

COMPASSIONATE RELEASE AS COMPASSIONATE
DECARCERATION: STATE INFLUENCE ON FEDERAL
COMPASSIONATE RELEASE AND THE UNFINISHED FEDERAL
REFORM

Chun Hin Jeffrey Tsoi*

INTRODUCTION

In July 2021, as the COVID-19 Delta variant contributed to the “rapid and alarming rise in the COVID-19 case and hospitalization rates around the country,”¹ Wylema Wilson hand-wrote a letter to the United States District Court for the Western District of Oklahoma, noting the COVID-19 deaths in her prison.² As a 66-year-old inmate having served some years for drug trafficking, she “hoped for a second chance at life, a life the way it should be[,] clean and sober.”³ The court denied her motion for compassionate release, concluding that a sentence reduction “would not reflect the seriousness of defendant's offense.”⁴

Grim as that result might be, grimmer is the systematically lagging trajectory of federal compassionate release reform. Until very recently, Wylema’s letter to seek early release would not even have been possible. While the history of court-ordered compassionate release in federal law dates back to the Sentencing Reform Act of 1984 (SRA),⁵ it was not until the First Step Act of 2018 (FSA) that prisoners were allowed to petition for their own compassionate release under the new phrase added to 18 U.S.C. § 3582(c) (“upon motion of the defendant”).⁶ Before the FSA's passage on December 21, 2018,⁷ federal courts could only reduce the term

* Chun Hin Jeffrey Tsoi is a *juris doctor* candidate at Georgetown University Law Center, with expected graduation in 2023. He is a Featured Online Contributor for Volume 59 of the *American Criminal Law Review*, and he is also a Ph.D. student at Georgetown University Department of Philosophy. This article owes credit to James Zeigler, Hannah Mullen, April Rose Knight, Victoria Finkle, Hannah Nguyen, Shaun Rogers, and Sephora Grey for their contribution and advice.

1. *Delta Variant: What We Know About the Science*, CTRS. FOR DISEASE CONTROL & PREVENTION (2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

2. Casey Tolan, *Compassionate release became a life-or-death lottery for thousands of federal inmates during the pandemic*, CNN (Sept. 30, 2021), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html>.

3. *Id.* (internal quotations omitted).

4. *Id.* (internal quotations omitted).

5. Sentencing Reform Act of 1984 § 212(a)(2), 18 U.S.C. § 3582 (1984).

6. First Step Act of 2018 § 603(b), 18 U.S.C. § 3582.

7. *Id.*

of imprisonment “upon motion of the Director of the Bureau of Prisons,” who has often been reluctant and untimely in filing the motions.⁸ It took six bills⁹ amending 18 U.S.C. § 3582 for the federal criminal justice system to arrive at the current Prisoner-initiated & Court-ordered (PICO) Compassionate Release system.¹⁰

But the PICO compassionate release statute—which one could argue is the bare minimum of a genuine compassionate release system, where prisoners can have their voices heard in a public proceeding—was not first seen in the federal criminal justice system, despite strong scholarly attention to federal compassionate release.¹¹ Historical records suggests that by 1994 at the latest, New Jersey already had a PICO compassionate release system, first among the states.¹² State compassionate release practices arguably influenced federal compassionate release reform in part through the American Law Institute’s Model Penal Code: Sentencing, the final draft of which was approved in May 2017, a year before the introduction and passage of the FSA.¹³

As activists who urged its passage wrote, the FSA was a “modest but necessary” step¹⁴; the pandemic and the threat it posed to the incarcerated population¹⁵ ought to prompt reflections on what the next steps should be. This Essay is intended to serve as both a brief historical review of state influence on federal compassionate release, and as a

8. See *infra* Part IIB; see also Marielle Paloma Greenblatt, *In Search of Judicial Compassion: The Cantu-Lynn Divide Over Compassionate Release for Federal Prisoners*, 52 COLUM. HUMAN RIGHTS L. REV. 140, 143 (2020) (hereinafter *Judicial Compassion*).

9. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7107, 102 Stat. 4181, 4418; Crime Control Act of 1990, Pub. L. No. 101-647, § 3588, 104 Stat. 4789, 4930; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 70002, 108 Stat. 1796, 1984; Economic Espionage Act of 1996, Pub. L. No. 104-294, § 604(b)(3), 110 Stat. 3488, 3506; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3006, 116 Stat. 1758, 1806; First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

10. 18 U.S.C. § 3582(c)(1)(A) (“[T]he court . . . upon motion of the defendant after the defendant has fully exhausted all administrative rights . . . may reduce the 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.”).

11. See, e.g., Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83 (2019); Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791 (2018–2019); *Judicial Compassion*, *supra* note 8.

12. See *infra* Part II.

13. AM. L. INST., MODEL PENAL CODE: SENTENCING APPROVED (2017), <https://www.ali.org/news/articles/model-penal-code-sentencing-approved/>.

14. *Letter in Support of an Act to Reform the Criminal Justice System*, AFL-CIO (Dec. 18, 2018), <https://aflcio.org/about/advocacy/legislative-alerts/letter-support-act-reform-criminal-justice-system>.

15. See *infra* Part I.

reflection on the unfinished compassionate release reform in terms of DOJ's execution. Part I briefly surveys the trajectory of 18 U.S.C. § 3582(c) from the SRA to the PICO compassionate release provision in the FSA, and its application in the pandemic. Part II supplements the compassionate release literature by exploring the history of PICO compassionate release in state law as a backdrop of the long-awaited federal reform allowing prisoners to petition for their own release, and it proposes that state practices, especially that of New Jersey, might have influenced the introduction and passage of FSA in part through the Model Penal Code. Part III suggests that the arc of compassionate release reform in federal law is nevertheless unfinished, with the Department of Justice's (DOJ) objection practices being part of the necessary change. Using data and cases from the District of Columbia, whose PICO compassionate release statute is modeled after federal law and clearly intended as a response to the pandemic, this Essay proposes that the DOJ's perspective and practices must change to adapt to the essential purpose of compassionate release: addressing mass incarceration in America with compassion.

PART I. A BRIEF HISTORY OF FEDERAL COMPASSIONATE RELEASE: FROM
THE SENTENCING REFORM ACT TO PRISONER-PETITIONED
COMPASSIONATE RELEASE MOTIONS DURING THE PANDEMIC

COVID-19 posed specific health threats to the incarcerated population. Overcrowding, vulnerability of certain populations, and violence within prison walls all contribute to the defenselessness of prisoners against a global pandemic.¹⁶ As early as June 2020, about three months into the pandemic, a study showed 42,107 cases of COVID-19 and 510 deaths among a sample of 1,295,285 federal and state prisoners¹⁷— 5.5 times the case rate and 3 times the death rate of the entire U.S. population.¹⁸ As of November 2021, there has been at least a total of more than 440,000 cases and 2,600 deaths in prisons across the United States according to official data,¹⁹ some sources indicating an even higher number.²⁰

16. *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (April 16, 021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

17. Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. OF THE AM. MED. ASS'N, no. 6, Aug. 11, 2020, at 602–03.

18. *Id.* (death rate adjusted for age difference).

19. *National COVID-19 Statistics*, THE COVID PRISON PROJECT (last visited Jan. 5, 2022), <https://covidprisonproject.com/data/national-overview/>.

20. *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (April 16, 021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/> (estimating a 661,000 case rate and 2,990 death rate as of April 2021).

Despite grievances over the tardiness of federal compassionate release reform, it is some relief that the FSA came in a timely manner, just about a year before the arrival of SARS-CoV-2 (the virus that causes COVID-19), allowing prisoners to directly petition for court-ordered compassionate release for the first time since 1984. The number of federal compassionate release motions filed across the country surged drastically during the pandemic. From April 2020 to June 2021, 20,447 motions were filed (an average of 1,363 per month), compared to a total of 118 pre-pandemic motions from January 2020 to March 2020 (an average of 39 per month), more than a 30-fold increase in monthly average.²¹ (State responses, in comparison, leaned towards executive and legislative action, over which prisoners themselves have no say.²²).

To see the importance of prisoner-petitioned compassionate release put in place by FSA, it should be noted that *any* prisoner-initiated attempt to directly petition a federal court to grant early release, on the basis of “extraordinary and compelling reasons”²³ such as medical conditions, would have been both theoretically and practically impossible before the passage of the FSA.²⁴ Five amendments to 18 U.S.C. § 3582 all left the issue of initiation untouched.²⁵ Among the pertinent and significant amendments, the Violent Crime Control and Law Enforcement Act of 1994 added that in addition to “extraordinary and compelling reasons,” courts granting motions for compassionate release must find that

21. U.S. SENTENCING COMMISSION, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf>.

22. *The Most Significant Criminal Justice Policy Changes from The Covid-19 Pandemic*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last visited Jan. 5, 2022).

23. 18 U.S.C. § 3582(c)(1)(A)(i).

24. Going all the way back to the time before the SRA, Rule 35(b) of the Federal Rules of Criminal Procedure provided that “[t]he court may reduce a sentence within 120 days after it is imposed,” which theoretically allowed the court to adjust sentences on medical grounds, but there scarcely was any recorded instance of that relief actually being granted. See Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is The Cure Worse Than The Disease?*, 3 WIDENER J. PUB. L. 799, 815 & n.59 (1994) [hereinafter *Too Little, Too Late*] (suggesting *United States v. Niemiec*, 689 F.2d 688, 689 (7th Cir. 1982) as the only recorded instance of Rule 35(b) motion granted for medical purpose). The SRA both amended Rule 35(b) to allow only reduction of sentences for substantial assistance to law enforcement, Sentencing Reform Act of 1984 § 215(b), Fed. R. Crim. P. 35(b) (1984), and repealed 18 U.S.C. § 4205(g) which provided that “[a]t any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served.” *Id.* § 218(a)(5), 18 U.S.C. § 4205(g) (1984). It instead put in their place 18 U.S.C. § 3582 provisions, which allows courts to “reduce the term of imprisonment . . . if it finds that extraordinary and compelling reasons warrant such a reduction,” but still only “upon motion of the Director of the Bureau of Prisons.” *Id.* § 212(a)(2), 18 U.S.C. § 3582 (1984).

25. See *supra* note 9.

“the defendant is at least 70 years of age, has served at least 30 years in prison . . . and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger,”²⁶ raising the bar for compassionate release. The Economic Espionage Act of 1996 reversed the change (and a little more) by allowing courts to grant compassionate release upon satisfaction of *either* condition.²⁷ Finally, the FSA added in 2018 that the court may grant compassionate release “upon motion of the defendant after the defendant has fully exhausted all administrative rights.”²⁸

But PICO compassionate release existed in state law long before the FSA. As a backdrop to the federal inquiry, Part II describes the historical arc of state compassionate release and explores how it might have influenced Congress to finally implement the long-awaited federal reform allowing prisoners to petition for their own release—although the FSA reform still needs closure, as Part III argues.

PART II: STATE ORIGINS OF PRISONER-INITIATED & COURT-ORDERED COMPASSIONATE RELEASE: NEW JERSEY’S POTENTIAL INFLUENCE ON FEDERAL COMPASSIONATE RELEASE REFORM

Before looking into the future, it is worth looking back to the past to see why the FSA compassionate release reform is important and should have arrived earlier—history of compassionate release in states (and conversations in legal communities) show the critical significance of having PICO compassionate release as part of a criminal justice system. There are two reasons to focus on the evolution of PICO compassionate release in particular.

First, identifying specific characteristics to look for in history is methodologically necessary for a manageable historical analysis. That there are 51 sets of state criminal justice systems (including D.C.) necessarily means that there is a range of different measures dealing with compassionate release or other forms of sentencing reduction. If the goal were merely to look for something resembling an early release in history, we might have to at least trace back to Edward III’s general pardon in 1377.²⁹ Nor would it be helpful to explore the etymology of the phrase “compassionate release.” For our purposes, we must identify specific features of compassionate release systems in history and trace their evolution.

26. Violent Crime Control and Law Enforcement Act of 1994 § 70002, 18 U.S.C. § 3582 (1994).

27. Economic Espionage Act of 1996 § 604(b)(3), 18 U.S.C. § 3582 (1996).

28. First Step Act of 2018 § 603(b), 18 U.S.C. § 3582.

29. *See, e.g.*, HELEN LACEY, *THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND* 115 (2009).

Second, and more importantly, the roles of initiators and decision-makers are doubtlessly important features that control the fate of prisoners seeking early release. Transparency, impartiality, efficiency, and other factors could depend critically on who can start the process and who gets to make the call—does the executive branch get to do both, or is the power distributed? Exploring the contrasts between court-ordered release, administrative release, prisoner petitioning, and gatekeeper petitioning will not only help us examine the historical arc of PICO compassionate release, but also see why it matters—better institutional competence, motivation, and transparency, among other things.

A. Court-ordered Release vs. Administrative Release

In 1994, the American Bar Association's (ABA) Corrections and Sentencing Committee conducted a survey of the “compassionate release statutes, procedures, and programs in the fifty states and the federal system.”³⁰ The breadth of state practice in sentence reduction can be seen by their definition of “compassionate release”:

[T]he term ‘compassionate release’ will be used to identify all forms of release available to terminally ill prisoners . . . Terminology used by the various states includes, but is not limited to, medical parole, medical furlough, executive clemency, medical pardon, medical reprieve, medical release, parole for humanitarian reasons, parole of dying prisoners, community furlough, and compassionate leave.³¹

This broad range of sentence reduction practices can be grouped into two general categories: court-ordered release and administrative release. The former simply consists of judicial reduction of sentences like 18 U.S.C. § 3582, while the latter includes executive clemency, parole, or temporary releases shortly before death. Two states had court-ordered release mechanisms, and some other states have administrative release mechanisms: eight states had executive commutation or clemency, six states had temporary release mechanisms (for example, Arizona’s Department of Corrections may utilize temporary administrative release to “authorize the release of terminally ill prisoners so that they can die at

30. *Too Little, Too Late*, *supra* note 24, at 801 (“This Article reports the results of a survey conducted at the request of the American Bar Association's Corrections and Sentencing Committee.”).

31. *Id.* at 801 n.10. For a recent and relatively comprehensive survey of state compassionate release taxonomy, see MARY PRICE, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES, FAMM 27 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [hereinafter EVERYWHERE AND NOWHERE].

home”), and so on.³²

Institutional competence is one reason to favor court-ordered release over administrative ones. Congress noted the difference between these two mechanisms, their reasoning straightforwardly couched in terms of separation of powers: “[t]he approach taken keeps the sentencing power in the judiciary where it belongs.”³³ It is not hard to speculate on their premise: given that compassionate release involves the application of statute and precedents defining “extraordinary and compelling,” the judiciary is naturally more competent in the task.³⁴

On the other hand, for prisoners seeking administrative release, institutional motivation might be a bigger problem than institutional competence. Even though the pre-FSA federal compassionate release is formally a court-ordered system, the Bureau of Prisons (BOP) was the only actor that could petition, and it therefore dominated the compassionate release process. Commentators of the federal system have suggested various political factors that might explain the hesitancy of the executive branch in making release decisions, shedding light on similar concerns present in state administrative release procedures — “fear that it will be blamed for release decisions that later prove to have been mistaken [because] terminally ill inmates are still at risk of reoffending [or] the adverse public reaction to word of their release . . . The BOP may also believe that the projected cost savings are ephemeral.”³⁵ Evidence of administrative hesitancy might be reflected in state practices such as in New Jersey, where their medical parole — administered by a parole board and separate from their court-ordered release³⁶ — was granted no more than twice a year from 2010 to 2017;³⁷ or in Wisconsin, whose Earned Release Review Commission overseeing compassionate release petitions granted only eight releases out of fifty-five petitions between October 1, 2009, and July 19, 2011.³⁸

32. *Too Little, Too Late*, *supra* note 24, at 820–26.

33. See Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 102 (2019).

34. There are strong arguments that the SRA failed to achieve this goal and still left the decision to the Bureau of Prisons. See *id.* at 103.

35. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 911–12 (2019).

36. See *infra* Part IIB; see also Model Penal Code: Sentencing § 305.7 Reporters' Note c. (Am. L. Inst., Proposed Final Draft 2017).

37. EVERYWHERE AND NOWHERE, *supra* note 31, at 13. For comparison, New Jersey's executive order at the beginning of the COVID-19 pandemic released and approved home confinement for nearly 1,000 prisoners by the end of May 2020, see *In re Request to Modify Prison Sentences*, 231 A.3d 667, 673 (N.J. 2020).

38. Nicole M. Murphy, *Dying to be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1708–11 (2012).

B. Prisoner Petitioning vs. Gatekeeper Petitioning

The comparison of court-ordered release and administrative release allows us to significantly narrow our scope in search of state influences to federal compassionate release: we can eliminate forty-eight states (and D.C.) with only administrative release procedures, or no compassionate release procedures of a similar nature, in 1994 when the ABA conducted the compassionate release survey.³⁹ Among the two states in ABA’s 1994 survey that did have court-ordered release procedures — California and New Jersey — only the latter allows direct petition by the prisoners themselves: “In California, the director of the DOC can recommend at any time that the sentencing court issue a ‘recall of an inmate’s commitment’ for a terminally ill inmate,” whereas “[i]n New Jersey, the prisoner himself can initiate a motion for a change of sentence. This is particularly attractive because the prisoner need not rely on corrections officials to identify him as terminally ill and to initiate proceedings for his release.”⁴⁰ This proved critical years later in the COVID-19 pandemic: while the Supreme Court of New Jersey in *Matter of Request to Modify Prison Sentences* rejected the Office of the Public Defender and ACLU’s arguments for a “broad-based judicial furlough process,”⁴¹ it nevertheless recognized that New Jersey Rules of Court, N.J. Ct. R. 3:21-10(b)(2), “gives all inmates an opportunity to seek direct relief in court” without having to exhaust administrative remedies promulgated by executive order,⁴² and further directed the New Jersey court system to “resolve[] [3:21-10(b)(2) motions] in an expedited manner [, including] an expedited briefing schedule for such motions, a return date within five days of filing, and a decision within the next three days.”⁴³ For important reasons, New Jersey made a wise policy choice in terms of having no gatekeeper for compassionate release.

Even the DOJ saw administrative issues with having a BOP

39. Iowa seems to have neither a compassionate release statute nor a comparable regulation, according to a recent survey in 2018. See EVERYWHERE AND NOWHERE, *supra* note 31, at 12.

40. *Too Little, Too Late*, *supra* note 24, at 820–22 & n.83 (citing California Code, and comparing it to New Jersey Court Rule that says “[a] motion may be filed and an order may be entered at any time amending a custodial sentence to permit the release of a defendant because of illness or infirmity.”). The distinction remains today, compare CAL. PENAL CODE § 1170(e) (West 2022) (“[T]he secretary may recommend to the court that the prisoner’s sentence be recalled . . . The court shall have the discretion to resentence or recall if the court finds . . . The prisoner is terminally ill.”), with N.J. Ct. R. 3:21-10(b)(2) (2022) (“A motion may be filed and an order may be entered at any time . . . amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant.”).

41. *Matter of Request to Modify Prison Sentences*, 231 A.3d 667, 678 (N.J. 2020).

42. *Id.* at 679–80.

43. *Id.*

petition for prisoners' compassionate release. In a 2013 report by the DOJ Office of the Inspector General, they reached the conclusions that, *inter alia*, "[t]he BOP has no timeliness standards . . . [or if so does not] consider the special circumstances of medical compassionate release requests . . . does not have formal procedures to inform inmates about the compassionate release program . . . [and] does not have a system to [keep consistent records]."⁴⁴ The reason is clear: whenever an administrative body is assigned to gatekeep, they are allowed discretion in initiating petitions.⁴⁵ And with discretion comes a lack of accountability over inaction.

The American Law Institute, in drafting the Model Penal Code: Sentencing, agreed with this reasoning, stating that gatekeeper petitioning would result in "only a trickle of recommendations each year . . . the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled [upon],"⁴⁶ thus endorsing New Jersey's practice of having no gatekeeper in compassionate release petitions.⁴⁷ In deliberation, the ALI also considered the American Bar Association's expressed hesitation in 2009 about the formulation of a gatekeeping authority.⁴⁸

While arguments about influence and scaling can hardly be conclusive, it can be argued that New Jersey's foresighted PICO compassionate release statute influenced other states to establish court-ordered release systems at minimum, and stood as an example for ALI to recommend prisoner petitioning in Model Penal Code: Sentencing § 305.7.⁴⁹ It is also plausible to argue that the proposed final draft of Model Penal Code: Sentencing, approved in a little more than a year

44. U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 27–34 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf>.

45. *See, e.g., Too Little, Too Late, supra* note 24, at 817 ("The discretion over whether to use the federal time requirements for parole eligibility in 18 U.S.C. § 4205(g) or § 3582(c)(1) lies exclusively with the Bureau, and judicial review of Bureau inaction is precluded.").

46. Model Penal Code: Sentencing § 305.7 Reporters' Note c. (Am. L. Inst., Proposed Final Draft 2017) (internal citations omitted).

47. *Id.*

48. *Id.* (citing ABA COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, SENTENCE REDUCTION MECHANISMS IN A DETERMINATE SENTENCING SYSTEM: REPORT OF THE SECOND LOOK ROUNDTABLE 28 (2009)).

49. Model Penal Code: Sentencing § 305.7(1)–(2) (Am. L. Inst., Proposed Final Draft 2017) ("An offender under any sentence of imprisonment shall be eligible for *judicial modification* of sentence in [certain] circumstances . . . The department of corrections shall notify prisoners of their rights . . . and shall provide prisoners with adequate assistance for the *preparation of applications.*" (emphasis added)).

before the introduction and passage of the FSA,⁵⁰ influenced directly or indirectly the arc of federal compassionate release reform.

PART III. DEPARTMENT OF JUSTICE’S OPPOSITION AND THE UNFINISHED
FEDERAL COMPASSIONATE RELEASE REFORM: WHY THE DOJ’S
PRACTICE MUST CHANGE TO ADAPT TO THE GOAL OF COMPASSIONATE
DECARCERATION

Part II shows what a long way Congress has come to finally implement the PICO compassionate release system, where prisoners can initiate their early release before the courts. Having reviewed the history, this Part now looks into the future, because compassionate release reform in the federal criminal justice system is certainly unfinished business. There are a number of lingering substantive questions: Are the eligibility requirements too strict or vague? Are there contradictory guidelines? Should there be exceptions to the extent that there are categorical exclusions?⁵¹ But substantive questions aside, the procedural arc of reform still needs closure. The DOJ's practice of opposing compassionate release motions also needs to change; compassionate release reform means little to prisoners facing compelling threats if the government keeps vehemently opposing their release.

The District of Columbia’s PICO compassionate release statute is an effective entry point for an inquiry into the DOJ’s practice of opposition. Other than general prosecuting power in the District,⁵² DOJ is also authorized to bring or oppose compassionate release petitions in D.C.⁵³ D.C.’s current compassionate release statute, preceded by the FSA, was explicitly “modeled after [the] federal [system],”⁵⁴ and aimed to “align the [District’s] use of compassionate release with the federal First Step Act of 2018.”⁵⁵

While an analysis of federal data and cases on compassionate release will be more direct in the study of DOJ’s compassionate release practices, there are at least two advantages to studying D.C. instead. First,

50. *Model Penal Code: Sentencing Approved*, AM. L. INST. (May 24, 2017), <https://www.ali.org/news/articles/model-penal-code-sentencing-approved/>.

51. EVERYWHERE AND NOWHERE, *supra* note 31, at 13.

52. D.C. Code § 23-101(c).

53. D.C. Code § 24-403.04(b) (“Motions brought pursuant to this section may be brought by the United States Attorney's Office for the District of Columbia”); *see also* Bailey v. United States, 251 A.3d 724, 728 (D.C. 2021) (the United States government objected to the defendant’s compassionate release motion).

54. *Bailey*, 251 A.3d at 729 & n.3 (quoting *COVID-19 Response Supplemental Emergency Amendment Act of 2020: Hearing on B23-733*, D.C. Council 27th Legis. Meeting (Apr. 7, 2020) (statement of Councilmember Charles Allen)).

55. D.C. Res. 23-399, COVID-19 Response Supplemental Emergency Declaration Resolution of 2020, § 2(f) (D.C. 2020).

D.C. Council displayed clear legislative intent when passing the compassionate release statute. While there was limited floor discussion on the FSA’s impact on compassionate release,⁵⁶ the timing, title, and accompanying resolution of the D.C. Council all made clear that the compassionate release amendments were intended to “protect health and safety of individuals who are in the criminal justice system” considering the “imminent threat to the health, safety, and welfare . . . posed by the spread of COVID-19.”⁵⁷ The first emergency legislation containing the compassionate release provision, the COVID-19 Response Supplemental Emergency Amendment Act of 2020, went into effect on April 10, 2020,⁵⁸ roughly a month after COVID-19 forced the mayor to declare a public emergency.⁵⁹ The D.C. Council continued to pass a series of emergency legislation to extend the provision,⁶⁰ and finally passed the Omnibus Public Safety and Justice Amendment Act of 2020 in January 2021 to finalize the changes.⁶¹ The clear purpose displayed in the legislative process helps evaluate whether DOJ’s compassionate release practice is faithful to the statute’s spirit.

Second, there are many fewer cases in D.C. to comb through, both because the compassionate release provisions are enacted so recently in response to the pandemic, and because we only have one court system to review, instead of the 94 district courts and 13 circuit courts in the federal system.⁶² Though there is aggregate data that shows that a total of 3,608 grants of compassionate release had been issued among 20,565 petitions from January 2020 to June 2021,⁶³ there is no readily accessible data on DOJ opposition of federal compassionate release motions, and it would

56. *See generally* 164 Cong. Rec. S7753–81 (daily ed. Dec 18, 2018) and 164 Cong. Rec. H10346–66 (daily ed. Dec 20, 2018) (debating in each House the legislative vehicle for First Step Act 2018 but containing only one explicit mention of “compassionate release”).

57. D.C. Res. 23-399, COVID-19 Response Supplemental Emergency Declaration Resolution of 2020, § 2(f) (D.C. 2020).

58. COVID-19 Response Supplemental Emergency Amendment Act of 2020, D.C. Act 23-286 § 305(b).

59. D.C. Res. 23-399, COVID-19 Response Supplemental Emergency Declaration Resolution of 2020, § 2(a) (D.C. 2020).

60. *See* Coronavirus Support Emergency Amendment Act of 2020, D.C. Act 23-326 § 706(b)(2); Coronavirus Support Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-328 § 706(b)(2); Coronavirus Support Temporary Amendment Act of 2020, D.C. Act 23-334 § 706(b)(2); Coronavirus Support Emergency Amendment Act of 2021, D.C. Act 24-30, § 706(b)(2).

61. Omnibus Public Safety and Justice Amendment Act of 2020, D.C. Act 23-568 § 1203(b).

62. U.S. DEP’T OF JUST., INTRODUCTION TO THE FEDERAL COURT SYSTEM (2021), <https://www.justice.gov/usao/justice-101/federal-courts>.

63. U.S. SENTENCING COMMISSION, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf>.

take tremendous effort to review all of these cases in different jurisdictions.

This Essay is not intended to be a quantitative study, but numbers do give a helpful picture. Although there is no way to find *all* grants of compassionate release in the D.C. Superior Court with certainty, personal research turned out 101 grants of compassionate release in the D.C. Superior Court up to March 2021,⁶⁴ 38 of which were granted before September 14, 2020. And while one could worry that these 101 cases that happened to be found are biased (or cherry-picked) such that DOJ's opposition looks frequent, an official tally shows that there was indeed a total of 38 grants by September 14, 2020,⁶⁵ which ensures that at least these 38 do not form a biased sample. Of these 38 cases in which the court ultimately found that the defendants are *both* not dangerous *and* presents "extraordinary and compelling" circumstances,⁶⁶ the DOJ opposed at least 34 of them—about 90% of all motions.⁶⁷ Similarly, for the cases after September 14, while there is no official tally, among the 63 listed, the DOJ opposed at least 52 of them, about 83% of all motions.⁶⁸ The question should not be "does it matter if these motions ended up being granted anyway?", but whether more motions could and should have been granted if DOJ's practice were different, and what perspective of compassionate release underlies DOJ's practice of near-universal opposition to the motions.

One plausible answer is the adherence to traditional sentencing goals such as the need for general deterrence or restitution for the victim. One of the rare published opinions in the D.C. Court of Appeals on compassionate release, *Bailey v. United States*,⁶⁹ reflects this tension. Defending the trial court's denial of compassionate release for the defendant, the DOJ argued that statutory language asking the court to consider 18 U.S.C. §§ 3142(g) and 3553(a) sentencing factors excludes none of the factors from the calculus, and that materials such as victim impact statements should be a valid consideration in disposing of the motion.⁷⁰ The high court disagreed:

64. See *infra* Appendix for the complete list and methodology. Credit to James Zeigler for the idea and for providing the list of cases where he knows compassionate release was granted.

65 Compare D.C. CORR. INFO. COUNCIL, THEMATIC REPORT: THE IMPLEMENTATION OF DC CODE 24-403.04 MOTIONS FOR COMPASSIONATE RELEASE AS OF SEPTEMBER 14, 2020 (2020) ("As of August 18, 2020 . . . twenty-nine (29) persons had been granted compassionate release as a result of the new legislation. As of September 14th . . . thirty-eight (38) persons have been granted compassionate release.") with *infra* Appendix.

66. D.C. Code § 24-403.04(a).

67. See *infra* Appendix.

68. See *id.*

69. 251 A.3d 724, 728 (D.C. 2021).

70. *Id.* at 731.

[The sentencing] factors are relevant to compassionate release decisions only insofar as they inform the determination of a prisoner's present or future dangerousness . . . examples [of irrelevant factors] include the need for general deterrence in § 3553(a)(2)(B), and the need to provide restitution to any victims under § 3553(a)(7) . . . [T]here is simply no room in the statutory scheme for concerns about general deterrence and victim restitution to trump [determinations of compelling circumstances and non-dangerousness].⁷¹

The ultimate goal of compassionate release should be to address mass incarceration in America with compassion.⁷² While we have an adversarial legal system, that does not necessarily imply it is in the best interest of the people for the DOJ to habitually oppose every motion—particularly if their objections miss the point of compassionate release.

IV. CONCLUSION

The federal compassionate release system had taken so many years to arrive at the PICO system right before the pandemic struck. It should have come earlier, given the various merits of allowing prisoners held by the executive branch to petition an independent branch of government for their release: institutional competence, motivation, and transparency etc. But here it is, fortunately put in place before the pandemic by the FSA.

Going forward, criminal justice practitioners should remember that compassionate release reform means little to prisoners facing compelling threats if the government keeps vehemently and arbitrarily opposing their release. The DOJ must understand compassionate release as compassionate decarceration and change its practice of habitual opposition.

71. *Id.* at 732.

72. *See, e.g.*, ACLU AND THE LEADERSHIP CONF. ON CIV. AND HUM. RIGHTS, RE: THE ACLU AND THE LEADERSHIP CONFERENCE SUPPORT S.756, AND URGE YOU TO VOTE YES ON CLOTURE AND NO ON ALL AMENDMENTS (2018), <https://civilrights.org/resource/the-aclu-and-the-leadership-conference-support-s-756-and-urge-senators-to-vote-yes-on-cloture-and-no-on-all-amendments/> (“Our country has over 20 percent of the world’s incarcerated individuals, despite having less than five percent of the world’s population. In 2015, the U.S. Justice Department’s Bureau of Justice Statistics estimated that 6.7 million persons were involved in the adult correctional systems in this country and almost 2.2 million were in prison or jail. More than 180,000 of these people are in federal prison.”); *United States v. Santamaria*, 516 F. Supp. 3d 832, 834 (S.D. Iowa 2021) (“The First Step Act of 2018 amended numerous provisions of the U.S. Code to promote rehabilitation of prisoners and unwind decades of mass incarceration.”).

APPENDIX: D.C. SUPERIOR COURT CASES IN WHICH COMPASSIONATE
RELEASE HAS BEEN GRANTED UP TO MARCH 2021⁷³

Defendant	Judge	Outcome	Date of order	Case Number	DOJ response
Alfaro, David	Ryan	Granted	5/7/2020	2018 CF2 015604	Opposed
Wilson, Eddie	Beck	Granted	5/13/2020	1975 FEL 097258	Unclear
Hopson, Tyrone	Edelman	Granted	5/14/2020	2018 CF3 015480	Opposed
Brown, Martin	Kravitz	Granted	5/21/2020	2007 CF1 007404	Opposed
Montgomery, Albert	Fisher	Granted	5/29/2020	2015 CF2 011794	Opposed
Wheeler, Charles	Smith	Granted	6/2/2020	2019 CF3 011279	Opposed
Hughes, William	Fisher	Granted	6/3/2020	1982 FEL 005725	Unclear
McDougle, Jimmie	McKenna	Granted	6/4/2020	2015 CF2 003661	Opposed
Edelen, Kerry	Okun	Granted	6/5/2020	1986 FEL 008215	Opposed
Dent, Robert	Fisher	Granted	6/9/2020	1983 FEL 000855	Opposed
Dunn, Thomas	Unclear	Granted	6/15/2020	1999 FEL 001751	Opposed

73. This list contains 101 cases up to March 2021 in which motions for compassionate release were granted or granted in part by the D.C. Superior Court, verified using *eAccess*, D.C. SUPERIOR COURT, <https://eaccess.dccourts.gov/eaccess> (search using case number). Because the database does not contain all filings and orders some information is unclear. This is true particularly for “DOJ response,”—that list includes “Opposed” or “Not Opposed” only when their stance is clear on the record. There is official data to confirm that this list contains all grants before September 14, 2020, *see* D.C. CORR. INFO. COUNCIL, THEMATIC REPORT: THE IMPLEMENTATION OF DC CODE 24-403.04 MOTIONS FOR COMPASSIONATE RELEASE AS OF SEPTEMBER 14, 2020 (2020) (“As of August 18, 2020 . . . twenty-nine (29) persons had been granted compassionate release as a result of the new legislation. As of September 14th . . . thirty-eight (38) persons have been granted compassionate release.”). No such official tally exists for cases after September 14, and thus the list of cases after that date can be viewed merely as a sample of grants.

Bartrum, Harold	Edelman	Granted	6/16/2020	1990 FEL 002059	Opposed
Williams, James	Beck	Granted	6/25/2020	1992 FEL 005153	Opposed
Workman, Quintin	Beck	Granted	6/29/2020	2015 CF2 014787	Opposed
Coleman-Bey, Earl	Morin	Granted	6/30/2020	1974 FEL 089779	Opposed
Smith, Gregory	Okun	Granted	7/1/2020	1985 FEL 001951	Opposed
Wilcox, Anthony	Edelman	Granted	7/1/2020	2018 CF1 008055	Opposed
Adams, John	Josey Herring	Granted	7/7/2020	1979 FEL 006236	Opposed
Montgomery, Kimberly	Okun	Granted	7/7/2020	1997 FEL 001096	Opposed
Mackall, Gilbert	Edelman	Granted	7/8/2020	1993 FEL 012822	Opposed
McKinney, Elbert	O'Keefe	Granted	7/15/2020	1987 FEL 004305	Opposed
Marshall, Ronald	Edelman	Granted	7/24/2020	1987 FEL 008229	Opposed
Gray, Andre	Beck	Granted	7/29/2020	2018 CF1 014151	Opposed
Mabry III, Frank	Kravitz	Granted	7/30/2020	2009 CF3 025023	Opposed
Hill, Arnold	Becker	Granted	8/3/2020	1987 FEL 011252	Opposed
Fortune, Delonte	Leibovitz	Granted	8/7/2020	2008 CF1 007699	Opposed
Kitt, Denon	Unclear	Granted	8/7/2020	1997 FEL 002334	Opposed
Ayers, Lee	Smith	Granted	8/13/2020	2008 CF3 020985	Opposed
Hunt, Stanley	O'Keefe	Granted	8/17/2020	1983 FEL 000679	Unclear

Austin, Romes	Josey Herring	Granted	8/19/2020	1981 FEL 002391	Opposed
Bennett, Thomasine	Lopez	Granted	8/24/2020	2017 CF1 002937	Opposed
Smith, Wendell	O'Keefe	Granted	8/25/2020	1988 FEL 008497	Unclear
Rider, David	Beck	Granted	8/26/2020	1993 FEL 000142	Opposed
Corbin, James	Salerno	Granted	9/1/2020	2012 CF3 010713	Opposed
Gordon, Lebert	Wellner	Granted	9/2/2020	1985 FEL 006524	Opposed
Surratt, James	Ryan	Granted	9/3/2020	2010 CF2 014375	Opposed
Purvis, Carl	Pittman	Granted	9/4/2020	2010 CF1 022011	Opposed
Turner, Melvin	Raffinan	Granted	9/4/2020	2016 CF3 011970	Opposed
Holley, Gertrilla	Edelman	Granted	9/15/2020	2004 FEL 006098	Opposed
Brooks, Paul	Morin	Granted	9/25/2020	1974 FEL 077607	Opposed
Davis, Edward	Morin	Granted	9/25/2020	1993 FEL 007843	Opposed
Johnson, Charles	Ryan	Granted	9/25/2020	1991 FEL 014822	Opposed
Shakur, Abu	Unclear	Granted	9/28/2020	1976 FEL 073123	Opposed
Atkins, Kevin	Wellner	Granted	10/2/2020	1996 FEL 003884	Opposed
Chapman, Albert	Josey Herring	Granted in part	10/7/2020	1994 FEL 008034	Opposed
Johnson, Victor	McKenna	Granted	10/7/2020	2016 CF3 005847	Opposed
Smith, Glen	Smith	Granted	10/7/2020	2019 CF2 016080	Opposed

Jackson, Raymond	Broderick	Granted	10/9/2020	2002 FEL 007449	Opposed
Mehalic, John	Broderick	Granted	10/9/2020	1998 FEL 005444	Opposed
Roberts, Harold	Christian	Granted	10/9/2020	1983 FEL 003954	Unclear
Dawkins, Anthony	Broderick	Granted	10/13/2020	1993 FEL 010223	Opposed
Forrest, Leonard	Brandt	Granted	10/13/2020	1996 FEL 001905	Opposed
Neal, Willie	O'Keefe	Granted	10/13/2020	1992 FEL 011146	Unclear
Pleasant, Terrence	Edelman	Granted	10/14/2020	1991 FEL 013263	Opposed
Kittrell, Rodorrio	Beck	Granted	10/16/2020	2006 CF3 024322	Opposed
Coleman, Anthony	Rigsby	Granted	10/19/2020	1993 FEL 005923	Not Opposed
Williams, David	Ryan	Granted	10/22/2020	1992 FEL 007744	Opposed
Beckwith, Loretta	Becker	Granted	10/23/2020	2015 CF1 008354	Opposed
Garvin, Daron	Beck	Granted	10/27/2020	2007 CF3 017016	Opposed
Campbell, Eugene	Ryan	Granted	10/28/2020	1976 FEL 100953	Not Opposed
Rogers, Keith	Leibovitz	Granted	10/28/2020	1991 FEL 009067	Opposed
Dunmore, James	Becker	Granted	10/29/2020	2013 CF3 001471	Opposed
Jennings, Everett	Pittman	Granted	10/30/2020	2000 FEL 004515	Opposed
Kinard, Joseph	Crowell	Granted	10/30/2020	1996 FEL 010034	Opposed
Walsh, Bruce	O'Keefe	Granted	11/2/2020	2003 FEL 003681	Opposed

Lloyd, Douglas	Okun	Granted	11/3/2020	1998 FEL 006602	Opposed
Harris, James	O'Keefe	Granted	11/12/2020	1987 FEL 001058	Opposed
Johnson, Aaron	Becker	Granted	11/12/2020	1978 FEL 002008	Unclear
Spencer, David	O'Keefe	Granted	11/13/2020	1991 FEL 006252	Opposed
Parrott, William	Nooter	Granted	11/16/2020	2005 FEL 001575	Opposed
Price, Antoine	Kravitz	Granted	11/16/2020	2005 FEL 002694	Opposed
Watson, James	Brandt	Granted	11/16/2020	1994 FEL 006065	Unclear
Beaner, Kenneth	Brandt	Granted	11/17/2020	1999 FEL 001278	Opposed
Fogle, Keith	Becker	Granted	11/18/2020	2012 CF1 020391	Opposed
Ferebee, Robert	Salerno	Granted	11/19/2020	2018 CF2 014817	Opposed
Foreman, Timothy	Kravitz	Granted	11/19/2020	2010 CF1 022597	Not Opposed
Onley, Monwell	O'Keefe	Granted	11/19/2020	2002 FEL 005490	Unclear
Strickland, Willie	Pittman	Granted	11/23/2020	1973 FEL 030427	Unclear
Ahmed, Ahmed	Crowell	Granted	12/2/2020	1999 FEL 002687	Not Opposed
Daniel, Bryant	Di Toro	Granted	12/11/2020	2015 CF3 016703	Opposed
Engram, Willie	Wellner	Granted	12/11/2020	1973 FEL 073988	Opposed
Butler, Anthony	Fisher	Granted	12/14/2020	2012 CF3 018627	Opposed
Muhammad, Dyrell	Dayson	Granted	12/15/2020	1998 FEL 007642	Opposed

Paige, Marcus	Unclear	Granted	12/15/2020	2001 FEL 005821	Opposed
Faulkner, Orlando	Okun	Granted	12/16/2020	1994 FEL 004396	Unclear
Limes, Nathaniel	Edelman	Granted	12/16/2020	2017 CF2 007184	Opposed
Wright, Calvin	Unclear	Granted	12/16/2020	1993 FEL 004154	Opposed
Givens, Soloman	Edelman	Granted	12/21/2020	2015 CF3 002268	Opposed
Wilson-Bey, Lakeeshia	Dayson	Granted	12/23/2020	2000 FEL 000504	Opposed
McGill, Antwoin	Becker	Granted	12/29/2020	1995 FEL 003297	Opposed
Byrd, Anthony	Dayson	Granted	12/31/2020	2013 CF3 007868	Opposed
Short, Maurice	Anderson	Granted	1/13/2021	2011 CF3 004605	Opposed
Evans, Joseph	Josey Herring	Granted	1/14/2021	2008 CF3 005414	Opposed
Thomas, John	Pan	Granted	1/14/2021	1991 FEL 001015	Opposed
Johnson, Raina	Okun	Granted	1/27/2021	2007 CF3 023081	Opposed
Jacobs, Charles	Dayson	Granted	1/29/2021	1999 FEL 001599	Opposed
McLean, Demetrius	Iscoe	Granted	2/2/2021	1991 FEL 003760	Opposed
Urbaez, Roberto	Smith	Granted	2/17/2021	1989 FEL 012361	Opposed
Digiovanni, Anthony	Fisher	Granted	2/18/2021	1993 FEL 006390	Opposed
Roberson, Eugene	McLean	Granted	3/9/2021	2000 FEL 005983	Opposed
Garrett, Michael	Okun	Granted	3/15/2021	1999 FEL 000516	Opposed