No. 21-7752

United States Court of Appeals
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

KELVIN BROWN
Defendant – Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia

OPENING BRIEF OF APPELLANT KELVIN BROWN

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STATEMENT OF JURISDICTION

The district court had jurisdiction over Defendant-Appellant Kelvin Brown's § 3582(c)(1)(A) motion for compassionate release pursuant to 18 U.S.C. §§ 3231 and 3582. On December 2, 2021, the district court issued a final order denying Mr. Brown's motion. JA123–137. Mr. Brown filed a timely notice of appeal by placing his notice in the prison mail system on December 8, 2021. Fed. R. App. P. 4(c)(1); JA138. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion by finding that the risk to Mr. Brown's life posed by his obesity, high blood pressure, and chronic bronchitis did not constitute an extraordinary and compelling reason for his release.

II. Whether the district court erroneously disregarded, for failure to exhaust, Mr. Brown's § 924(c) claim that the disparity between his 30-year stacked sentence and the 10-year sentence he would receive under current law constituted an extraordinary and compelling reason for release.

III. Whether the district court abused its discretion by failing to re-weigh the applicable § 3553(a) sentencing factors that favor release, including the need to avoid unwanted sentence disparities, the lack of need for the sentence imposed, and Mr. Brown's post-sentencing conduct.

STATEMENT OF THE CASE

Mr. Brown appeals the district court's denial of his § 3582(c)(1)(A) motion for compassionate release. Mr. Brown seeks release because his medical conditions place him at serious risk of illness or death. He also argues that release is warranted because the First Step Act's changes to § 924(c) create a 20-year disparity between his original sentence and the sentence that he would receive today, and because his post-sentencing rehabilitation favors release.

A. Mr. Brown's 57-Year Sentence

In 2014, after electing to represent himself in his criminal trial, Mr. Brown was convicted by a jury of the following offenses: conspiracy to manufacture, distribute, and/or possess 28 grams or more of cocaine base and less than 500 grams of cocaine (21 U.S.C. § 846, Count One); two counts of distribution of cocaine (21 U.S.C. § 841(a)(1) and (b)(1)(C), Counts Six and Eight); possession with intent to distribute cocaine (21 U.S.C. § 841(a)(1) and (b)(1)(C), Count Ten); and felon in possession of a firearm (18 U.S.C. § 922(g)(1), Count Twelve). JA051–054, JA056. Mr. Brown was also convicted of two counts of possession of a firearm in

furtherance of a drug trafficking crime (18 U.S.C. § 924(c), Counts Nine and Eleven).[1] JA056.

The court sentenced Mr. Brown, then 34 years old, to a total of 687 months (over 57 years) of imprisonment. JA057, JA062. The court imposed a mandatory sentence of 360 months (30 years) for his two § 924(c) convictions that was consecutive to any other sentence. JA057. Count Nine was Mr. Brown's first conviction for possession of a firearm in furtherance of drug trafficking under § 924(c). It carried a mandatory minimum of 5 years. 18 U.S.C. § 924 (2018). At that time, Count Eleven—Mr. Brown's second conviction under § 924(c)—carried a mandatory minimum sentence of 25 years. 18 U.S.C. § 924 (2018). The court also sentenced him to 327 months (over 27 years) on concurrent terms for Count One (327 months); Counts Six, Eight, and Ten (60 months each); and Count Twelve (120 months). JA057. This Court affirmed the conviction and sentence. *United States v. Brown*, 636 F. App'x 157 (4th Cir. 2016). Since his arrest and incarceration in November 2013, Mr. Brown has served over nine years of his sentence.

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[1] The jury did not reach a verdict on Count Seven, possession with intent to distribute cocaine base (21 U.S.C. § 841(a)(1) and (b)(l)(B)(i)). JA053.

See JA013 (noting Mr. Brown's arrest warrant was returned executed on November 26, 2013).

B. Mr. Brown's Rehabilitation and Medical Conditions

Mr. Brown has progressed during his time in prison. JA062–075. He completed multiple adult continuing education courses and classes on topics including leadership, anger management, Microsoft Office, the errors of criminal thinking, and the dangers of drug abuse. JA066. When not taking classes, Mr. Brown had multiple jobs. JA066. He worked in the library and was promoted to head clerk, entrusted with the responsibility of reorganizing the library system. JA072. Mr. Brown also "us[ed] [his] abilities to help others" while employed in the education department. JA072. As a teacher's aide he helped teach adult continuing education classes, and as a tutor he helped many peers attain their GEDs. JA066, JA072. Mr. Brown attests that his supervisors and counselors can speak to his hard work and character as both an employee and a person. JA072. Throughout his incarceration, Mr. Brown has received only one disciplinary infraction: for defending himself from assault within the prison. JA119.

In March 2020—over five years into Mr. Brown's sentence—the COVID-19 pandemic began. Mr. Brown was incarcerated at FDC Philadelphia, which was placed on lockdown: prisoners were confined to their cells for 22.5 hours a day and all recreation areas were closed. JA062, JA063. At some point in the pandemic, Mr. Brown was transferred to USP Hazelton, which imposed lockdowns "for weeks" while not providing regular COVID-19 testing for inmates, even those complaining of symptoms. JA114–115. As of November 2021, Mr. Brown had been tested for COVID-19 only twice—in December 2020 and January 2021. JA114.

Mr. Brown fears contracting a life-threatening case of COVID-19 because of his health conditions. JA064. At 5 feet and 9 inches and 232 pounds, he is obese.[2] JA062. He also has high blood pressure, a condition that runs in his family, along with heart disease and asthma, and he suffers from chronic bronchitis, for which he was hospitalized on several occasions as a child. JA062–063. Mr. Brown had reconstructive knee surgery while incarcerated and takes medication for both his knee pain

[2] The district court noted that Mr. Brown is obese because his body mass index is 34.3. JA132 (citing the CDC's Adult BMI Calculator).

and his esophageal reflux disorder. JA063–064, JA066. He is also narcoleptic and has severe sleep apnea, which requires him to use a machine to continue breathing in his sleep. JA062, JA066. He requested a sleep-apnea machine from the prison in March 2020 but had not been provided one as of July 2020. JA066.

Mr. Brown's fear of contracting COVID-19 causes severe anxiety attacks. JA064. Although prison medical staff instructed him to exercise to manage his medical conditions and to rehabilitate his recently reconstructed knee, prison lockdowns prevent him from leaving his cell to do so. JA063–064, JA114. Even when the facility is not locked down, he often remains in his cell out of concern that he cannot protect himself from the virus by social distancing. JA064.

Because of the lack of testing at USP Hazelton, Mr. Brown worries that the number of confirmed cases at the prison is underreported. JA115. He has observed that many officers, including vaccinated ones, continue to test positive for COVID-19. JA115–116. Mr. Brown thus doubts the vaccine's effectiveness because "[it] does not mitigate the risk of infection totally." JA115–116. Though Mr. Brown has declined to receive the vaccine, he continues to take seriously the risk that COVID-

19 poses to his health: he "wears masks, washes his hands, and takes all the preventive measures []as best he can in the close confines of USP Hazelton[]," JA115–116, and would continue to do so once released, JA072.

While incarcerated, Mr. Brown has also suffered several personal losses. His grandmother died in January 2014, and he did not attend her funeral because he could not afford to travel from detention even after receiving permission to do so. JA065. Mr. Brown remains active in his children's lives to the best of his ability and speaks with them often, despite being removed from their lives. JA065–066. He has missed important events in his daughters' lives, and he has been incarcerated for his son's entire life. JA065–066, JA069. During Mr. Brown's incarceration, his son has experienced anger issues and has been prescribed mental health medications. JA069. Mr. Brown has watched his son struggle because of his absence—something Mr. Brown also experienced as a child due to his own father's imprisonment—and fears his son will repeat his same mistakes. JA069–071.

Mr. Brown accepts full responsibility for his actions and recognizes that he has an obligation to everyone he let down—especially his

children. JA072–073. His children have given him a "purpose and a real cause," and if released, he has resolved to "give all [his] time to [his] kids." JA071–072. Mr. Brown wants to instill in his children the same values his late grandmother taught him, and he regrets that his grandmother passed away before she was able to see those values come to fruition. JA069. He also hopes to help care for his elderly mother, who underwent intestinal surgery and requires assistance. JA065.

Mr. Brown's aunt has offered him a place to live upon release, and two former employers have already agreed to employ him. JA068. Mr. Brown also wants to invest in his community upon release; he desires to "apply[] [him]self in a positive light" and to "start repaying the blessings…bestowed upon [his] family." JA068–069, JA073. For example, he plans to volunteer at his aunt's retirement home as well as a local food bank—the same food bank he sought help from as a child growing up in poverty—and hopes to bring his children with him so they can "see [him] leading by example." JA068–069.

C. Procedural History

Mr. Brown filed a pro se motion seeking release under 18 U.S.C. § 3582(c)(1)(A) on July 7, 2020 ("Letter Motion"). JA062–78. Mr. Brown

based his motion on medical conditions that heightened his risk for serious illness or death from COVID-19, including obesity, high-blood pressure, chronic bronchitis, pre-diabetes, severe sleep apnea, narcolepsy, and esophageal reflux disorder. JA062–063. Mr. Brown also argued that release was warranted because the First Step Act prohibits imposing enhanced sentences for multiple § 924(c) convictions in the same proceeding (colloquially known as "sentence stacking"). JA064–065. This legislative change created a 20-year disparity between Mr. Brown's original sentence and what he would receive today. *See* JA064–065.

Nine days later, before the Government could respond, the district court denied Mr. Brown's Letter Motion. JA079–086. The court first determined that Mr. Brown "provided no evidence in his Letter Motion" that he had satisfied administrative exhaustion. JA084. The court also determined that even were it to waive the exhaustion requirement, Mr. Brown's "bronchitis, severe sleep apnea, narcolepsy, high-blood pressure, esophageal reflux disorder, and pre-diabetes" did not show "a particularized susceptibility" to COVID-19 that would render him

"virtually defenseless" if infected. JA084–085. Mr. Brown timely filed a notice of appeal. JA046 (ECF No. 367, First Notice of Appeal).

On July 20, 2020, four days after the district court's denial, Mr. Brown submitted a request for compassionate release to the Warden at Philadelphia FDC, where he was then confined. JA109. Mr. Brown requested release due to COVID-19, arguing that his medical conditions, rehabilitative efforts, and positive discipline record while incarcerated justified his release. JA109. The Warden denied Mr. Brown's request. JA108. Mr. Brown administratively appealed the Warden's denial, which the National Inmate Appeals Administrator denied. JA093.

After initially placing Mr. Brown's compassionate release appeal in abeyance, this Court vacated and remanded the district court's order on September 29, 2021. JA087–091. This Court found that the district court abused its discretion in denying Mr. Brown's motion without evaluating a significant component of his claim: it "did not explicitly identify Brown's alleged obesity in its analysis of whether his preexisting medical conditions . . . satisfied the 'extraordinary and compelling' standard." JA090. Between the time of Mr. Brown's request to the Warden at FCI Philadelphia for release and this Court's remand, Mr. Brown was

transferred to USP Hazelton. *See* JA0114–115 (discussing his experiences at USP Hazelton).

On October 11, 2021, Mr. Brown placed in the prison mail system a request for appointment of counsel to the district court, explaining his desire for legal assistance to fully develop his arguments given the "new case law and facts." JA092. In that filing, Mr. Brown attached a copy of his Bureau of Prisons administrative remedy appeal receipt and argued that he had exhausted his administrative remedies. JA092–093. On October 22, 2021, the district court issued an order directing the Government to "explain its position regarding [Mr. Brown's] motion and requested relief" and to provide information that addressed, among other topics, the updated status of COVID-19 in Mr. Brown's prison, how obesity affects COVID-19, and Mr. Brown's post-sentencing conduct. JA096–098.

Four days after the district court's order, Mr. Brown placed in the prison mail system a "motion to supplement [his] compassionate release motion." JA099–106. In this filing, Mr. Brown cited to the arguments made in his Letter Motion, including his particular vulnerability to serious illness or complications should he contract COVID-19 as well as

the disparity and severity reflected in his stacked sentences under § 924(c). JA099–101, JA103–104. Mr. Brown also argued for the first time that another extraordinary and compelling reason for release was the Supreme Court's decision in *Rehaif v. United States*, which held that a § 922(g) conviction requires the Government to prove the defendant knew not only that he possessed a firearm but also that he belonged to the relevant category of persons barred from possessing a firearm. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); JA101–103. The Government responded that Mr. Brown had not exhausted his claim, established an extraordinary and compelling reason for release, or demonstrated that the § 3553(a) factors support his release. Rep. in Opp'n to Mot. for Compassionate Release, ECF No. 393. Mr. Brown timely submitted a reply. JA110–122.

The district court denied Mr. Brown's motions. JA123–137. The court found that Mr. Brown's Letter Motion did not contain any evidence that he satisfied the administrative exhaustion requirement, but noted that this requirement is a claims-processing rule subject to waiver if not raised by the Government. JA130. The court observed that it "did not require the Government's response in its original decision" and stated

that "waiver will not apply to any new claims and exhaustion is not waived by the Government regarding the new claims as the Government has answered them." JA130–131. It then proceeded to the merits of Mr. Brown's "original claims." JA131.

The district court determined that Mr. Brown's high blood pressure and obesity are "significant" and "put[] him at increased risk of severe COVID-19 infection," but that "significant factors . . . mitigate[d] against a finding of extraordinary and compelling reasons" for compassionate release. JA132. The court pointed to Mr. Brown's refusal to get a COVID-19 vaccine, concluding that he could not request release because of the risks of COVID-19 while simultaneously "refusing a vaccine that could virtually eliminate that risk." JA132 (citation omitted). The court also observed the active COVID-19 case count at the Hazelton prison complex on November 30, 2021 (0 confirmed cases among inmates and 1 among staff) as well as the vaccination rate at the facility (531 staff members and 2,567 inmates vaccinated), and reasoned that Mr. Brown's high blood pressure and obesity are "common chronic conditions" that his prison could "help manage." JA133.

The court also denied relief on Mr. Brown's § 924(c) sentence stacking and § 922(g) *Rehaif* arguments. First, the court determined that both arguments were raised for the first time in his motion to supplement, that the Government had not waived exhaustion for any new claims, and that Mr. Brown had failed to properly exhaust his administrative remedies because he had not presented these specific claims to the Bureau of Prisons. JA134.

Second, though the court observed that it could "waive exhaustion requirements when 'pursuing an administrative remedy would be futile,'" it held that the § 3553(a) factors did not support release. JA134–135. The district court concluded that it "carefully weighed these [factors] at sentencing." JA135. It found Mr. Brown's "service while imprisoned, including his work in the library and as a GED tutor," insufficient to outweigh his "troubled past," including his criminal history and firearms convictions, as well as the fact that he had served only 11% of his sentence at the time. JA135–136. Finally, the district court denied Mr. Brown's request for appointment of counsel. JA136–137.

Mr. Brown timely appealed the district court's denial of his motions, JA138, and he filed an informal opening brief on January 13, 2022. On

December 19, 2022, undersigned counsel was appointed to address any meritorious issues alongside the following issue "of particular interest": "Whether, on remand, the court abused its discretion in denying compassionate release because of Brown's vaccination status and in conducting its alternative 18 U.S.C. § 3553(a) analysis."

SUMMARY OF THE ARGUMENT

Congress enacted 18 U.S.C. § 3582(c)(1)(A) to provide a mechanism for relief in cases like Mr. Brown's where extraordinary and compelling reasons warrant a sentence reduction. *See United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020). The district court abused its discretion when it denied Mr. Brown's motion, which established that his serious medical conditions, stacked § 924(c) sentences, and exemplary rehabilitation presented extraordinary and compelling reasons for release. And it compounded this error when it failed to reweigh the § 3553(a) factors, which favored release.

The district court mistakenly concluded that Mr. Brown's obesity, high blood pressure, and chronic bronchitis do not constitute an extraordinary and compelling reason for release in light of the COVID-19 pandemic. The court first abused its discretion by failing to properly assess the many conditions that heightened his medical risk, relying instead on Mr. Brown's denial of the vaccine and failing to consider his reasons for declining it. Second, the district court relied on incomplete COVID-19 statistics at USP Hazelton and overstated the facility's ability to properly manage Mr. Brown's conditions.

In addition, the district court abused its discretion by disregarding Mr. Brown's argument that the First Step Act's elimination of sentence stacking under § 924(c) presents an extraordinary and compelling reason for release. If sentenced today, Mr. Brown would be subject to a 10-year mandatory minimum for his two § 924(c) convictions as opposed to the 30-year sentence that the court was required to impose in 2014. The district court failed to address this gross disparity as well as the sheer length of the § 924(c) sentence imposed, which is years (or even decades) longer than the national sentencing average for murder, kidnapping, manslaughter, and robbery.

The district court also neglected to consider Mr. Brown's rehabilitation, including his continued education, mentorship, acceptance of responsibility, and other efforts. When viewed in totality, these circumstances show extraordinary and compelling reasons for release, comporting with the purpose of § 3582(c)(1)(A). *See McCoy*, 981 F.3d at 285–86.

Mr. Brown's § 924(c) stacking claim should be considered by the Court because it was properly exhausted. To the extent the district court concluded that the government waived exhaustion for the "original

claims" in Mr. Brown's Letter Motion, this waiver should apply with equal force to the § 924(c) stacking claim that was also included in the motion. Moreover, the court erred when it required Mr. Brown to demonstrate that he had presented this specific stacking argument to the Warden. Issue exhaustion is not required for compassionate release motions, and Mr. Brown's medical-based administrative request exhausted *all* the claims he presented to the district court. Alternatively, the equitable exceptions of futility and irreparable harm should excuse the exhaustion requirement. The Bureau of Prisons does not consider sentence stacking as an eligible ground for compassionate release, and Mr. Brown's medical vulnerabilities underline the significant risks of undue delay.

The district court also failed to reweigh the § 3553(a) sentencing factors, as this Court requires. All three applicable factors—the need to avoid unwanted sentence disparities, the lack of need for the sentence imposed, and Mr. Brown's characteristics—weigh in favor of Mr. Brown's release. The twenty-year sentencing disparity resulting from the First Step Act reflects the unjust nature of Mr. Brown's original sentence. The court also abused its discretion by overlooking evidence of Mr. Brown's

rehabilitation, including his employment, good behavior, reformative re-entry plan, and the deterrent effect of his remorse.

Given the array of errors committed below, this Court should remand.

ARGUMENT

A court may reduce a movant's sentence where, as here, extraordinary and compelling reasons exist and the relevant § 3553(a) sentencing factors merit release.[3] 18 U.S.C. § 3582(c)(1)(A). The "very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions" in cases like Mr. Brown's. *McCoy*, 981 F.3d at 287 (citation omitted). This Court reviews the denial of a motion for compassionate release for abuse of discretion. *United States v. Kibble*, 992 F.3d 326, 329 (4th Cir. 2021).

The district court erred on multiple fronts by denying Mr. Brown relief: it failed to properly assess his individualized medical vulnerabilities, it improperly disregarded his § 924(c) stacking claim, and it failed to reweigh the § 3553(a) factors. This Court should therefore reverse the district court's decision and remand with instructions to grant Mr. Brown's motion for compassionate release or, at the least, remand for a complete consideration of his motion.

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[3] The statute also requires that any sentence reductions be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). No "applicable policy statement[]" has been adopted since the First Step Act's enactment, so Mr. Brown need not address that factor. *McCoy*, 981 F.3d at 281 (citation omitted).

I. MR. BROWN'S MEDICAL CONDITIONS CONSTITUTE EXTRAORDINARY AND COMPELLING REASONS FOR RELEASE.

This Court finds extraordinary and compelling reasons in the context of the COVID-19 pandemic when the movant demonstrates both a "particularized susceptibility" to the disease and a "particularized risk" of contracting it at their facility. *United States v. Hargrove*, 30 F.4th 189, 196 (4th Cir. 2022). The district court accurately concluded that Mr. Brown's high blood pressure and obesity place him at "significant risk" of contracting a life-threatening case of COVID-19. JA132. It abused its discretion when it improperly relied on his vaccination status and incomplete COVID-19 statistics at USP Hazelton to deny relief. Moreover, the court erred by not considering Mr. Brown's rehabilitation as a factor that further establishes extraordinary and compelling reasons for release. *McCoy*, 981 F.3d at 286 & n.9.

A. Mr. Brown's denial of the vaccine did not mitigate the life-threatening risk of COVID-19 posed by his obesity, high blood pressure, and chronic bronchitis.

The district court erred by determining that Mr. Brown's denial of the vaccine barred his assertion of a particularized susceptibility to COVID-19. *See* JA132. A movant's "personal circumstances" are part of the "totality of the relevant circumstances" that district courts must

consider when assessing a motion for compassionate release. *Hargrove*, 30 F.4th at 197–98. Accordingly, a district court errs when it fails to consider a movant's medical conditions or risk, *United States v. Spotts*, No. 20-6791, 2021 WL 5985035, at *1 (4th Cir. Dec. 16, 2021), including the individualized context of a person's vaccination status. *United States v. Singleton*, No. 21-6798, 2022 WL 5240607, at *1 (4th Cir. Oct. 6, 2022).

For this reason, other circuits have held, as this Court did in *Singleton*, that compassionate release remains available on a case-by-case basis to movants who decline the vaccine. *See e.g.*, *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021) (holding that a movant who is "unable to receive or benefit from a vaccine" may still qualify for compassionate release); *United States v. Brownlee*, No. 21-2591, 2022 WL 35404, at *2 (6th Cir. Jan. 4, 2022) (holding that a movant with "a sincerely held religious objection, an allergy to the vaccine, or another medical reason" could still be eligible for compassionate release). Indeed, any per se rule based on vaccination status would run counter to judicial caution that the COVID-19 pandemic "continues to evolve" in ways that courts cannot predict. *Kibble,* 992 F.3d at 3336 (Quattlebaum, J., concurring).

By fixating on Mr. Brown's vaccination status, the district court failed to properly assess his individual susceptibility to the virus and reasons for declining the vaccine. The vaccine does not eliminate any and all concerns of COVID-19, especially for people like Mr. Brown whose medical conditions impose a heightened risk. *See, e.g.*, *United States v. Sawyer*, No. 5:15-CR-160-BO-1, 2021 WL 3051985, at *2 (E.D.N.C. June 15, 2021) (citing medical study that obesity can hamper vaccine immunogenicity). Accordingly, courts have found extraordinary and compelling reasons for an individual's release from incarceration *even when vaccinated*. *See e.g.*, *Sawyer*, 2021 WL 3051985, at *2; *United States v. Jenkins*, No. DKC 12-0043, 2021 WL 5140198, at *4–5 (D. Md. Nov. 4, 2021); *United States v. Hussain*, No. 13-cr-661-PWG, 2021 WL 3367822, at *4 (D. Md. Aug. 3, 2021); *United States v. Spriggs*, No. CCB-10-364, 2021 WL 1856667, at *3 (D. Md. May 10, 2021); *United States v. Garcia*, No. CCB-11-569, 2021 WL 4846937, at *2 (D. Md. Oct. 15, 2021).

Mr. Brown's heightened susceptibility to COVID-19 due to his obesity and high blood pressure underlines the district court's error in concluding that the vaccine is a panacea for everyone. *See* JA132 (claiming the Pfizer vaccine "is 95% effective at preventing illness"). This

error is made even more plain by the emergence of new variants and "breakthrough infections among the fully vaccinated," which further underscore the need to "consider [an] applicant's individualized arguments and evidence." *United States v. Rucker*, 27 F.4th 560, 563 (7th Cir. 2022). Mr. Brown questioned the vaccine's efficacy and chose not to receive it because of these breakthrough infections, JA115–116, a consideration the district court improperly disregarded.

The district court's assertion that vaccines could "virtually eliminate" Mr. Brown's risk from COVID-19 is further undermined by the health conditions the district court neglected: his chronic bronchitis and inability to engage in physical activity. *See* JA132 (citation omitted). The CDC has warned that the risk of severe COVID-19 "increases as the number of underlying medical conditions increases." *Spriggs*, 2021 WL 1856667, at *2 (quoting the CDC). Yet the district court overlooked Mr. Brown's chronic bronchitis and physical inactivity—both of which are CDC-recognized risk factors[4]—as well as the reality that the "co-existence" of multiple conditions made him "especially vulnerable" to

[4] *See People with Certain Medical Conditions*, CDC (Dec. 6, 2022), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

COVID-19. JA063. The district court incorrectly dismissed Mr. Brown's chronic bronchitis as merely "a history of childhood bronchitis," JA131, which ignores his assertion that he currently "*ha[s]* chronic bronchitis." JA063. Mr. Brown thus has four underlying medical conditions that increase his vulnerability to COVID-19. By limiting its analysis to two, the district court failed to consider the full breadth of his claim.

B. Mr. Brown demonstrated a particularized risk at USP Hazelton.

The district court also erred when it relied on incomplete COVID-19 statistics at the prison and speculations about the prison's management of Mr. Brown's medical conditions to conclude there was no particularized risk.

First, the district court erred by focusing solely on the then-confirmed active cases of COVID-19 (0 cases among the incarcerated and 1 case among staff). JA133. Relying only on this statistic incorrectly demands that an outbreak occur before a movant can demonstrate a particularized risk of contracting the disease. *See Avila v. United States*, No. 2:14-CR-108, 2021 WL 1082481, at *4 (E.D. Va. Mar. 18, 2021) (courts "need not wait until an outbreak occurs"). This is especially true given that Mr. Brown has asserted that the active case numbers at USP

Hazelton are misleading because of inadequate testing—an argument the district court overlooked entirely. *See* JA064, JA114–116. A particularized risk can exist where, though the current active case number is low, the total number of reported positive cases at the facility nonetheless demonstrates COVID-19's impact on the prison population. *See, e.g.*, *Haley v. United States*, No. 2:12-cr-149, 2021 WL 3575113, at *3 (E.D. Va. Aug. 12, 2021) (287 reported cases and 0 current cases). As of December 2021, USP Hazelton had reported 278 total cases of COVID-19. Rep. in Opp'n to Mot. for Compassionate Release, 5, ECF No. 393.

Similarly, the court abused its discretion when it relied on the vaccination rates at USP Hazelton as evidence of Mr. Brown's diminished risk of contracting COVID-19. *See* JA133. This ignores Mr. Brown's *individual* particularized risk at the prison. Given his medical conditions, *see supra,* Part I.A, Mr. Brown faces a particularized risk from COVID-19 in a congregate prison setting. *See Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities*, CDC (Nov. 29, 2022), https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html (explaining that the risk of transmission "is higher" in "congregate living arrangements"

like "correctional and detention facilities"). Especially in such congregate settings, courts must account for the unpredictability and transmissibility of COVID-19 variants, which "present[] heightened concerns." *United States v. Jones*, No. 5:13-cr-00025, 2021 WL 3288355, at *3 (W.D. Va. Aug. 2, 2021) (holding that the movant demonstrated a particularized risk with only 3 active cases). As Mr. Brown attested, breakthrough infections have occurred despite vaccinations at his prison. JA115–116. *See also United States v. Carter*, No. 16-235, 2021 WL 3725425, at *3 (D. Md. Aug. 20, 2021) (citing instances of "large COVID-19 outbreaks" among mostly vaccinated populations).

Finally, the district court erred by speculating that the common and chronic nature of Mr. Brown's obesity and hypertension undermine his assertion of a particularized risk because they are easily managed by USP Hazelton. JA133. A health condition need not itself be "extraordinary"—the risk imposed by the condition in light of the COVID-19 pandemic is sufficient to satisfy this threshold. *United States v. Petway*, No. 21-6488, 2022 WL 168577, at *3 (4th Cir. Jan. 19, 2022). And in any event, the record demonstrates that USP Hazelton is not managing Mr. Brown's health risks. He cannot safely exercise to manage

his obesity, in part because lockdowns persist due to the pandemic, and his fear of contracting COVID-19 causes anxiety attacks that exacerbate his blood pressure. JA114, JA063–064. Indeed, the pandemic conditions at USP Hazelton have made his incarceration "harsher and more punitive than would otherwise have been the case." *United States v. Rodriguez*, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020).

C. Mr. Brown's rehabilitation strengthens his showing of extraordinary and compelling reasons for release.

Further, Mr. Brown details his "substantial steps toward rehabilitation" throughout his filings, and the district court erred by failing to consider his extensive post-sentencing conduct when assessing the extraordinary and compelling reasons for relief. *See McCoy*, 981 F.3d at 286.

Mr. Brown detailed his positive strides throughout his filings. He has spent his sentence teaching adult continuing education classes, helping his peers obtain their GEDs, maintaining employment and earning the promotion of head library clerk, completing recidivism reduction BOP programming, exhibiting good behavior, and staying in close contact with his children. JA066, JA068–072. Along with expressing remorse for his actions, Mr. Brown seeks to become a better

person by volunteering in his community and uplifting others. JA072–073. Mr. Brown has already arranged to volunteer at a local food bank and retirement home upon release. JA068.

Notably, Mr. Brown took these rehabilitative steps despite being sentenced to over 57 years of incarceration—effectively a life-term. JA057, JA062. These "substantial steps" merit consideration, and the court erred in disregarding this record when assessing the extraordinary and compelling reasons for Mr. Brown's release. *McCoy*, 981 F.3d at 286.

II. MR. BROWN'S UNJUSTLY STACKED § 924(C) SENTENCES CONSTITUTE AN EXTRAORDINARY AND COMPELLING REASON FOR RELEASE.

Along with failing to conduct an individual assessment of Mr. Brown's medical vulnerabilities, the district court erred by disregarding the merits of Mr. Brown's claim that the First Step Act's abrogation of sentence stacking under § 924(c)—a change that would decrease Mr. Brown's sentence by 20 years if he were sentenced today—presents another extraordinary and compelling reason for release.

Prior to the First Step Act, § 924(c) required a 5-year minimum sentence for violations of the statute and an additional 25-year minimum sentence for "second or subsequent" violations. *McCoy*, 981 F.3d at 275.

A § 924(c) conviction was treated as "second or subsequent" even if the first conviction resulted from the same indictment—a process known as sentence stacking. *Id.* (citation omitted). But in 2018, the First Step Act made the "[m]onumental" change of eliminating the practice of § 924(c) sentence stacking by "clarifying that the 25-year mandatory minimum applies only when a prior § 924(c) conviction arises from a separate case and already 'has become final.'" *Id.* (citation omitted). Now, violations of § 924(c) in the same indictment carry consecutive sentences of 5 years per count, *see* 18 U.S.C. § 924(c)(1)(A)(i), which also reflects the guideline sentence for this offense. *See* U.S. SENT'G GUIDELINES MANUAL U.S.S.G. § 2K2.4(b) (U.S. SENT'G COMM'N 2021) (explaining that the guideline sentence for § 924(c) violations is "the minimum term of imprisonment required by statute"). If sentenced today, Mr. Brown would receive a sentence of 10 years for both § 924(c) violations (5 years, respectively, for Counts Nine and Eleven) rather than the 30-year sentence that was imposed (5 years for Count Nine and 25 years for Count Eleven).

Mr. Brown argued that this sentencing disparity created an extraordinary and compelling reason for release that, alongside his medical conditions, supported his motion for compassionate release. But

the district court failed to consider the merits of Mr. Brown's § 924(c) argument because it erroneously denied the claim for failure to exhaust. These errors warrant remand.

A. Exhaustion poses no hurdle to Mr. Brown's § 924(c) stacking argument.

The district court should have reached the merits of Mr. Brown's § 924(c) stacking argument because Mr. Brown exhausted this claim. To exhaust a motion for compassionate release, a defendant must submit an administrative request to the Warden and either (1) fully complete the administrative appeals process after the Warden denies the request, or (2) wait thirty days after submitting the request. *United States v. Muhammad*, 16 F.4th 126, 130–31 (4th Cir. 2021). This exhaustion requirement is a non-jurisdictional claims-processing rule subject to waiver or forfeiture. *See id.* at 129–30. This Court reviews *de novo* a dismissal for failure to exhaust administrative remedies. *United States v. Ferguson*, 55 F.4th 262, 267 (4th Cir. 2022).

The district court erred by dismissing the § 924(c) stacking claim for failure to exhaust. As an initial matter, the court wrongly concluded that waiver could not apply to the § 924(c) stacking claim because it was raised for the first time in Mr. Brown's supplemental motion rather than

in his Letter Motion. JA130–131, JA134. Mr. Brown's Letter Motion proves otherwise. *See* JA065 ("In my case, the 924(c)'s were stacked and thus resulted in a[n] extreme sentence disparity."). Indeed, when the district court's first denial was vacated on appeal, this Court recognized that Mr. Brown had asserted a § 924(c) argument in his Letter Motion, JA088, and it noted the relevance of *United States v. McCoy*, which discussed how the severity of stacked § 924(c) sentences can be an extraordinary and compelling reason for a sentence reduction, JA090–091 n.4.

Exhaustion poses no hurdle for two additional reasons: Mr. Brown satisfied the exhaustion requirement when he submitted an administrative request to the Warden, and the equitable exceptions of futility and irreparable harm should have waived the requirement.

1. *Mr. Brown exhausted his § 924(c) stacking argument.*

The district court incorrectly concluded that Mr. Brown did not satisfy the exhaustion requirement as to his § 924(c) stacking argument because he provided no proof that he included this specific claim in his administrative request to the Warden. *See* JA134. Though Mr. Brown's request argued only that his medical conditions and rehabilitation

warrant compassionate release, JA109, nothing more is needed. This Court has held that § 3582(c)(1)(A) does not require issue exhaustion before the agency. *See Ferguson*, 55 F.4th at 269. As in *Ferguson*, Mr. Brown's medical-only administrative request satisfied the exhaustion requirement for *all* his claims, medical and non-medical alike. *See id.*

Once Mr. Brown submitted his administrative request to the Warden, exhaustion required only the lapse of thirty days. *See Muhammad*, 16 F.4th at 129. Mr. Brown waited thirty days from submitting his administrative request before filing a supplemental motion for compassionate release. JA099–105. Alternatively, thirty days had passed by the time the district court reconsidered Mr. Brown's Letter Motion on remand. *See, e.g.*, *United States v. Bright*, No. 2:15CR00015-005, 2020 WL 2537508, at *2 (W.D. Va. May 19, 2020) (measuring thirty days from the Warden's receipt of the administrative request to the court's consideration of the motion). Both circumstances satisfy the exhaustion requirement.

2. *Pursuing administrative remedies would be futile and cause Mr. Brown irreparable harm.*

Even if Mr. Brown did not properly exhaust his claim, the district court should have recognized that equitable exceptions—including

irreparable harm and futility—excused that failure to exhaust. *See, e.g.*, *United States v. Scparta*, 567 F. Supp. 3d 416, 421–26 (S.D.N.Y. 2020) (finding that Congress intended for equitable exceptions to apply to § 3582(c)(1)(A)); *United States v. Gibson*, 570 F. Supp. 3d 346, 354 (E.D. Va. 2021) (waiving exhaustion for futility).

First, requiring Mr. Brown to exhaust his administrative remedies for his § 924(c) stacking argument would be futile as the Bureau of Prisons has no authority to consider it. The Bureau "lists several scenarios it considers extraordinary and compelling, but stacked sentences under 21 U.S.C. § 924(c) are not listed." *See Gibson*, 570 F. Supp. 3d at 354 (citing Bureau of Prisons, Dep't of Just., Program Statement Number 5050.50, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)* (2019)). Where, as here, the administrative process does not allow consideration of a defendant's arguments, it would be a waste of judicial resources to require Mr. Brown to exhaust this claim. *See id.*

In addition, undue delay could result in catastrophic health consequences that cause irreparable injury. *See United States v.*

Zukerman, 451 F. Supp. 3d 329, 333 (S.D.N.Y. 2020). Mr. Brown's medical conditions—which were raised alongside his stacking argument—place him at risk of suffering severe health complications should he contract COVID-19. *See Coleman v. United States*, 465 F. Supp. 3d 543, 545–49 (E.D. Va. 2020).

B. The district court failed to consider the length and disparity of Mr. Brown's § 924(c) sentence and his rehabilitation as extraordinary and compelling reasons for release.

Had the district court considered Mr. Brown's § 924(c) stacking argument (as it should have), it would have found an extraordinary and compelling reason for release because of the sentence disparity resulting from the First Step Act, the sheer length of Mr. Brown's sentence, and his significant strides in rehabilitation. *See McCoy*, 981 F.3d at 279.

The 20-year difference between Mr. Brown's § 924(c) sentence and that which he would receive today after the First Step Act represents the type of "gross disparity" that constitutes an extraordinary and compelling reason for reduction. *See McCoy,* 981 F.3d at 285–88 (endorsing the lower court's consideration of a nearly 17-year disparity for one defendant and 30-year disparity for others). The district court's complete disregard of this distinction is particularly egregious as a key "purpose of the First

Step Act [is] to reduce sentencing disparities." *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021). Many other courts rightly agree that disparities comparable to Mr. Brown's warrant compassionate release. *See United States v. Jones*, 482 F. Supp. 3d 969, 979–80 (N.D. Cal. 2020) (15-year disparity); *United States v. Haynes*, 456 F. Supp. 3d 496, 514–16 (E.D.N.Y. 2020) (30-year disparity); *United States v. Redd*, 444 F. Supp. 3d 717, 723–24 (E.D. Va. 2020) (30-year disparity).

The district court also neglected to address the "sheer and unusual length" of Mr. Brown's 30-year sentence. *McCoy,* 981 F.3d at 285. A stacked sentence that transcends the average punishment imposed for more serious crimes supports a motion for release. *See id.* Mr. Brown's 30-year stacked sentence alone is "decades longer" than the national sentencing average for manslaughter (over 5 years) and robbery (roughly 9 years), and it exceeds the national sentencing average for murder (just over 24 years) and kidnapping (roughly 15 years). *Redd*, 444 F. Supp. 3d at 723, 728 n.20.

Moreover, Mr. Brown has shown considerable rehabilitation through his post-sentencing behavior, teaching, mentorship, employment, continued commitment to family, and acceptance of

responsibility, *see supra*, Part I.C —none of which were addressed by the district court as extraordinary and compelling reasons for release. The district court's myriad errors regarding Mr. Brown's medical conditions, § 924(c) stacked sentence, and rehabilitation warrant remand.

III. THE § 3553(A) FACTORS SUPPORT RELEASE.

Finally, the district court abused its discretion by failing to reweigh the § 3553(a) factors. *United States v. Malone*, No. 21-6242, ---F. 4th---, 2023 WL 105673, at *6 (4th Cir. Jan. 5, 2023). The order denying Mr. Brown's motion stated that "the Court cannot say a reconsideration of the § 3553(a) factors would lead to a different result than arrived at during Defendant's sentencing." JA136. But that articulation is merely a "cursory treatment" of the § 3553(a) factors and is antithetical to the court's statutory duty to actually reweigh them. *Malone*, 2023 WL 105673 at *6. The "very purpose" of remedial sentence reductions is to "reopen final judgments." *See Concepcion v. United States*, 142 S. Ct. 2389, 2398 n.3 (2022). The district court's failure to fulfill that purpose warrants reversal.

All three applicable factors—the need to avoid unwarranted sentence disparities, the lack of need for the sentence imposed, and Mr.

Brown's characteristics—counsel in favor of Mr. Brown's motion for compassionate release.

A. The need to avoid an unwarranted sentence disparity favors release.

The district court erred by ignoring entirely "the need to avoid [the] unwarranted sentence disparit[y]" between Mr. Brown's mandatory 30-year stacked § 924(c) sentences and that received by "defendants with similar records who have been found guilty of similar conduct" today. 18 U.S.C. § 3553(a)(6); *see supra,* Part II.B. Not only is Mr. Brown's 30-year sentence grossly disparate given the First Step Act, but it is also grossly disparate relative to national sentencing for more egregious conduct. *See supra,* Part II.B. And as Mr. Brown observed, JA065, his § 924(c) sentences alone were longer than the sentences imposed on each of his co-conspirators. *See* JA001–009.

While the district court erroneously disregarded this factor, many others within this circuit have rightly afforded it adequate weight, finding that sentencing disparities like Mr. Brown's favor release. *See, e.g., United States v. Bailey,* 547 F. Supp. 3d 518, 525 (E.D. Va. 2021); *Redd*, 444 F. Supp. 3d at 728–29; *United States v. Arey*, 461 F. Supp. 3d 343, 352 (W.D. Va. 2020).

B. The lack of need for Mr. Brown's sentence favors release.

The district court also erred by overlooking record evidence that undermines the "need for the sentence imposed." 18 U.S.C. § 3553(a)(2). All four subfactors favor release.

First, the district court neglected to weigh Congress's determination that a 30-year sentence like Mr. Brown's is too severe to be considered "just punishment" for § 924(c) violations. *See* 18 U.S.C. § 3553(a)(2)(A). The sizeable disparity between Mr. Brown's 30-year sentence and the 10-year mandatory minimum he would receive today stems from "Congress' conclusion that sentences like [Mr. Brown's] are unfair and unnecessary," which reflects both "a legislative rejection" of this sentence stacking "as well as a legislative declaration of what level of punishment is adequate." *McCoy,* 981 F.3d at 285 (quoting *Redd*, 444 F. Supp. 3d at 723); *see also Bailey*, 547 F. Supp. 3d at 525.

In addition, the court abused its discretion by neglecting evidence of the "adequate deterrence" already established in Mr. Brown's case. *See* 18 U.S.C. § 3553(a)(2)(B). This factor includes an analysis of both general deterrence (preventing crime among the general population) *and* specific deterrence (preventing future crimes by the defendant). *United States v.*

Schoultz, 340 F. App'x 852, 854 (4th Cir. 2009); *United States v. Demma*, 948 F.3d 722, 732 (6th Cir. 2020). General deterrence cannot justify Mr. Brown's original § 924(c) sentence given Congress's abrogation of this sentence stacking. Moreover, Mr. Brown has demonstrated genuine remorse for his actions and an authentic desire to turn his life around that is further accompanied by successful completion of recidivism reduction programming. JA066–073. By failing to consider these aspects of Mr. Brown's motion, the district court disregarded record evidence of the specific deterrence that Mr. Brown's incarceration has already achieved. *Rodriguez*, 492 F. Supp. 3d at 315 (demonstrated remorse can support release).

Finally, the district court also abused its discretion by ignoring Mr. Brown's reentry plan, which demonstrates the unlikelihood of "further crimes." *See* 18 U.S.C. § 3553(a)(2)(C). *See Rodriguez*, 492 F. Supp. 3d at 314–15 (explaining that a "supportive network prepare[s] to help him effectively transition" into society). *See also Memorandum for Director of Bureau Prisons*, OFFICE OF THE ATTORNEY GENERAL (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_

confinement.pdf (stating that reentry plans can "prevent recidivism and maximize public safety" and that such plans can support a prisoner's request for home confinement). The district court ignored Mr. Brown's arrangements for a place to live, employment, and service to his community. JA068. And as required by § 3553(a)(2)(D), Mr. Brown has developed skills and furthered his education throughout his incarceration. Rather than being harmed by his release, Mr. Brown's community will only benefit from his re-entry.

C. Mr. Brown's medical conditions and rehabilitation favor release.

Finally, the district court erred by overlooking two key "characteristic[s]" of Mr. Brown under 18 U.S.C. § 3553(a)(1). First, the district court failed to consider Mr. Brown's particular vulnerability to COVID-19 when weighing the § 3553(a) factors, which this Court has held warrants remand. *United States v. Mangarella*, No. 20-7912, ---F. 4th---, 2023 WL 139324 (4th Cir. Jan. 10, 2023). *See supra* Part I.

Second, the court disregarded Mr. Brown's extensive rehabilitation. By stating only that it "appreciate[d] his service" as a tutor and library clerk, JA135–136, the district court neglected the "mountain of new mitigating evidence" regarding his post-sentencing conduct." *United*

States v. Martin, 916 F.3d 389, 396 (4th Cir. 2019). Instead, the court misplaced its focus on Mr. Brown's criminal history and improperly deferred to its imposition of the original sentence. *See* JA135–136.

Like the "laudable" movant in *Spencer*, Mr. Brown has successfully completed numerous classes and demonstrated good behavior while incarcerated. *United States v. Spencer*, No. 20-7171, 2022 WL 355775, at *2 (4th Cir. Feb. 7, 2022). He has received only one disciplinary infraction, which was for defending himself when assaulted by another inmate in 2018. JA119. Mr. Brown's 57-year sentence at age 34 was effectively a life sentence, yet like the movant in *Martin* he sought to better both himself and those around him while incarcerated "without the prospect of any incentive or reward." *Martin*, 916 F.3d at 397.

But the district court did not make an "individualized assessment" based on evidence of Mr. Brown's rehabilitation. *See United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010). Mr. Brown's extensive service to others as a tutor, teacher's aide, and library clerk entitled him to a "more robust explanation" than the one provided. *Martin*, 916 F.3d at 396. And his many classes completed, strong disciplinary record, continued commitment to his family and children,

and demonstrated remorse received *no* explanation. Because the district court disproportionately focused on Mr. Brown's criminal history and failed to give adequate weight to his post-sentencing characteristics, remand is warranted.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial and remand with instructions to grant Mr. Brown's motion for compassionate release, or at the least, remand for a complete consideration of his motion.

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Brown respectfully requests oral argument pursuant to Federal Rules of Appellate Procedure 34(a) and Fourth Circuit Local Rule 34(a). Oral argument would aid this court in articulating the proper standard for conducting an individualized assessment of a defendant's vaccination status when assessing extraordinary and compelling reasons for compassionate release. In addition, oral presentation would aid this Court's resolution of the case's fact-intensive inquiry into the § 3553(a) resentencing factors, including proper consideration of Mr. Brown's post-sentencing rehabilitation and remorse.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,973 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Tiffany Yang, certify that on January 25, 2023, I electronically filed the foregoing Opening Brief of Appellant via this Court's CM/ECF system, which will send notice of such filing to counsel of record in the above-captioned case.

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