Compassionless Plea Bargaining

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Too often, the guilty plea hearing process practiced in our federal courts fails to adequately ensure the validity of a defendant's change of plea decision. Rather than engage in colloquies that are sufficiently in-depth and truly aimed at ascertaining voluntariness and defendant comprehension, critical details are frequently glossed over, and defendant guilty pleas are accepted without meaningful inquiry.

While academics have skillfully critiqued the Sixth Amendment and its trial-focused provisions, comparatively scant focus has been expended on the equally, if not more, critical change of plea hearing. Compassionless Plea Bargaining *seeks to fill this gap with its focus on a recent controversy that threatened to engulf the Biden Administration's Department of Justice into an unfortunate—and arguably embarrassing—controversy.*

In December 2018, President Donald Trump signed into law the First Step Act. Designed primarily to address the nation's mass incarceration crisis, one of its more overlooked features was a provision that addressed sentencing modification. Commonly referred to as compassionate release, the Act sought to ease the ability of defendants to obtain a modification of their sentence in the event of an extraordinary life circumstance. During the COVID-19 pandemic, as the virus spread rapidly through correctional facilities, compassionate release requests predictably skyrocketed—and so did the workload of federal prosecutors tasked to respond to these motions. As a result, many U.S. Attorney's Offices included provisions in plea agreements requiring defendants to forgo their compassionate release rights under the Act in exchange for the concessions offered by the government. A brewing controversy ensued, with critics, including the National Association of Criminal Defense Lawyers, arguing that the government was leveraging its substantial negotiating power, and defendants were often agreeing to such waivers in the absence of a full awareness of the attendant consequences. In response, Attorney General Merrick Garland discontinued the practice in March 2022. However, the reprieve is likely to be short-lived, as future attorneys general will almost certainly resuscitate the practice.

The byproducts of a guilty plea are varied, deeply consequential, and, as evidenced in the compassionate release context, can even be fatal. This Article explains why federal change of plea hearings too often fail to adequately assess the knowledge and voluntariness underlying a defendant's guilty plea and offers a proposal for reform.

INTRODUCTION

"The point is this: While the plea agreement leaves open a path to compassionate release, it is hardly wider than the eye of a needle. . . . [I]t is inhumane. . . . [I]ts effects are appallingly cruel. . . . The waiver of compassionate release is senseless."

Senior Judge Charles R. Breyer, Northern District of California[1]

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Justice Anthony Kennedy aptly observed that "criminal justice today is for the most part a system of pleas, not a system of trials."[2] To appreciate this, consider that 97% of all federal convictions and 94% of state court convictions are obtained via the guilty plea.[3] Thus, for the indigent and people of color, who are disproportionately represented in America's criminal justice system, it is the guilty plea hearing, not the jury trial, that is the primary mechanism through which they are adjudicated guilty and are imprisoned.[4]

The consequences that attend a decision to change a plea to guilty are enormous. When defendants plead guilty, they are consenting to a judgment of conviction[5] and are forgoing a number of constitutional guarantees.[6] Their character will be tainted, their liberty may be restrained, and their lives forever changed. They further forgo statutory protections, such as the right to pursue certain appellate matters[7] and, potentially, even the right to seek modification of their sentence,[8] no matter how grave and unpredictable the personal circumstance. It is an impactful decision and generates a myriad of undesirable consequences. That is why the Supreme Court described the decision to plead guilty as "a grave and solemn act" and as one that a court should "accept[] only with care and discernment."[9] This fact, said the Court, "has long been recognized," which underlies the congressional effort over the years to establish a guilty plea hearing process that respects this most critical decision.[10]

It is tenable to believe that for many, if not most, defendants, the most decisive factors regarding

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regarding possible reforms.

[1] United States v. Osorto, 445 F. Supp. 3d 103, 106–07, 109–10 (N.D. Cal. 2020).

[2] Lafler v. Cooper, 566 U.S. 156, 170 (2012); *see also* Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/ [https://perma.cc/9CER-NTP5] (stating that "[t]he Brookings Institution found that only 49 percent of incarcerated men were employed in the three years prior to incarceration and their median annual earnings were $6,250; just 13 percent earned more than $15,000"); Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 6 (2012) (stating that in excess of 80% of defendants charged with felonies are indigent).

[3] Missouri v. Frye, 566 U.S. 134, 135 (2012) (noting "the simple reality that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas," as well as the "central[ity]" of plea bargains in "today's criminal justice system").

[4] *Inmate Ethnicity*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/7H8Z-8HM9] (last visited Nov. 18, 2022) (noting that Hispanics make up approximately 29% of federal inmates); *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/2TXA-S29F] (last visited Nov. 18, 2022) (noting that African-Americans make up approximately 39% of federal inmates).

[5] *Plea Bargaining*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/pleabargaining [https://perma.cc/S4CZ-CHRR] (last visited Nov. 18, 2022) ("When the defendant admits to the crime, they agree they are guilty and they agree that they may be 'sentenced' by the judge presiding over the court . . . .").

[6] For a more extended discussion, *see infra* notes 119–26 and accompanying text; *see also* AM. BAR ASS'N., ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-1.4, at 36 (3d ed. 1999)(noting "that by pleading guilty the defendant waives the right to a speedy and public trial, including the right to trial by jury; the right to insist at a trial that the prosecution establish guilt beyond a reasonable doubt; the right to testify at a trial and the right not to testify at a trial; the right at a trial to be confronted by the witnesses against the defendant, to present witnesses in the defendant's behalf, and to have compulsory process in securing their attendance . . . .").

[7] AM. BAR ASS'N., *supra* note 6, at 36 (noting "that by pleading guilty the defendant generally waives the right to appeal . . . .").

[8] *See* United States v. Bridgewater, 995 F.3d 591, 594–95 (7th Cir. 2021) (addressing validity of plea agreements containing a provision waiving a defendant's right to seek modification of his sentence).

[9] Brady v. United States, 397 U.S. 742, 748 (1970).

[10] *Id.*

whether to accept a plea proposal or proceed to trial pertain to sentencing. The sentencing differential between the likely outcome after a jury trial conviction versus that offered pursuant to a guilty plea proposal is undoubtedly a principal driver in a great many instances.[11] Commonly referred to as the "trial penalty," the term denotes "the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial," and is a potent influencer that hovers over this most critical decision.[12] This differential—which is often meaningful—has coercive influences that can cloud and influence a defendant's change of plea decision.[13] Driven by a desire to avoid the imposition of lengthy prison sentences, defendants—including some innocent of crimes—will often opt to avoid this possibility by changing their plea to guilty.[14]

It must be strenuously emphasized, however, that avoidance of the trial penalty is hardly the only driver and certainly not the only consequence of significance when defendants change their pleas to guilty. Often, defendants have other concerns that are paramount. For some, the possibility of deportation is of critical importance.[15] For others, it is the retention of appellate rights.[16]

In this vein, there was a plea agreement-related controversy (outside the "trial penalty" context) that recently manifested and threatened to mushroom and engulf President Biden's Department of Justice (DOJ) into an unfortunate—and arguably embarrassing—controversy. Though it involved a practice employed by only a minority of U.S. Attorney's Offices, it generated a vociferous response from a prominent California federal district court judge who described it as "appallingly cruel," "senseless," and "inhumane."[17] The controversy centered upon inmate attempts to obtain compassionate release and strategies employed by some quarters of the DOJ to curtail those efforts. Compassionate release is a mechanism by which inmates confronted with extraordinary and compelling life circumstances (e.g.,

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[11] Paul Bergman, *The Benefits of a Plea Bargain*, NOLO (Apr. 11, 2023), https://www.nolo.com/legal-encyclopedia/the-benefits-plea-bargain.html [https://perma.cc/CD53-3NNA]) ("For most defendants, the main benefit of plea bargaining is receiving a lighter sentence and/or a less severe charge than they might get if they go to trial and lose.").

[12] RICK JONES, GERALD B. LEFCOURT, BARRY J. POLLACK, NORMAN L. REIMER, KYLE O'DOWD, NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 11 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/R882-YW8Z].

[13] Walter I. Gonçalves, Jr., *"How Much Time Am I Looking at?": Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts*, 59 AM. CRIM. L. REV. 293, 295–96 (2022) ("The lack of jury trials in federal court is problematic and a result of harsh trial penalties. These punishments lead criminal defendants to accept plea agreements in lieu of exercising their constitutional right to trial—the hallmark of the American system of justice. As plea rates increase, trials become rare; innocent people plead guilty . . . ."); Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CALIF. L. REV. 1415, 1416 (2019) ("In plea negotiations, the government can straightforwardly impose a cost on defendants' decisions to go to trial: a 'trial penalty' in the form of greater liability and punishment if convicted.").

[14] Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539, 540–15 (2023). *Id.* at 540–41 ("[T]he risk of an extreme post-trial sentence pressures defendants to forego trial and plead guilty. . . . For example, with three prior 'strikes' alleged in an indictment against him, Troy McAlister faced life in prison as he sat in jail awaiting trial on robbery charges. . . . [A new district attorney later] offered McAlister a deal: Plead guilty and be released in a few weeks. McAlister's attorney opposed the deal, contending that McAlister 'would have likely prevailed at trial.' Nevertheless, McAlister pled guilty and was freed the next month.").

[15] *See* Lee v. United States, 582 U.S. 357, 371 (2017) (holding that defendant was denied effective assistance when he changed plea to guilty based upon erroneous advice from counsel that he would not be subject to deportation).

[16] *See* Class v. United States, 583 U.S. 174, 185 (2018) (concluding that defendant who entered guilty plea did not waive his right to appeal a jurisdictional issue).

[17] United States v. Osorto, 445 F. Supp. 3d 103, 107, 109–10 (N.D. Cal. 2020).

significant personal or family medical situations[18]) can seek to have their sentences reduced.[19]

Historically, administrative roadblocks hindered the success of these compassionate release petitions.[20] However, the First Step Act (FSA) of 2018 greatly facilitated this process.[21] And when the COVID-19 pandemic emerged in March 2020, compassionate release petitions predictably skyrocketed,[22] as did the workload of the DOJ, which was tasked with the responsibility of responding to these motions.[23] As a result, a minority of U.S. Attorneys' Offices commenced a practice of inserting waiver provisions in their plea agreements that required defendants to forgo their compassionate release rights under the FSA.[24]

The defense community erupted. In an impassioned four-page letter to Attorney General Merrick Garland dated February 15, 2022, the National Association of Criminal Defense Lawyers (NACDL) and the Families Against Mandatory Minimums (FAMM) complained about the practice and pleaded for its discontinuance.[25] The organizations explicitly and in great detail warned of the dire consequences that would befall their clients should the practice persist. Yet, they implicitly acknowledged their powerlessness to force a change in DOJ policy. As the letter noted:

> USAOs [United States Attorneys' Offices] throughout the country are using their immense power and forcing defendants to bargain away their right to ask the court to send them home to die, release them to care for their children who have been orphaned by the death of the other parent, or free them to cope with a debilitating medical condition with dignity.[26]

The letter also suggested that some defendants unwittingly agree to such waivers. It detailed the

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[18] For a more in-depth discussion of the circumstances that qualify as extraordinary and compelling, see *infra* notes 54–69 and accompanying text.

[19] 18 U.S.C. § 3582(c)(1)(A).

[20] *Osorto*, 445 F. Supp. 3d at 107 (noting that "[f]rom 2006 to 2011, an average of just twenty-four defendants were granted compassionate release each year").

[21] *Id.* at 108 ("It was against the backdrop of this grim history that Congress enacted the First Step Act's amendments to § 3582(c)(1)(A). Congress's intent in amending the statute is clear. The title of the section containing the amendments was 'Increasing the Use and Transparency of Compassionate Release.' (citation omitted). Senator Ben Cardin said, 'The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.' 164 Cong. Rec. S7774 (Dec. 18, 2018).").

[22] Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 575 (2021).

[23] Joseph Neff & Keri Blakinger, *Michael Cohen and Paul Manafort Got to Leave Federal Prison Due to COVID-19. They're the Exception.*, THE MARSHALL PROJECT (May 21, 2020, 7:45 PM), https://www.themarshallproject.org/2020/05/21/michael-cohen-and-paul-manafort-got-to-leave-federal-prison-due-to-covid-19-they-re-the-exception?utm_medium=social&utm_campaign=share-tools&utm_source=twitter&utm_content=post-top [https://perma.cc/KX4E-LQSH] ("The Department of Justice has been fighting many coronavirus-related requests for compassionate release in court, according to records and advocates monitoring the process.").

[24] Carrie Johnson, *The U.S. Is Limiting Compassionate Release in Plea Deals. Many Say That's Cruel*, NPR (Feb. 16, 2022, 5:00 AM), https://www.npr.org/2022/02/16/1080863822/the-u-s-is-limiting-compassionate-release-in-plea-deals-many-say-thats-cruel#:~:text=Press-,The%20U.S.%20is%20limiting%20compassionate%20release%20in%20plea%20deals.,flouts%20Congress%20and%20is%20cruel [https://perma.cc/V4U2-J26Y] ("Ring, of FAMM, said the Justice Department's limits on compassionate release are 'disgusting.' 'I am sure responding to lots of compassionate release motions can be a nuisance for prosecutors, but trust me, that's nothing compared to battling a deadly disease in prison during a global pandemic,' he said.").

[25] Letter from Kevin A. Ring, President, FAMM, and Martín Sabelli, President, NACDL, to Lisa Monaco, Deputy Att'y Gen. 1 (Feb. 15, 2022), https://famm.org/wp-content/uploads/2022/03/Letter-DAG-Plea-Agmt_2.15_FAMM.NACDL_FINAL17.pdf [https://perma.cc/JBJ2-9QMX].

[26] *Id.* at 2.

experience of a sixty-five-year-old individual in Arizona "with pre-existing health conditions" who contested the validity of the compassionate release waiver in his plea agreement.[27] Despite the district court's acceptance of his guilty plea, the individual nevertheless contended that his compassionate release waiver was "neither knowingly nor voluntarily" agreed upon.[28]

The following month, Garland announced a discontinuation of the practice.[29] However, his directive also acknowledged the likely legality of the policy.[30] While Garland's response provides a welcome reprieve for the defense bar, it will likely be temporary. With near certainty, the DOJ will resuscitate the practice when future administrations assume executive branch power.[31] With rising crime rates, the issue of compassionate release has already become a political football, as was evident during the confirmation hearings for Justice Ketanji Brown Jackson.[32]

The high utilization rate of the guilty plea hearing by defendants, without more, should compel a comprehensive review of its effectiveness. But, in this context, compelling sentencing and non-sentencing considerations further underscore this necessity. And as evidenced in the above-described compassionate release controversy, sometimes the non-sentencing considerations can be potent, and even deadly.[33] While academics have generated an impressive body of literature commenting upon the Sixth Amendment's trial guarantees,[34] scant attention has been aimed at the real driver of American criminal

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[27] *Id.* at 3.

[28] *Id.* (noting that the government eventually agreed "to drop the waiver provision in that particular case").

[29] Memorandum from the Deputy Att'y Gen. to all Fed. Prosecutors 1 (Mar. 11, 2022), https://www.justice.gov/file/1482956/download [https://perma.cc/KXT6-LE4E] [hereinafter DOJ Memo]. Garland's memorandum stated, in pertinent part:

> [I]n order to ensure a consistent practice across the Department, as well as an approach that accords with the statute, the relevant guidelines promulgated by the Sentencing Commission, and the interests of justice, the Department now issues the following guidance: As a general matter, plea agreements should not require broad waivers of the right to file a compassionate release motion under Section 3582(c)(l)(A). Specifically, prosecutors should not, as a part of a plea agreement, require defendants to waive: (1) the general right to file a compassionate release motion; (2) the right to file a second or successive such motion; or (3) the right to appeal the denial of a compassionate release. If a defendant has already entered a plea and his or her plea agreement included a waiver provision of the type just described, prosecutors should decline to enforce the waiver.

[30] *Id.* (noting that "[c]ourts that have confronted the issue have held that a defendant may generally waive the right to file such a motion").

[31] *See infra* notes 43, 100–07 and accompanying text.

[32] *See* Meredith McGraw, *Trump's Criminal Justice Reform Bill Becomes Persona Non Grata Among GOPers*, POLITICO (May 1, 2022, 7:00 AM), https://www.politico.com/news/2022/05/01/trump-republicans-first-step-act-00029104 ("In the past year, violent crime rates have risen dramatically, with at least 12 major U.S. cities breaking annual homicide records in 2021."). In March 2022, during Supreme Court Justice Ketanji Brown Jackson's confirmation hearing, several Senate Judiciary Committee Republicans were openly critical of the Justice's record on compassionate release. *See Cotton Questions SCOTUS Nominee Jackson Over Her Reduction of the Prison Sentence of a Convicted Drug Kingpin*, YAHOO NEWS (Mar. 22, 2022, 9:16 PM), https://news.yahoo.com/cotton-questions-scotus-nominee-jackson-011601953.html [https://perma.cc/VJU4-ZK63]; Mark Bergin, *Sen. Thom Tillis Questions Supreme Court Nominee Judge Ketanji Brown Jackson About Early Releases*, WRAL NEWS (Mar. 23, 2022, 11:07 AM), https://www.wral.com/sen-thom-tillis-questions-supreme-court-nominee-judge-ketanji-brown-jackson-about-early-releases/20201262/ [https://perma.cc/83B8-4RER**]**. Many lawmakers who supported the FSA, including former President Trump, have since distanced themselves from the law. *See* McGraw *supra* note 32 ("Three-and-a-half years later, few Republicans—Trump included—seem not at all interested in talking about it. With spikes in crime registering as a top concern for voters, Republicans have increasingly reverted back to that 1980s mindset.").

[33] *See supra* notes 15–32 and accompanying text.

[34] *See, e.g.*, Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L. J. 1459 (2005); Richard D. Friedman & Jeffrey L. Fisher, *The Frame of Reference and Other Problems*, 113

justice—the guilty plea hearing. *Compassionless Plea Bargaining* helps fill this critical gap. This Article examines federal guilty plea hearings, explores their meaningful imperfections, discusses the adverse impact the current process has for criminal defendants in general, and ultimately sets forth proposed reforms.[35]

Specifically, in Part I, this Article will commence with a detailed review of the controversy surrounding compassionate release waivers and explore their significance for criminal defendants in federal court. In Part II, the Article will turn its attention to the federal guilty plea hearing. It will discuss the prerequisites to judicial acceptance of a defendant's guilty plea, examine the modes of questioning commonly employed by the courts (e.g., leading and compound questions) during this process, and then explain why these questioning modes inadequately assess defendant knowledge and voluntariness. It will discuss how expediency frequently trumps probing inquiries; why courts—rather than engaging in colloquies that are sufficiently in-depth and are truly aimed at ascertaining voluntariness and defendant comprehension—all too frequently gloss over critical details and accept defendant guilty pleas in the absence of meaningful inquiries.[36] Finally, in Part III, the Article will offer a proposal for reform. It argues that Rule 11 of the Federal Rules of Criminal Procedure should be amended to require that courts develop a more robust record demonstrating a defendant's knowledge and voluntariness and greatly restrict the use of leading questioning (and avoid compound questioning altogether) during the guilty plea colloquies.

I. COMPASSIONATE RELEASE

A. OVERVIEW

When President Donald Trump signed the FSA[37] into law on December 18, 2018, it was hailed as a significant bipartisan effort to address mass incarceration in our nation's federal prisons.[38] By

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MICH. L. REV. FIRST IMPRESSIONS 43 (2014); Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach But Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16 (2006); Jason Mazzone, *Batson Remedies*, 97 IOWA L. REV. 1613 (2012).

[35] *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 140 (2004) (arguing, among other things, that guilty plea hearings are "dry recitations of rights and facts" that produce "perfunctory, scripted statements [that] are far from full apologies"); Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post*-Boykin *Era*, 77 NOTRE DAME L. REV. 597, 615–24 (2002) (demonstrating how judicial employment of leading and compound questioning during the Rule 11 hearing inadequately ensures that defendants have entered their guilty pleas knowingly and voluntarily); Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL L. REV. 195, 236–42 (1991) (advancing reform measures to enhance plea hearing effectiveness in military courts); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 301, 345–50 (1987) (arguing for victim participation in plea bargaining process).

[36] RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 8 (2020) ("Usually, a superficial judicial inquiry—the 'plea colloquy'—probes whether a person's plea bargaining choices are sufficiently informed; these are typically highly scripted proceedings that are outlined in state and federal procedural rules governing the formal entrance of guilty pleas on the record in open court.").

[37] *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

[38] The Brennan Center notes that since 1970 the federal prison population and corresponding federal spending has increased by more than 700% and 600%, respectively. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/B8UU-TW66]. The nation's approach to illegal narcotics has been a principal contributor to this problem. *See Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/CDB9-WREF] (last visited Sept. 6, 2024) (noting that approximately 44% of all federal inmates as of July 2022 were incarcerated on narcotics

overwhelming margins, the FSA passed both branches of Congress and enjoyed the support of a diverse coalition of groups on each side of the political divide.[39] In his 2019 State of the Union address, President Trump referenced the achievement, declaring:

> This legislation reformed sentencing laws that have wrongly and disproportionately harmed the African-American community, [and it] gives nonviolent offenders the chance to reenter society as productive, law-abiding citizens. Now, states across the country are following our lead. America is a nation that believes in redemption.[40]

The Act contains several provisions which, individually and collectively, address narcotics sentencing and mass incarceration. Most notably, the Act reduced the length of certain minimum mandatory penalties,[41] made the FSA (which reduced the sentencing disparity between crack and powder cocaine offenses) retroactive,[42] expanded the safety valve provision, which empowers federal courts to sentence qualifying defendants to sentences beneath mandatory minimum penalties,[43] and increased the number of good-time credits an inmate can earn, thereby enabling qualifying inmates to obtain an earlier release.[44] Yet, for all the national fanfare afforded for these aspects of the Act, the provision of the FSA pertaining to the issue of compassionate release has received comparatively less national attention.[45]

Compassionate release is a mechanism—and for most, a lifeline—through which inmates, confronted with an extraordinary life crisis, can seek to have their sentences modified or reduced.[46] The FSA broadened the compassionate release mechanism by allowing inmates to seek compassionate release directly from federal courts rather than having to rely on the Bureau of Prisons (BOP) to submit petitions on their behalf.[47]

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offenses).

[39] John F. Ferraro, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2483 (2021); Emily Tillett, *Sens. Cory Booker and Mike Lee on Putting Aside Politics to Reform Criminal Justice*, CBS (July 22, 2019, 8:47 AM), https://www.cbsnews.com/news/senators-cory-booker-mike-lee-on-putting-aside-political-impasses-to-reform-criminal-justice/ [https://perma.cc/72WF-3NND] (recounting New Jersey Senator Cory Booker's views on the First Step Act's purpose of addressing mass incarceration).

[40] German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019, 9:42 PM), https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform [https://perma.cc/PPR2-C5AM**]**.

[41] NATHAN JAMES, THE FIRST STEP ACT OF 2018: AN OVERVIEW 8–9 (2019), https://crsreports.congress.gov/product/pdf/R/R45558 [https://perma.cc/7KJH-7DNR] (discussing the modification of mandatory minimum prison sentences for some drug traffickers with prior drug convictions).

[42] *Id.* at 9 (noting the retroactivity of sentencing provisions of the Fair Sentencing Act of 2010 as applied to individuals convicted of crack cocaine offenses).

[43] *Id.* (discussing the safety valve provision, which empowers courts to avoid imposing minimum mandatory sentences for certain "low-level" offenders).

[44] *Id.* at 16 (reviewing changes in the way good time credits are calculated); Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, THE SENT'G PROJECT (Dec. 17, 2019), https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/ [https://perma.cc/K376-FCUG].

[45] *See* Maggie Haberman & Annie Karni, *Trump Celebrates Criminal Justice Overhaul Amid Doubts It Will Be Fully Funded*, N.Y. TIMES (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/us/politics/first-step-act-donald-trump.html.

[46] 18 U.S.C. § 3582(c)(1)(A); Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743, 1754 (2022).

[47] Compassionate release was originally enacted in 1984 as part of the Comprehensive Crime Control Act, 18 U.S.C. 3582(c)(1)(A), which set forth a process by which federal courts could modify the sentence of inmates who were confronted with "extraordinary and compelling" circumstances. 18 U.S.C. § 3582(c)(1)(A). However, only requests from the Bureau of Prisons (BOP) were considered; no provision allowed inmates to request release on

The contours of the extraordinary and compelling circumstance standard were less than clear at the time of the FSA's passage.[48] This lack of clarity resulted in some variances among the circuits in regard to application.[49] However, in November 2023, the United States Sentencing Guidelines Commission promulgated more definitive standards to help guide the courts in this task.[50] Codified in section 1B1.13(b), the guidelines delineate a varied set of standards that encompass an array of qualifying health, family, age, and prison abuse-related circumstances.[51] For example, sections 1B1.13(b)(1)(A), (B), and (C) address health-related circumstances and allow for compassionate release when, *inter alia*, an inmate is experiencing a "terminal illness," a "serious physical or medical condition," a "serious functional or cognitive impairment," or a "medical condition that requires long-term or specialized medical care that is not being provided" and might subject the inmate to further health deterioration.[52] Similarly,

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their own. Hamilton *supra* note 46, at 1751–52 (providing that courts may reduce a term of imprisonment "upon motion of the Director of the Bureau of Prisons"). Thus, inaction on the part of the BOP would preclude judicial consideration of a compassionate release request, irrespective of the merits of the petition. And the dearth of court ordered modifications that characterized the three-plus decades preceding the FSA was unequivocally attributable to the BOP's refusal to act. A scathing report issued in 2013 by the Office of the Inspector General (OIG) affirmed this fact. *See* OFF. OF THE INSPECTOR GEN., U.S. DOJ, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM (2013), https://oig.justice.gov/reports/2013/e1306.pdf [https://perma.cc/69NU-VBC6]. A review of the case files provided by the BOP, revealed that the agency's inaction sometimes had deadly consequences. In 28 of the 208 cases (13%) where a preliminary administrative approval had been granted, the inmate died prior to a final determination by the agency's Director. *Id.* at 11. Notably, the report noted that of the approximately 218,000 inmates housed in federal facilities between 2006 to 2011, only an average of 24 inmates per year were awarded a compassionate sentence modification. *Id.* at 1.

[48] This absence of clarity was attributable to the lack of a quorum on the Federal Sentencing Guideline Commission committee charged with amending the guideline's policy statements. As explained in a dissenting opinion in *United States v. Bryant*:

> The First Step Act took away BOP's solitary control over this gatekeeping function but left the Sentencing Commission with the authority to describe what "extraordinary and compelling" reasons might warrant a sentence reduction. *See* 28 U.S.C. § 994(t). The Commission has been unable to update its commentary on what constitutes "extraordinary and compelling" reasons since 2018 because . . . it has lacked a quorum since that time.

996 F.3d 1243, 1267 (11th Cir. 2021) (Martin, J., dissenting).

[49] Holly Barker, *Significant Amendments to US Sentencing Guidelines Now in Effect*, BLOOMBERG LAW (Nov. 1, 2023, 5:00 AM), https://news.bloomberglaw.com/litigation/significant-amendments-to-us-sentencing-guidelines-now-in-effect (noting "a circuit split over when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling circumstances"); Zachary Newland, *GUEST BLOG: Breaking Down the Recent Amendments as Incorporated in the 2023 Federal Sentencing Guidelines*, THE FEDERAL DOCKET (Dec. 28, 2023), https://thefederaldocket.com/a-detailed-breakdown-of-the-2023-federal-sentencing-guidelines/ [https://perma.cc/S7BH-PRPP] (stating that "the First, Fourth, Ninth, and Tenth Circuits had held that a non-retroactive change in law could be considered where such change created a sentencing disparity among defendants. On the other side of the split were the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits.").

[50] U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. background (U.S. SENT'G COMM'N 2023) (noting that "the Commission is required by 28 U.S.C. § 994(t) to 'describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.'").

[51] *See id.* at § 1B1.13(b) (delineating guidelines for courts to follow when assessing compassionate release petitions).

[52] IB1.13(b)(1)(A)–(C). These sections provide, in pertinent part:

> 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.—

compassionate release is available in circumstances when an inmate is "housed at a correctional facility" and is "at imminent risk of being affected by . . . an ongoing outbreak of infectious disease." [53]

Inmates who can demonstrate that they have been subjected to sexual or physical abuse perpetrated by a correctional officer or BOP employee, among other individuals, while in prison may also qualify for compassionate release. [54] In addition, inmates who are experiencing serious family situations or age-related physical or mental health conditions may also qualify for relief.[55] There is also a catch-all

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(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.

[53] IB1.13(b)(1)(D) provides:

(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.

[54] IB1.13(b)(4)(A)–(B) provides:

VICTIM OF ABUSE.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

(A) sexual abuse . . . ; or

(B) physical abuse . . . :

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. [abuse must be established by a formal process].

[55] 1B1.13(b)(2), (3). These sections provide, in pertinent part:

(2) AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old; (B) is experiencing a serious

provision, which allows for early release when an inmate presents evidence of a comparably grave circumstance not expressly identified in the statute.[56] Finally, compassionate relief is available in circumstances when an inmate is serving an "unusually long sentence."[57]

The passage of the FSA in December 2018, coupled with the global COVID-19 pandemic that commenced approximately a year and a half later in March 2020, led to an exponential increase in compassionate release petitions.[58] In 2019, for example, 1,735 inmates sought compassionate release; by March 2020, that number swelled to almost 31,000.[59] A byproduct of this exponential rise in compassionate release motions has been the workload burdens it has placed upon prosecutors, the defense bar, and the courts.[60] Though the FSA does not expressly provide for a right to counsel, it is not

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> 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.

[56] 1B1.13(b)(5) provides:

> (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)).

[57] IB1.13(b)(6) provides:

> 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.

[58] *See* Tinto & Roberts, *supra* note 22, at 575.

[59] *See* Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, THE MARSHALL PROJECT (June 11, 2021, 6:00 AM), https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36 [https://perma.cc/5KQW-NV5W]. Despite this drastic increase, BOP approved fewer petitions for compassionate release in 2020 (36) than it did in pre-pandemic 2019 (55). *Id.*

[60] *See* Walter Pavlo, *Federal Prosecutors Across the Country Oppose Many Common Sense Motions for Compassionate Release*, FORBES (Apr. 15, 2020, 7:18 PM), https://www.forbes.com/sites/walterpavlo/2020/04/15/federal-prosecutors-across-the-country-oppose-many-common-sense-motions-for-compassionate-release/?sh=4a47f44375a0 [https://perma.cc/2XAH-VRZH] ("Defense attorneys have been forced to file motions in federal court, which is both expensive and time consuming . . . . These motions for compassionate release are consuming the time of defense attorneys, prosecutors, judges and the BOP . . . all resources of our criminal justice system."); STEPHEN R. SADY & ELIZABETH G. DAILY, COMPASSIONATE RELEASE BASICS FOR FEDERAL DEFENDERS 3 (2019), https://or.fd.org/sites/or/files/case-documents/Compassionate%20Release%20Basics_REVISED_2templates.pdf [https://perma.cc/K3CW-87Y7] (detailing the various responsibilities of defense counsel assigned to represent a defendant who seeks release on compassionate release grounds).

uncommon for inmates pursuing such claims to be represented.[61] In this context, defense attorneys have an array of responsibilities, including ensuring compliance with the FSA's administrative prerequisites and preparing sentencing modification motions.[62] The submission of such motions triggers an obligation for DOJ to respond.[63] Courts must then adjudicate the claims. And while federal prosecutors have commonly resisted these motions[64]—to the ire of many—it is another strategic initiative adopted by certain federal prosecutor offices that generated substantial controversy.

B. DEPARTMENT OF JUSTICE CONTROVERSY

The controversy centered around a practice adopted by a minority of U.S. Attorneys' Offices that required defendants, in exchange for the plea-bargained concessions offered by the government, to forgo their rights to amend their sentences under Section 3582.[65] This waiver practice was modeled after the successful implementation of other waiver provisions, such as appellate waivers, that are now standard in federal plea agreements.[66]

Perhaps no case more prominently addressed this controversy than a case in the Northern District of California, *United States v. Osorto*.[67] At issue was whether the court should accept a plea agreement in a narcotics case that contained a waiver clause requiring the defendant to restrict his right to pursue compassionate release.[68] Specifically, it required that the defendant agree:

> "not to move the Court to modify [his] sentence under 3582(c)(1)(A) until [he had] fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring such a motion on [his] behalf, unless the BOP ha[d] not finally resolved [his] appeal within 180 days of [his] request . . . ."[69]

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[61] Siobhan A. O'Carroll, *"Extraordinary and Compelling" Circumstances: Revisiting the Role of Compassionate Release in the Federal Criminal Justice System in the Wake of the First Step Act*, 98 WASH. U. L. REV. 1543, 1555 (2021) ("[While t]he modified statute also anticipates motions filed by the defendant's attorney[,] . . . . the statute does not provide a right to appointed counsel."); Bill Rankin, *In Atlanta, Federal Lawyers Fight to Free Inmates Amid Coronavirus*, ATLANTA J.-CONST. (Sept. 7, 2020), https://www.ajc.com/news/atlanta-news/atlanta-lawyers-mission-amid-virus-compassionate-release-of-inmates/VTI6ZEZG7JFTTNW42AZNRY2YMM/ [https://perma.cc/SRS6-ED6W] (noting that Chief Judge Thomas Thrash "signed an administrative order that appointed the Federal Defenders Office to review every compassionate release request filed by federal inmates who were not represented by counsel").

[62] SADY & DAILY, *supra* note 60, at 2–9 (detailing various responsibilities of defense counsel in compassionate release representations).

[63] O'Carroll, *supra* note 61, at 1555 (discussing how "the First Step Act created an adversarial process for compassionate release where none existed before: on one side, the petitioning inmate, and on the other, the DOJ defending the BOP's administrative denial of the petition").

[64] *See e.g.*, Pavlo, *supra* note 60; *Federal Prison Officials Granted Only 36 of 31,000 Compassionate Release Requests During Pandemic*, EQUAL JUST. INITIATIVE (June 16, 2021), https://eji.org/news/federal-prison-officials-granted-only-36-of-31000-compassionate-release-requests-during-pandemic/ [https://perma.cc/3KW2-HQT6] ("Federal prosecutors fought most compassionate release requests in court . . . ."); Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021 7:05 AM), (noting the government's "near-blanket opposition to almost all" requests for compassionate release).

[65] *See* Johnson, *supra* note 24.

[66] Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J. L. REFORM 347, 348 n.2 (2015) (discussing the use of appellate waivers in federal practice). Such appellate waivers have been upheld by every federal circuit that has considered them. *Id.* at 351 n.28.

[67] 445 F. Supp. 3d 103 (N.D. Cal. 2020).

[68] *Id.* at 104.

[69] *Id.*

In a blistering opinion, Senior Judge Charles Breyer rejected the plea agreement, noting that the agreement's 180-day provision, which was "far narrower" than the 30-day statutorily prescribed period, "meaningfully limit[ed Osorto's] ability to seek" compassionate relief.[70] Though the provision did not completely foreclose Section 3582 relief, Breyer stated that the pathway it afforded was "hardly wider than the eye of a needle" and would be "devastating for a person with a terminal illness or children left uncared for."[71]

Breyer further reasoned that the waiver undercut congressional intent regarding the Section 3582 amendments.[72] He stated that the modification agreement "neatly und[id] Congress's work" by substituting the statute's thirty-day waiting period "with an alternative likely to be just as if not more time consuming than exhaustion."[73] Breyer added that the restoration of obstacles by "unelected federal prosecutor[s]"[74] "undermines the purpose of that law's amendments," and that the court would not endorse such efforts through the acceptance of the plea agreement.[75]

Breyer also emphasized the "appalling[] cruel[ty]" of such waivers.[76] He explained how compassionate release enables inmates, courts, and even government prosecutors to respond to the "unforeseeable" as well as the "unthinkable."[77] Breyer argued that when terminal illness, children's issues, and deaths, among other compelling circumstances arise, compassionate release is the congressionally created mechanism that allows courts to respond accordingly.[78]

This practice by a minority of U.S. Attorneys' Offices of including compassionate release waivers in plea agreements also generated substantial backlash from several advocacy organizations and the media. On February 15, 2022, two criminal justice-focused organizations—the NACDL and the FAMM—sent a joint letter to Attorney General Merrick Garland requesting a cessation of the waiver practice.[79] The letter argued, in part, that the waiver practice undermines congressional intent underlying the FSA and that it "aggravates the most coercive aspects of plea bargaining by requiring an accused to waive the opportunity to seek relief for future, unknown, and unpredictable personal or familial tragedies including terminal diagnoses."[80] It added that compassionate release, which can be a "safety valve and lifeline" for inmates confronted with challenging personal circumstances, "play[s] a critical role" in the criminal justice system's ability to respond to these varied situations.[81] The letter further suggested that some defendants who plead guilty are unaware of the compassionate release waivers contained in their plea agreements.[82]

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[70] *Id.* at 105.

[71] *Id.* at 105–06.

[72] *Id.* at 105.

[73] *Id.* at 108.

[74] *Id.* at 109.

[75] *Id.* at 108.

[76] *Id.* at 109.

[77] *Id.*

[78] *Id.*

[79] Letter from Kevin A. Ring and Martín Sabelli to Lisa Monaco, *supra* note 25, at 1 ("We write to urge that the Department of Justice direct United States Attorney Offices ("USAOs") to discontinue the practice of demanding, during plea negotiations, that an accused waive his or her right to seek compassionate release relief under 18 U.S.C. § 3582(c)(1)(A).").

[80] *Id.*

[81] *Id.* at 2.

[82] *Id.* at 3 (providing the example of a sixty-five-year-old Arizona man with health concerns that predated his incarceration, who requested that a court allow "him to withdraw from the plea agreement after the plea had been entered, because of the compassionate release waiver provision. The individual argued that he neither knowingly nor voluntarily agreed to waive those rights at the time of the plea. The government vehemently opposed this motion, and months of litigation ensued. Ultimately, the government agreed to drop the waiver provision in that particular case. Many other defendants in Arizona are not so fortunate; the compassionate release waiver provision appears to remain as part of the template plea agreement.").

Approximately one month later, on March 11, 2022, Garland responded, issuing a directive generally prohibiting the practice.[83] Though he candidly acknowledged the likely validity of such waivers,[84] Garland nonetheless announced a unified policy generally forbidding their use.[85] The Garland memorandum neither referenced *Osorto* nor its underlying rationales. And in stark contrast to the fervent phraseology in *Osorto*, Garland's moratorium announcement was—predictably and appropriately—dispassionate.[86] Nevertheless, Garland's announcement was undoubtedly welcome news to those who were critical of the practice.[87]

Yet, there is reason to believe that this reprieve will be short-lived. It is not only highly probable that future attorneys general will resurrect the practice, but it is possible that such modification restrictions will become standard fare. Consider that attorneys general commonly rescind the policies and practices of their predecessors. Then, after their administrative term concludes, they watch as many of their own policies and practices are subsequently rescinded and replaced by their successors. For example, Jeff Sessions, former President Trump's first Attorney General, rescinded numerous policies that had been implemented by Loretta Lynch and Eric Holder, the attorneys general who served under former President Barack Obama. [88] Obama-era directives pertaining to indictment and sentencing practices, as well as politically charged issues involving transgender students, consent decrees, and affirmative action, among others, were all revised during Sessions' leadership.[89] However, when Attorney General Garland

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[83] DOJ MEMO, *supra* note 29, at 1.

[84] In the letter, Garland notes that courts that have considered the question have upheld such waivers. *Id.*

[85] *Id.* The letter provided, in relevant part:

> As a general matter, plea agreements should not require broad waivers of the right to file a compassionate release motion under section 3582(c)(l)(A). Specifically, prosecutors should not, as a part of a plea agreement, require defendants to waive: (1) the general right to file a compassionate release motion; (2) the right to file a second or successive such motion; or (3) the right to appeal the denial of a compassionate release. If a defendant has already entered a plea and his or her plea agreement included a waiver provision of the type just described, prosecutors should decline to enforce the waiver.

Id. at 1. Garland did allow for three limited exceptions. *Id.* at 2.

[86] In contrast to the February 2022 letter from the NACDL and FAMM which detailed, *inter alia*, the government's plea-bargaining advantages and the adverse impacts of the waiver practice upon inmates confronted with extraordinary life circumstances, the Garland's memorandum was devoid of any such descriptive or accusatory verbiage. The four-paragraph memorandum merely contained a brief discussion of the compassionate release statute, referenced the fact that a minority of U.S. Attorney's Offices have sought waivers (and that the courts have found that such waivers are generally waivable), and, subject to some limited exceptions, the DOJ would follow a unified policy against including such waivers in federal plea agreements. *See id.*; *supra* notes 90–94 and accompanying text.

[87] *See FAMM Releases Statement on New Guidance Memo on Compassionate Release Waivers from Department of Justice*, FAMM, https://famm.org/famm-releases-statement-on-new-guidance-memo-on-compassionate-release-waivers-from-department-of-justice/ [https://perma.cc/78PB-6KZC] (last visited Sept. 22, 2024).

[88] The DOJ has often dismantled policies that misalign with the sitting Attorney General's objectives. *See, e.g.*, Press Release, U.S. DOJ, *Attorney General Jeff Sessions Rescinds 25 Guidance Documents* (Dec. 21, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents [https://perma.cc/RA53-5YRD] (noting twenty-five policies from previous administrations that Jeff Sessions ended in accordance with an executive order issued by Donald Trump).

[89] Masood Farivar, *How US Attorney General Jeff Sessions Has Rolled Back Obama-era Policies*, VOA (Dec. 30, 2017, 5:55 AM) (noting that Sessions ended an Obama plan to use private prisons for individuals convicted of federal offenses, rescinded policies pertaining to bathroom use by transgender students, "ordered a review of Obama-era reform agreements" [consent decrees], and "depart[ed] from the Obama administration's policy of leniency in sentencing low-level, nonviolent offenders, . . . [by] direct[ing] federal prosecutors . . . to 'pursue the most serious, readily provable offense' with the lengthiest sentences in all criminal cases.").

assumed his post during the Biden administration, many of the Sessions-era policies were discarded in favor of other preferred practices, which included many priorities pursued during the Holder years.[90]

In the compassionate release context, a similar political and ideological dynamic has been on display, and it is clear that the issue has become a political football.[91] Criticism of the FSA among Republican lawmakers, including among some who previously supported the bill, has heightened.[92] Even former President Trump has seemingly distanced himself from the FSA.[93] This dynamic was notably on display during the Senate confirmation hearings for Justice Ketanji Brown Jackson when she was pressed to defend her compassionate release record by Republican senators on the Judiciary Committee.[94] And some Republican senators who ultimately voted against her confirmation cited her compassionate release record as a factor in their decision.[95] Against this historical and political backdrop, the prospect of a resurrection

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[90] David Bitkower, Brandon D. Fox, Annie Kastanek & Kristen A. Dupard, *Client Alert: Attorney General's December 2022 Revisions to DOJ's Charging, Pleas, and Sentencing Policies*, JENNER & BLOCK LLP (Jan. 25, 2023), https://www.jenner.com/en/news-insights/publications/client-alert-attorney-generals-december-2022-revisions-to-dojs-charging-pleas-and-sentencing-policies ("Many aspects of the Garland memorandum reflect a return to Holder-era policies. The memorandum uses language similar to Holder's in directing that charges fairly reflect the seriousness of a defendant's conduct, that federal charges be supported by a substantial federal interest, and that charges not be filed, nor the option of filing charges raised, simply to exert leverage to induce a plea. And, like the Holder memorandum, the Garland memorandum emphasizes the need for consistent application of the Sentencing Guidelines—but permits for use of departure provisions under the Guidelines in appropriate cases."); Michael Balsamo, *Garland Rescinds Trump-era Memo Curtailing Consent Decrees*, AP, (Apr. 16, 2021, 6:47 PM), https://apnews.com/article/politics-merrick-garland-jeff-sessions-police-local-governments-075b33730688fe6151f25d76da034413 [**https://perma.cc/WDS8-NJU5]** (noting that Garland "rescinded a Trump-era memo that curtailed the use of consent decrees that federal prosecutors have used in sweeping investigations of police departments").

[91] *See e.g.*, Brandon Gillespie, *Ron DeSantis Rips Trump Over First Step Act, Vows to Repeal it: 'Basically a Jailbreak Bill,'* FOX NEWS (May 26, 2023, 7:31 PM), https://www.foxnews.com/politics/ron-desantis-rips-trump-first-step-act-vows-repeal-jailbreak-bill [https://perma.cc/YJ4H-ERX9] (noting then-presidential candidate Ron DeSantis's criticism of Trump over the passage of the FSA).

[92] *See e.g.*, Marc Levin, *The GOP Was for These Prison Reforms Before Turning Against Them*, HILL (Aug. 15, 2023, 12:00 PM), https://thehill.com/opinion/criminal-justice/4151873-the-gop-was-for-these-prison-reforms-before-turning-against-them/ (support for the bill by then-congressman Ron DeSantis and Representative Jim Jordan, as well as Republican criticism of the FSA).

[93] Meredith McGraw, *Trump's Criminal Justice Reform Bill Becomes Persona Non Grata Among GOPers*, POLITICO (May 1, 2022, 7:00 AM), https://www.politico.com/news/2022/05/01/trump-republicans-first-step-act-00029104 (stating that in the three plus years since the passage of the FSA, "few Republicans — Trump included — seem not at all interested in talking about it").

[94] Jacob Fischler, *What Senators Asked Ketanji Brown Jackson on the Third Day of U.S. Supreme Court Hearings*, TENN. LOOKOUT (Mar. 24, 2022, 7:00 AM), https://tennesseelookout.com/2022/03/24/what-senators-asked-ketanji-brown-jackson-on-the-third-day-of-u-s-supreme-court-hearings/ [**https://perma.cc/576U-X3UC**] (noting the following regarding Tennessee Senator Marsha Blackburn during Justice Brown Jackson's confirmation hearing: "Blackburn also pressed Jackson on sentencing and her use of compassionate release. 'You have an unmistakable pattern of releasing criminals with dangerous backgrounds back into the community,' Blackburn said.").

[95] Brianne Pfannenstiel, *Sen. Chuck Grassley Votes 'No' on Judge Ketanji Brown Jackson to the U.S. Supreme Court*, DES MOINES REG., (Apr. 4, 2022, 3:53 PM), https://eu.desmoinesregister.com/story/news/politics/2022/04/04/iowa-sen-chuck-grassley-vote-no-judge-ketanji-brown-jackson-supreme-court-justice/7234364001/ [https://perma.cc/EH44-BT6U] (stating that Senator Grassley's "no" vote was influenced by Justice Brown Jackson's compassionate release record); Chuck Morris, *Tennessee Senators Oppose Jackson's Nomination to the Supreme Court*, WSMV4 (Apr. 7, 2022, 12:04 PM), https://www.wsmv.com/2022/04/07/tennessee-senators-oppose-jacksons-nomination-supreme-court/ [https://perma.cc/J395-3BTJ] (noting Senator Blackburn's reference to Brown Jackson's record on compassionate release as a reason for her opposition).

of the compassionate release waiver in a post-Biden DOJ is plainly foreseeable.

The short tenure of this waiver practice has afforded few courts the opportunity to adjudicate its merits. Instructive, however, are decisions rendered by the Seventh Circuit, which has frequently—and forthrightly—enforced such waivers.[96] In *United States v. Bridgewater*, the court reasoned that statutory rights, such as the right to compassionate release, are waivable, as are most constitutional rights.[97] And it further reasoned that such waivers are "more defensible against public policy and unconscionability challenges than [42 U.S.C.] § 1983 release-dismissal agreements" which have generally been upheld by the Supreme Court.[98]

And while other district courts have declined to enforce such waivers, these courts have generally cited the fact that the plea agreements preceded the enactment of the FSA.[99] Given this, these courts concluded that defendants could not knowingly waive rights that were not in existence at the time they changed their plea.[100] Thus, even in these courts, it remains an open question whether a post-FSA waiver provision would be deemed enforceable. And, to date, no circuit—including the Ninth—has adopted Breyer's approach in *Osorto*. Indeed, the prospect of such an outcome would appear to be quite remote, given that every circuit that has considered the propriety of an analogous waiver provision, such as appellate waivers, has upheld their enforcement.[101] In fact, appellate waivers are so ingrained in federal court guilty plea practice that courts are now statutorily mandated to forewarn defendants about such

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[96] United States v. Otzoy, No. 19-CR-30108, 2021 WL 212268, at *2 (S.D. Ill. Jan. 21, 2021) ("The more significant obstacle to Otzoy's motion is his plea agreement, which waives the right to seek to 'modify' his sentence. As this Court and other Courts in this circuit have held, broad waiver language prohibiting 'modification' and the like prevents future motions for compassionate release, even where such language was agreed to before the passage of the First Step Act."); United States v. Evans, 848 F. App'x 673, 674 (7th Cir. 2021) ("We agree that the waiver in Evans's plea agreement covers his compassionate-release motion and is enforceable.").

[97] United States v. Bridgewater, 995 F.3d 591, 596 (7th Cir. 2021).

[98] *Id.* Release-dismissal agreements are agreements entered into between the government and a defendant wherein the defendant agrees not to commence a civil rights action against law enforcement in exchange for government promises not to bring or dismiss charges. In *Town of Newton v. Rumery* (480 U.S. 386 (1987)) the Supreme Court upheld a release-dismissal agreement and, in doing so, rejected the need for "a per se rule of invalidity." The Court reasoned, in part:

> We agree that some release-dismissal agreements may not be the product of an informed and voluntary decision. The risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious. But this possibility does not justify invalidating all such agreements. In other contexts, criminal defendants are required to make difficult choices that effectively waive constitutional rights. For example, it is well settled that plea bargaining does not violate the Constitution, even though a guilty plea waives important constitutional rights. *See Brady v. United States*, 397 U.S. 742, 752–53 (1970); *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring). We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted.

480 U.S. at 393.

[99] *See* United States v. Brown, No. 21-1754, 2021 WL 3356946, at *2 (3d Cir. Aug. 3, 2021) (observing that Brown's plea in 2016 predated the First Step Act of 2018, which granted defendants the right to directly petition a court).

[100] *See, e.g.*, United States v. Burrill, 445 F. Supp. 3d 22, 25 (N.D. Cal. 2020) (holding that defendant could not waive right to move for sentence reduction under First Step Act because he could not knowingly waive rights not in existence at time of plea); United States v. Trent, No. 16-CR-00178, 2020 WL 1812214, at *1 (N.D. Cal. Apr. 9, 2020) (holding that Trent could not knowingly waive his right to seek compassionate release since the right did not exist at the time of his plea); United States v. Davis, No. 15-CR-00019, 2020 WL 7138645, at *3 (S.D. Ind. Dec. 7, 2020) (granting compassionate release notwithstanding a broad appellate waiver in the plea agreement entered *before* the FSA's enactment).

[101] *See* Bennardo, *supra* note 66, at 351 n.28.

waivers prior to accepting a guilty plea.[102]

This type of broad waiver practice breeds inequity, as Senior Judge Breyer addressed in *Osorto* by rejecting the notion that such waivers are the byproduct of evenhanded negotiations.[103] Referring to plea agreements as "contract[s] of adhesion," Breyer stressed that it is the government that is empowered to impose its will during such negotiations.[104] A defendant who refuses a government-proffered deal, Breyer added, "does so at his peril."[105] He submitted that it is the government, not the defendant, who possesses "enormous power," for it is the government who can investigate, arrest, indict, dismiss, and recommend sentences.[106]

Indeed, the enormous bargaining advantages enjoyed by prosecutors are a byproduct of the various structural and resource advantages that are built into the criminal justice system. As acknowledged by the late Professor William Stuntz, the presence of competent, high-quality defense representation during plea negotiations is certainly critical to the achievement of equitable bargaining outcomes.[107] This truth is well-established. The Supreme Court has recognized that effective counsel is a constitutional mandate and is required at all critical stages of a prosecution, including during plea negotiations.[108] However, as Stuntz correctly observed, the terms of plea-bargained agreements are more often "dictate[d]" by the preferences of prosecutors:

> But *given the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys*. The key to the system is the prosecutor's incentive: to achieve the results that forces other than the law--her own preferences, her boss's electoral ambitions, local voters' priorities, and the like--suggest. The law serves only to define her opportunities. And she generally has more opportunities than she needs.[109]

Certainly, the most consequential byproduct of this waiver practice is the personal impact it has upon the inmate who is confronted with a meaningful life occurrence. The restrictions that accompany such waivers—and their derivative consequences—are felt most acutely by the inmate and their families. The waivers are heartless. They reflect a value hierarchy that is misaligned. While federal prosecutors enjoy wide discretion in the performance of their duties, the DOJ helps guide its exercise and limits it when necessary. Such expectations and guidelines are delineated comprehensively in the DOJ's "Justice Manual." Section 1-4.010 instructs prosecutors that they should be guided by a "common value," namely, that "public service is a public trust, meaning that the decisions and actions that federal employees take

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[102] *See* FED. R. CRIM. P. 11 (outlining the constitutional rights that courts must advise defendants they forfeit by pleading guilty); Brady v. United States, 397 U.S. 742, 748–49 (1970).

[103] *See* United States v. Osorto, 445 F. Supp. 3d 103, 109–110 (N.D. Cal. 2020).

[104] *Id.*

[105] *Id.*

[106] *Id.*; *see also* United States v. Sembrano, No. 19-CR-00651, 2020 WL 3161003, at *2 (N.D. Cal. May 28, 2020) ("So, rather than risk a court decision it disagrees with, the Government can rely on its *disproportionate power in negotiating the terms of the plea agreement* to foreclose in advance any compassionate release motion it think is unmeritorious." (emphasis added)).

[107] William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) ("And where law does not reign, the district attorney's office generally does. This is one point on which I differ with Professor Bibas. In his view, defense attorneys 'are the linchpins of the plea-bargaining system': improve the quality of the advice defendants get from their lawyers, and bargains will improve too. There is some merit to that position.").

[108] Lafler v. Cooper, 566 U.S. 156, 162 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. (citations omitted). During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'").

[109] *Id.* (emphasis added).

must be made in the best interests of the American people."[110] Certainly, justice, at times, mandates a forceful prosecutorial response. Yet, justice sometimes requires the exercise of compassion.

However, the derivative lessons from this waiver controversy extend beyond the personal. Indeed, the debate regarding compassionate relief waivers highlights a more general and equally compelling lesson: the need to reform the process by which the validity of guilty pleas is assessed.

II. RULE 11 HEARINGS AND LEADING AND COMPOUND QUESTIONING

The significant bargaining advantages enjoyed by prosecutors and their ability to exert influence upon defendants during pretrial negotiations amplify the need to assess and enhance the efficacy of the federal guilty plea hearing process. The Fifth Amendment's Due Process Clause provides some general safeguards by requiring guilty pleas to be entered knowingly and voluntarily.[111] This requires courts to assess the voluntariness of the defendant's decision as well as the defendant's comprehension of its relevant consequences during a plea hearing.[112]

A. CONSTITUTIONAL AND STATUTORY STANDARDS

To its credit, the Supreme Court has, on numerous occasions, addressed matters directly relevant to the guilty plea hearing process.[113] Congress has also supplemented the Court's constitutional pronouncements with an array of statutory directives detailed in Federal Rule of Criminal Procedure (FRCP) 11. Together, these constitutional and statutory mandates govern the approach that district courts follow when assessing the validity of a defendant's change of plea decision.

In 1944, Rule 11 was enacted, detailing the process by which guilty plea hearings are conducted.[114] The original version of the rule was rudimentary in context and totaled fewer than 200 words.[115] This changed drastically in 1975.[116] In response to *Boykin v. Alabama*, where the Supreme Court held that a defendant's due process rights are violated when a court accepts a defendant's guilty plea based on a silent record,[117] Congress substantially reworked the rule. In the years since Congress has amended the

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[110] U.S. DOJ, JUST. MANUAL § 1-4.010 (2020) https://www.justice.gov/jm/jm-1-4000-standards-conduct [https://perma.cc/3A67-FLPF] (last visited Sept. 6, 2024).

[111] *See* Brady v. United States, 397 U.S. 742, 748 (1970).

[112] *See id.*; Boykin v. Alabama, 395 U.S. 238, 242 (1968); Henderson v. Morgan, 426 U.S. 637, 648 (1976) (White, J., concurring); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (abrogated on other grounds).

[113] *See, e.g.*, *Boykin*, 395 U.S. at 243 (1968) (holding it is improper to presume the validity of a guilty plea when the record is silent); McCarthy v. United States, 394 U.S. 459, 468–69 (1969) (holding that automatic reversal is required when Rule 11 errors occur); Santobello v. New York, 404 U.S. 257, 263 (1971) (finding breach of plea agreement by government necessitated resentencing); *Henderson*, 426 U.S. at 647 (1976) (finding plea involuntary when defendant was inadequately informed of the nature of the charge); Hyde v. United States, 520 U.S. 670, 679–80 (1997) (holding that fair and just plea withdrawal standard applied to defendant who entered guilty plea but sought to withdraw his plea prior to sentencing); United States v. Vonn, 535 U.S. 55, 63 (2002) (holding that plain error standard applies to defendants who failed to object to error during Rule 11 proceeding); Iowa v. Tovar, 541 U.S. 77, 81 (2004) (holding that Sixth Amendment requires that a defendant be informed of the nature of the charges, sentencing consequences, and their right to be counseled regarding their plea); Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) (finding that representations made by defendant and their attorney sufficiently advised defendant of specific intent element and cured omission made by trial judge during plea hearing).

[114] FED. R. CRIM. P. 11 (1944), *reprinted in* BENDER'S FEDERAL PRACTICE MANUAL 539 (Raymond Cannon & Russell E. Newkirk eds., 1948).

[115] *Id.*

[116] *See* Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, 89 Stat., 370; 1A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 171 (5th ed. 2022).

[117] *Boykin*, 395 U.S. at 243.

rule on several occasions. [118] Today, Rule 11 is approximately 1,200 words and meticulously details an array of requirements that must be fulfilled prior to the acceptance of a guilty plea.[119]

On the one hand, Rule 11 is largely silent regarding the methodology that a court must employ when assessing the validity of a guilty plea. Thus, district courts enjoy substantial discretion when carrying out their Rule 11 obligations. However, the rule ties the hands of the courts in other respects. The statute mandates that district courts "address the defendant personally in open court" and "inform the defendant of[] and determine that the defendant understands" the various constitutional and non-constitutional rights and informational items listed in the rule.[120] With respect to constitutional protections, the rule requires that a court inform and ensure a defendant's understanding of the right not to plead guilty, the right to a jury trial, the right to counsel (including the right to have counsel appointed, if necessary), as well as "the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses."[121] In addition, the rule requires that courts ensure that a defendant's plea decision is voluntary,[122] that the defendant comprehends the nature of the charge,[123] as well as the various sentencing consequences (e.g., maximum authorized statutory sentence, any mandatory minimum penalties, the applicability of sentencing guideline ranges, possible forfeitures, and restitution).[124] The court is also required to ensure that there is a supporting factual basis for the defendant's plea.[125] More recently, the rule was amended to require that courts ensure a defendant's understanding of the possibility of deportation and waiver provisions involving appellate rights. [126] Notably, the rule is devoid of a comparable mandate regarding other waiver provisions, including those involving compassionate release rights.

B. JUDICIAL MODES OF QUESTIONING

At the very least, Rule 11's mandate to inform tempts courts—often burdened by caseload and other related matters—to resort to examination techniques, such as leading and compound questioning, that prioritize expediency over probing inquiries. The statutory requirement to inform[127] places an affirmative obligation upon district court judges to ensure that, during the course of the change of plea hearing, the informational items delineated in the rule are not overlooked and that defendants comprehend those items. Failure to perform either of these functions jeopardizes the validity of the defendant's change of plea.[128]

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[118] *See id.* (Rule 11's amendment history includes: Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, § 3(5)–(10), July 31, 1975, 89 Stat. 371, 372, eff. Aug. 1 and Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Pub. L. 100–690, title VII, § 7076, Nov. 18, 1988, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 16, 2013, eff. Dec. 1, 2013).

[119] *See generally* FED. R. CRIM. P. 11.

[120] *Id.* at 11(b)(1).

[121] *Id.* at 11(b)(1)(B)–(F).

[122] *Id.* at 11(b)(2).

[123] *Id.* at 11(b)(1)(G).

[124] *Id.* at 11(b)(1)(H)–(M).

[125] *Id.* at 11(b)(3).

[126] *Id.* at 11(b)(1)(N)–(O) (the appellate waiver provision was added in 1999, and the immigration consequence verbiage was added in 2013).

[127] *Id.* at 11(b)(1).

[128] Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) ("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.' (citation omitted). Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid."); United States v. Lopez-Parra, 995 F.2d 234, 234 (9th Cir. 1993) ("A guilty plea must be made with an understanding of the charge

Given this reality, even the most conscientious judges will be tempted to resort to scripted processes that might include leading and compound questioning to ensure compliance with these statutory obligations and to avoid the prospect of being reversed on appeal. As observed by the Vera Institute, the statutorily imposed mandates typically do not produce probing judicial inquiries. Rather, the inquiries are "[u]sually . . . superficial," "highly scripted proceedings" that require that defendants merely:

> provide short, often perfunctory, affirmative responses and a basic explanation of the offense to which they are admitting. Courts rarely conduct a deeper inquiry into whether people fully comprehend the consequences of pleading guilty beyond what is minimally required by the governing standard set out in *Brady* and codified in the rules of criminal procedure.[129]

As a result, the laudable objectives underlying Rule 11 are too often undercut. To see this, consider the following. It is well-established that an attorney's commentary and questions at trial have no evidentiary value.[130] Yet, when an attorney poses a question to a witness that is considered leading—commonly defined as a question that suggests the desired answer—there is a risk that the attorney is effectively testifying.[131] As explained in a leading treatise:

> The danger of a leading question is that it may suggest to the witness the specific tenor of the reply desired by counsel, and such a reply may be given irrespective of actual memory. The use of leading questions is limited in order to prevent the substitution of the attorney's language for the thoughts of the witness as to material facts in dispute.[132]

Given this danger, leading questions are generally prohibited at trial on direct examination but allowed on cross-examination.[133] On direct examination, attorneys and their witnesses often have a shared litigation objective, thus raising the risk of the witness "simply affirm[ing] the closed-ended statement of the lawyer."[134]

Relatedly, a question is considered compound when it poses more than one question.[135] Compound questions are prohibited irrespective of the context in which they occur, given the risk of confusion that necessarily attends to such questions and witness responses.[136] That is why courts typically prefer that attorneys ask witnesses a single question, which allows for greater clarity regarding the precise inquiry being made of the witness as well as the response ultimately provided.[137]

The Federal Rules of Evidence, including the leading and compound questioning rules, are trial rules

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and consequences of the plea, and may be constitutionally invalid if the defendant does not understand the nature of the protections he is waiving by pleading guilty.").

[129] Subramanian et al., *supra* note 36, at 8.

[130] Commonwealth v. Freeman, 573 Pa. 532, 577 (2003) ("It is well settled in the law that attorneys' statements or questions at trial are not evidence.").

[131] *Leading Question*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[132] *See* 81 AM. JUR. 2D *Witnesses* § 659 (2023).

[133] FED. R. EVID. 611(c).

[134] Jack J. Mazzara, *Leading Questions on Direct and Cross-Examination*, MICH. BAR J. 36, 37 (2023). Leading questions on direct examination present two dangers. The first is that suggestive questions may supply "a false memory for the witness—that is, to suggest desired answers not in truth based upon a real recollection." The second is that the examiner may use a friendly witness to parrot the lawyer's view of the evidence. The reason for restricting leading questions is that we prefer testimony of the witness over testimony of the lawyer. If the witness is sympathetic to the lawyer's cause (as is ordinarily the case when the witness is called on direct) the risk is that he will be too easily led to simply affirm the closed-ended statement of the lawyer.

[135] EXAMINATION OF WITNESSES § 11:13 (2d ed. 2023).

[136] *Id.*

[137] *Id.*

and are thus inapplicable in non-trial contexts, which seemingly include guilty-plea hearings.[138] And district courts commonly employ these questioning techniques during change-of-plea hearings.[139] Yet, the core rationales that underlie these rules in the trial setting are equally applicable in the guilty-plea hearing context.

The defendant who is entering a guilty plea views the judge as a conduit to a more optimal litigation outcome.[140] The defendant who has elected to change their plea has decided, correctly or not, that settlement of their case will yield an outcome preferable to the outcome of a trial.[141] They understand that absent acceptance of the plea and the accompanying plea agreement by the court, the negotiated benefits sought by the defendant will not be realized.[142] To enhance their prospects, the defendant will be deferential to their judicial examiner. They will be disinclined to correct, interrupt, or appear disrespectful.[143] Their mindset is to avoid the erection of roadblocks that might impede their litigation

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[138] *See* FED. R. EVID. 1101(d).

[139] *See* 8 MINNESOTA PRACTICE SERIES, CRIMINAL LAW & PROCEDURE § 19:25 (4th ed. 2022) ("A surprising volume of guilty plea records consist of leading questions by counsel or the court, with the accuser's participation limited to 'yes' or 'no' answers, or even merely nods or shakes of the head."); Barajas v. Castro, No. C 00-04075, 2002 WL 202440, at *7 (N.D. Cal. Feb. 1, 2002) (observing that "compound questions are normal in plea colloquys").

[140] For an elaborative discussion regarding the importance of remorse and contrition in the criminal process, see Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 92–95 (2004). The authors observe:

> [T]he presence or absence of remorse, contrition, or apology can greatly help or hurt defendants. In federal court, for example, judges reduce sentences by two or three levels for defendants who express contrition or remorse. At the high end of the Federal Sentencing Guidelines, this reduction can subtract years from a defendant's sentence. The effect is just as stark at the state level. . . .

Id. at 93.

Why does the criminal law accord so much weight to these expressions? In the eyes of judges, they indicate that an offender is not "lost," that he has some self-transformative capacity that justifies (or requires) a lesser punishment:

> Some scholars, judges, and attorneys may be less convinced that a judge's gestures or mannerisms could cause an innocent defendant to plead guilty. But consider the decision-making skills of a defendant who is terrified by the thought of staying in prison for a long time. If it is possible to reduce prison time by any degree, would a defendant not leap at that opportunity? Perhaps the defendant is a first offender who has no idea how the criminal justice process works. The person who wields all the power (i.e., the judge) silently, but perceptibly, reprimands the defendant, convincing the defendant that going to trial would only upset the judge and increase the chances of being punished more harshly. Thus, the defendant pleads guilty.

Prentice L. White, *The Judge Made Me Do It: Evaluating How Judicial Expression in Plea Negotiations May Contribute to Wrongful Convictions*, 54 Willamette L. Rev. 137, 163 (2017).

[141] John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173 (2014) (arguing that some innocent defendants plead guilty to "get out of jail" and to "avoid being punished for exercising their right to trial").

[142] Quoting Andrew W. Grindrod in *Bottom-Up Federal Sentencing Reform*:

> [O]nce a defendant makes the decision to plead guilty . . . he knows that he must then express remorse to earn the acceptance of responsibility reduction. With knowledge that an apology will effectively reduce his sentence by 28 percent, a defendant has all the incentive in the world to express remorse. Very few defendants will fail to apologize, leaving judges to ferret out opportunistic expressions of remorse from those that are sincere.

65 WM. & MARY L. REV. 785, 816–17 (2024).

[143] Allen Bentley, *Book Review: I'm Sorry for What I've Done: The Language of Courtroom Apologies*,

outcomes.[144] Like the trial witness on direct examination, the defendant in a change-of-plea circumstance will be inclined to follow the lead of the judge and not express any objection or confusion in response to compound questioning posed by the court.[145]

While these underlying principles align both in and outside the trial context, there is a critical and ironic difference that should not be underappreciated. In a trial setting, defendants contest their guilt, the government retains its burdens of production and persuasion,[146] and the jury is charged with assessing the facts.[147] The jury is free to disregard the evidentiary facts admitted at trial, including testimony received via leading and compound questions, and to acquit the defendant at the end of the process.[148] In contrast, when defendants elect to change their plea, they are admitting their guilt, relieving the government of its burdens, and consenting to the imposition of criminal penalties.[149] They are literally just minutes away from being adjudicated guilty. In this context, where defendants are consenting to the adjudication of their guilt and are disinclined to resist a court's inquiries, it is hard to imagine a trial scenario where the employment of leading and compound questioning could be as weighty and consequential. Yet, it is only in the trial context where such questioning modes are circumscribed.

III. PROPOSAL FOR REFORM

The problems identified with the Rule 11 process can be successfully mitigated by implementing modest statutory reforms. What is critical is the creation of a judicial record that captures more sufficiently each defendant's mindset regarding their change of plea decision. In each instance, a judicial record must be developed that adequately measures the extent of a defendant's knowledge of the various Rule 11 informational items, the voluntariness of their decision, and the underlying factual basis. More elaborate defendant commentary is necessary to adequately gauge the validity of a guilty plea.

CHAMPION (Aug. 2015) (reviewing M. CATHERINE GRUBER, I'M SORRY FOR WHAT I'VE DONE: THE LANGUAGE OF COURTROOM APOLOGIES (2014)) (recognizing defendant motives to appease judges at sentencing; Bentley states that "[a]ll defendants have hurdles to overcome in delivering an effective allocution. By definition, the defendant has broken a governing social rule. By status, the defendant has an interest in the outcome, which forms a motive to feign contrition.").

[144] Often these litigative objectives pertain to the length of sentence. Defendants understand that fulfillment of their sentencing preferences is in the hands of the court. *Id*. ("On any given weekday, at any time, somewhere in the United States a defendant appears before a federal judge for sentencing. Rule 32(i)(4)(A)(ii) of the Federal Rules of Criminal Procedure requires the sentencing judge to offer the defendant, before sentence is imposed, an opportunity to speak on her own behalf and to present information to mitigate the sentence. *The defendant then speaks, seeking the words that may lead to a lesser sentence.*" (emphasis added)); *see* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1586 (1998) (noting greater likelihood of juror acceptance of defendant statements of remorse when tendered earlier rather than later).

[145] Leanna C. Minix, *Examining Rule 11(b)(1)(N) Error: Guilty Pleas, Appellate Waiver, and* Dominguez Benitez, 74 WASH. & LEE L. REV. 551, 603 (2017) (noting that in the context of Rule 11 appellate waivers, the "Third, Sixth, and Seventh Circuits[]" discourage lower courts' use of leading questions so as to "prevent the colloquy from turning into a sham or farce . . . .").

[146] *See* United States v. Dilg, 700 F.2d 620, 623–24 (11th Cir. 1983) (noting the government's burden to prove a defendant's guilt beyond a reasonable doubt and the presumption of a defendant's innocence).

[147] United States v. Caputo, 288 F. Supp. 2d 912, 916 (N.D. Ill. 2003).

[148] *See* United States v. Hernandez, 433 F.3d 1328, 1334 (11th Cir. 2005) ("Although Lopez and Benavides testified that Hernandez was not a participant in the conspiracy, the jury was free to disbelieve their testimony. . . . 'A jury is free to choose among reasonable constructions of the evidence.'" (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982)).

[149] *See e.g.*, United States v. Marcia-Acosta, 780 F.3d 1244, 1251 (9th Cir. 2015) ("When a defendant pleads guilty to a crime, 'he waives his right to a jury determination of only that offense's elements . . . .'"); Blakely v. Washington, 542 U.S. 296, 310 (2004) (noting that a defendant's plea of guilty can potentially permit the government to seek sentencing enhancements).

Achievement of these objectives will typically require more robust judicial colloquies, characterized by limited judicial employment of leading questions and an avoidance altogether of compound questioning.[150]

Instructive in this regard is *United States v. Bridgewater*.[151] There, the defendant entered a guilty plea in 2019 to a single felony count (soliciting an obscene visual depiction of a minor).[152] He was sentenced to seventy-eight months imprisonment and seven years of supervised release.[153] The following year, he filed a motion with the district court seeking compassionate release, arguing that his preexisting medical conditions rendered him "especially susceptible to serious illness or death from the COVID-19 outbreak" at his prison facility and that these circumstances satisfied the "extraordinary and compelling" threshold.[154]

At issue in *Bridgewater* was the applicability of the following waiver provision in the defendant's plea agreement:

> [I]n exchange for the recommendations and concessions made by the United States in this Plea Agreement, *Defendant knowingly and voluntarily waives the right to seek modification of or contest any aspect of the conviction or sentence in any type of proceeding*, including the manner in which the sentence was determined or imposed, that could be contested under Title 18 or 28, or under any other provision of federal law, except that if the sentence imposed is in excess of the Sentencing Guidelines as determined by the Court (or any applicable statutory minimum, whichever is greater), Defendant reserves the right to appeal the substantive unreasonableness of the term of imprisonment.[155]

The Seventh Circuit found that the waiver provision encompassed the defendant's compassionate release petition and dismissed his appeal.[156] The court found, *inter alia*, that compassionate release "is clearly a form of sentence modification."[157] It referenced "[t]he heading to [18 U.S.C.] § 3582(c) [which] reads 'Modification of an imposed term of imprisonment,' and noted that compassionate release is among the listed modifications.[158] It further reasoned that the waiver language was "broad" and encompassed not only direct appeals and habeas petitions but also motions for compassionate release.[159]

The court also referenced the defendant's guilty plea colloquy, which it submitted, evinced the

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[150] *See* Allison D. Redlich, Kirsten Domagalski, Skye A. Woestehoff, Amy Dezember & Jodi A. Quas, *Guilty Plea Hearings in Juvenile and Criminal Court*, 46 LAW & HUM. BEHAV. 337, 349 (2022):

> A second novel type of insight we were able to glean concerned the degree to which defendants appeared to participate in plea hearings and the court attempted to engage defendants. First, irrespective of the court, defendant participation was minimal, as has been noted by legal professionals when asked about juveniles' participation in plea hearings. Our observational design did not allow us to evaluate why participation was so low, but we can offer some speculative explanations. One possibility stems from the type of questions asked and defendants' responses. Insofar as the judicial colloquy is comprised of yes/no questions (e.g., "do you understand ...") or perhaps statements to confirm or deny, there is likely little opportunity to elaborate. Closed-ended questions often lead to simple or one-word answers rather than elaborated responses, especially in youth.

Id.

[151] *See generally* United States v. Bridgewater, 995 F.3d 591 (7th Cir. 2021); *see supra* notes 110–11 and accompanying text.

[152] *Bridgewater*, 995 F.3d at 593.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 602.

[157] *Id.* at 595.

[158] *Id.*

[159] *Id.*

defendant's comprehension of the waiver:

> Q: All right. And in terms of, finally, waiving your appeal rights. [The prosecutor] mentioned certain waivers that are part of the Plea Agreement. Did you specifically have a chance to discuss those waivers with your attorney ... so that you understand what rights to appeal you are actually waiving in exchange for the agreement?
>
> A: Yes ma'am.[160]

The defendant's affirmative response, according to the court, "confirmed that he understood his waiver."[161]

Thus, the court's conclusion rests largely upon the defendant's response in monosyllables to a single question that was not only leading and compound but was devoid of any identifying or explanatory details regarding the "certain waivers" referenced by the prosecutor.[162] There was no exploration regarding what information the defendant's attorney supposedly shared with the defendant regarding the waivers to be forfeited, the length of these discussions, or even the location where these conversations allegedly took place. Moreover, the court failed to reference any portion of the written plea agreement, the change of plea hearing transcript, or anything else in the record where the subject of compassionate release was discussed.

Against this backdrop, it is highly dubious that the defendant truly comprehended the scope of the sentencing modification waiver contemplated by his plea agreement. And even if he, in fact, possessed such an understanding, this record fails to meaningfully support this conclusion. As noted, the Supreme Court in *Boykin* held that a valid guilty plea could not be found based on a silent record.[163] And Congress sought to guide the courts in the development of this record by amending Rule 11 to detail the array of items that a defendant should be made aware of and understand.[164] The decision to change a plea and accept the accompanying consequences should not be so blithely affirmed as they were in *Bridgewater*. The spirit of *Boykin*, as well as the significant and recurrent Congressional amendments to Rule 11, surely evince a will for a more meaningful judicial effort. They reflect an intent to implement a guilty plea hearing process that is true to the concept of due process. By amending Rule 11 to require meaningful defendant elaboration with respect to their knowledge and voluntariness and by circumscribing the allowable judicial questioning modes, the laudable objectives underlying the rule are more likely to be realized.

Critics will correctly argue that my proposal will greatly elongate the change of plea hearings. However, the truncated hearings that have long characterized federal court change of plea practice are a byproduct of the expediency rush that has produced uneven results.[165] Elongating these hearings will not

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[160] *Id.* at 596.

[161] *Id.*

[162] *See id.*

[163] Boykin v. Alabama, 395 U.S. 238, 243 (1968).

[164] *See supra* notes 127–39 and accompanying text.

[165] *See* Redlich et al., *supra* note 150 detailing the similarities of juvenile and adult criminal guilty plea hearings:

> First was their length. As anticipated, plea hearings were incredibly quick, consistent with observational studies spanning up to four decades. The hearings lasted about 6-8 min in juvenile court and about twice as long, but still only 13 min, in criminal court. Although the plea hearings we observed were longer than misdemeanor arraignment hearings (about 3 min; Smith & Maddan, 2011), is it possible that plea validity can be adequately--much less comprehensively-- addressed in a matter of minutes? As a result, even juveniles, who regularly fail to fully understand many aspects of their legal case , ceded their rights and were convicted, often of felony crimes, in mere minutes. In contrast, the length of a criminal jury trial is 11 hr and 7 min . . . . Thus, the time

always be necessary, but in all probability, they will become far more common under my proposal if greater surety of defendant change of plea decisions is to be achieved. It is important to note that the extra time expended at the district court level will be mitigated by enhanced efficiency at the appellate level, where there will be fewer appellate claims alleging Rule 11 errors. [166]

Critics will also argue that defendants who have trouble expressing themselves or who demonstrate an insufficient level of comprehension will be unable to comply with this heightened standard. I concede that such communicative difficulties will inevitably arise. However, in these situations, a court is not without a remedy. A court may, for example, allow defendants the opportunity to consult with their attorneys, grant a recess, reschedule the hearing, or ask limited leading questions.[167]

To underscore the feasibility of my proffered reforms, aspects of my recommendations are already a staple of change of plea procedure in our military courts. The Military Court of Appeals has clearly communicated that in the military system, there is a heightened judicial expectation when it comes to assessing defendants' change of plea decisions.[168] In contrast to the inconsistent standards of "rigor" that characterize civilian court plea colloquies, there is an institutional expectation in the military system of judicial consistency, namely, that all military court judges will meticulously assess each defendant's change of plea decision prior to accepting or rejecting a defendant's change of plea request.[169] To this end, it is notable that the use of leading questions during a defendant's change of plea colloquy is "generally disfavored."[170]

> it takes to convict a juvenile by trial is roughly 95 times longer than the time it takes to convict them by plea, and 51 times longer for an adult.

Id. at 347;

Right now, guilty plea hearings are often dry recitations of rights and facts. Judges advise defendants of a laundry list of procedural rights they are waiving, and defendants answer "yes" to indicate that they understand each one. After that, defendants provide very brief factual statements explaining what they did, which are often written by their lawyers. *See* Bibas & Bierschbach, *supra* note 35, at 140.

[166] Diarmuid F. O'Scannlain, *Striking A Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473 (2009) (describing the federal appellate court caseload as "overwhelmingly composed of criminal cases and administrative agency appeals."); For additional discussion about the burgeoning caseload at the federal appellate court level, see Marin K. Levy, *Judging Justice on Appeal Injustice on Appeal: The United States Courts of Appeals in Crisis*, 123 YALE L.J. 2386, 2388 (2014) ("When recently asked what he thought was one of the greatest problems plaguing the federal judiciary, Supreme Court Justice Samuel Alito responded by saying the 'crushing' workload faced by his former colleagues on the courts of appeals. The Justice's statement should come as no surprise. For close to half a century, judges and scholars alike have spoken out about a critical problem facing the federal appellate courts: the caseload has grown at an exponential rate.").

[167] *See* Green v. United States, 348 F.2d 340, 341 (D.C. Cir. 1965) ("The trial court may permit leading questions where, for example, the witness has forgotten some events or is ignorant or even reluctant to testify."); 3 CRIM. PRAC. MANUAL § 77:6 (2023) (noting that leading questions may be permissible when attempting to "extract[] information from witnesses with limited understanding, whether due to mental capacity, immaturity, extreme nervousness, fear, inexperience, or other impediments," as well as for "certain witnesses, including a child sexual abuse victim, a foreign witness testifying through a translator, an unusually soft-spoken and frightened witness, and a mentally [disabled] adult who was the victim of sexual abuse . . . .").

[168] Sean Patrick Flynn, *Ensuring Justice Without "Beating the Deal"*," 94 NOTRE DAME L. REV. ONLINE 128, 137–38 (2019) (discussing the varying degrees of judicial rigor during plea colloquies in civil courts versus that in the military system).

[169] *See id.*

[170] S. Charles Neill, *Everybody Cut Footloose: Recent Developments in the Law of Court-Martial Personnel, Guilty Pleas, and Pretrial Agreements*, 2010 ARMY L. 31, 39 (2010) (noting that "a great burden" is placed "on military judges to explain the elements of an offense to an accused before a guilty plea may be accepted, in stark contrast to the lower standard in civilian courts"). Judicial employment of leading questions that "merely elicit 'yes' or 'no' response[s]" during the providence inquiry is disfavored. *See* United States v. Negron, 60 M.J.

And the thrust of my proposal is not without support in civilian federal courts.[171] Consider *Shafer v. Bowersox*.[172] There, the defendant, who entered guilty pleas to four charges (two counts of first-degree homicide and two counts of armed criminal action), challenged in his habeas petition the validity of his guilty plea.[173] His arguments focused primarily upon the alleged failure of the Missouri state trial court to advise him of certain informational items which, he contended, evidenced the court's failure to "conduct a 'penetrating and comprehensive examination of all the circumstances under which [the] plea [was] tendered.'"[174]

Finding that the defendant's guilty plea was invalid, the district court's decision rested, in part, upon the mode of questioning employed by the trial court during its plea colloquy. Specifically, the district court referenced the trial court's use of leading questions and the defendant's monosyllabic responses ("Yes, I do") during a colloquy regarding a certain sentencing consequence.[175] In the end, the district court reasoned that the trial court's employment of leading questions, among other trial court "omissions," failed to "demonstrate that [the defendant] understood the law in relation to the facts . . . and the 'alternative courses of action' available to him."[176]

CONCLUSION

Stressing the necessity for a judicial process that ensures the entry of informed and voluntary guilty pleas, Professor Stuntz wrote:

> The guilty plea . . . is the *end* of the process, not the beginning. There are no more accuracy checks once the plea is entered. It is thus vitally important that there be some mechanism for checking the accuracy of pleas that protects the innocent to roughly the same extent as does the trial, with its adversary presentation of evidence and heavy burden of proof on the state . . . .The defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime. Thus, . . . the plea proceeding requires someone who is legally trained to check the accuracy of the defendant's confession.
>
> The judge can perform this accuracy check to some extent—hence the rule that the court must find a factual basis for the defendant's guilty plea. But unless guilty plea hearings are to become as long and as thorough as full-scale trials, the court's check cannot be enough.[177]

Stuntz's observations evince his appreciation for the solemnity of the change of plea decision. They reflect his understanding that the integrity of the criminal justice process mandates a judicial inquiry into a plea's validity that is commensurate with its gravity. And it is safe to infer that Stuntz understood that

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136, *aff'd*, (C.A.A.F. Feb. 21, 2007) (noting the discouragement of leading questions during military system plea colloquies).

[171] Sentiment for my concerns regarding the use of leading questions in this context has also been expressed by some civilian state courts and state court criminal practice commentators. *See, e.g.*, State v. Raleigh, 778 N.W. 2d 90, 95 (Minn. 2010) (noting the general discouragement of leading questions to establish the factual basis); *see also* 8 MINNESOTA PRACTICE SERIES, CRIMINAL LAW & PROCEDURE § 19:25 (4th ed. 2022) ("A surprising volume of guilty plea records consist of leading questions by counsel or the court, with the accuser's participation limited to 'yes' or 'no' answers, or even merely nods or shakes of the head. This is to be discouraged.").

[172] *See generally* 168 F. Supp. 2d 1055 (E.D. Mo. 2001), *aff'd*, 329 F.3d 637 (8th Cir. 2003).

[173] *Id.* at 1058, 1061, 1079.

[174] *Id.* at 1079.

[175] *Id.* at 1080.

[176] *Id.* at 1082 (internal citation omitted). A similar result was reached in Wilkins v. Bowersox, 933 F. Supp. 1496, 1511 (W.D. Mo. 1996) (holding that defendant's guilty plea was neither intelligent nor voluntary citing the lower court's use of leading questions).

[177] William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 830–31 (1989).

this judicial respect required, at a minimum, a substantive examination of the defendant; an in-depth colloquial exchange that far exceeds the cursory, arguably cavalier, examinations that too often characterize federal change of plea practice.

Sentence length, immigration consequences, and appellate rights are among the critical ramifications that often accompany a defendant's change of plea decision.[178] Enumerated in Rule 11, each of these items requires judicial mention and consideration during the change of plea process.[179] The focus of this Article, however, highlighted another notable consequence of significance—an inmate's waiver of the ability to obtain sentencing modification through compassionate release. Though unenumerated in Rule 11 and thus not subject to Rule 11's discussion mandate, the waiver of compassionate release rights is a deeply impactful ramification. It involves a waiver of a right to seek sentencing modification for extraordinary life events that are often unforeseeable.[180] The unpredictability and potential severity of these life circumstances arguably render the waiver of this right as consequential as any of the items that require judicial mention delineated in the rule.

Stuntz is correct that a "court's check cannot be enough."[181] Frankly, I am not sure that any guilty plea adjudicatory process can ever be "enough." However, I am not convinced, as he suggests, that an effective change of plea procedure requires elongating the plea hearing to that of a trial. I submit that meaningful and impactful plea hearing reform can be effectively achieved through more modest measures. The proposed amendments to Rule 11 presented in this article, which require more thorough judicial inquiries and circumscribed questioning modes, are apt and appropriate measures of reform. The proposals are logical, their implementation is feasible, and they further the critical objective of ensuring the entry of an informed and voluntary guilty plea by building upon the body of constitutional and statutory framework established by the Supreme Court and Congress over the last several decades. If enacted, the federal change of plea process will come closer to fulfilling the laudable objectives that underlie the rule.

[178] *See supra* notes 133–39 and accompanying text.
[179] *Id.*
[180] *See supra* notes 18–19, 58–69, 91 and accompanying text.
[181] Stuntz, *supra* note 176, at 831.