No. 24-1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States,

Plaintiff-Appellee,

v.

Michael Norwood,

Defendant-Appellant.

On Appeal from an Order of the
United States District Court for the District of New Jersey
Case No. 1:96-CR-00232, Judge Robert B. Kugler

PETITION FOR INITIAL HEARING EN BANC

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March 7, 2025

Rule 35(b) Statement

This appeal involves a question of exceptional importance because it implicates binding circuit precedent that directly conflicts with the United States Sentencing Commission's exercise of statutorily delegated authority. Congress expressly charged the Commission with promulgating policy statements and guidelines establishing, among other things, a framework governing compassionate release of federal prisoners. 28 U.S.C. § 994(a), (t). So, when Congress provided that district courts could consider a sentence reduction if warranted by "extraordinary and compelling reasons," 18 U.S.C. § 3582(c)(1)(A), Congress did not define that phrase. Instead, it directed the Commission to do so. 28 U.S.C. § 994(t).

The Commission did as Congress instructed. In 2023, it issued a binding policy statement clarifying that, in specified circumstances, nonretroactive changes in sentencing law may constitute an extraordinary and compelling reason for a sentence reduction. *See* U.S.S.G. § 1B1.13(b)(6).

But a panel of this Court held that the Commission lacked the authority to promulgate this policy statement. *See United States v. Rutherford*, 120 F.4th 360, 374-76 (3d Cir. 2024). *Rutherford* was wrong to invalidate the Commission's exercise of its expressly delegated authority, and only the en banc court can right that wrong. Under *Rutherford*, a nonretroactive change in sentencing law can never be an

extraordinary and compelling reason to grant compassionate release. As long as *Rutherford* remains binding, Appellant Michael Norwood's request for compassionate release is foreclosed. But if this Circuit follows the Commission's binding policy statement, a district court would have discretion to consider Norwood's request. The Court should grant en banc review and overrule *Rutherford*.

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Issue Presented

District courts can grant compassionate-release motions if there are extraordinary and compelling reasons to do so and other conditions are met. A policy statement issued by the United States Sentencing Commission provides that, in specified circumstances, nonretroactive changes in sentencing law can constitute an extraordinary and compelling reason. The issue presented is whether a panel of this Court properly invalidated this binding policy statement.

Jurisdiction

Michael Norwood appeals from the district court's May 13, 2024, final order denying his motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The district court had jurisdiction under 18 U.S.C. § 3231. Norwood timely filed his notice of appeal on May 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1291.

Statutes and Policy Statement Involved

Pertinent statutory provisions and the relevant Sentencing Commission policy statement are attached to this petition.

Statement of the Case

I. Legal background

A. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1987-2040, established the modern federal sentencing regime. Through the Act, Congress created the United States Sentencing

Commission and directed it to promulgate guidelines and policy statements governing sentencing and sentence modifications. *See* 28 U.S.C. §§ 991, 994(a)(1)-(2).

The Act's compassionate-release provision, 18 U.S.C. § 3582(c), offers defendants a path to sentence reduction. District courts may reduce a sentence if (1) "extraordinary and compelling reasons warrant such a reduction"; (2) "the factors set forth in section 3553(a)" also support a reduction; and (3) the "reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(1)(A). Originally, only the director of the Bureau of Prisons could move for a prisoner's sentence reduction. *Id.* (1984) (amended 2018).

Congress did not define "extraordinary and compelling reasons." Rather, it provided that "[t]he Commission, in promulgating general policy statements …, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). Congress imposed only two limits on the Commission's power to establish these criteria. First, rehabilitation "alone" is not extraordinary and compelling. *Id.* Second, the Commission's guidelines and policy statements must be "consistent with all pertinent provisions of any Federal statute." *Id.* § 994(a). The Commission then promulgated a policy statement, U.S.S.G § 1B1.13(b), that defined categories of "extraordinary and compelling reasons" as those based on a defendant's medical

condition, age, family circumstances, and other reasons as determined by the Bureau of Prisons. U.S.S.G. App. C, supp., amend. 799 (effective Nov. 1, 2016).

B. In 2018, Congress enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, which made two relevant changes to the statutory scheme. First, Congress amended the compassionate-release statute to authorize defendants, in addition to the Bureau of Prisons, to file compassionate-release motions. 18 U.S.C. § 3582(c)(1)(A).

Second, the First Step Act modified several harsh sentencing schemes, including, as relevant here, a "stacking provision" in 18 U.S.C. § 924(c), which imposes a mandatory-minimum sentence for certain firearm offenses. Before 2018, defendants faced a twenty-five-year mandatory-minimum sentence for a "second or subsequent" Section 924(c) firearm conviction, even when that conviction arose out of the same incident as the first conviction. *See* 18 U.S.C. § 924(c) (2006) (amended 2018); *Deal v. United States*, 508 U.S. 129, 132-33 (1993). After 2018, that twenty-five-year mandatory minimum applies only when the offender already has a prior "final" Section 924(c) conviction. Pub. L. No. 115-391, § 403(a), 132 Stat. 5221; *see United States v. Davis*, 588 U.S. 445, 450 n.1 (2019). Congress made this amendment nonretroactive, so defendants who were sentenced to the twenty-five-year mandatory minimum before 2018 were not automatically eligible for resentencing. Pub. L. 115-391, § 403, 132 Stat. 5221-22.

C. After the First Step Act's enactment, the Commission lost a quorum. 88 Fed. Reg. 28256 (May 3, 2023). As a result, the Commission could not issue a binding policy statement addressing the First Step Act amendments. *Id.* In the absence of a statement, a circuit split developed as to "when, if ever, nonretroactive changes in law may be considered as extraordinary and compelling reasons" under Section 3582(c)(1)(A). *Id.* at 28258; *see United States v. Rutherford*, 120 F.4th 360, 366 n.7 (3d Cir. 2024) (collecting cases), *petition for cert. filed*, No. 24-820. In *United States v. Andrews*, a panel of this Court held that a nonretroactive change in law cannot constitute an "extraordinary and compelling" reason. 12 F.4th 255, 260-62 (3d Cir. 2021).

In 2023, the Commission regained a quorum and "respond[ed] to [the] circuit split" by amending the governing policy statement. 88 Fed. Reg. 28258. The amended policy statement clarified that a nonretroactive change in the law, like the First Step Act's amendment to Section 924(c), can be considered in the extraordinary-and-compelling-reasons analysis. U.S.S.G. § 1B1.13(b)(6). Specifically, district courts may consider "a change in the law" when (1) "a defendant received an unusually long sentence"; (2) he "has served at least 10 years" of the sentence; (3) the intervening change in the law has "produce[d] a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed"; and (4) the court has fully considered "the defendant's individualized circumstances." *Id.*

But a panel of this Court rejected this clarification. *United States v. Rutherford*, 120 F.4th at 376, held that Section 1B1.13(b)(6) did not abrogate *Andrews* because the amended policy statement conflicts with Congress's intent when it made the First Step Act amendment nonretroactive. So, despite the Commission's express statement to the contrary, *Rutherford* concluded that a nonretroactive change in the law—like the amendment modifying Section 924(c)'s stacking provision—cannot be a consideration in "determining a prisoner's eligibility for compassionate release." *Id.*

II. Factual and procedural background

Michael Norwood was convicted of a series of offenses in January 1997, including two counts of using a firearm in furtherance of a violent crime under 18 U.S.C. § 924(c). Addendum (Add.) 1. Norwood is currently serving a sentence of 500 months (about forty-one years), including five years for the first Section 924(c) conviction and twenty years for the second. Add. 2.

Norwood filed a compassionate-release motion in November 2023, relying on Section 1B1.13(b)(6) to argue that the sentencing disparity resulting from the First Step Act's elimination of Section 924(c)'s stacking provision was an "extraordinary and compelling" circumstance under Section 3582(c)(1)(A). Add. 2-4. If sentenced today, Norwood would receive only ten years on the Section 924(c) charges—five years on each count. Add. 4.

The district court denied Norwood's motion on the ground that *Andrews* remained binding Circuit precedent, even though the Commission issued its policy statement after *Andrews* was decided. Add. 4-5. This Court stayed consideration of Norwood's appeal pending a decision in *Rutherford*. 3d Cir. Doc. 11 (June 24, 2024).

Reasons for Granting En Banc Review

United States v. Rutherford, 120 F.4th 360 (3d Cir. 2024), held that nonretroactive changes to mandatory-minimum sentences can never be an extraordinary and compelling reason giving a district court discretion to consider a sentence reduction. *Rutherford* would bind a panel in Norwood's case. But *Rutherford* conflicts with the Sentencing Commission's controlling policy statement, which the Commission issued under authority expressly delegated by Congress. Resolving this conflict is important, and this petition presents an ideal vehicle to consider the issue. The Court should grant en banc review and overrule *Rutherford*.

I. *Rutherford* should be overruled.

Rutherford directly conflicts with the Sentencing Commission's policy statement. According to *Rutherford*, the policy statement "would conflict with Congressional intent on nonretroactivity," so nonretroactive changes in sentencing law "cannot be considered" in the extraordinary-and-compelling-reasons analysis. 120 F.4th at 363, 380. Put differently,

Rutherford held that the policy statement was invalid, so declined to follow it.

The policy statement controls. The statement is binding because Congress expressly delegated to the Commission the authority to define "extraordinary and compelling reasons." *See* 28 U.S.C. § 994(t). Further, the policy statement dovetails with the statutory scheme and preserves district courts' historic discretion.

A. *Rutherford* conflicts with the Sentencing Commission's binding policy statement.

Congress delegated authority to the Commission to do exactly what it did. Congress may permissibly delegate this authority. *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989). Here, Congress instructed the Commission to develop "general policy statements regarding application of the guidelines or any other aspect of sentencing … that in the view of the Commission would further the purposes" of sentencing statutes, including the compassionate-release provision. 28 U.S.C. § 994(a)(2)(C). And Congress specified that the Commission's policy statements regarding compassionate release "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." *Id.* § 994(t).

This Congressional delegation includes the authority to resolve circuit splits. Congress "necessarily contemplated that the Commission would

periodically review the work of the courts" and resolve "conflicting judicial decisions." *Braxton v. United States*, 500 U.S. 344, 348 (1991). When circuit courts cannot agree with each other, the Commission typically gets the last word. *See id.* Thus, "the Sentencing Commission may modify the Guidelines and associated commentary in a manner that abrogates prior judicial decisions, much as Congress may amend a statute previously interpreted by the courts." *United States v. Ware*, 694 F.3d 527, 534 n.4 (3d Cir. 2012). And, as *Rutherford* acknowledged, "the Commission's policy statements are generally binding" on courts. 120 F.4th at 375. That's why the first appellate court to consider the amended policy statement recognized the importance of following it. *See United States v. Jean*, 108 F.4th 275, 288-90 (5th Cir. 2024), *petition for reh'g en banc filed*, No. 23-40463.

Congress can, of course, limit the Commission's authority, but the two limits it imposed on the Commission's authority to define "extraordinary and compelling" don't apply. First, "[r]ehabilitation of the defendant alone" can't be "extraordinary and compelling." 28 U.S.C. § 994(t). That's not relevant here. Second, the Commission's guidelines and policy statements must be "consistent with all pertinent provisions of any Federal statute." *Id.* § 994(a). As we now show, that's not a concern either.

B. The policy statement is consistent with the statutory scheme.

The Commission's definition of "extraordinary and compelling" is consistent with the ordinary meaning of the phrase. "Extraordinary and compelling" is a broad phrase, capacious enough to include nonretroactive changes in sentencing law. In 1984, when Congress passed the Sentencing Reform Act, "extraordinary" meant "going beyond what is usual" and "compelling" meant "demanding attention." Webster's Ninth New Collegiate Dictionary 268, 441 (1983). These words meant the same thing in 2018, when Congress passed the First Step Act. *See* Merriam-Webster's Dictionary of Law 89, 182 (2016). A gross sentencing disparity goes beyond what is usual, and a district court could find that some disparities demand attention.

Although "extraordinary and compelling" is a broad term, Congress knew how to limit it. *See Kimbrough v. United States*, 552 U.S. 85, 103 (2007). As discussed, Congress specified that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). If Congress could explicitly bar consideration of rehabilitation alone, it could have also barred consideration of nonretroactive changes in sentencing law. But it didn't. And that's not because Congress never considered the issue. In passing the Sentencing Reform Act of 1984, the Senate contemplated that sentence reductions may be justified by changed circumstances, such as when "the sentencing

guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment." S. Rep. No. 98-225, at 55-56 (1983).

Rutherford incorrectly found that because nonretroactive changes in sentencing law are "ordinary practice," they "cannot also be an extraordinary and compelling reason to deviate from that practice." 120 F.4th at 371 (quoting *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021)). That reasoning is flawed. Though Congress ordinarily makes sentencing-law changes nonretroactive, nonretroactive changes can be extraordinary in a specific case. Sentencing is an inherently individualized exercise, *see Concepcion v. United States*, 597 U.S. 481, 486 (2022), and what matters is whether the reason is extraordinary as it pertains to a particular criminal defendant, *see* U.S.S.G. § 1B1.13(b)(6). For example, aging is far from extraordinary, but no one doubts that the age and physical health of a particular inmate can be "extraordinary and compelling reasons" for compassionate release. *See* U.S.S.G. § 1B1.13(b)(2). As with aging, health conditions, and other circumstances long recognized as "extraordinary," a change in law can create a large sentencing disparity that provides an extraordinary reason to reduce an individual's unusually long sentence.

Nor was *Rutherford* correct that the policy statement conflicts with Congress's decision in the First Step Act to make the changes to Section 924(c)'s stacking provision nonretroactive. *See* 120 F.4th at 376. The

retroactive application of a sentencing law and an individual defendant's eligibility for compassionate release are fundamentally different. A retroactive change in law has the effect of vacating *every* defendant's sentence, granting automatic eligibility for resentencing. *See United States. v. McCoy*, 981 F.3d 271, 286-87 (4th Cir. 2020); *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022). By contrast, compassionate release turns on a discretionary, case-by-case, and factor-by-factor analysis. 18 U.S.C. § 3582(c)(1)(A); U.S.S.G. § 1B1.13; *see Ruvalcaba*, 26 F.4th at 27. And the policy statement allows district courts to consider nonretroactive changes that produce gross sentencing disparities only after full consideration of individual circumstances, and only when a particular defendant received an unusually long sentence and has served at least ten years. U.S.S.G. § 1B1.13(b)(6).

The policy statement thus furthers a central goal of both the Sentencing Reform Act of 1984 and the First Step Act: to reduce disparities in sentencing. Before 1984, "there were 'significant sentencing disparities among similarly situated offenders' in the actual length of time prisoners served." *Rutherford*, 120 F.4th at 363 (quoting *Peugh v. United States*, 569 U.S. 530, 535 (2013)). Congress created the Commission to "establish sentencing policies and practices" that "provide certainty and fairness" by "avoiding unwarranted sentencing discrepancies." 28 U.S.C. § 991(b)(1); *see Rutherford*, 120 F.4th at 363. Similarly, Congress created compassionate release as a "safety valve" for

individual circumstances when "it would be inequitable to continue … confinement." S. Rep. No. 98-225, at 55-56, 121 (1983). The First Step Act aimed to correct disparities in sentencing by amending Section 924(c), in particular, because the previous stacking regime was too "harsh." *United States v. Mitchell*, 38 F.4th 382, 387 (3d Cir. 2022). Consistent with these goals, the policy statement allows district courts to reduce disparities by modifying individual sentences that are viewed today as too harsh.

C. The policy statement preserves district courts' historic discretion.

Rutherford categorically bars district courts from considering nonretroactive changes in law that create individual sentence disparities. 120 F.4th at 380. It thus curtails district courts' historic discretion.

In ruling on motions for compassionate release, district courts have broad discretion to consider all potentially relevant information, including "intervening changes of law." *Concepcion*, 597 U.S. at 490-93, 500. This discretion "dates back to before the founding." *Id.* at 491.

Only the Constitution or an express limitation from Congress can limit this discretion. *Concepcion*, 597 U.S. at 491. And "Congress is not shy about placing such limits where it deems them appropriate." *Id.* at 494. So, courts may not infer limits on sentencing discretion from congressional silence. *See Kimbrough*, 552 U.S. at 103.

No express limitation from Congress applies here. Rather, Congress has emphasized the need to preserve district courts' "flexibility" in

sentencing. 28 U.S.C. § 991(b)(1)(B). Congress has said nothing about—let alone created an express limitation on—whether courts can consider a nonretroactive change in law that creates an individual sentence disparity. It would be wrong to read in that limitation here. *See Kimbrough*, 552 U.S. at 103.

II. The issue presented is important, and this case is an ideal vehicle for considering it.

Importance. *Rutherford* invalidated Section 1B1.13(b)(6) of the Sentencing Commission's policy statement. As discussed (at 2), Congress expressly required the Commission to promulgate policy statements like this one. 28 U.S.C. § 994(a), (t). By invalidating part of the policy statement*, Rutherford* usurped a function delegated to the Commission by Congress.

Rutherford's implications are far-reaching. Motions based on nonretroactive changes in the law under Section 1B1.13(b)(6) are the third-largest category of granted sentence-reduction motions nationwide.[1] Defendants regularly seek sentence reductions in this Circuit based, in part, on nonretroactive changes of law.[2] But this relief

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[1] U.S. Sent'g Comm'n, Compassionate Release Data Report: Preliminary Fiscal Year 2024 Cumulative Data Through 4th Quarter, at tbl.10 (Oct. 2024).

[2] *See, e.g.*, *United States v. Carter*, 2024 WL 5339852 (3d Cir. Dec. 2, 2024), *petition for cert. filed*; *United States v. McDaniels*, 2025 WL 19007 (W.D. Pa. Jan. 2, 2025); *United States v. Wilson*, 2024 WL 4793713 (E.D.

is unavailable because *Rutherford* entirely forecloses motions for compassionate release under 1B1.13(b)(6).

For each of these individuals, the stakes are high. Each is serving an unusually long sentence that he would not receive today. For example, Norwood was sentenced to the mandatory minimum of twenty-five years on two Section 924(c) counts. If he received the mandatory minimum today, he would be sentenced to ten years on these two counts and might already be home.

National uniformity. *Rutherford* also undermines Congress's and the Commission's goal of national uniformity by rendering the policy statement binding in some geographic regions but not others. As shown (at 11), Congress expressly directed the Commission to revise its guidelines to avoid unwarranted sentencing disparities, including geographic disparities. *See Kimbrough v. United States*, 552 U.S. 85, 108 (2007); 28 U.S.C. § 991(b)(1). This means two things: Congress intended national uniformity, and it's the Commission's job to ensure that uniformity.

Pa. Nov. 14, 2024); *United States v. Frazier*, 2024 WL 1285931 (W.D. Pa. Mar. 26, 2024); *United States v. Ali*, 738 F. Supp. 3d 584 (E.D. Pa. 2024); *United States v. Berry*, 2024 WL 3927260 (D.N.J. Aug. 23, 2024); *United States v. Bailey*, 2025 WL 45687 (D.N.J. Jan. 8, 2025); *United States v. Shore*, 2023 WL 7285144 (E.D. Pa. Nov. 2, 2023); *United States v. Resto*, 2024 WL 5249246 (D.N.J. Dec. 30, 2024); *United States v. Johnson*, 2024 WL 665179 (E.D. Pa. Feb. 16, 2024); *United States v. Johnson*, 2024 WL 964710 (W.D. Pa. Mar. 5, 2024).

So, when a circuit split "means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced," it is the Commission's job to step in. *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari). That is exactly what happened here. A circuit split arose on nonretroactive changes of law, based in part on the absence of a governing policy statement.[3] The Commission's policy statement then resolved the split. 88 Fed. Reg. 28258. That should have ended the issue.

The United States previously recognized that the Commission was the proper body to step in. The Justice Department successfully opposed petitions for certiorari seeking to resolve the split prior to the issuance of the policy statement by arguing the Commission could "promulgate a new policy statement, binding on district courts," that would "deprive" a Supreme Court decision "of any practical significance." Brief for the

[3] *See United States v. Jenkins*, 50 F.4th 1185, 1214 (D.C. Cir. 2022) (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) ("This case should never have come before us. Had the Sentencing Commission not been left without a quorum for years, it would by now have published a policy statement providing guidance on the relevant questions."); *see also United States v. McCall*, 56 F.4th 1048, 1054 & n.3 (6th Cir. 2022) (noting the absence of an applicable policy statement); *United States v. Crandall*, 25 F.4th 582, 584-85 (8th Cir. 2022) (same); *United States v. Chen*, 48 F.4th 1092, 1095 (9th Cir. 2022) (same); *United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022) (same); *United States v. McCoy*, 981 F.3d 271, 275 (4th Cir. 2020) (same).

United States in Opposition at 18, *Jarvis v. United States*, 2021 WL 5864543 (No. 21-568) (U.S. Dec. 8, 2021).[4] Elsewhere, the United States has continued to maintain that Section 1B1.13(b)'s definition of extraordinary and compelling reasons binds district courts. Brief for United States in Opposition at 18-19, *Fernandez v. United States*, No. 24-556 (U.S. Feb. 2025).

Congress, the Supreme Court, and the United States have all consistently recognized the Commission's function of ensuring national uniformity. *Rutherford* did not. The en banc court should correct that oversight.

Ideal vehicle. This case presents an ideal vehicle for initial en banc hearing because the district court denied Norwood's compassionate-release motion only because this Court's "binding precedent instructs that a defendant's unusually long sentence is not an adequate basis for compassionate release." Add. 5 (quoting *United States v. Carter*, 711 F. Supp. 3d 428, 437-38 (E.D. Pa. 2024)).

A grant of initial en banc review would be outcome determinative. If this Court affirms, Norwood's case would be at its end. If this Court

[4] *See also* Memorandum for the United States in Opposition at 2, *Watford v. United States*, 2021 WL 5983234 (No. 21-551) (U.S. Dec. 15, 2021); Memorandum for the United States in Opposition at 2, *Williams v. United States*, 2022 WL 217947 (No. 21-767) (U.S. Jan. 24, 2022); Memorandum for the United States in Opposition at 2, *Thacker v. United States*, 2022 WL 467984 (No. 21-877) (U.S. Feb. 14, 2022).

overrules *Rutherford*, as we urge, his case would be remanded for further consideration of the compassionate-release factors. No antecedent issue could prevent the en banc court from reaching the issue presented. Moreover, because *Rutherford* would be binding on a panel of this Court, a panel decision before en banc review would serve no purpose. Initial en banc review is warranted.

Conclusion

The petition for initial hearing en banc should be granted.

Respectfully submitted,

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March 7, 2025

Certificate of Compliance

1. I certify that this document complies with Federal Rule of Appellate Procedure 32(g)'s type-volume limitations. In compliance with Rule 35(b)(2), it contains 3,898 words, excluding the parts exempted by Rule 32(f) and Circuit Rule 32(e)(1), and it has been prepared in proportionally spaced typeface using Century Schoolbook, 14-point, in Microsoft Word 2019.

2. I certify that, on March 7, 2025, this brief was filed via CM/ECF. All participants in the case are registered CM/ECF users and will be served electronically via that system with the public copy of this brief. The sealed copy of the brief was served on participants via email. Seven paper copies of this brief will also be filed with the Clerk of this Court.

3. In accordance with Local Rule 28.3(d), I certify that I am a member of the bar of the Third Circuit in good standing.

4. In accordance with Local Rule 31.1(c), I certify that (i) this brief has been scanned for viruses using McAfee LiveSafe and is free of viruses; and (ii) when paper copies are required by this Court, the paper copies will be identical to the electronic version of the brief filed via CM/ECF.

/s/ Madeline Meth
Madeline Meth

Counsel for Defendant-Appellant
Michael Norwood

Addendum

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

UNITED STATES,	:	
v.	:	Crim. No. 96-232 (RBK)
MICHAEL NORWOOD,	:	**OPINION**
Defendant.	:	

KUGLER, United States District Judge:

THIS MATTER comes before the Court upon *pro se* Defendant Michael Norwood's Motion for Reduction of Sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) (the "Compassionate Release Motion" or "Mot."). (ECF No. 317). For the reasons set forth below, the Court **DENIES** the Motion.

I. BACKGROUND

Following a jury trial in January 1997, Mr. Norwood was convicted of bank robbery, in violation of 18 U.S.C. § 2113(a); armed bank robbery, in violation of 18 U.S.C. § 2113(d); use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); carjacking, in violation of 18 U.S.C. § 2119; a second count of use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and possession of a firearm by an armed career criminal ("ACCA"), in violation of 18 U.S.C. § 922(g) and § 924(e). (Presentence Investigation Report, or "PSR," at 1, ¶ 8).[1] Mr. Norwood was sentenced to life imprisonment on the ACCA count, consecutive sentences totaling 25 years on the Section 924(c) counts, and concurrent sentences on the remaining counts. (ECF No. 110).

[1] Mr. Norwood's PSR is on file with the U.S. Probation Office in the District of New Jersey.

Following a series of direct appeals, post-conviction motions, and habeas petitions, Mr. Norwood's conviction for bank robbery under Section 2113(a) was dismissed, (ECF No. 171), and Mr. Norwood was twice resentenced, most recently in 2013. (ECF Nos. 135, 197).[2] Mr. Norwood is currently serving a sentence of 500 months, consisting of 200 months on Count 2, 180 months on Count 4, and 200 months on Count 6, all to be served concurrently, plus consecutive sentences totaling 25 years on the two Section 924(c) counts. (ECF No. 197).

Mr. Norwood, proceeding *pro se*, filed the present Motion for Compassionate Release on November 21, 2023, (ECF No. 317), followed by a notice of new authority on December 18, 2023. (ECF No. 320). The Government opposed the Motion on January 26, 2024, (ECF No. 321), to which Mr. Norwood replied on February 2, 2024. (ECF No. 322).

II. LEGAL STANDARD

Section 3582(c)(1)(A), as amended by Section 603(b) of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, authorizes district courts to reduce the term of imprisonment upon a finding that "extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]" 18 U.S.C. § 3582(c)(1)(A). "Extraordinary and compelling reasons" are not defined by statute. Rather, Congress tasked the U.S. Sentencing Commission (the "Commission") with providing further guidance. 28 U.S.C. § 994(t). The Commission has done so at Section 1B1.13 of the U.S. Sentencing Guidelines (the "Guidelines" or "U.S.S.G."). Relevant to the present Motion, the Guidelines state that an "unusually long sentence" that is

[2] Mr. Norwood's Judgment was amended once more on February 28, 2023. (ECF No. 305). The amendment, however, was merely to confirm that Mr. Norwood's obligation to pay restitution had expired as a matter of law. *See* (ECF No. 304). It did not change the length of his sentence. (*Id.*).

grossly disproportionate to "the sentence likely to be imposed at the time the motion is filed" is a basis for compassionate release. U.S.S.G. § 1B1.13(b)(6).

Before a defendant may petition a court to reduce his sentence under § 3582(c)(1)(A), he must exhaust his administrative remedies. *United States v. Rodriguez*, 451 F. Supp. 3d 392, 396 (E.D. Pa. 2020). Defendants "must at least ask the Bureau of Prisons (BOP) to [bring a motion] on their behalf and give BOP thirty days to respond." *United States v. Raia*, 954 F.3d 594, 595 (3d Cir. 2020). Thirty days after submitting the request or after exhausting all administrative appeal rights, whichever is earlier, a defendant may move for compassionate release in the district court. *United States v. Harris*, 973 F.3d 170, 171 (3d Cir. 2020).

III. DISCUSSION

As a preliminary matter, the Court finds that Mr. Norwood has satisfied the exhaustion requirements such that the Court may consider his Compassionate Release Motion. Mr. Norwood asserts that he sent the warden of his correctional institution an electronic request for modification of his sentence on October 12, 2023. (Mot. 2). He then waited more than thirty days before filing his Motion before this Court. *See Harris*, 973 F.3d at 171. The Government does not dispute that Mr. Norwood satisfied the exhaustion requirements. The Court therefore turns to the substance of the Compassionate Release Motion.

The sole basis for Mr. Norwood's Motion is that he is serving an unusually long sentence that warrants a sentence reduction pursuant to U.S.S.G. § 1B1.13(b)(6). (Mot. 3–5). Specifically, he points out that he received consecutive mandatory minimum sentences of five years and twenty years, respectively, for his convictions on each of the two Section 924(c) counts. (*Id*. at 3). Since the time of Mr. Norwood's most recent re-sentencing in 2013, Congress in the First Step Act amended Section 924(c) to substantially reduce the harshness of the mandatory

minimum "stacking" provision going forward. *See United States v. Andrews*, 12 F.4th 255, 257 (3d Cir. 2021). If sentenced today, Mr. Norwood would likely receive a substantially shorter sentence on the Section 924(c) counts of five years each. In passing the First Step Act, however, Congress decided that the changes to Section 924(c) would not be retroactive—that is, they do not apply to people who, like Mr. Norwood, have already been sentenced. *See id*. at 261.

Unfortunately for Mr. Norwood, binding circuit precedent forecloses his argument that U.S.S.G. § 1B1.13(b)(6) can serve as a basis for compassionate release in his case. In *Andrews*, which dealt with the length of "stacked" Section 924(c) sentences, the Third Circuit affirmed the lower court's conclusion that "the duration of [a defendant's] sentence and the nonretroactive changes to mandatory minimums could not be extraordinary and compelling reasons warranting sentence reduction" under 18 U.S.C. § 3582(c)(1)(A). *Id*. at 260. The Third Circuit held that "[t]he duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance," adding that "[t]here is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute." *Id*. at 260–61 (quoting *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021)).

Andrews is binding on this Court even though the Commission promulgated U.S.S.G. § 1B1.13(b)(6) after *Andrews* was decided.[3] The Court adopts the reasoning of a sister court that recently considered this issue:

[3] The Commission amended U.S.S.G. § 1B1.13, effective Nov. 1, 2023, to reflect that a defendant is now authorized to file a motion under 18 U.S.C. § 3582(c)(1)(A) directly with the district court and to expand the list of "extraordinary and compelling reasons" that can warrant a sentence reduction, including an "unusually long sentence." Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28254–59 (May 3, 2023).

> In the absence of an applicable policy statement from the Sentencing Commission, *Andrews* can only be understood as a decision interpreting the text of the compassionate-release statute itself. And after considering that statutory language, the Third Circuit concluded that a defendant's unusually and disproportionately long sentence is not an "extraordinary and compelling reasons warrant[ing] [] a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). That holding may not now be overridden by the Sentencing Commission, which "does not have the authority to amend the statute [the court] construed" in a prior case. *Neal v. United States*, 516 U.S. 284, 290 (1996).

United States v. Carter, Crim No. 07-374, 2024 WL 136777, at *6 (E.D. Pa. Jan. 12, 2024).

Should the Third Circuit reconsider its holding in *Andrews* in light of the Commission's recent revisions to U.S.S.G. § 1B1.13, Mr. Norwood may have a stronger case for compassionate release. As things currently stand, however, "binding precedent instructs that a defendant's unusually long sentence is not an adequate basis for compassionate release. Unless and until any reconsideration of *Andrews* takes place or it is abrogated by a Supreme Court decision, that holding remains binding on district courts in this circuit." *Carter*, 2024 WL 136777, at *6.

IV. CONCLUSION

Accordingly, Mr. Norwood's Compassionate Release Motion (ECF No. 317) is **DENIED**. An Order follows.

Dated: May 13, 2024

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

UNITED STATES,	:	
v.	:	Crim. No. 96-232 (RBK)
MICHAEL NORWOOD,	:	**ORDER**
Defendant.	:	

KUGLER, United States District Judge:

THIS MATTER comes before the Court upon *pro se* Defendant Michael Norwood's Motion for Reduction of Sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) (the "Compassionate Release Motion"). (ECF No. 317). For the reasons expressed in the corresponding Opinion,

IT IS HEREBY ORDERED that the Court **DENIES** Mr. Norwood's Compassionate Release Motion. (ECF No. 317).

Dated: May 13, 2024

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

Statutes and Policy Statements Involved

18 U.S.C. § 3582 – Imposition of a sentence of imprisonment.

...

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, 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 the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

> **(B)** the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and
>
> **(2)** in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

...

28 U.S.C. § 994 – Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

> **(1)** guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—
>
> > **(A)** a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
> >
> > **(B)** a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
> >
> > **(C)** a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after

imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) [1] of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

...

(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, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

...

U.S.S.G. § 1B1.13

(a) In General.—Upon motion of the Director of the Bureau of Prisons or the defendant pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1)

(A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

(b) Extraordinary and Compelling Reasons.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) Medical Circumstances of the Defendant.—

(A) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end-of-life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(B) The defendant is—

(i) suffering from a serious physical or medical condition,

(ii) suffering from a serious functional or cognitive impairment, or

(iii) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(C) 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.

(D) The defendant presents the following circumstances—>

(i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of

exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be adequately mitigated in a timely manner.

(2) Age of the Defendant.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(3) Family Circumstances of the Defendant.—

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(B) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

(D) The defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for such family member or individual. For purposes of this provision, "immediate family member" refers to any of the individuals listed in paragraphs (3)(A) through (3)(C) as well as a grandchild, grandparent, or sibling of the defendant.

(4) Victim of Abuse.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

> **(A)** sexual abuse involving a "sexual act," as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or
>
> **(B)** physical abuse resulting in "serious bodily injury," as defined in the Commentary to §1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.

For purposes of this provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

(5) Other Reasons.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

(6) Unusually Long Sentence.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

(c) Limitation on Changes in Law.—Except as provided in subsection (b)(6), a change in the law (including an amendment to the Guidelines

Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

(d) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement. However, rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

(e) Foreseeability of Extraordinary and Compelling Reasons.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement**.**