP delayed this treatment until July 2018—almost three years—at which point an orthopedist concluded that the defendant required an "urgent surgical consult" for spinal decompression surgery.<sup>85</sup>

Despite the recommendation from medical professionals as to the extent of Mr. Almontes's spinal condition and the urgent need for treatment, the BOP never provided him with the medical care he needed.<sup>86</sup> Instead, over the next year and a half, while acknowledging periodically that Mr. Almontes needed spinal surgery, the BOP failed to provide him access to surgery.<sup>87</sup> As a result, Almontes's condition deteriorated.<sup>88</sup> In light of this blatant neglect, the district court ultimately concluded

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<sup>78</sup> *United States v. Donnes*, No. CR16-12, 2021 WL 4290670, at \*1-2 (D. Mont. Sept 21, 2021) (finding the "sheer difficulty of maintaining prescriptions and coordinating medical appoints and tests through BOP" was extraordinary and compelling).

<sup>79</sup> *See United States v. Levi*, No. 8:04-CR-235-DKC, doc. 2085 (D. Md. July 6, 2021); *see also* Kristine Phillips, *Woman who was arrested after missing officials' phone call while in computer class is headed home*, USA Today (July 7, 2021), <https://www.usatoday.com/story/news/politics/2021/07/06/gwen-levi-headed-homeafter-judge-approves-compassionate-release/7877359002> [<https://perma.cc/6SQX-KN39>].

<sup>80</sup> *See, e.g., United States v. Scarmazzo*, No. 1:06-CR-000342DAD, 2023 WL 1830792, at \*14 (E.D. Cal. Feb. 6, 2023) (changing legal landscape as to marijuana in combination with other factors constituted extraordinary and compelling reasons); *United States v. Vigneau*, 473 F. Supp. 3d 31 (D.R.I. 2020) (recognizing that changing societal attitudes towards marijuana justify imposition of a lower sentence today).

<sup>81</sup> *See supra* note 1.

<sup>82</sup> *See Almontes*, No. 3:05-CR-58, 2020 WL 1812713, at \*6-7.

<sup>83</sup> *Id.* at \*6.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*7.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

that the “BOP’s indifference” to the defendant’s serious medical condition constituted “extraordinary and compelling” circumstances and reduced his sentence to time-served.<sup>89</sup>

Over the next three years, the inadequate medical care doctrine continued to grow.<sup>90</sup> In 2022, another district court, in *United States v. Verasawmi*, held that BOP’s inadequate care for Vishallie Verasawmi’s serious health issues (including

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<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., *United States v. English*, No. 19-cr-20164, 2022 WL 17853361, at \*8 (E.D. Mich. Dec. 22, 2022) (“In sum, BOP’s gross mismanagement of English’s serious health conditions, even if they are not yet life-threatening, presents an extraordinary and compelling reasons for release.”); *United States v. Ranes*, No. 3:06-cr-00041, slip op. at 5 (D. Alaska Nov. 22, 2022) (granting release in part due to lack of necessary surgery and medical care for many intestinal issues); *United States v. Gaulden*, No. CR 499-001-1, 2022 WL 2820109, at \*4 (S.D. Ga. July 19, 2022) (granting release to Terrell Gaulden due in part to prison’s failure to treat defendant’s serious medical condition of sarcoidosis); *United States v. Gaulden*, No. CR 499-001-2, 2022 WL 2820114, at \*34 (S.D. Ga. July 19, 2022) (granting release to Terrell’s twin, Derrell Gaulden, as a result of his seizure disorder and comorbid conditions); *United States v. Derentz*, 608 F.Supp.3d 189, 193-94 (E.D. Pa. 2022) (finding that BOP’s “grossly inadequate treatment” of a defendant’s medical condition, including delays in treatment, may qualify as an extraordinary and compelling reason and “the BOP’s repeated delays contributed to Deretnez becoming blind.”); *United States v. Kohler*, No. 8:15-CR-425, 2022 WL 780951, at \*4 (M.D. Fla. Mar. 15, 2022) (granting compassionate release for 64-year-old based on prison’s failure to adequately treat defendant’s heart condition and other serious medical issues); *United States v. Robles*, No. 19CR4122, 2022 WL 229362, at \*2 (S.D. Cal. Jan. 26, 2022) (granting compassionate release and finding that “[d]espite the occasional doctors’ visits, which usually coincide with one of her strokes, it appears that Robles has not received the consistent care, monitoring, and treatment required for her conditions, including a much-needed heart surgery which has yet to even be scheduled.”); *United States v. Rodriguez-Gonzales*, No. 3:08-CR-304-4, 2021 WL 5769160, at \*1-3 (N.D. Ohio. Nov. 3, 2021) (“The defendant needs medical care for a serious condition that incontestably can be painful and can affect the quality of life... It seems clear that the [prison’s] decisionmakers were not inclined to take even the simplest of steps to respond to this situation.”); *United States v. Perez-Urena*, No. 1:05-CR-477-MHC-GGB-2, slip op. at 2–3, 24 (N.D. Ga. Oct. 26, 2021) (granting release to defendant in part due to fact that he was not receiving needed medical care for his diabetes and related medical conditions); *United States v. Munera-Cadavid*, 89-CR-00294, slip op. at 3–5 (S.D. Fla. Aug. 8, 2021) (granting compassionate release due to high risk of aggressive skin cancer and failure to receive sufficient preventative care); *United States v. Eubanks*, No. 3:06-CR-105, 2021 WL 3557653, at \*4 (W.D. Ky. Aug. 11, 2021) (finding defendant’s serious medical condition and difficulty of providing care for him qualifies for compassionate release); *United States v. Roman*, No. 2:14-CR-43, 2021 WL 3173351, at \*4 (S.D. Ohio July 26, 2021) (determining that the BOP’s failure to schedule regular appointments for the treatment of the defendant’s glaucoma, which resulted in blindness, qualified as an extraordinary and compelling reason for release); *United States v. Oshinski*, No. 2:14-CR-00284, 2021 WL 2518981, at \*2 (D. Nev. June 17, 2021) (finding defendant’s current medical condition and inability of prison to treat it qualifies for compassionate release under U.S.S.G. §1B1.13); *United States v. Sesay*, 16-CR-265(1), slip op. at 2 (D. Minn. Mar. 23, 2021) (granting compassionate release based on defendant’s severe glaucoma for which his treatment was delayed during the pandemic); *United States v. Morse*, No. 10--20361, 2020 WL 6534899, at \*3 (S.D. Fla. Nov. 3, 2020) (granting release in part because defendant “is not currently receiving necessary medical follow up and treatment for his ongoing health issues while incarcerated.”); *United States v. Vazquez Torres*, No. 19-CR-20342, at \*4 (S.D. Fla. July 14, 2020) (granting compassionate release “given Defendant’s current health issues and the obstacles he faces in receiving adequate and complete treatment while incarcerated”).

lung and throat damage requiring her to use portable oxygen, severe mental illness, heart irregularities, migraines, and incontinence) justified her release.<sup>91</sup> The court concluded that “the compounding effects” of BOP’s mismanagement on the defendant’s “serious medical issues, some of which place her at heightened risk of severe illness from COVID-19, and others of which independently place her at risk of serious health complications or cause significant pain,” required compassionate release to ensure her conditions would not prove fatal.<sup>92</sup> Given BOP’s repeated failures, the court made clear that, had it not intervened, “the ‘urgent’ care Verasawmi’s physician ordered would have continued to fall through the cracks.”<sup>93</sup>

In 2022, this issue moved from the orbit of criminal defense to the public sphere when news outlets began reporting on the horrific saga of Frederick Bardell.<sup>94</sup> While serving his federal sentence, Mr. Bardell developed metastatic colon cancer.<sup>95</sup> In November 2020, through counsel, Mr. Bardell filed an emergency motion for compassionate release, asserting he suffered from “unspecified bleeding,” metastatic liver lesions (suspected cancer), and malignancy in his colon.<sup>96</sup> The government responded that “no one has determined [Bardell’s] condition is terminal” and assured the court that Mr. Bardell could receive adequate care for his health circumstances while in custody.<sup>97</sup> Taking the government at its word, the court denied the compassionate release motion.<sup>98</sup>

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<sup>91</sup> United States v. Verasawmi, No. 17-254, 2022 WL 2763518 (D. N.J. July 15, 2022).

<sup>92</sup> *Id.* at \*9–10.

<sup>93</sup> *Id.* at \*8.

<sup>94</sup> See Glenn Thrush, *Judge Holds Prison Officials in Contempt for Treatment of Terminally Ill Inmate*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/politics/florida-prison-cancer-release.html#:~:text=Judge%20Roy%20B.,treatment%20of%20Frederick%20Mervin%20Bardell> [https://perma.cc/CTZ2-TYQT]; Devlin Barrett, *Judge blasts Bureau of Prisons’ treatment of dying prisoner*, WASHINGTON POST (Oct. 14, 2022, 3:51 PM), <https://www.washingtonpost.com/national-security/2022/10/14/prisons-contempt-dying-inmate> [https://perma.cc/PEB7-5CD]; Austin Sarat, *A federal prisoner’s gruesome and shameful mistreatment—and why it was all too typical*, SALON (Oct. 19, 2022, 5:30 AM) <https://www.salon.com/2022/10/19/a-prisoners-shameful-mistreatment--and-why-it-was-all-too-typical> [https://perma.cc/83LH-ZP5A]; C.J. Ciaramella, *Justice Department Inspector General Launches Investigation Into Inmate Death Following Judge’s Contempt Order*, REASON (Oct. 17, 2022), <https://reason.com/2022/10/17/justice-department-inspector-general-launches-investigation-into-inmate-death-following-judges-contempt-order/> [https://perma.cc/E7LN-QPLP].

<sup>95</sup> United States v. Bardell, 634 F. Supp. 3d 1083, 1084 (M.D. Fla. 2022).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see also Order, United States v. Bardell, No. 11-CR-401, ECF 85 (M.D. Fla. Dec. 2, 2020).

Three months later, Mr. Bardell filed a second motion, which was supported by an affidavit from a board-certified oncologist who confirmed that Mr. Bardell needed immediate treatment for his “likely terminal” cancer.”<sup>99</sup> The government again opposed release, arguing that “it was not even definitive that Mr. Bardell had cancer—let alone terminal cancer.”<sup>100</sup> Despite the government’s protests, on February 5, 2021, the court granted Mr. Bardell’s motion.<sup>101</sup>

Mr. Bardell died on February 17, 2021, under horrible conditions, shortly after his release from prison.<sup>102</sup> At the time of his release, Mr. Bardell was “skin and bones,” had a tumor protruding from his stomach, was wheelchair dependent, and bladder and bowel incontinent.<sup>103</sup> Despite his condition, the BOP left Mr. Bardell on the curb of an airport terminal without his wheelchair after making his parents pay for his plane ticket home (contrary to BOP policy).<sup>104</sup> When his plane landed, his parents found him bleeding, soiled, and nearly unrecognizable.<sup>105</sup> They immediately took him to the hospital.<sup>106</sup> He died nine days after his release.<sup>107</sup>

Once notified of the “disturbing circumstances” of Mr. Bardell’s release, the district court issued a show cause order against the BOP for violating the court’s release order and appointed a special master to investigate the circumstances of his custody and release.<sup>108</sup> Following the recommendations of the special master, on October 4, 2022, the court held the BOP in contempt and imposed sanctions, accusing it of “sheer disregard for human dignity.”<sup>109</sup> Also noting its concerns about “the adequacy of [Mr. Bardell’s] treatment and diagnosis,” the court recommended that the Attorney General investigate the failure of the BOP to respond to Mr. Bardell’s medical needs and the BOP’s misrepresentations in the compassionate release briefing as to the seriousness of his condition.”<sup>110</sup> The court also retained jurisdiction to investigate the “truthfulness of the assertions in the Government’s

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<sup>99</sup> *Id.* at \*1.

<sup>100</sup> *Id.*

<sup>101</sup> Order, *United States v. Bardell*, No. 11-CR-401, ECF 92 (M.D. Fla. Feb. 5, 2021).

<sup>102</sup> Second Joint Status Report, *United States v. Bardell*, No. 11-CR-401, ECF 97 (M.D. Fla. Feb. 18, 2021).

<sup>103</sup> *United States v. Bardell*, No. 6:11-CR-401-RDB-DAB, 2022 WL 4944552, at \*2 (M.D. Fla. Oct. 4, 2022).

<sup>104</sup> *Id.* at \*2.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at \*3. The district court had specified this in its order granting compassionate release.

<sup>109</sup> *Id.* at \*4.

<sup>110</sup> *Id.* at \*5.

filings” about Mr. Bardell’s condition and the BOP’s ability to treat him, “as well as Mr. Bardell’s incarceration and release.”<sup>111</sup>

Compassionate release motions involving BOP’s failure to provide prisoners adequate medical care came full circle in late 2022 when the same federal judge from *Beck* was faced with another inadequate medical care case. In *United States v. Burr*, the court found “strong, compelling, and uncontradicted” evidence of BOP’s negligence and neglect in failing to treat Mr. Burr’s ongoing epigastric pain, which “is a violation of the standard of care.”<sup>112</sup> For two years, the BOP failed to schedule Mr. Burr’s endoscopy for a possible cancerous gastric ulcer, despite his ongoing abdominal pain and despite the fact three medical professional had ordered this test.<sup>113</sup> This failure “has caused pain and suffering unrelated to any penological purpose and raises a real possibility of death from an undiagnosed and untreated cancerous ulcer.”<sup>114</sup> In granting Mr. Burr’s motion, the court also noted the desperate position of medically vulnerable prisoners who are “wholly dependent on the BOP for health care” and often must spend “years fighting the BOP bureaucracy” to get the care they need.<sup>115</sup> The court went on to say:

Prisoners are dependent on the State for food, clothing, and necessary medical care.... Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.<sup>116</sup>

The court then reduced Mr. Burr’s sentence to time-served.<sup>117</sup>

#### IV. THE SENTENCING COMMISSIONS ADDS “INADEQUATE MEDICAL CARE” TO THE AMENDED §1B1.13 POLICY STATEMENT

While undoubtedly tragic, the plights of these individuals—including Mr. Burr, Mr. Bardell, Ms. Verasawmi, Mr. Almontes, and Ms. Beck—were not completely in vain. Rather, their stories have led to real reform and have contributed to the growing recognition that medically vulnerable prisoners neglected by BOP deserve relief.

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<sup>111</sup> *Id.*

<sup>112</sup> *United States v. Burr*, No. 1:15-CR-362-1, 2022 WL 17357233, at \*7 (M.D.N.C. Dec. 1, 2022).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at \*11.

<sup>115</sup> *Id.* at \*9.

<sup>116</sup> *Id.* at \*9 (citing *Brown v. Plata*, 563 U.S. 493, 510-11 (2011)).

<sup>117</sup> *Id.*



In 2022, the Sentencing Commission obtained a quorum for the first time since early 2019.<sup>118</sup> The Commission made clear that one of their top priorities was to resolve the conflict between the outdated policy statement in §1B1.13 and the FSA.<sup>119</sup> The Commission noted that, “in the wake of the COVID-19 pandemic, the debate about what constitutes ‘extraordinary and compelling reasons’ for compassionate release took center stage across the nation with different results,” and the Commission should provide “updated guidance” to the courts.<sup>120</sup>

In February 2023, the Commission released its proposed amendments, which included some of the most significant changes to §1B1.13 since the policy statement was first enacted in 2006.<sup>121</sup> The Commission first ensured that the amended version of §1B1.13 would apply to defendant-filed motions, as well as BOP-initiated motions.<sup>122</sup> The amendment also added several enumerated factors that courts could consider as extraordinary and compelling reasons in compassionate release motions.<sup>123</sup> Significantly, the Commission determined that failure to provide long-term or specialized medical care to prisoners that could lead to serious deterioration in health or death should be added to §1B1.13 as an extraordinary and compelling reason. The language of the amendment, as submitted to Congress, states: “The defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death.”<sup>124</sup>

Unlike other amendments to §1B1.13, the addition of “inadequate medical care” as an extraordinary and compelling reason was relatively uncontroversial.<sup>125</sup>

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<sup>118</sup> See Raymond, *supra* note 66.

<sup>119</sup> U.S. SENT’G COMM’N, U.S. Sentencing Commission to Implement First Step Act with Focus on Compassionate Release (Oct. 28, 2022), <https://www.ussc.gov/about/news/press-releases/october-28-2022> [<https://perma.cc/H9UR-LBTN>].

<sup>120</sup> *Id.*

<sup>121</sup> U.S. SENT’G COMM’N, Proposed Amendments to the Sentencing Guidelines; *see also* United States Sentencing Commission Guidelines Manual, USSG App. C (2004), amended by §1B1.13 (2006).

<sup>122</sup> *Id.*

<sup>123</sup> U.S. SENT’G COMM’N, Amendments to the Sentencing Guidelines, 1-9 (Apr. 27, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305\\_Amendments.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf) [<https://perma.cc/M6TV-6DWC>] (The effective date of the Amendments is November 1, 2023); *Id.* at 1.

<sup>124</sup> *Id.*

<sup>125</sup> See U.S. Sent’g Comm’n Public Meeting 58-62, April 5, 2023 (four Commissioners voted in favor of amended §1B1.13 while three voted against); *see also* Ryan Tarinelli, Sentencing policy sparks clash over future criminal justice bills, ROLL CALL (April 18, 2023, 2:45 PM), <https://rollcall.com/2023/04/18/sentencing-policy-sparks-clash-over-future-criminal-justice-bills> [<https://perma.cc/W3YG-5L9Y>].

Although the Commissioners did not unanimously vote in favor of amendment §1B1.13, at least one Commissioner made clear that the objection was based on two other provisions to amended §1B1.13 (unusually long sentences and the “catch-all”)—not to any other provisions.<sup>126</sup> Indeed, the voluminous comments to all the Commission’s proposed amendments suggest little opposition to the addition of “inadequate medical care” as an enumerated extraordinary and compelling reason.<sup>127</sup>

Given the significant case law defining extraordinary and compelling reasons that has developed since the FSA was passed, the addition of inadequate medical care as an enumerated factor makes sense. In many ways, this shows our system is working. One federal judge in North Carolina, realizing a grave injustice had occurred, made clear that adequate medical care for prisoners was a basic tenant of human dignity.<sup>128</sup> If the BOP denies that medical care to a prisoner, then extraordinary and compelling reasons can exist warranting a reduced sentence. Incarcerated individuals and criminal defense attorneys read that opinion, used it as support for their compassionate release motions, and, within a few years, a large body of case law supported this principle.<sup>129</sup>

In turn, the Commission—charged by Congress to establish sentencing policies that reflect the “advancement in knowledge of human behavior as it relates to the criminal justice process”<sup>130</sup>—has taken this new body of case law and memorialized it in §1B1.13.<sup>131</sup> In doing so, the Commission has effectively taken a once novel argument and ensured that it can be available as a ground for compassionate release for all present and future incarcerated individuals.

## CONCLUSION

The time period between 2018-2023 was highly unusual for federal criminal law. In the absence of an applicable policy statement for compassionate release and

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<sup>126</sup> See U.S. Sent’g Comm’n Public Meeting 76, April 5, 2023 (“It’s not that we disagree with all of the provisions. We focused on the two that we thought had legal infirmities that stopped us from joining.”).

<sup>127</sup> See U.S. Sent’g Comm’n, 2022-2023 Amendment cycle: Proposed Amendments/Public Comment (Mar. 2023), 296-1668, <https://www.ussc.gov/policymaking/public-comment/public-comment-march-14-2023> [<https://perma.cc/TPE3-ZCKX>].

<sup>128</sup> See *supra* note 1.

<sup>129</sup> See *supra* n. 89 (long string cite).

<sup>130</sup> 28 U.S.C. § 991(b)(1)(C).

<sup>131</sup> See 28 U.S.C. § 994(a)(2)(C) (stating that the Commission shall promulgate to federal courts general policy statements regarding application of the guidelines or any other aspect of sentencing including “the sentence modification provisions set forth in section[...]3582(c).”); 28 U.S.C. § 994(t) (“The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction.”).

in the midst of a global pandemic, compassionate release case law flourished. The Commission carefully reviewed the law that has developed during this time and wisely determined that our understanding of what could constitute a basis for a reduced sentence has grown. The new amendment, with its addition of inadequate medical care, reflects that expansion in knowledge.

The development of the inadequate medical care cases tells the story of the system working as designed. Congress established the Sentencing Commission as the expert body that would not be ossified, but rather, would be uniquely equipped to respond to trends in criminal law – trends like inadequate medical care as a basis for compassionate release. Because of the interconnected and responsive relationship between the United States Federal Courts and the Commission, one case can drive national policy, effecting positive change for incarcerated people across the country.