
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7752

UNITED STATES OF AMERICA,
Appellee,

v.

KELVIN BROWN,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Newport News
The Honorable Robert G. Doumar, District Judge

RESPONSE BRIEF OF THE UNITED STATES

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Introduction

The same district court who sentenced defendant Kelvin Brown in 2014 denied compassionate release because his medical conditions do not demonstrate a unique risk of contracting COVID-19 in his prison facility; he failed to exhaust his administrative remedies; and, alternatively, the sentencing factors weighed against any reduction in sentence. The district court rejected defendant's arguments about his susceptibility to COVID-19 infection due to his medical conditions. Although his obesity contributes to a risk of serious infection, his six other cited medical conditions do not contribute to an increased risk of illness from COVID-19. Further, the district court found that defendant's risk of COVID-19 infection due to obesity is mitigated by his refusal to obtain the vaccine and the extremely low incidence of COVID-19 cases among inmates and staff at defendant's prison facility. Overall, the district court reasonably concluded that defendant had not demonstrated an extraordinary and compelling reason for release based on his particularized susceptibility to COVID-19 and his particularized risk at his prison facility.

Although defendant is correct that the district court's issue-exhaustion ruling is incorrect after recent precedent, the district court issued an alternate, independent holding that even if it found an extraordinary and compelling reason under the statute, the sentencing factors weigh against early release. In its holding, the court focused on the seriousness of defendant's drug distribution conviction, the fact that

he has served only 11% of his original term, and his serious criminal history, including multiple firearms convictions. Lastly, defendant's evidence of post-conviction rehabilitation in prison—without another independent extraordinary and compelling circumstance—is not enough to support a reduced sentence. The district court's reasoned explanation satisfies the requirements this Court has laid out. Therefore, the Court should affirm the district court's ruling.

Issues Presented

1. Did the district court abuse its discretion by concluding that defendant's medical concerns regarding COVID-19 did not establish an extraordinary and compelling reason warranting release?

2. Did the district court abuse its discretion in making an alternative holding that even if defendant's stacked § 924(c) sentences were extraordinary and compelling, the applicable § 3553(a) sentencing factors weighed against a sentence reduction?

Statement of the Case

A. Original Proceedings

On May 12, 2014, defendant and a co-defendant were named in a twelve-count second superseding indictment, charging defendant with Drug Conspiracy, in violation of 21 U.S.C. § 846 (Count One); Distribution of Cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Counts Six and Eight); Distribution and

Possession with Intent to Distribute 28 Grams or More of Cocaine Base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii) (Count 7); Possession, with Intent to Distribute Cocaine and Marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count Ten); Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c) (Counts Nine and Eleven); and Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1) (Count Twelve). SA1.

During defendant's initial appearance, defendant elected to represent himself after being fully advised of his Sixth Amendment right to counsel. JA13-14. The district court appointed stand-by counsel who remained through the conclusion of defendant's criminal case. On May 15, 2014, defendant waived formal arraignment and pleaded not guilty. JA26. Following a seven-day jury trial, the jury found defendant guilty on Counts One, Six, Eight, Nine, and Ten through Twelve of the Second Superseding Indictment. JA51-55. The jury failed to reach a verdict on Count Seven. *Id.* On December 8, 2014, the district court sentenced defendant to a total of 687 months' imprisonment, consisting of 327 months on Count One; 60 months each for Counts Six, Eight, and Ten, to run concurrently with Count One; 60 months on Count Nine, to be served consecutively to Count One; 300 months on Count Eleven, to be served consecutively to Counts One and Nine; and 120 months on Count Twelve, to run concurrently with Count One. JA057. Defendant's sentence also included a supervised release term of five (5) years. *Id.* at 58.

On December 10, 2014, defendant appealed his conviction. JA39. Subsequently, on January 11, 2016, the Fourth Circuit affirmed defendant's conviction in an unpublished opinion. *See United States v. Brown (Brown I)*, 636 F. App'x 157 (4th Cir. 2016); JA43. On May 19, 2016, defendant filed a petition for writ of certiorari with the Supreme Court of the United States, which was denied on June 27, 2016. *See Brown v. United States*, 136 S. Ct. 2529 (2016).

On June 25, 2017, defendant filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence and a supporting memorandum. On September 4, 2018, the district court denied defendant's § 2255 motion and declined to issue a certificate of appealability. JA45. Defendant appealed, and on February 25, 2019, the Fourth Circuit dismissed defendant's appeal and declined to issue a certificate of appealability. *See United States v. Brown (Brown II)*, 754 F. App'x 214 (4th Cir. 2019). On June 18, 2020, defendant filed a motion under 28 U.S.C. § 2244 seeking authorization to file a successive application for relief under § 2255. *See Motion, In re Kelvin Brown*, No. 20-307 (4th Cir.), ECF No. 2. On July 7, 2020, this Court issued an order holding the defendant's motion in abeyance pending the decision in *In re Horton*, No. 19-373. JA46.

B. Compassionate Release Proceedings

On July 7, 2020, defendant filed a Letter Motion for Compassionate Release, citing concerns over his facility's handling of the COVID-19 pandemic and alleging

his medical conditions, such as bronchitis, severe sleep apnea, narcolepsy, high-blood pressure, esophageal reflux disorder, obesity, and pre-diabetes, make him more susceptible to contracting COVID-19. *See* JA62-75. On July 16, 2020, the district court, without response from the United States, denied defendant's motion finding that defendant had not exhausted his administrative remedies pursuant to 18 U.S.C. § 3582(c)(1)(A). JA79-86. Additionally, the district court found that even if it were to waive the exhaustion requirements, defendant had not shown a particularized susceptibility to COVID-19 and defendant's medical concerns did not rise to the level of extraordinary and compelling warranting compassionate release. JA084-86. Defendant appealed the denial of his compassionate release motion. On appeal, this Court noted that the district court "did not explicitly identify Brown's alleged obesity in its analysis of whether his preexisting medical conditions, considered within the context of the Covid-19 pandemic, satisfied the 'extraordinary and compelling' standard in § 3582(c)(1)(A)(i)." JA090. This Court then vacated and remanded the district court's ruling. JA091. On July 20, 2020, four days after the district court's denial, defendant submitted a request for compassionate release to the Warden at Philadelphia FDC, where he was confined. JA109. He cited COVID-19, arguing that his medical conditions and post-conviction behavior supported a sentence reduction. JA109. The Warden denied defendant's request.

JA108. Defendant administratively appealed the Warden's denial, which the National Inmate Appeals Administrator denied. JA093.

On October 22, 2021, the district court issued an order directing the government to respond to defendant's motion, and to specifically focus on defendant's preexisting medical conditions, including his alleged obesity and vaccination status, among other things. JA097. On November 1, 2021, defendant filed a "Motion to Supplement Compassionate Release Motion." JA099. Defendant's supplemental motion raised arguments not previously raised in his first motion, *i.e.*, that his § 922(g) conviction is no longer valid under *Rehaif v. United States*, 139 S. Ct. 2191 (2019) and that his stacked § 924(c) sentences are extraordinary and compelling reasons for compassionate release. JA100-04. On November 15, 2021, the government filed a response in opposition to defendant's compassionate release motion and supplemental motion. JA48-49. On November 29, 2021, defendant filed a reply to the government's response. JA110-21. The district court issued an Order denying defendant's compassionate release motion and supplemental motion on December 2, 2021. JA123-27. Defendant filed a notice of appeal regarding the district court's order on December 16, 2021. JA49, JA138-141. On January 25, 2023, defendant filed his opening brief with this Court.

Summary of the Argument

This Court does not require a district court to lay out an exhaustive or point-by-point rebuttal of defendant's arguments when denying a sentence reduction. The district court here made amply clear the basis for its discretionary denial was based on defendant's failure to demonstrate an extraordinary and compelling reason for release as well as the § 3553(a) factors. Notwithstanding defendant's disagreement with the district court's conclusions, those reasons fall squarely within its discretion and should be affirmed.

The district court made factual findings demonstrating that defendant failed to show an extraordinary and compelling reason based on a susceptibility to COVID-19. Those findings are reviewable only for clear error, and the district court's ultimate determination for an abuse of discretion. The district court's conclusion is both supported by the record and reasonable. The district court applied no per se rules and made no errors of law in its assessment of defendant's particularized risk and susceptibility to COVID-19 at his facility. With respect to defendant's arguments about his stacked sentences under § 924(c), the district court found that, even if it assumed an extraordinary and compelling reason, it would deny any reduction under the § 3553(a) factors. Additionally, without more, rehabilitation is not a permissible basis on which to find an extraordinary and compelling circumstance. The district court acted within its discretion in denying defendant's

motion for compassionate release and provided enough analysis to demonstrate its basis for the decision and for this Court to conduct a meaningful review.

Accordingly, this Court should affirm the district court's denial of defendant's compassionate release motion.

Argument

Generally, a district court “may not modify a term of imprisonment once it has been imposed.” 18 U.S.C. § 3582(c). A limited exception to this general rule is § 3582(c)(1)(A)(i), which provides that a 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 it finds that ... extraordinary and compelling reasons warrant such a reduction.” Defendant bears the burden of proving that he is entitled to relief under § 3582(c)(1)(A). *See, e.g., United States v. Bethea*, 54 F.4th 836, 833 (4th Cir. 2022) (noting that “mak[ing] a requisite threshold showing of extraordinary and compelling reasons” is “the portal a movant must enter to establish eligibility for relief”); *United States v. Colleton*, No. 21-6015, 2022 WL 18500, at *1 (4th Cir. Jan. 3, 2022); *United States v. Byrd*, 859 F. App'x 669, 671 (4th Cir. 2021); *see also United States v. Wright*, 42 F.4th 1063 (9th Cir. 2022); *Ward v. United States*, 11 F.4th 354, 361 (5th Cir. 2021); *United States v. Newton*, 996 F.3d 485, 488 (7th Cir. 2021).

Thus, a district court “*may* find a defendant who filed a motion [for compassionate release] *eligible* for a sentence reduction after finding only that such a reduction is warranted by extraordinary and compelling reasons.” *United States v. Hargrove*, 30 F.4th 189, 194–95 (4th Cir. 2022) (quoting *United States v. High*, 997 F.3d 181, 186 (4th Cir. 2021)). If the court finds extraordinary and compelling reasons exist, “it is still not required to grant defendant’s motion for a sentence reduction.” *Id.* (quoting *High*, 997 F.3d at 186). Instead, the district court “must ‘consider[]’ the § 3553(a) sentencing factors ‘to the extent that they are applicable’ in deciding whether to exercise its discretion to reduce defendant’s term of imprisonment.” *Id.* (quoting *High*, 997 F.3d at 186). A “district court is not required to address each of defendant’s arguments for a reduced sentence”; instead, “just how much of an explanation is required depends on the narrow circumstances of the particular case.” *United States v. Jenkins*, 22 F.4th 162, 170 (4th Cir. 2021) (citing *Chavez-Mesa v. United States*, 138 S. Ct. 1959, 1965 (2018)).

I. The district court did not abuse its discretion when it concluded that defendant’s medical conditions do not establish an extraordinary and compelling reason for release.

Defendant argues that the district court abused its discretion by relying on defendant’s vaccination status as well as the COVID-19 statistics at USP Hazelton to find that defendant did not face a particularized susceptibility or particularized risk of contracting COVID-19 at his facility. Def. Br. 22. This Court has not yet

defined in a published opinion a precise test for determining an extraordinary and compelling reason based on the COVID-19 pandemic. *See United States v. Kibble*, 992 F.3d 326, 336 (4th Cir. 2021) (Quattlebaum, J., concurring). Nonetheless, this Court has embraced decisions that “have found extraordinary and compelling reasons for compassionate release when an inmate shows *both* a particularized susceptibility to the disease and a particularized risk of contracting the disease at his prison facility.” *United States v. Steward*, No. 22-6403, 2022 WL 16948600, at *1 (4th Cir. Nov. 15, 2022) (citing *United States v. Feiling*, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (citing cases)). The Court has also noted that the factors defining extraordinary and compelling circumstances are “complex and not easily summarized” and, in the COVID-19 context, has instructed courts not to rely on the rarity of defendant’s condition but on “whether the underlying condition places the inmate at an increased risk of severe illness.” *Bethea*, 55 F.4th at 832. In doing so, however, “[t]he district court ultimately retains discretion to choose the guidance it finds most pertinent in balancing the inmate’s circumstances with the need for incarceration.” *Ibid*. The Court has further emphasized that defendant must demonstrate that his risk of contracting COVID-19 in his facility is higher than the risk he would face outside the prison, and that his preexisting medical conditions increase that risk. *High*, 997 F.3d at 185.

The district court began its denial by listing the medical conditions cited in defendant's Letter Motion, JA069-75, to include bronchitis, severe sleep apnea, narcolepsy, high-blood pressure, esophageal reflux disorder, obesity, and pre-diabetes. JA130. The district court then noted "Defendant's health and the public health emergency caused by COVID-19 are extremely important considerations that the Court does not take lightly." *Id.* The district court considered the merits of defendant's Letter Motion and found that sleep apnea, narcolepsy, esophageal reflux disorder, prediabetes, and a history of childhood bronchitis were not considered diseases that would put an individual at higher risk for severe illness from COVID-19. JA131; *cf. Hargrove*, 30 F.4th at 196 (affirming district court's conclusion that sleep apnea among other conditions was "insufficient to establish an extraordinary and compelling reason for release from prison"). On the other hand, the court noted that high blood pressure and obesity do put an individual at higher risk of severe COVID-19 illness. JA132. Following this statement, the district court explained defendant's obesity as well as statistics regarding COVID-19 and obesity. *Id.* The district court found that defendant's obesity was a significant factor in putting him at risk for severe COVID-19. *Id.*

Defendant states that the district court erred in neglecting his "chronic bronchitis and inability to engage in physical activity." Def. Br. 25. However, the district court did consider defendant's bronchitis. Defendant stated he has bronchitis

“of which [he] was hospitalized and treated for several times as a child.” JA062. Defendant did not submit any medical records showing that he was still suffering from bronchitis. The district court therefore understood defendant’s argument to rely on a history of childhood bronchitis, which it addressed. JA130-131. As for the inactivity, the district court was fully aware that defendant was in a BOP facility and that many of the BOP facilities had strict lockdowns during COVID-19 to protect the inmates. The district court considered that when he looked at the statistics at USP Hazelton. JA133. Regardless, the district court is just required to set forth enough information “to satisfy this court that it has considered the parties’ arguments and has a reasoned basis for exercising its own legal decision-making authority, so as to allow for meaningful appellate review.” *Jenkins*, 22 F.4th at 171 (quoting *High*, 997 F.3d at 190). The district court was not required to address every condition defendant listed. He considered defendant’s obesity and high blood pressure to be increased risk factors but ultimately found that defendant did not face a particularized risk of contracting COVID-19 at his facility. The district court’s reasoned analysis about defendant’s risk at USP Hazelton was sufficient to find he did not present an extraordinary and compelling reason for release despite having medical conditions that did increase his chances of severe illness from COVID-19.

As noted above, this Court has upheld findings of extraordinary and compelling reasons for release when an individual shows *both* a particularized

susceptibility, as found here, *and* a particularized risk of contracting the disease at the individual's facility. *Hargrove*, 30 F.4th at 196 (quoting *Feiling*, 453 F. Supp. 3d at 841). Thus, although the court noted that defendant's obesity and hypertension could put him at risk of contracting severe COVID-19, the district court was also within its discretion in considering other factors related to defendant's risk of actually contracting a severe case of COVID-19 at his facility. Defendant suggests that the district court "fixated" on vaccination status and considered the vaccine "a panacea for everyone." Def. Br. 24. However, defendant's vaccination status was just one of many factors the district court considered, along with defendant's health risks and statistics at his facility. *See Bethea*, 54 F.4th at 832-33 (noting that it was "clear" from the record "that Bethea's vaccination status was far from the only factor that the district court considered"). The district court did not apply a per se rule that vaccinations eliminate the risk of COVID-19. It simply stated scientific facts on the effectiveness of the Pfizer-BioNTech vaccine, the very vaccine defendant refused. JA132.

Defendant cites a number of cases where "compassionate release remains available on a case-by-case basis to movants who decline the vaccine." Def. Br. 23. Of course, a defendant who declines the vaccine *could* still be eligible for compassionate release as a district court may consider "*any* extraordinary and compelling reason for release that a defendant might raise." *United States v. McCoy*,

981 F.3d 271. Here the district court considered defendant's denial of the vaccine and even noted "Defendant certainly has a personal right to refuse vaccination." JA132. However, the district court cited case law in the district that emphasized a defendant "cannot simultaneously claim that he must be released because of the risk of complications while refusing a vaccine that could virtually eliminate that risk." *Id.* Other courts in this district have also found that a defendant's refusal to take preventative measures against COVID-19 undermines an assertion that his susceptibility to COVID-19 is an extraordinary and compelling reason. Order at 5, *United States v. Madison*, No. 2:17-cr-80, ECF No. 88 (E.D. Va. Mar. 19, 2021) (internal quotation marks omitted); *see also United States v. Greene*, No. 3:17cr134, 2021 WL 1969453, at *3 (E.D. Va. May 17, 2021) (finding that a defendant who "refused to be vaccinated when offered the opportunity" failed to establish a particular risk), *appeal dismissed*, No. 21-6869 (4th Cir. Aug. 25, 2021); *United States v. Vaughn*, No. 4:19-cr-21 (RCY), 2021 WL 5139502, at *4 (E.D. Va. Nov. 3, 2021) (internal quotation marks omitted). Maybe if defendant had a medical or religious reason why he could not accept the vaccine, the district court would have weighed his denial of the vaccine differently. However, defendant refused the vaccine apparently because he questioned its efficacy and breakthrough cases were still happening. JA115-16. Therefore, the district court was reasonable in pointing out the scientific statistics on the vaccine, and it did not abuse its discretion in

substantially weighing defendant's denial of the vaccine. Again, as this Court has repeatedly reaffirmed, the district court retains ultimate discretion "in balancing the inmate's circumstances with the need for incarceration." *Bethea*, 54 F.4th at 832; *see also Hargrove*, 30 F.4th at 189 ("[M]options for relief under § 3582(c)(1)(A)(i) ask courts to balance the severity of the inmate's personal circumstances, on the one hand, against the needs for incarceration, on the other."). Defendant's personal choice to refuse a vaccine that would significantly mitigate the risk he claims presents an extraordinary and compelling reason to release him with just over a tenth of his sentence served indisputably goes to both sides of the balancing scale.

The district court has broad discretion in determining whether an extraordinary and compelling reason exists. *Kibble*, 992 F.3d at 330. A district court only abuses that discretion "when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law." *Hargrove*, 30 F.4th at 195 (quoting *United States v. Dillard*, 891 F.3d 151, 158 (4th Cir. 2018)). Here, the district court considered the relevant factors in determining whether defendant (1) faced a particularized susceptibility of serious illness due to COVID-19 and (2) whether he faced a particularized risk of contracting it at his facility.

Defendant next argues that the district court erred by relying on "incomplete COVID-19 statistics at the prison and speculations about the prison's management

of Mr. Brown’s medical conditions.” Def. Br. 26. To support this, defendant cites to one case in the district where the district court found that “even if Petitioner were vaccinated, there would still exist a possibility that he *could* contract COVID-19.” *Haley v. United States*, No. 2:12-cr-149, 2021 WL 3575113, at *3 (E.D. Va. Aug. 12, 2021). The district court in *Haley* then recited statistics from the BOP website for the facility where defendant was housed and concluded, generally, “[d]espite the BOP’s protection measures, individuals housed in prisons remain particularly vulnerable to infection.” *Id.* Regardless of this general assertion that prison facilities pose a risk, the court found that defendant was receiving adequate preventative medical care for his conditions in the facility, so he did not face a particularized risk from COVID-19. *Id.* at *2. Finally, the district court found, overall, the § 3553(a) factors did not favor release. Thus, ultimately, the statistics about previous COVID-19 cases in that particular BOP facility were unpersuasive. Just as they were in this case. Moreover, a district court engaged in adjudicating a compassionate release motion is bound by the evidence introduced before it, as is this Court reviewing that decision on appeal. *See Bethea*, 54 F.4th at 833 n.2.

The district court looked at the COVID-19 statistics for USP Hazelton that were available through the BOP website. JA133. After considering that there were 0 confirmed cases of COVID-19 among inmates and only 1 confirmed case among staff, the district court found there was a lack of extraordinary and compelling

reasons for release. *Id.* (citing *United States v. Woolridge*, No. 3:09-cr-156, 2021 WL 415131, at *5 (E.D. Va. Feb. 5, 2021), where the court found no particularized risk where there were 8 active cases). Again, a district court is not required to recite every fact considered, just enough to demonstrate a reasoned basis for exercising its discretion. *High*, 997 F.3d at 190. Here, the district court did more than that by outlining, not only the statistics on current positive COVID-19 cases at defendant’s facility, but also the high rate of vaccination, which further solidified its decision that defendant did not face a particularized risk of contracting COVID-19 at his facility.

Defendant further states that the district court abused its discretion when it relied on those vaccination rates at USP Hazelton as evidence that defendant did not face a particularized risk at his facility. Def. Br. 27. Defendant states that this “ignores [his] *individual* particularized risk at the prison.” *Id.* However, the district court stated exactly why the high vaccination rates were relevant to defendant’s individualized risk. It stated, “[r]obust vaccination rates help ‘limit spread through communities and will restrict the virus’s opportunity to continue to mutate into new variants . . . [t]herefore, the high number of vaccinations at USP Hazelton assist in limiting the spread of COVID-19 *to Defendant.*” JA133 (emphasis added). There are, of course, breakthrough cases with the vaccine, but the district court was within its discretion in finding that the high number of vaccinations at USP Hazelton,

combined with the infection rate, demonstrated that defendant did not face a particularized risk.

Finally, defendant states that the district court erred in “speculating that the common and chronic nature of Mr. Brown’s obesity and hypertension ... are easily managed by USP Hazelton.” Def. Br. 28. The district court noted that common chronic conditions can be managed in a prison facility. JA133 (citing *United States v. Smith*, No. 3:15-cr-101, 2021 WL 3641463, at *3 (E.D. Va. Aug. 17, 2021 (finding chronic conditions manageable in prison do not constitute extraordinary and compelling reasons for release)). Defendant had not demonstrated that his conditions could not be managed by his facility. He stated he was on lock down and was too anxious to leave his cell. JA114, JA063-64. However, USP Hazelton is operating at Level 1, which means their medical isolation rate is below 2%, facility vaccination rate is above or equal to 65%, and the community transmission rate is less than 100 per 100,000 over the last seven days. *COVID-19 Modified Operations Plan & Matrix*, BOP, https://www.bop.gov/coronavirus/covid19_modified_operations_guide.jsp (last visited Feb. 9, 2023). This means that inmates are allowed to leave their cells and participate in activities while following basic COVID-19 safety precautions. *Id.* In addition, defendant did not submit to the district court any medical records that

would substantiate his argument that USP Hazelton is in fact unable to manage his conditions.

Defendant focuses on each individual point that the district court could have considered in granting or denying his Letter Motion. However, the proper consideration is whether the district court considered the “totality of the relevant circumstances” and provided enough to satisfy the appellate court that it considered defendant’s arguments and had a reasonable basis for exercising its decision, so the appellate court can conduct a meaningful review. *See Bethea*, 54 F.4th at 832; *Hargrove*, 30 F.4th at 198; *see also United States v. Mangarella*, 57 F.4th 197, 203 (4th Cir. 2023). The district court specifically stated that defendant’s conditions were serious, but manageable, and that, combined with his refusal of the vaccine, and the COVID-19 statistics, the court found there was not an extraordinary and compelling reason for release based on COVID-19. JA134. This demonstrates that the district court considered the relevant circumstances to defendant’s COVID-19 argument and, in its discretion, denied defendant’s Letter Motion. The Court should affirm the district court’s ruling.

II. The district court did not abuse its discretion in alternatively holding that the § 3553(a) factors did not warrant a reduced sentence.

Defendant correctly observes that since the district court’s decision in this case, this Court has held that issue exhaustion is not required. *See United States v. Ferguson*, 55 F.4th 262, 268 (4th Cir. 2022). Accordingly, the government agrees

that the exhaustion basis for denial of defendant’s argument related to his stacked § 924(c) offenses is now erroneous. That conclusion does not mean, however, that defendant is entitled to a remand. Defendant overlooks the district court’s statement that “[e]ven if the Court were to waive exhaustion, the § 3553(a) factors here do not support early release.” JA135. In fact, the district court even concluded “[d]efendant has failed to exhaust his administrative remedies. *Alternatively*, the § 3553(a) factors do not support Defendant’s release.” JA136 (emphasis added). In other words, it would be futile to go through the analysis because, even if the 924(c) stacking provisions *did* amount to an extraordinary and compelling reason for release, the § 3553(a) factors do not support release.¹ Thus, the district court acted fully within its discretion to deny defendant’s supplemental motion on this alternative basis.

To grant a compassionate release motion, “the district court must conclude that the movant satisfies two separate criteria.” *Bethea*, 54 F.4th at 831; *Hargrove*, 30 F.4th at 194–95. The court must first determine defendant has demonstrated an extraordinary and compelling reason for relief. *Bethea*, 54 F.4th at 831. Then, if the district court has found an extraordinary and compelling reason, it must determine

¹ Perhaps recognizing that *Ferguson* also forecloses compassionate release based on challenges to the validity of his conviction (*see Ferguson*, 55 F.4th at 270), defendant does not raise his *Rehaif*-based argument for compassionate release in his opening brief and has therefore waived it. *See Graydin O Co. v. Agadir Int’l LLC*, 856 F.3d 307, 316 (4th Cir. 2017).

whether release is appropriate under the applicable § 3553(a) sentencing factors. *Id.*; *High*, 997 F.3d at 186 (“In any event, if a court finds that a defendant has demonstrated extraordinary and compelling reasons, it is still not required to grant defendants motion for a sentence reduction.”) “Thus, even if a movant satisfies the threshold eligibility requirement for obtaining relief, a district court has discretion to grant or deny relief based on its assessment of the salient § 3553(a) factors.” *Id.* Further, the district court has broad discretion in determining whether release should be granted. *Kibble*, 992 F.3d at 330.

In *High*, for example, the Fourth Circuit found the district court did not abuse its discretion when it did not address defendant’s argument for extraordinary and compelling reasons. 997 F.3d at 186–87. The Court held that the district court based its decision on its consideration of the § 3553(a) factors alone and this did not amount to an abuse of discretion. *Id.* Here, the district court did not specifically determine whether the stacked 924(c) convictions in defendant’s case constituted an extraordinary and compelling circumstance; it simply held that the 3553(a) factors would not warrant a reduction in defendant’s sentence even if they did. Moreover, a district court is not required to “invariably *acknowledge and address* each of defendant’s arguments on the record.” *High*, 997 F.3d at 189 (citing *Chavez-Meza*, 138 S. Ct. at 1965, 1968).

If the Court were to find that the district court did err in not considering the § 924(c) argument, the Court should still affirm the district court's ruling based on the § 3553(a) factors. *Bethea*, 54 F.4th at 833. Because the district court provided a sound assessment of the § 3553(a) factors, it provided enough for meaningful appellate review and the Court should affirm the district court's ruling.

In challenging these factors, defendant finally contends that the district court abused its discretion by “failing to reweigh the § 3553(a) factors.” Def. Br. 38. Specifically, defendant claims the district court failed to consider “the need to avoid unwarranted sentence disparities, the lack of need for the sentence imposed, and Mr. Brown's characteristics.” *Id.* at 38–39. The Fourth Circuit has noted that district courts “enjoy broad discretion in analyzing the § 3553(a) factors” for compassionate release motions. *Bethea*, 54 F.4th at 834 (quoting *Kibble*, 992 F.3d at 330). However, the Fourth Circuit has provided some guideposts for the analysis. First, “it is significant that the district judge who considered [defendant's] motion for a sentence reduction ‘was the same judge who had sentenced [him] originally.’” *High*, 997 F.3d at 189 (quoting *Chavez-Meza*, 138 S. Ct. at 1967); *Kibble*, 992 F.3d at 332; *Bethea*, 54 F.4th at 834. This weighs against a finding of abuse of discretion. *Bethea*, 54 F.4th at 834. It is also permissible for the district court to “add to its original, sentencing-phase consideration of the § 3553(a) factors.”

Here, the district court sentenced defendant in December of 2014. JA038. At that time, the district court considered the § 3553(a) factors as they related to defendant. While that was a little over eight years ago, defendant has filed a number of motions and appeals in his case, keeping the case fresh in the district court’s mind. Further, the district court explicitly listed the factors and noted that it “carefully weighed [them] at sentencing” and, in consideration of the seriousness of the offense and defendant’s self-representation at trial, imposed a within-Guidelines sentence. JA135. The district court then repeated some of the most salient points in its view, including defendant’s troubled past, criminal history category, escalation in criminal activity, how much of his sentence defendant had served, and whether, based on the nature of his crime, he would be deterred by that percentage of time served. *Id.* After considering those things, the district court noted that “a reconsideration of the § 3553(a) factors would [not] lead to a different result than arrived at during Defendant’s sentencing.” JA136.

The district court also recognized defendant’s service while in custody, including his work at the library and as a GED tutor. JA135-36. While defendant may have wanted a more robust analysis of the § 3553(a) factors and more consideration for his post-sentencing conduct and rehabilitation, the district court was not required to provide more. The district court clearly considered the § 3553(a) factors and determined that they had not changed since defendant’s sentencing and,

thus, there was no basis for early release. The district court has provided enough for meaningful appellate review and did not abuse its discretion in denying defendant's compassionate release motion.² The Court should affirm the district court's ruling.

Defendant asks that this Court remand with instructions to grant defendant's motion, or at the least, remand for complete consideration. While remand is not appropriate in this case, if the Court feels that it is necessary, the Court should not instruct the district court to grant the motion. The decision whether to grant or deny a motion for compassionate release remains within the district court's discretion and instructing the district court how to rule would abrogate that discretion.

² Recently, this Court held that a district court had not adequately explained its basis for denying a sentence reduction based on the § 3553(a) factors where the district court "appeared to take the view that it was inappropriate to consider COVID-19 or Mangarella's particular susceptibility to the disease not only as part of the 'extraordinary and compelling reasons' analysis but also under the § 3553(a) factors." *Mangarella*, 57 F.4th at 204. Those "unusual facts" (*ibid.*) are not present here, where defendant's stacked-§ 924(c) argument was predicated on sentence length and the district court reaffirms that the original sentence remains appropriate for the offense while noting post-sentencing conduct raised by defendant. JA135-136.

Conclusion

For the foregoing reasons, the government requests that this Court affirm the district court's denial of defendant's compassionate release motion.

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Statement Regarding Oral Argument

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid in the decisional process.

Certificate of Compliance

I certify that this brief was written using 14-point Times New Roman typeface and Microsoft Word 2016.

I further certify that this brief does not exceed 13,000 words (and is specifically 5,704 words) as counted by Microsoft Word, excluding the table of contents, table of authorities, statement regarding oral argument, this certificate, the certificate of service, and any addendum.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

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