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

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REPLY BRIEF OF APPELLANT KELVIN BROWN

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The district court's failure to consider Mr. Brown's § 924(c) stacking argument demands remand. Even after this Court highlighted the relevance of Mr. Brown's § 924(c) stacked sentence, JA090–091 n.4, the district court persisted in ignoring it. The government does not contest that his stacked sentence (further bolstered by his exemplary rehabilitation) constitutes an extraordinary and compelling reason for release, nor does it provide any justification for the court's failure to factor the stacked sentence into its § 3553(a) analysis. The government's silence is deafening in light of its agreement that the district court erroneously dismissed the § 924(c) claim for failure to exhaust. Gov't Br. 24–25. It has no defense because there is none: the district court's utter disregard of this claim compels remand.

The district court's reliance on its original assessment of the § 3553(a) factors was an abuse of discretion that provides another ground for remand. The court contravened its statutory obligation to actually reweigh the relevant factors. This reweighing is critical given the remedial nature of 18 U.S.C. § 3582(c)(1)(A), a "safety valve" for sentence reductions that entrusts courts with the "discretion . . . to consider

leniency" in each individual's case. *United States v. McCoy*, 981 F.3d 271, 287–88 (4th Cir. 2020) (internal quotation omitted). The district court overlooked Mr. Brown's extensive post-sentencing rehabilitation, which merited more than the passing reference the court afforded it.

Finally, both the government and district court erroneously conclude that Mr. Brown's medical conditions do not constitute an extraordinary and compelling reason for release. The government concedes that his obesity and high blood pressure place him at an increased risk of contracting a life-threatening case of COVID-19, and that denying vaccination cannot be a per se bar to compassionate relief. Gov't Br. 16, 18. Yet, the government parrots the district court's errors by failing to properly consider significant components of Mr. Brown's argument, including his comorbidities, his heightened susceptibility even if vaccinated, and the inadequate testing procedures at USP Hazelton. By excusing the district court's disregard, the government advocates for an untenably lenient definition of "abuse of discretion" that threatens to eviscerate this standard.

I. DISREGARDING MR. BROWN'S STACKED § 924(C) SENTENCE WAS AN ABUSE OF DISCRETION THAT WARRANTS REMAND.

The parties agree that Mr. Brown's § 924(c) stacked sentence is an extraordinary and compelling circumstance that the district court wholly failed to consider. The government's only argument against remand on this point rests on the district court's cursory consideration of the § 3553(a) factors. Gov't Br. 25. That argument is flawed both because the district court failed to acknowledge the stacking argument as relevant to § 3553(a) and because it gave no weight to his exemplary rehabilitation.

Beginning with the areas of consensus, the government agrees that the district court erroneously dismissed his § 924(c) stacking claim for failure to exhaust. Gov't Br. 24–25. It does not dispute that Mr. Brown's sentencing disparity in the wake of the First Step Act is exactly the type of "gross disparity" that constitutes an extraordinary and compelling reason for release. Opening Br. 36 (citing *McCoy,* 981 F.3d at 285–88). Nor does it refute Mr. Brown's argument that his remarkable

rehabilitation bolsters this finding.[1] Finally, it says nothing about the district court's silence on the § 3553(a) factors most impacted by this legislative change, including "the need to avoid [an] unwarranted sentence disparit[y]" and the need for "just punishment." 18 U.S.C. §§ 3553(a)(6), (a)(2)(A). Much as it might like to, the government cannot ignore the fact that the First Step Act's elimination of § 924(c) sentence stacking in 2018—which occurred *after* Mr. Brown's original sentencing in 2014—is a significant post-sentencing development that the district court was required to consider. *See United States v. High*, 997 F.3d 181, 185, 190 (4th Cir. 2021). Its failure to do so requires remand.

This § 924(c) error alone is sufficient to warrant relief for Mr. Brown. But it is not the only reason for remand. The court's perfunctory analysis of the remaining § 3553(a) factors contravenes its statutory duty to actually reweigh those factors. For one, the government claims that the district court's single line about Mr. Brown's "service while in

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[1] The government does not dispute the remarkable strides Mr. Brown has made while incarcerated. It argues instead that rehabilitation cannot, on its own, constitute an extraordinary and compelling reason for release. Gov't Br. 12. True. But it does not contest that his rehabilitation provides strong *support* for a finding of extraordinary and compelling reasons where another basis exists. *See McCoy*, 981 F.3d at 286 & n.9.

custody" satisfied the court's responsibility to weigh his evidence of post-sentencing rehabilitation. Gov't Br. 28 (citing JA135–136). But this "one passing comment in an explanation otherwise devoted" to his "original criminal behavior" does not suffice under this Court's standard. *United States v. Gutierrez*, No. 21-7092, 2023 WL 245001, at *4 (4th Cir. Jan. 18, 2023) (internal quotation omitted). Cases like Mr. Brown's that are "made complex by significant evidence of post-sentencing rehabilitation" require a "'robust' and 'individualized' explanation for how those [rehabilitative] efforts have been weighed." *Id.* (quoting *United States v. Martin*, 916 F.3d 389, 396 (4th Cir. 2019)). The district court's brief reference does not "reflect[] consideration of the exceptional breadth of [Mr. Brown's] rehabilitative efforts," *id.*, which include his near-perfect disciplinary record, his employment (including his promotion to head library clerk), his mentorship of peers, his completion of rehabilitative programming, and his consistent contact with his children and family. Opening Br. 29–30, 42–43.

Further, the government gives no response to Mr. Brown's remaining arguments regarding the lack of "need for the sentence imposed." 18 U.S.C. § 3553(a)(2). The government is silent about the

district court's failure to appreciate the "adequate deterrence" already achieved by Mr. Brown's imprisonment, as demonstrated by his rehabilitative programming, remorse, and family's suffering due to his absence. *See* Opening Br. 40–41 (citing 18 U.S.C. § 3553(a)(2)(B)). It also fails to acknowledge Mr. Brown's reentry plan, which demonstrates the unlikelihood of "further crimes," and his advancement of skills and education while incarcerated. *See* Opening Br. 41–42 (citing 18 U.S.C. §§ 3553(a)(2)(C)–(D)). Instead, the government appears to argue that the court was within its discretion to ignore those factors. Gov't Br. 26–29. Not so. A district court must at the very least set forth enough to make it clear that it *considered* the parties' arguments, including post-sentencing developments. *High*, 997 F.3d at 189–90. And it "cannot ignore a host of mitigation evidence" that arises post-sentencing. *Martin*, 916 F.3d at 398. Deference to the district court is merited only where it properly conducts the appropriate analysis. But here, the district court abused its discretion by ignoring Mr. Brown's extensive mitigation evidence—which is relevant to multiple § 3553(a) factors. The aggregate harm of the district court's silences warrants remand.

The government seeks to rationalize the district court's superficial consideration by noting that the judge who considered Mr. Brown's motion "'was the same judge who had sentenced [him] originally.'" Gov't Br. 27 (quoting *High*, 997 F.3d at 189). This does not excuse the judge from his statutory duty to reweigh the factors and apply the law correctly. *See United States v. Malone*, 57 F.4th 167, 176 (4th Cir. 2023) (explaining that a district court abuses its discretion by "failing to . . . reweigh the relevant § 3553(a) factors"). And the more time that passes between a defendant's original sentencing and a denial of compassionate release, the less consequential the "same judge" consideration should become. *See United States v. Bethea*, 54 F.4th 826, 834–35 (4th Cir. 2022). The government acknowledges that about seven years had passed between Mr. Brown's sentencing in 2014 and the denial of his compassionate release motion in 2021. Gov't Br. 28. This differs starkly from the 16-month lapse in *High*, 997 F.3d at 183, the six-month lapse in *United States v. Kibble*, 992 F.3d 326, 328, 332 (4th Cir. 2021), and the same-day hearing in *Bethea*, 54 F.4th at 834–35. The government attempts to minimize the import of these intervening seven years by arguing that Mr. Brown has "ke[pt] the case fresh in the district court's mind" by filing a

direct appeal of his conviction, a § 2255 motion, and a motion to file a successive petition. Gov't Br. 28. But these filings are irrelevant to Mr. Brown's motion for compassionate release, which uniquely focuses on post-sentencing mitigation evidence.

The district court also erred in disregarding Mr. Brown's medical vulnerabilities as a relevant "characteristic[]" under § 3553(a)(1). Citing *United States v. Mangarella*, 57 F.4th 197, 204 (4th Cir. 2023), the government correctly recognizes that a district court abuses its discretion when it fails to consider medical vulnerabilities in its § 3553(a) assessment. Gov't Br. 29 n.2. To be sure, the district court in *Mangarella* required the government to file a supplemental response that explicitly removed the "COVID-19 issue" from the "§ 3553(a) issue," *Mangarella*, 57 F.4th at 204, a fact not present here. But the error warranting remand was the district court's failure to "properly 'reconsider[] the § 3553(a) factors in view of' his . . . health conditions" in the pandemic, *id.*, the very same mistake committed by the district court below.

One post-sentencing consideration the district court did weigh was the length of time Mr. Brown has served, *see* Gov't Br. 6–7, 28, which the court stated at the time amounted to approximately 11% of his original

sentence.[2] JA135. But the district court overlooked the First Step Act's elimination of § 924(c) sentence stacking when it calculated Mr. Brown's time served. Accounting for this twenty-year difference, Mr. Brown's then-eight years of incarceration would amount to roughly 22% of the 37-year sentence he would receive today. And importantly, the length of time or percentage served is not dispositive, especially when the considerations warranting release could not have been weighed during the original § 3553(a) assessment. *See Woodard v. United States*, 469 F. Supp. 3d 499, 503–04 (E.D. Va. 2020). The § 3553(a) factors can weigh in favor of release where a movant has served only nine years of a life sentence. *See Martin*, 916 F.3d at 392, 397. Thus, Mr. Brown's eight years served of a 57-year sentence—a sentence much longer than any that his co-defendants received—is no impediment to release given the

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[2] The district court appears to have erroneously calculated the 11% figure by not including the time that Mr. Brown served prior to his sentencing. *See* 18 U.S.C. § 3585 (b)(1) ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences as a result of the offense for which the sentence was imposed."). From the time of Mr. Brown's arrest and incarceration in November 2013 to the court's decision in December 2, 2021, Mr. Brown had served more than 8 years. JA013 (ECF No. 33); JA137. This amounts to more than 14% of Mr. Brown's 57-year sentence.

remarkable strides in rehabilitation he achieved without prospect of reward. *See id*. at 398.

II. THE GOVERNMENT FAILS TO CONSIDER THE TOTALITY OF MR. BROWN'S CIRCUMSTANCES REGARDING HIS MEDICAL VULNERABILITIES.

Mr. Brown's medical conditions constitute an extraordinary and compelling reason for release and, at the least, add urgency to his argument that the injustice of his stacked § 924(c) sentence favors release. The government argues that Mr. Brown focuses on individual errors rather than on the "totality of the relevant circumstances," Gov't Br. 24, but it is precisely the district court's multitude of errors that illustrates its failure to properly consider the circumstances of Mr. Brown's case.

Although the government agrees that Mr. Brown's high blood pressure and obesity place him at a higher risk of a severe COVID-19 illness, it improperly downplays Mr. Brown's two other relevant comorbidities that increase his susceptibility: bronchitis and physical inactivity. Gov't Br. 16, 17. To the extent the district court made a factual finding that Mr. Brown's bronchitis is limited to his childhood (as the government also claims, Gov't Br. 17), this was clearly erroneous. *See*

JA131. Mr. Brown asserted in his motion: "I . . . *have* chronic bronchitis." JA063 (emphasis added). Even the district court previously referred to Mr. Brown's condition as "bronchitis," *not* a childhood history of bronchitis. JA085. The government provides no legal basis for its assertion that Mr. Brown must supplement his claim with medical records and has never before raised any such argument. *See* Gov't Br. 17. Given the clear language of Mr. Brown's motion, there was no need for him to submit medical records substantiating the current state of his bronchitis.

The government also attempts to disregard Mr. Brown's inability to engage in physical activity by arguing that the court was not required to address every condition that Mr. Brown listed. Gov't Br. 17. But physical inactivity is not just any condition. It is—as the government does not contest—a CDC-recognized risk factor that places individuals at higher risk of severe illness from COVID-19, especially in light of Mr. Brown's obesity. *See* Opening Br. 25. The government speculates that the district court must have considered this condition because it "was fully aware that defendant was in a BOP facility and that many of the BOP facilities had strict lockdowns." Gov't Br. 17. But to do as the

government asks—to assume from a district court's silence that it considered a relevant argument—would eviscerate the abuse of discretion standard.

And regarding the vaccine, the government concedes that vaccination status is not dispositive and that compassionate release remains available to movants who refuse the vaccine on a case-by-case basis. Gov't Br. 18. Nonetheless, the government defends the district court by arguing that it did not apply a per se rule that denying the vaccine was a bar to asserting an extraordinary and compelling reason. Gov't Br. 18. But this assertion flies in the face of the district court's own language—which the government quoted—that a movant "*cannot* simultaneously claim that he must be released because of the risk of complications while refusing a vaccine that could virtually eliminate that risk." Gov't Br. 19 (quoting JA132) (emphasis added). The district court used vaccination status as a dispositive factor for compassionate release rather than considering the totality of the relevant circumstances, which constituted an abuse of discretion.

The government erroneously asserts that the district court weighed Mr. Brown's individualized reasons for declining the vaccine. Gov't Br.

19–20. The only language it cites for this proposition is the district court's reference to "scientific statistics on the vaccine." Gov't Br. 19. But the court's claim that the vaccine is 95% effective fails to reflect *any* consideration of Mr. Brown's individualized circumstances, *see* JA132, including his reasons for denying the vaccine and his persisting susceptibility to COVID-19 even if vaccinated. *See* Opening Br. 24. The court's silence on this point warrants remand. *United States v. Singleton*, No. 21-6798, 2022 WL 5240607, at *1 (4th Cir. Oct. 6, 2022).

The government also defends the district court's reasoning by arguing that a "refusal to take preventative measures against COVID-19 undermines an assertion that [the movant's] susceptibility to COVID-19 is an extraordinary and compelling reason." Gov't Br. 19. Its error here is two-fold. It conflates the vaccine as the *only* preventative measure possible while ignoring record evidence of the plethora of other measures, like wearing a mask, that Mr. Brown takes to protect himself. JA116. And it cites three unpublished district court opinions that commit the very mistake the government admits is erroneous: they reason that a movant who declines the vaccine cannot assert an extraordinary and compelling reason for release. *See* Gov't Br. 19 (citing *United States v.*

Vaughn, No. 4:19-cr-21, 2021 WL 5139502, at *4 (E.D. Va. Nov. 3, 2021); *United States v. Madis*on, No. 2:17-cr-80, ECF No. 88, at 4–6 (E.D. Va. Mar. 19, 2021); *United States v. Greene*, No. 3:17-cr-134, 2021 WL 1969453, at *3 (E.D. Va. May 17, 2021)).

Like the district court, the government relies on the active case count and vaccination rates to defend the court's determination that there was no particularized risk at USP Hazelton. Gov't Br. 21–22. But the factors defining extraordinary and compelling reasons are "complex and not easily summarized," Gov't Br. 15 (quoting *Bethea*, 54 F.4th at 832), and are certainly not reducible to two statistics. By fixating on those generalized data points, the district court again failed to consider "significant component[s]" of Mr. Brown's individual claim. *See United States v. Brown*, No. 20-7095, 2021 WL 4461607, at *2 (4th Cir. Sept. 29, 2021); JA090. This includes Mr. Brown's argument about inadequate testing procedures producing artificially low numbers of positive cases at USP Hazelton, as well as the total number of reported COVID-19 cases

the prison had experienced up to that point (278),[3] which neither the district court nor the government addressed. *See* Opening Brief at 26–27.

Indeed, the government admits that "[t]here are, of course, breakthrough cases with the vaccine"—as it must given the reality of new and constantly evolving COVID-19 variants. Gov't Br. 22. But it fails to engage with the reasonable inference of this obvious point: that vaccination rates will not prevent breakthrough infections at a congregate setting like USP Hazelton, so the court should "not wait until an outbreak occurs" to assess particularized risk. *See* Opening Br. 26–28 (citation omitted). Even the government recognizes the rationale in *Haley v. United States* that incarcerated people remain "particularly vulnerable" to COVID-19, and it does not contest *Haley*'s reasoning that a prison with 0 active cases *can* establish a particularized risk. Gov't Br. 21 (quoting *Haley v. United States*, No. 2:12-cr-149, 2021 WL 3575113, at *3 (E.D. Va. Aug. 12, 2021)). The government's only response is to pivot

[3] Unlike the government's citation of USP Hazelton's Level 1 operational status as of February 2023, Gov't Br. 23, this fact was actually before the district court in 2021, ECF 393 at 5.

by stating that Mr. Haley could not demonstrate a potential susceptibility to COVID-19 because he received medication to control his ailments. Gov't Br. 21 (citing *Haley*, 2021 WL 3575113, at *2). But here, there is *no* record evidence that Mr. Brown's different combination of medical conditions is being managed by his prison, which highlights yet another error made by the district court.

The government admits that courts err by requiring that a defendant's condition be rare to qualify as an extraordinary and compelling reason for release. Gov't Br. 15. It is the "risk of severe illness," Gov't Br. 15 (quoting *Bethea,* 54 F.4th at 832), even from common and chronic conditions, that is central to the inquiry. But the district court made precisely this mistake: it incorrectly speculated there could be no reason for release because Mr. Brown's obesity and high blood pressure were "common" and "chronic" conditions that USP Hazelton could manage. JA133. There is no evidence in the record to support that claim. In fact, Mr. Brown has stated that the opposite is true: because of lockdowns and anxiety attacks caused by the pandemic, he has been unable to manage his obesity and his high-blood pressure. JA063–064, JA114. The government does not contest that given his medical

conditions, Mr. Brown's incarceration has become "harsher and more punitive than would otherwise have been the case." *See United States v. Rodriguez*, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020).

It is true that district courts ordinarily wield broad discretion in deciding compassionate release motions. *See* Gov't Br. 29. But a remand is properly accompanied by instructions to grant the motion where, as here, the record presents "extraordinary conditions" that compel release. *See Malone*, 57 F.4th at 177–78. This Court has already remanded this case for the district court to fully consider Mr. Brown's arguments, JA088–091, which the district court has again failed to do. This repeated failure is exacerbated by the over 2.5 years that Mr. Brown has remained at risk after moving for compassionate release.

CONCLUSION

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.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,385 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Tiffany Yang, certify that on March 3, 2023, I electronically filed the foregoing Reply 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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