Debevoise's Holloway Project and "Second Looks": How Challenging One Discrete Racial Inequity in Federal Criminal Justice Can Help Produce Systemic Change

JOHN GLEESON

Partner, Debevoise & Plimpton LLC*

I. Introduction

Good for the *Federal Sentencing Reporter* for dedicating an Issue to Clemency. And good for Margaret Love, one of the leading lights on the topic, for guest editing it.

The president's power to grant clemency is but one feature of a sentence-correction ecosystem. The others include direct appeals, collateral challenges, and retroactive amendments to the Sentencing Guidelines ("guidelines"), as well as reductions based on post-conviction cooperation with the government, an inmate's age and medical condition, or the pressing need for an inmate to perform caregiver responsibilities. Some of those measures require legal defects in the conviction or sentence; one depends on the Sentencing Commission's policy choices; another on the government's crime control choices; and the others on the extreme offender characteristics specified above. But the abolition of federal parole in the 1980s left the clemency power as the only way to correct lawfully imposed sentences for the simple reason that they are too damn long.

Or did it? This article is about another way to correct sentences for that simple reason, one that has been right there all along but was moribund for decades, and about a 2018 statute and a Debevoise & Plimpton pro bono project that breathed life into it. And it is a critical Article III complement to the Article II clemency power.

For the past five years, the Holloway Project at Debevoise has advocated for federal prisoners, overwhelmingly men of color, who were given bone-crushing sentences pursuant to the cruelest mandatory sentencing law the federal system had to offer: the twenty-five-year mandatory *and consecutive* sentence for "second or successive" firearm convictions under 18 U.S.C. § 924(c). The typical Holloway Project client is a middle-aged man who was sentenced decades ago for robbery sprees in which a firearm was used but no one was hurt and little was stolen. In almost all of their cases, the indefensible sentences—often as not the equivalent of life without parole—had nothing to do with their culpability and everything to do with their refusals to cooperate and/or plead guilty.

Left behind by efforts to reform nonviolent drug offense sentences, our clients are among the highest-hanging fruit on the sentencing reform tree: men who are actually guilty of multiple violent crimes committed with firearms. Anyone who thinks defendants who fit that description cannot receive manifestly unjust sentences hasn't spent enough time in federal courtrooms over the last thirty years. And anyone who thinks such men cannot mature in prison into commendable people deserving of a second chance doesn't understand what people are capable of accomplishing. Yet there are no foundations or law school clinics devoted to securing justice for them. Until recently, they were gone *and* forgotten.

Enter the Holloway Project. Established in 2016 for the specific purpose of rectifying the miscarriages of justice inflicted disproportionately on Black men in the form of "stacked" sentences under § 924(c), at first the project overestimated the capacity of the Department of Justice (DOJ) for mercy and compassion. As a result, it failed completely for more than two years. Then, in December 2018, the First Step Act ("First Step") transformed us from hat-in-hand supplicants into litigants, squaring off in court against the same prosecutors before whom we had groveled for mercy.

The results have been impressive and of enormous significance, and not just for our clients and the families and communities to which we've returned them. One of the holy grails of sentencing reformers over the past two decades is a judicial "second look" at the excessively severe sentences the previous reform movement ushered into our federal and state criminal justice systems.[1] A lot of gifted lawyers, including many of the brightest minds in the academy, have worked hard to achieve that goal. The need for it has been glaring; parole was abolished in the federal system some thirty-five years ago in the name of certainty in sentencing, but too many of those certain sentences were imposed not by judges but by prosecutors, whose imprudent exercises of discretion forced sentencing outcomes that shame us all.

Thanks to First Step, we now have a meaningful "second look" in the federal system, and the Holloway Project has helped to place its potential and importance in the sharpest possible relief. Many others have contributed to the effort, among them Professor Shon Hopwood at Georgetown and the immensely talented and dedicated federal defenders throughout the country. But the most significant contributors by far are the countless federal judges who have

Federal Sentencing Reporter, Vol. 33, No. 5, pp. 319–327, ISSN 1053-9867, electronic ISSN 1533-8363.
 DOI: https://doi.org/10.1525/fsr.2021.33.5.319.

stepped up to the plate and taken those second looks. After holistic, compassionate reevaluations of the men our clients have become after all their years in prison, those judges have injected some humanity and justice into a sentencing regime that is still in desperate need of both.

II. Sentence Reductions Under 18 U.S.C. § 3582(c)(1)(A) Before the First Step Act

What has become known colloquially as the "compassionate release" statute, 18 U.S.C. § 3582(c)(1)(A), was enacted as part of the Comprehensive Crime Control Act of 1984. Prior to First Step, § 3582(c)(1)(A) provided as follows:

> [T]he court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, . . . and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person in the community . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.][2]

The goals of the statute were clear. Having abolished parole and created a "completely restructured guidelines sentencing system,"[3] Congress recognized the need for judicial authority to reduce previously imposed sentences:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of *severe illness*, cases in which *other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some *cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment*.[4]

The three italicized categories of cases are revealing. The third anticipated downward adjustments to guidelines sentences that the Commission would make retroactive,[5] and § 3582(c)(2) authorized sentence reductions accordingly.[6] The first, severe illness, would become, due to subsequent events described below, the popular conception of "compassionate release." The second anticipated a determinate system in which prosecutors would be empowered to force courts to impose extraordinarily long mandatory sentences and established a critical safety valve. Rather than subject all federal sentences to opaque review by the Parole Commission, Congress provided for a "second look" at a small subset—"unusually long" ones, in cases presenting "extraordinary and compelling" reasons. In those narrow circumstances, § 3582(c)(1)(A)(i) permitted transparent sentence reductions in courtrooms—in other words, judicial second looks.[7]

So far, so good. But our federal sentencing regime since the mid-1980s has been littered with the adverse consequences of a handful of critical mistakes by Congress and the Sentencing Commission. In this context, it was the decision by Congress to condition sentence reductions under § 3582(c)(1)(A) on a motion brought by the Bureau of Prisons (BOP).[8] The error was compounded by the Sentencing Commission's failure for two decades to comply with Congress's directive to "describe what should be considered extraordinary and compelling reasons for sentence reduction."[9] By the time the Commission got around to it, the BOP had mired itself in a rut of its own making. Placed by Congress in the role of gatekeeper, it chose to almost never open the gate,[10] and on the few occasions when it did, it filed motions only on behalf of elderly, extremely ill inmates. As a result, a generation of lawyers, judges, and inmates came to believe that "compassionate release" (a term found nowhere in the statute) was hardly ever available, and when it was, it was limited to those narrow circumstances.

III. Section 924(c) "Stacking"

Section 924(c) mandates consecutive minimum sentences when a firearm is used or possessed during a crime of violence. A defendant's first conviction under the law requires a sentence of five years (seven if the weapon is brandished, ten if it's discharged). Additionally, before the First Step amendment, "second or successive" convictions each resulted in a mandatory consecutive sentence of twenty-five years, even if they were obtained in the same case as the first.[11] The practice of charging multiple § 924(c) counts in a single case became known as "stacking."

When a defendant commits multiple robberies with firearms, prosecutors have broad charging discretion. They can charge only the robbery counts and seek upward adjustments in the guidelines range based on the presence of the gun.[12] Or they can bring one or more charges under § 924(c) and seek the much harsher (and mandatory) sentences described above on each such count. Unfortunately, the government, armed by Congress with a discretionary power to compel the ultra-harsh punishments by stacking § 924(c) counts, exercised that power for decades not against the most culpable defendants, but against those who refused to cooperate and/or plead guilty.[13] Even more troubling, as the Sentencing Commission reported over and over again, was the government's decades-long habit of deploying stacked § 924(c) counts in racially disproportionate fashion against Black men.[14]

IV. The Origin of the Holloway Project

The Holloway Project traces its origin back to 1995. Francois Holloway, who operated a chop shop, committed three carjackings in twenty-four hours; his accomplice had a gun

in each. The crimes were serious, but no one was physically injured. Holloway was offered a plea bargain under which the government would drop two of the three § 924(c) counts; Holloway would have to serve about nine years in prison. Instead, he insisted on going to trial, a choice that cost him more than forty years because he was convicted of the stacked § 924(c) charges and the law at the time required that he be sentenced to fifty-seven years.

I was Holloway's sentencing judge. His mandatory sentence haunted me for almost two decades. In 2013, I issued an order requesting that the United States Attorney consider agreeing to the dismissal of two or more of Holloway's § 924(c) convictions. U.S. Attorney Loretta Lynch worked hard in response to the request, carefully considering Holloway's impressive rehabilitation while incarcerated, contacting the victims of his crimes, and taking into account the excessive severity of his sentence. In July 2014, she exercised her discretion to grant my request, allowing me to reduce what was effectively a sentence of life without parole to a sentence of time served, giving Holloway back the rest of his life.

I published a memorandum opinion describing these events more fully,[15] and that made me popular among other inmates in the federal system who were serving excessive sentences resulting from stacked § 924(c) counts. They wrote me letters, hoping I would somehow do for them what I was able to do for Holloway.

Their stories were compelling. Ted Davis was more than twenty years into a sentence based on his minor role in a string of robberies committed when he was eighteen years old. Likened by his prosecutor to the orphans in *Oliver Twist*, Ted made the mistake of insisting on a trial. The other "orphans," who pled guilty, had been released more than fifteen years earlier, but in 2016 Ted was still looking at more than a decade in prison. Eric Andrews was only nineteen years old, with no criminal history, when he participated in thirteen robberies of small markets and gas stations. Again, there were no physical injuries and only small amounts were stolen, but Eric also chose to go to trial, so he was sentenced to *three hundred and eleven years*. Not all of the men who wrote me had gotten their unjust sentences as punishment for going to trial. Thomas McCoy, also only nineteen when he participated in a robbery spree a lot like Eric's, decided not to risk dying in prison, so he accepted a plea offer pursuant to which he was serving "only" thirty-five mandatory years.

I was struck by how moving the letters were and by how many I received. There were hundreds of them. A few years later, a Sentencing Commission report would show that more than 2,500 inmates received stacked § 924(c) sentences between 2000 and 2018.[16] The letters showed me that there were many more who were sentenced before 2000 and were still facing decades (in some instances centuries) of additional time in prison.

I left the bench and joined Debevoise in the spring of 2016. That summer brought shootings of Black men by police officers on successive days in Minnesota and Louisiana. The firm's response included an all-hands meeting in which lawyers and staff spoke candidly about the shootings, about the role of race in policing and in criminal justice generally, and about how many in our midst had personally suffered the effects of racism at the hands of law enforcement on a regular basis. At that meeting, we decided as a firm to do something concrete to address racial inequities in criminal justice. I already had a substantial client base in the form of the inmate letters I had saved, so Debevoise started the Holloway Project.

V. Phase One of the Project—Hat in Hand

The first phase of the project boiled down to asking U.S. Attorneys around the country to do what Loretta Lynch had done in the *Holloway* case. In detailed letters setting forth the circumstances of our clients' offenses, their remarkable rehabilitative accomplishments, their impressive BOP disciplinary histories, their release plans, and the legal authority for our request, we sought the prosecutors' consent to the dismissal of one or more of the stacked § 924(c) counts so that a more just sentence could be imposed. We had dozens of clients who were even deeper into their sentences than Holloway had been and presented even more compelling cases for mercy. We sent copies of the letters to the judges in our clients' cases, and some urged the U.S. Attorney to agree to our requests. Several judges stated that the sentences they were forced to impose had bothered them for years, just as Holloway's had done to me.

Not a single prosecutor agreed. Some never even responded. For more than two years, the project sought compassion and mercy from the institution that was solely responsible for our clients' indefensible sentences, and found none. It was an unmitigated failure.

VI. The First Step Act

On December 21, 2018, President Trump signed the First Step Act into law.[17] It did many things, but as it related to the Holloway Project, First Step amended both § 924(c) and the sentence reduction statute, 18 U.S.C. § 3582(c)(1)(A).

On the § 924(c) front, the new law brought both good news and bad. The good part was that Section 403 of First Step, titled "Clarification of Section 924(c)," established that Congress never intended the enhanced, twenty-five-year mandatory consecutive sentences for "second or successive" § 924(c) convictions to apply when those convictions came in the same case as the first. First Step amended § 924(c) so that will never happen again, and by doing so placed an imprimatur on one of the core arguments we had been making to U.S. Attorneys around the country. We were now able to say that even that Congress, and even that President, neither one known for excessive sympathy for violent offenders, had agreed with us that the sentences resulting from stacked § 924(c) counts in a defendant's first § 924(c) case were so draconian they had to be abolished.

The bad news was that the amendment was made retroactive only to cases that had not yet been sentenced. Our

clients were serving mandatory sentences imposed decades earlier. They would not be eligible for relief under Section 403 of First Step.

But First Step also amended the sentence reduction statute. Section 603(b) of the new law removed the BOP as the gatekeeper for motions to reduce sentences under § 3582(c)(1)(A). Titled "Increasing the Use and Transparency of Compassionate Release," it allowed inmates to file such motions themselves, even in the absence of BOP support and, indeed, even if the BOP had affirmatively rejected the inmate's request for a BOP motion.

At first blush, this latter amendment did not appear to be a game changer, for two reasons. The first was the popular misconception that only old and infirm inmates had a shot at sentence reductions. The BOP had imbued that belief in us all through more than two decades of miserly invocation of its authority to move for sentence reductions. The second was the statutory command that sentence reductions under § 3582(c) had to be consistent with any applicable policy statement in the Commission's *Guidelines Manual*. That provision, U.S.S.G. § 1B1.13, required a BOP motion. It also appeared, on its face, to vest in the BOP the authority to determine whether extraordinary reasons other than age, medical condition, and caregiver status warrant a sentence reduction no matter who made the motion.[18] Since the Commission itself was (and remains) without a quorum, DOJ would argue that even after First Step, judges were without authority to reduce the sentences of our clients.

The situation thus seemed perplexing. Thousands of men were serving mandatory sentences that were orders of magnitude longer than Congress ever intended them to receive, and Congress had now condemned those sentences going forward. "So, what to do?" wrote Judge David Larimer a couple of months after First Step was enacted. "One option now is for those in the system to say to Mr. [Chad] Marks," the defendant he had sentenced years earlier, "'too bad, the changes don't apply to you and you must serve the lengthy remainder of your 40-year term, and perhaps die in jail.'" Another option, the judge wrote, was for U.S. Attorneys to understand that our criminal justice "system is about justice and fairness ultimately," and to consider agreeing to vacate § 924(c) convictions so that judges can do justice. "The record reflects extraordinary accomplishments" by Marks, he wrote, and "[e]xtraordinary cases require extraordinary care and sometimes extraordinary relief." He urged the U.S. Attorney in the Western District of New York to review my opinion in *Holloway* and do what the prosecutor had done there.[19] Judge Larimer was not alone; in the wake of First Step, several judges sua sponte encouraged the U.S. Attorneys to reconsider our requests for relief on consent. They all declined.

Judge Larimer's words foreshadowed the answer to his own question. The relief contemplated by the statute, as one of our Holloway Project clients pointed out to me in the immediate aftermath of First Step becoming law, has *never* been restricted to the aged and infirm. On its face, it authorizes sentence reductions whenever "extraordinary and compelling reasons" warrant them. Our clients were serving breathtakingly long sentences that Congress never intended and had now abolished; though their offense conduct was serious, in almost all the cases no one was hurt and little was stolen; most had received the sentences as a penalty for refusing to cooperate and/or exercising the right to trial; they'd demonstrated extraordinary efforts to rehabilitate themselves while in custody; and most were Black men who'd been subjected to cruel mandatory enhancements that had been invoked by DOJ in a racially discriminatory fashion for decades. Really, what could be more extraordinary and compelling than that?

We saw our opportunity, and from that point forward we devoted all of our efforts to pursuing it in the courts.

VII. Phase Two of the Project—Litigation

Liberated from the futility of asking for mercy from U.S. Attorneys and the BOP,[20] our clients could now file motions directly with the courts seeking sentence reductions under § 3582(c)(1)(A) based on extraordinary and compelling reasons. We have filed forty-three such motions all over the country, litigating them in twenty-nine district courts and in seven courts of appeals.

We've done well. Seventeen clients have already been reunited with their families. (One is Chad Marks; after reading Judge Larimer's order, we brought a motion on his behalf and the judge rejected the government's desperate efforts to keep Marks in prison another twenty years.)[21] Twenty-one cases have been won in the district courts; we've had at least one success in every circuit except the D.C. and Eighth circuits. We've had six positive appellate outcomes.[22] The Holloway Project has reduced its clients' sentences by a total of 827 years.

In addition to the clients now under post-release supervision, the Holloway Project currently has forty-nine active cases in the courts, and our client list is growing. There are limits to how many cases we can take on; as mentioned above, thousands of men are serving stacked § 924(c) sentences, and no doubt a meaningful percentage deserve consideration for reductions. So we have worked closely with Professor Hopwood, the Federal Defender Program, Families Against Mandatory Minimums, and the National Association of Criminal Defense Lawyers in the hope that our project would provide a template for them and others, including pro se defendants, to seek reductions based on the favorable case law our successful motions have created.[23] Increasingly, they have achieved success.[24]

We've learned so much in the process. It's impossible to overestimate the government's willingness to defend the indefensible, for example. Even as they admitted the excessive length of many of our clients' sentences, they clung to them. With a single exception—in 2021, the U.S. Attorney in Puerto Rico agreed to our request for release of a client who had already spent thirty years in prison—the closest we came to compassion were decisions by some prosecutors not to seek appellate review of sentence

reductions they had vigorously opposed in the district courts.

We also witnessed firsthand the federal judiciary waking up to a power to act as a check on prosecutorial power over sentencing. Not all seemed comfortable with it. One judge, who has been on the bench since before the guidelines era began, asked me point-blank whether I was contending that the amended sentence reduction statute made him "King." No, it makes you a judge again, I responded, but he wasn't up to the task and our appeal in that case is pending. For the most part, however, the judges showed both a hunger to do justice and a determination to do it carefully. In opinion after opinion, they engaged in precisely the holistic, full-blown second look § 3582(c)(1)(A) was enacted to provide, and many of the results are set forth in the margin.[25]

Each case raised both a legal question—do judges actually have the authority to reduce the sentence?—and then, depending on the district judge's answer, the question of whether, based on the facts of that particular case, the defendant was worthy of relief. On the critical threshold question, the government raised various arguments, but the central ones are addressed below.

First, the prosecutors contended that reducing a sentence resulting from stacked § 924(c) counts under the compassionate release statute would amount to an improper circumvention of Congress's decision not to make its amendment to § 924(c) fully retroactive. We successfully argued that we were not bringing the motions to retroactively apply Section 403 of the First Step Act; rather, we brought them on the basis of the amendment to § 3582(c)(1)(A)(i) made by Section 603(b) of the First Step Act, which allows a defendant to move for a sentence reduction without the support of the BOP. In our *McCoy* case in the Fourth Circuit, the court explained:

> The fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under § 3582(c)(1)(A)(i). As multiple district courts have explained, there is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable resentencings—and allowing for the provision of individual relief in the most grievous cases.[26]

In short, § 3582(c)(1)(A)(i) authorizes courts to reduce a sentence "in any case"—not any case "except those involving stacked sentences under § 924(c)"—presenting "extraordinary and compelling reasons warrant[ing] a reduction." And since one of the expressed purposes of the statute was to allow judges to reduce "unusually long sentence[s]," it would be odd indeed to require judges to ignore a congressional determination that stacked § 924(c) sentences were so unusually long that they would never be imposed again in a defendant's first § 924(c) case.[27] Indeed, "the very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions when there is not a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction."[28]

Another argument, which we faced in every case, was that even though Congress had cut the BOP out of the middle for the express purpose of increasing the use of sentence reductions, our clients in particular remained subject to BOP's control because their claimed extraordinary and compelling reasons were not their age, medical condition, or family circumstances. Relying on Application Note 1(D) to policy statement § 1B1.13,[29] the prosecutors argued that relief based on such "other reasons" could occur only where the BOP had determined them to be present in the case. Thus, the reductions we sought would not be consistent with the applicable policy statement, as the statute requires.

The easy answer to that argument is that the reference to the BOP in Application Note (1)(D) is obviously merely a relic of the old regime, in which the referenced BOP "determination" was a prerequisite to *every* motion. But the courts came up with an even easier one: because § 1B1.13, on its face, governs only motions brought by the BOP, it isn't even an "applicable policy statement" when the motion is made by a defendant.[30] A total of eight circuits have reached that conclusion.[31]

In any event, even if § 1B1.13 is considered "applicable" to a motion brought by a defendant, none of its references to the BOP's gatekeeper role would be binding on the courts. They conflict with the statutory text and the purpose of the First Step Act and with the text of § 1B1.13 (which itself is trumped to the extent it is inconsistent with the amended § 3582).[32] In addition, Congress contemplated exactly this situation in 18 U.S.C. § 3553(a)(5), which requires consideration of applicable guidelines and policy statements "subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments)."[33] Here, an act of Congress removed the BOP from its role as gatekeeper under § 3582(c)(1)(A) for the precise purpose of alleviating over-incarceration by increasing the use of sentence reductions.[34] As the Second Circuit emphasized in *Brooker*, this was Congress's "clear intention" in passing the First Step Act.[35] Thus, even assuming that § 1B1.13 is an "applicable policy statement" for a motion made by a defendant (rather than the BOP), the Court must consider it subject to that statutory demotion of the BOP.

Sentence reductions are inappropriate if the moving defendant would pose a danger if released, and a surprising number of prosecutors based dangerousness arguments solely on the offense conduct. One Assistant U.S. Attorney contended in oral argument that the offenses of conviction were so egregious that our client had to be incapacitated for the full fifty-five years of his sentence for the protection of the community. The judge immediately asked why, if that

were true, he had been offered a ten-year sentence if he pled guilty. She reduced his sentence to time served, which was less than fifteen years. In any event, the statute obviously focuses on *present* dangerousness. As one district judge has observed,

> The Government accuses most, if not all, defendants seeking compassionate release . . . of being a danger to the community. But, to assume every offender convicted of weapons offenses, drug crimes, robberies, or fraud schemes is a threat to the community and therefore cannot be granted compassionate release would render 18 U.S.C. § 3582(c)(1) meaningless as there are few federal inmates who are serving time for offenses that did not harm the public.[36]

DOJ's disparate deployment of § 924(c) stacking against Black men was a far less powerful argument than we expected. No one challenged the troubling data reported three times over a fourteen-year span by the Sentencing Commission.[37] But our contention that this systemic problem was an extraordinary and compelling reason to consider in reducing the sentences in our cases almost invariably devolved to an argument over whether the specific prosecutor opposing our motions, or the one who had obtained the conviction decades earlier, were themselves racists. One judge asked me if I had any evidence of such animus on the part of my adversary. Another asked why he should even consider the argument when the U.S. Attorney at the time the case was brought was Black. One of the prosecutors suggested in a court filing that I should be disciplined for making an unfounded accusation that he was a racist. These and other reactions ended any discussion of the real issue: DOJ was solely in charge of mandating these sentences; multiple sets of data it has never disputed show that, as an institution, it had done so in a racially discriminatory fashion for decades; so why was it determined not even to acknowledge that disturbing truth, let alone do something about it? Why is a relentless, remorseless effort to preserve the cruel results of a discriminatory practice any more defensible than the practice itself? In any event, the most telling indication that we're not yet able to deal with racial disparities that are baked into our system is that even though there are now many dozens of opinions that have reduced stacked § 924(c) sentences based on extraordinary and compelling reasons, not a single one even mentions the fact that those mandatory sentences were invoked disproportionately against Black men.

We've learned the critical importance of presenting our clients as the unique individuals they are. Mandatory sentencing provisions dehumanize defendants, as does a guidelines regime that creates the illusion, by establishing a labyrinthine calculus that quantifies countless factors, that sentencing is some kind of science. Our clients are three-dimensional human beings, with families that love them and communities that eagerly await their return. They have grown up in prison, many having spent almost their entire adult lives there, and the results are impressive: obtaining GEDs and, in some instances, college or other degrees; tutoring other inmates; participating in suicide watches; and generally preparing for a release that, for most, is not projected for decades, if they will be released at all. Their faith in a system that visited cruelly excessive sentences on them in racially discriminatory fashion remains unshaken. Take a look at any one of the Holloway Project clients and your first impression is that this is why any system of justice *must* provide for second looks at extremely long sentences. Take a look at the opinions granting our motions and your first impression is that the task of reducing sentences is quintessentially *judicial*, for both institutional and practical reasons, and cannot effectively be relegated entirely to the Article II clemency power. The latter authority remains an important safety net when court action fails, but second looks by judges play a critical role in relieving the pressure on the clemency process.

VIII. Where We Go From Here

The tide is changing and momentum is growing. In the first four months of 2021 alone, district courts reduced the prison terms of thirty-eight defendants sentenced pursuant to § 924(c).[38] The Debevoise Holloway Project will continue its juggernaut and help send many more home to their families and communities.

Still, the final chapters of both the project and the revived "second look" authority on which it relies are yet to be written. Just before this writing, a circuit split developed on the question of whether judges have the authority to reduce stacked § 924(c) sentences at all. In *United States v. Bryant*, the Eleventh Circuit concluded that the Sentencing Commission's policy statement is applicable even to defendant-filed motions.[39] It further held that Application Note 1(D) allows for reductions based on reasons other than age, medical condition, and family circumstances only to the extent that the BOP determines that such reasons exist (which, under the BOP's own policy statement, can never occur), and that continuing to vest such authority doesn't conflict with the decision to remove the BOP as sole gatekeeper.[40] What is now an 8–1 split in favor of judicial discretion will no doubt change as the remaining circuits address the issue.

More important, the new administration will soon repopulate the Sentencing Commission. All of us who care deeply about federal sentencing policy have long wish lists for the new Commissioners. At the top of mine is a prompt resolution of that circuit split through an emergency amendment to § 1B1.13. And all they need do to ensure that § 3582(c)(1)(A) remains the second look Congress intended it to be is to excise every reference to the BOP in the policy statement itself and its commentary. Otherwise, judges have this one covered. The overwhelming majority of them, district and circuit alike, handled it just fine when the Commission was nowhere to be found. Their decisions comported well with the guidance already set forth in § 1B1.13. Unlike the BOP, they actually gave life to a framework intended to ameliorate unfairness in the narrow band

of cases that present extraordinary and compelling reasons warranting sentence reductions. The last thing federal judges need is an overhaul of § 1B1.13; the only thing they need is clarity that the BOP is finally out of the way for good, as Congress intended in the First Step Act.

The result will be an essential complement to the president's power to grant clemency. The apparatus pursuant to which that power is exercised has been broken for many years. I look forward to reading the other articles in this Issue to learn more about how to fix it. But one thing is for sure: it does not need the pressure of thousands of cases that district judges around the country can and should address through the judicial "second look" power that has blossomed in the federal system over the past two years.

Notes

* Thanks to Maureen Gallagher Mentrek for her invaluable assistance with this article. Any remaining mistakes are mine alone. I also want to thank my Debevoise partners, especially Michael Blair and Bruce Yannett, our Presiding Partner and Deputy Presiding Partner, respectively, for their unflagging support of the Holloway Project and the firm's commitment to providing pro bono legal services generally. The associates who have volunteered their time to the project are far too numerous to list here, but they know who they are and they have my lasting thanks and praise. Associates Marisa Taney, Lauren Dolecki Kober, Matthew Specht, and Steve Tegrar deserve special mention for both managing the project and litigating the many cases, and we'd be nowhere without the remarkable litigation support provided by Melanie Audy, Deepti Sahrawat, and Heather Mehler.

1 Model Penal Code: Sentencing § 305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017) (advocating the creation of a "second look" process to allow prisoners who have served fifteen years of a sentence of imprisonment to seek judicial modification of their original sentence); *see also* Charles Colson Task Force on Fed. Convictions, Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Convictions 15 (2016) (the Colson Task Force was a congressionally mandated, nine-person, bipartisan, blue-ribbon panel on federal corrections policy and recommended the establishment of a judicial "second look" to allow those who have served more than fifteen years to apply for sentence modification); *see also* Shon Hopwood, *Second Looks and Second Chances*, 41 Cardozo L. Rev. 83, 123–24 (2019) (asserting that Congress did not make relief from § 924(c) sentence-stacking retroactive because it did not want to make all inmates "categorically" eligible for sentencing relief, but that Congress did mean for relief from draconian sentences to apply "individually").

2 *See* 18 U.S.C. § 3582(c)(1)(A).

3 S. Rep. No. 98–225, at 53 n.74 (1983).

4 *Id.* at 55–56 (emphasis added).

5 28 U.S.C. § 994(o) (2006); *see also* U.S. Sentencing Guidelines Manual § 1B1.13 (U.S. Sentencing Comm'n 2018).

6 18 U.S.C. § 3582(c)(2) (2018) (providing that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission").

7 The 1984 Act traces its lineage to a prior judicial sentence reduction authority, enacted in 1976 as part of the Parole Reorganization Act, 18 U.S.C. § 4205(g). It authorized judges on motion of the BOP to reduce a prison sentence to a "minimum term" to advance parole eligibility. BOP policy statements have treated the two statutes together. *See* Dep't of Justice, Fed. Bureau of Prisons, Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g) (Jan. 17, 2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf. The authority they confer has been described as a kind of judicial clemency. *See* United States v. Diaco, 457 F. Supp. 371, 372 (D.N.J. 1978) (Director of BOP explaining that the new sentence reduction procedure offered an alternative to an application to Pardon Attorney for clemency); United States v. Banks, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (sentence reduced because of exceptional adjustment in prison; same statement by BOP Director).

8 Other critical mistakes include (1) the legislative decision to have harsh mandatory minimum sentences for drug offenses, intended specifically for leaders and managers of drug operations, triggered not by proof of those roles but instead by drug type and quantity (*see* United States v. Dossie, 851 F. Supp. 2d 478 (E.D.N.Y. 2012)); (2) the Sentencing Commission's decision in 1987 to "link" the drug offenses guidelines ranges not to empirical data but rather to those drug types and quantities (*see* United States v. Diaz, No. 11–CR–00821–2 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013)); (3) the rejection by Congress in 1995 of the Sentencing Commission's effort to eliminate the shameful disparity between crack and powder cocaine guidelines ranges (*see* Kimbrough v. United States, 552 U.S. 85 (2007)); and (4) the original Sentencing Commission's defiance of the directive in 28 U.S.C. § 994(j) to ensure that the guidelines reflect the general appropriateness of probation when a first offender has not committed a crime of violence or otherwise serious offense (*see* United States v. Leitch, No. 11–CR–00609 (JG), 2013 WL 753445 (E.D.N.Y. Feb. 28, 2013)) (observing how the Sentencing Commission "unilaterally declared in 1987 that every theft, tax evasion, antitrust, insider trading, fraud, and embezzlement case is 'otherwise serious,' and thus no more eligible for a sentence of probation, even when committed by a first-time offender, than would a crime of violence").

9 28 U.S.C. § 994(t) (2006). The Commission did not promulgate the relevant policy statement, U.S.S.G. § 1B1.13, until 2006.

10 *See, e.g.*, Dep't of Justice, Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program 11 (Apr. 2013) (admonishing that "the BOP [did] not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered").

11 Deal v. United States, 508 U.S. 129, 132 (1993).

12 U.S. Sentencing Guidelines Manual § 2B3.1 (U.S. Sentencing Comm'n 2018).

13 *See, e.g.*, Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303, 1313 (2018) (explaining that prosecutors may "inflate the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses—increasing with each new charge the defendant's potential sentence, his risk of conviction, and the 'sticker shock' of intimidation" to achieve a guilty plea); Human Rights Watch, An Offer You Can't Refuse: How Federal Prosecutors Force Drug Defendants to Plead Guilty 5 (Dec. 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead# (identifying the ability to stack § 924(c) counts as one of prosecutors' "most power threats" and a "Plea Bargaining

Bludgeon." Specifically, "prosecutors will press the defendant to plead by raising the specter of consecutive sentences under 18 U.S.C § 924(c)" and that it "is entirely up to prosecutors whether to pursue these increased penalties against an eligible defendant.").

14 The Commission first reported the problem in 2004, stating it created an impression of "unfairness and unwarranted disparity"; U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing 90 (2004). Seven years later, it reported to Congress that Black men continued to be "convicted of multiple counts of an offense under section 924(c) . . . at higher rates than offenders with other demographic characteristics"; U.S. Sent'g Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 274 (2011). The Sentencing Commission recommended that Congress (1) lower the mandatory sentences in § 924(c); (2) make the enhanced sentences for second or subsequent convictions applicable only when the first § 924(c) conviction occurred in a prior case; and (3) allow for concurrent sentences on "stacked" counts. These amendments are necessary, the Commission stated, to remedy the "excessively severe and disproportionate sentences" in the cases (*id.* at 359). In 2018, the Commission again reported a shameful racial disparity in the use of § 924(c) stacking; Black offenders were seriously overrepresented (70.5%) in the category of defendants convicted of multiple § 924(c) counts; U.S. Sent'g Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 6 (2018).

15 United States v. Holloway, 68 F. Supp. 3d 310, 311 (E.D.N.Y. 2014) (Gleeson, J.).

16 U.S. Sent'g Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 20 (2018).

17 First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194 (Dec. 21, 2018).

18 U.S.S.G. § 1B1.13 states in relevant part:

> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment . . . if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—
>
> (1) (A) extraordinary and compelling reasons warrant the reduction;
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

The accompanying application notes set forth four categories of "extraordinary and compelling reasons." The first three are medical condition, age, and family circumstances (caregiver status). U.S.S.G. § 1B1.13 cmt. n.1(A)–(C). Application Note 1(D) established the fourth: "an extraordinary and compelling reason other than, or in combination with," the three specified ones, as "determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 cmt. n.1(D).

19 United States v. Marks, No. 03-CR-6033 L, ECF No. 493 (W.D. N.Y. Mar. 14, 2019). The U.S. Attorney ignored Judge Larimer.

20 There remains a low exhaustion threshold. *See* 18 U.S.C. § 3582(c)(1)(A) (2018) (providing that an inmate may bring a motion for a sentence reduction on his own behalf after "fully exhaust[ing] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier").

21 United States v. Marks, 455 F. Supp. 3d 17 (W.D.N.Y. 2020).

22 United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); United States v. Maumau, 993 F.3d 821(10th Cir. 2021); United States v. Brown, 835 F. App'x 120 (6th Cir. Feb. 3, 2021); United States v. Rollins, 2020 WL 7663884 (7th Cir. Nov. 30, 2020); United States v. Decator, 452 F. Supp. 3d 320 (D. Md. 2020), *aff'd* 981 F.3d 271, 286 (4th Cir. 2020); United States v. Facey (Davis), No. 20–1695, ECF No. 65 (2d. Cir. Sept. 28, 2020); United States v. Marks, No. 20–1404, ECF No. 115 (2d. Cir. Jan. 5, 2021).

23 By mooting our appellate arguments around the country, the Federal Defenders have been instrumental in creating the favorable appellate decisions.

24 *See* United States v. Littrell, 461 F. Supp. 3d 899 (E.D. Mo. 2020) ("After the passage of the First Step Act, Littrell filed several motions and supplemental motions. His initial First Step Act motions were filed pro se, and he and the government extensively briefed the issues. In those pro se motions Littrell asked that I direct the United States Attorney to vacate his 'stacked' § 924(c) convictions, relying on *United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014) and *United States v. Marks*, 6:03CR6003 DGL (W.D.N.Y Mar. 14, 2019)"); Bellamy v. United States, 474 F. Supp. 3d 777 (E.D. Va. July 22, 2020); United States v. Jones, 482 F. Supp. 3d 969 (N.D. Cal. Aug. 27, 2020); United States v. Brown, 457 F. Supp. 3d 691 (S.D. Iowa Apr. 29, 2020); United States v. Powell, 468 F. Supp. 3d 398 (D.D.C. June 19, 2020); United States v. Stephenson, 461 F. Supp. 3d 864 (S.D. Iowa May 21, 2020); United States v. Vigneau, 473 F. Supp. 3d 31 (D.R.I. July 21, 2020); United States v. Adams,—-F. Supp. 3d—-, 2021 WL 126797 (E.D. Mo. Jan. 11, 2021); United States v. Price, 496 F. Supp. 3d 83 (D.D.C. 2020); United States v. Phillips, 469F. Supp. 3d 180 (S.D.N.Y. 2020); United States v. Day, 474 F. Supp. 3d 790 (E.D. Va. 2020); United States v. Mazzini, 487 F. Supp. 3d 1170 (D.N.M. 2020); United States v. Wright, 425 F. Supp. 3d 588 (E.D. Va. 2019); United States v. Donald, 468 F. Supp. 3d 563 (W.D.N.Y. 2020).

25 United States v. Rainwater, No. 3:94-CR-042-D(1), ECF No. 255 (N.D. Tex. Apr. 26, 2021); United States v. Hicks, No. 98-CR-06-TCK, 2021 WL 1554326 (N.D. Okla. Apr. 20, 2021); United States v. Rahim, No. 4:03-cr-45-MLB, 2021 WL 1399763 (N.D. Ga. Apr. 14, 2021); United States v. Rollins, No. 99 CR 771–1, 2021 WL 1020998 (N.D. Ill. Mar. 17, 2021); United States v. Brown, No. 2:95-cr-066(3), ECF No. 403 (S.D. Ohio Mar. 9, 2021); McCoy v. United States, No. 2:03-cr-197, 2020 WL 2738225 (E.D. Va. May 26, 2020); United States v. Julio Luciano-Mosquera, No. 91-cr-00170, ECF No. 613 (D.P. R. Mar. 1, 2021); United States v. Fowler, No. 4:92-CR-177-Y, ECF No. 52 (N.D. Tex. Feb. 24, 2021); United States v. Ezell, No. 02–815–01, 2021 WL 510293 (E.D. Pa. Feb. 11, 2021); United States v. McDonel,— F. Supp. 3d—, 2021 WL 120935 (E.D. Mich. Jan. 13, 2021); United States v. Nafkha, No. 2:95-CR-00220-001-TC, 2021 WL 83268 (D. Utah Jan. 11, 2021); United States v. Guarascio, No 5:04-CR-45-2BO, ECF No. 243 (E.D.N.C. Nov. 25, 2020); United States v. Davis, No. 96-cr-212 (ERK), 2020 WL 6746823 (E.D.N.Y. Nov. 17, 2020); United States v. Ellerby, No. 95-CR-00077-CBA, ECF No. 172, at *6 (E.D.N.Y. Apr. 29, 2020); United States v. Maumau, No. 2:08-cr-00758-TC-11, 2020 WL 806121 (D. Utah Feb. 18, 2020); United States v. Marks, 455 F. Supp. 3d 17 (W.D.N.Y. 2020); United States v. Haynes, 456 F. Supp. 3d 496 (E.D.N. Y. 2020); United States v. Decator, 452 F. Supp. 3d 320 (D. Md. 2020); United States v. Redd, 444 F. Supp. 3d 717 (E.D. Va. 2020).

26 *McCoy*, 981 F.3d at 286–87 (internal quotation marks and citation omitted); *see also Maumau*, 993 F.3d at 828 ("It is not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to

relieve some defendants of those sentences on a case-by-case basis.") (*quoting* United States v. Maumau, No. 2:08-cr-00758-TC-11, 2020 WL 806121 at *5 (D. Utah Feb. 18, 2020)).

[27] *See United States v. Brooker*, 976 F.3d 228, 238 (2d Cir. 2020) (quoting language from S. Rep. No. 98–225, at 55–56 (1984), noting that it may be appropriate to reduce "unusually long sentence[s]"); *McCoy*, 981 F.3d at 286 n.8 (same).

[28] *McCoy*, 981 F.3d at 287.

[29] *See supra* note 18.

[30] *See, e.g., McCoy*, 981 F.3d at 275 (affirming that "treating the defendants' § 924(c) sentences as an 'extraordinary and compelling' reason for release is not inconsistent with any 'applicable policy statement' of the Sentencing Commission for the simple reason that the Commission has yet to issue a policy statement that applies to motions filed by defendants under the recently amended § 3582(c)(1)(A)"); *see also United States v. Long*,— F.3d—, No. 20–3064, 2021 WL 1972245 (D. C. Cir. May 18, 2021); United States v. Aruda, 993 F.3d 797(9th Cir. 2021); United States v. Shkambi, 993 F.3d 388 (5th Cir. 2021); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021); United States v. McGee, 992 F.3d 1035, (10th Cir. 2021); United States v. Jones, 980 F.3d 1098 (6th Cir. 2020); United States v. Gunn, 980 F.3d 1178 (7th Cir. 2020); United States v. Brooker, 976 F.3d 228 (2d Cir. 2020).

[31] *See id.*

[32] *See* Dorsey v. United States, 567 U.S. 260, 266 (2012) (holding that sentencing statutes "trump[] the Guidelines"); Stinson v. United States, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). *Dorsey* requires district judges to consider the language, structure, and basic objectives of a sentencing statute, 567 U.S. at 264, and in this case Congress amended the law for the explicit purpose, set forth on the face of the amendment, of increasing the use of sentence reductions, and did so by removing the BOP as an impediment.

[33] 18 U.S.C. § 3553(a)(5) (2018).

[34] *See McCoy*, 981 F.3d at 277 (affirming district court's holding that "when it enacted the First Step Act, . . . Congress intended to remove the BOP from this gatekeeping role—an intent that would be frustrated if § 1B1.13 and Application Note 1(D) continued to make BOP approval a 'prerequisite' to the district court's review of McCoy's sentencing petition"); *Maumau*, 993 F.3d at 836 (rejecting argument that § 1B1.13 remains binding on district courts in defendant-filed cases as such a requirement "clearly undercuts not only Congress's intent to expand the use of compassionate release, but also the Sentencing Commission's intent to recognize a 'catch-all' category of cases").

[35] 976 F.3d at 237.

[36] United States v. Daniels, No. 11-cr-20483, 2021 WL 735888, at *3 (E.D. Mich. Feb. 25, 2021) (Edmunds, J.).

[37] *See supra* note 14.

[38] United States v. Williams, No. 01:92-cr-00083-1, ECF No. 349 (E.D. Va. Jan. 5, 2021); United States v. McCurry, No. 6:08-cr-27-Orl-22LRH, 2021 WL 71189 (M.D. Fla. Jan. 5, 2021); United States v. Nafkha, No. 2:95-CR-00220-001-TC, 2021 WL 83268 (D. Utah Jan. 11, 2021); United States v. McDonel,— F. Supp. 3d—, 2021 WL 120935 (E.D. Mich. Jan. 13, 2021); United States v. Sterling, No. 2:05-CR-20061-01, 2021 WL 197008 (W.D. La. Jan. 19, 2021); United States v. Turns, No. 2:99-cr-104-1, 2021 WL 164255 (S.D. Ohio Jan. 19, 2021); United States v. Barton, No. 1:02CR00080-001, 2021 WL 237692 (W.D. Va. Jan. 25, 2021); United States v. Rivas, No. 91-CR-217-1-JPS-JPS, 2021 WL 254410 (E.D. Wis. Jan. 26, 2021); United States v. Castro, No. 11-cr-80187-BLOOM, 2021 WL 274304 (S.D. Fla. Jan. 26, 2021); United States v. Haynes, No.4:96-cr-40034, 2021 WL 406595 (C.D. Ill. Feb. 5, 2021); United States v. Merica, No. 5:04-cr-00015-GEC (W.D. Va. Feb. 8, 2021); United States v. Ezell, No. 02-815-01, 2021 WL 510293 (E.D. Pa. Feb. 11, 2021); United States v. Bayron, No. 95-338-01, 2021 WL 632677 (E.D. Pa. Feb. 18, 2021); United States v. Coon, No. 3:03-CR-151, 2021 WL 682064 (E.D. Tenn. Feb. 22, 2021); United States v. Fowler, No. 4:92-CR-177-Y, ECF No. 52 (N.D. Tex. Feb. 24, 2021); United States v. Ikegwuonu, No. 15-cr-21-wmc-1, 2021 WL 719160 (W.D. Wis. Feb. 24, 2021); United States v. Ngo, No. 97-CR-3397-GPC, 2021 WL 778660 (S.D. Cal. Mar. 1, 2021); United States v. Soltero-Lopez, No. 3:91-cr-00170-ADC, ECF No. 613 (D.P.R. Mar. 1, 2021); United States v. Ramos, No. PJM 04-293, 2021 WL 826304 (D. Md. Mar. 4, 2021); United States v. Reid, No.05-CR-596(1)(ARR), 2021 WL 837321 (E.D.N.Y. Mar. 5, 2021); United States v. Moore, No. 5:93-CR00137-SLB-SGC-1, 2021 WL 842549 (N.D. Ala. Mar. 5, 2021); United States v. Briggs, No. 06–715, 2021 WL 872761 (E.D. Pa. Mar. 8, 2021); United States v. Jones, No. 09-00017-KD-B, 2021 WL 867830 (S.D. Ala. Mar. 8, 2021); United States v. Brown, No. 2:95-cr-066(3), ECF No. 403 (S.D. Ohio Mar. 9, 2021); United States v. Allen, No. 2:11-CR-192, 2021 WL 926208 (E.D. Va. Mar. 10, 2021); United States v. Randall, No. 08–8, 2021 WL 922077 (E.D. Pa. Mar. 11, 2021); United States v. Clark, No. 2:00-cr-24-1, 2021 WL 925760 (S. D. Ohio Mar. 11, 2021); United States v. Avery, No. 04-243-01, 2021 WL 949482 (E.D. Pa. Mar. 12, 2021); United States v. Rollins, No. 99 CR 771–1, 2021 WL 1020998 (N.D. Ill. Mar. 17, 2021); United States v. Wilkerson, No. 5:96-CR-167-1H, 2021 WL 1062353 (E.D.N.C. Mar. 19, 2021); United States v. Mack, No. 2:98-cr-162, 2021 WL 1099595 (S.D. Ohio Mar. 23, 2021); United States v. McCreary,—F. Supp. 3d—, 2021 WL 1207438 (D. Ariz. Mar. 25, 2021); United States v. Kapononiahopili Lii, No. 06-00143-JMS (01), 2021 WL 1113663 (D. Haw. Mar. 23, 2021); United States v. Jones, No. 1:03-CR-47-1,2021 WL 1392867 (N.D.W. Va. Apr. 9, 2021); United States v. Rahim, No. 4:03-cr-45-MLB, 2021 WL 1399763 (N.D. Ga. Apr. 14, 2021); United States v. Hicks, No. 98-CR-06-TCK, 2021 WL 1554326 (N.D. Okla. Apr. 20, 2021); United States v. Steppe, No. 3:16CR00022, ECF No. 328 (W. D. Va. Apr. 20, 2021); United States v. Woods, No. 5:03-cr-30054, 2021 WL 1572562 (W.D. Va. Apr. 21, 2021); United States v. Rainwater, No. 3:94-CR-042-D(1), 2021 WL 1610153 (N.D. Tex. Apr. 26, 2021).

[39] United States v. Bryant,—F. Supp. 3d—, 2021 WL 1827158 (11th Cir. May 7, 2021).

[40] *Id.* at 14.