ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3088

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RAHMAN SHABAZZ
Defendant-Appellant

Appeal from the United States District Court
for the District of Columbia,
Case No. 17-cr-00043 (JDB)

MEMORANDUM OF LAW AND FACT IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

This appeal arises out of a criminal conviction of Defendant-Appellant Rahman Shabazz by Plaintiff-Appellee, the United States of America. There are no intervenors or amici.

II. Rulings Under Review

This is an appeal from a ruling of the district court (the Honorable John D. Bates) denying Appellant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) on November 24, 2020.

III. Related Cases

This case was not previously on review by this Court or any other court. Appellant is not aware of any related cases.

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STATUTES AND GUIDELINES

Relevant statutes and guidelines are reproduced in the attached addendum.

STATEMENT OF THE ISSUES

I. Whether the district court's abuse of discretion in relying on U.S.S.G. § 1B1.13, a policy statement governing compassionate release motions filed by "the Director of the Bureau of Prisons," to deny Mr. Shabazz's compassionate release motion requires reversal.

II. Whether the district court's abuse of discretion by failing to consider how COVID-19 heightens Mr. Shabazz's need to care for his ailing mother who is incapable of living alone, requires reversal.

STATEMENT OF THE CASE

Appellant Rahman Shabazz moved for compassionate release to care for his ailing mother amidst the global pandemic. The district court denied Mr. Shabazz's motion, grounding its opinion in the narrow constraints of U.S.S.G. § 1B1.13 and an improper balancing of sentencing factors. Since passage of the First Step Act, four sister circuits have found § 1B1.13 inapplicable to defendant-initiated compassionate release motions. This Court should now join that growing consensus and reverse the district court's judgment.

A. Mr. Shabazz's Guilty Plea and Sentence

Mr. Shabazz was indicted in July 2016 on one drug conspiracy count under 21 U.S.C. § 846. ECF No. 80.[1] He was released after his arrest with conditions, including drug testing, electronic monitoring, and a curfew, in Washington, D.C. ECF No. 83. Mr. Shabazz then moved to transfer his supervision to the Bronx, where his parents lived, so that he could care for his eighty-year-old father, who was suffering from emphysema and a hernia.

[1] The ECF citations for the details surrounding Mr. Shabazz's arrest, release, plea, and sentencing are from the docket in Case No. 1:16-cr-00005-JDB.

ECF No. 85; ECF No. 186-1. The district court granted that motion. ECF No. 87.

In March 2017, Mr. Shabazz pleaded guilty to the single drug conspiracy charge and also to one 18 U.S.C. § 1962(d) racketeering charge in a case transferred from the United States District Court for the District of Maryland to the district court below for purposes of his guilty plea and sentencing.[2] *See* ECF No. 184 at 11, 17. Mr. Shabazz continued on release pending sentencing. A month after the plea, the district court eased Mr. Shabazz's conditions of release. It eliminated his curfew and electronic ankle monitoring and permitted approved travel outside of a fifty-mile radius of his parents' apartment. ECF No. 170; Min. Order, Apr. 12, 2017.

The presentence report calculated a Guidelines range of 63 to 78 months, ECF No. 184 at 35, and the district court sentenced Mr. Shabazz to 67 months. ECF No. 191 at 2. The court delayed execution of this sentence for three months to allow him to continue caring for his father under the same pre-trial release conditions. *See id.* As directed, Mr. Shabazz reported to prison on November 1, 2017.

[2] The case from Maryland became Case No. 1:17-cr-00043-JDB.

B. Mr. Shabazz's Compassionate Release Motion

Mr. Shabazz filed a compassionate release motion under 18 U.S.C. § 3582(c)(1)(A) on September 10, 2020.[3] ECF No. 17. That provision permits district courts to reduce sentences if, after considering all applicable 18 U.S.C. § 3553(a) sentencing factors, the court finds that "extraordinary and compelling reasons warrant reduction" and that such reduction is consistent with "applicable policy statements" from the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A). Until the 2018 passage of the First Step Act, only the Director of the Bureau of Prisons could file a motion under § 3582(c)(1)(A). The Act now also permits defendants to file such motions.

U.S.S.G. § 1B1.13, a policy statement, limits relief on compassionate release motions filed by the "Director of the Bureau of Prisons" in two ways. First, an "extraordinary and compelling" reason must fall within three narrowly defined categories. Described generally, these categories are: (1) severe medical conditions that render a defendant extremely vulnerable in prison; (2) advanced age of a defendant if aging has caused serious deterioration in physical or mental health; and (3) a need to care for either

[3] Because Mr. Shabazz filed his Compassionate Release motion in Case No. 1:17-cr-00043-JDB, the ECF numbers regarding his motion refer to that docket.

a minor child whose caregiver is incapacitated or an incapacitated spouse where the defendant is the only available caregiver.[4] § 1B1.13 n.1(A)–(C). Second, § 1B1.13 requires the district court to find that the defendant is "not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)" before granting relief. § 1B1.13(2).

Mr. Shabazz based his motion on his extraordinary and compelling need to care for his elderly mother, Ms. Irene Brown Hunt, who has lived alone in the Bronx since Mr. Shabazz's father died in July 2018.[5] ECF No. 17 at 4. He cited his mother's many diagnosed health issues, including "dementia, gait instability, back problems, hypertension, deafness in one ear and hearing loss in the other ear." *Id.* at 3; *see* ECF No. 17-2 (letter from Ms. Hunt's doctor concluding that "it [is] impossible for her to continue living by herself"). These health challenges have left Ms. Hunt effectively incapable of "carry[ing] o[ut] the most basic tasks of daily life, including grocery shopping, cleaning, cooking and self-care." ECF No. 17 at 3–4. Mr. Shabazz also described how Ms. Hunt's "advanced age and serious health conditions"

[4] There is a fourth, catch-all category, but it is limited to reasons "determined by the Director of the Bureau of Prisons." § 1B1.13 n.1(D).
[5] It is undisputed that Mr. Shabazz exhausted this claim with the Bureau of Prisons (BOP) as 18 U.S.C. § 3582(c) requires. ECF No. 23 at 2–3.

put her "at heightened risk of severe complications" from COVID-19. *Id.* at 4.

Mr. Shabazz explained that he is "the only resource available to provide the significant support Ms. Hunt needs to handle her daily tasks." *Id.* Mr. Shabazz's sister (his only sibling) is "not able to provide the consistent care Ms. Hunt requires" because she lives in North Carolina, is a nurse (an "essential worker" during the pandemic), and provides care to her disabled granddaughter. *Id.*; ECF No. 17-3 (letter from sister stating that "only [Mr. Shabazz] can fulfill" the "gap" in Ms. Hunt's care). Indeed, Ms. Hunt relied on Mr. Shabazz "210%" before he was imprisoned. ECF No. 17 at 4 (quoting Presentence Report at 27). Mr. Shabazz proposed a release plan to live with his mother to provide the "nearly constant care" that she needs. *Id.* at 16.

Mr. Shabazz further demonstrated that the § 3553(a) sentencing factors favor a reduction because he "has never been convicted of a violent crime," and he has served over 34 months of his 67-month sentence. *Id.* at 16–17. His prison record includes only one disciplinary infraction—when

prison officials found a cellphone in the common area of his shared cell.[6] ECF No. 17-4. Accounting for good time credits, Mr. Shabazz's projected release date is September 6, 2022. ECF No. 17 at 2.

The government opposed the motion, arguing that Mr. Shabazz's desire to care for his mother, although "honorable," did not establish an extraordinary and compelling reason warranting release. ECF No. 22 at 1. The government further argued that Mr. Shabazz had neither met his burden under U.S.S.G. § 1B1.13 nor demonstrated that the § 3553(a) sentencing factors favored release because he still posed a danger to the community. *Id.* at 18.

The district court denied Mr. Shabazz's motion. ECF No. 23. It explained that § 1B1.13's definition of extraordinary and compelling reasons foreclosed relief because that policy statement did not identify caring for a parent as a qualifying reason. *Id.* at 4–5. And it reasoned that even if § 1B1.13 did not apply, Mr. Shabazz had failed to establish any extraordinary and compelling reason warranting release. *Id.* at 5–6. The district court also concluded that any sentence reduction would not be

[6] As he noted in his motion, Mr. Shabazz was cited for possession of a "hazardous tool," but the government did not dispute that the tool was a cellphone. *See* ECF No. 17-4; ECF No. 22 at 19; ECF No. 23 at 8–9.

"consistent with applicable sentencing policy" because Mr. Shabazz's prior record and his single disciplinary infraction made him a danger to the community. *Id.* at 8, 10.

ARGUMENT

Mr. Shabazz moved for compassionate release because of his extraordinary and compelling need to care for his eighty-year-old mother, who is incapable of caring for herself and faces heightened health risks from COVID-19. In denying that motion, the district court confined its discretion to § 1B1.13's requirements. But as four circuits have recognized, after passage of the First Step Act—an act intended to expand compassionate release—§ 1B1.13 does not constrain district courts' review of defendant-filed compassionate release motions.

Although the district court asserted that it need not decide whether § 1B1.13 applied to Mr. Shabazz's motion, it grounded its analysis in § 1B1.13. That constitutes reversible legal error. And even if the district court did not rely on § 1B1.13 in concluding that Mr. Shabazz failed to demonstrate exceptional circumstances, it still abused its discretion by failing to consider the ways in which the pandemic has heightened Mr. Shabazz's need to care for his mother. Finally, the district court failed to perform a § 3553(a) balancing. To the extent that it considered any § 3553(a) factor, it abused its discretion by unjustifiably contradicting its own prior dangerousness findings and failing to consider mitigating § 3553(a) facts.

A. U.S.S.G. § 1B1.13 Does Not Apply to Defendant-Filed Compassionate Release Motions Because Its Text Limits It to Motions Filed by the BOP.

Section 1B1.13's text covers only motions filed by the Director of the BOP, making the policy statement inapplicable to defendant-filed motions. Congress' intent in passing the First Step Act—to increase the availability of compassionate release by eliminating the BOP's role in controlling access to this critical form of relief—also underscores the importance of hewing to the text of § 1B1.13.

Section 1B1.13's text shows that it applies only to BOP motions. It states: "*Upon motion of the Director of the Bureau of Prisons* under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment" if, after considering any applicable § 3553(a) factors, the court determines that there are extraordinary and compelling reasons and the defendant has established a lack of dangerousness. § 1B1.13 (emphasis added). Therefore, § 1B1.13 does not apply to motions filed by defendants like Mr. Shabazz. *See United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020). Application Note 4 confirms this point. It states that "a reduction *under this policy statement* may be granted *only* upon motion by the Director of the Bureau of Prisons." § 1B1.13 n.4 (emphasis added). Because the Commission has not issued any

"applicable policy statements" for motions filed by defendants, there is no policy statement applicable to Mr. Shabazz's motion. *See* 18 U.S.C. § 3582(c)(1)(A).

Four other circuits have recently held that the plain language of § 1B1.13 makes it inapplicable to motions filed by defendants. *See United States v. McCoy*, 981 F.3d 271, 281–82 (4th Cir. 2020) ("By its plain terms . . . § 1B1.13 does not apply to defendant-filed motions."); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020) (same); *Jones*, 980 F.3d at 1109 (same); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (same). No circuit court has held the contrary.[7]

Legislative intent supports these circuits' plain-language approach to § 1B1.13. Specifically, Congress made clear that after seeing "decades of the BOP Director's failure to bring any significant number of compassionate release motions before the courts," it wanted to expand the availability of compassionate release by providing recourse without the approval of the BOP Director. *Brooker*, 976 F.3d at 236. It thus permitted defendants to file

[7] As the district court noted in its opinion, at least one district court in this Circuit has held that § 1B1.13 applies to defendant-filed motions. ECF No. 23 at 5 (citing *United States v. Goldberg*, 2020 WL 1853298, at *4 (D.D.C. Apr. 13, 2020)).

motions and courts to grant release regardless of BOP action or inaction. *See id.* at 233. Because § 1B1.13 is inapplicable to defendant-filed compassionate release motions, the next question is whether the district court's unduly constrained review of Mr. Shabazz's motion requires reversal. As discussed below, it does.

B. The District Court Abused Its Discretion by Erroneously Relying on § 1B1.13 to Deny Mr. Shabazz's Motion or, in the Alternative, by Failing to Consider that COVID-19 Renders Mr. Shabazz the Only Caregiver for His Mother.

The district court grounded its denial of relief in the strictures of § 1B1.13. Its reliance on that inapplicable policy statement is a legal error that "by definition" constitutes abuse of discretion. *Koons v. United States*, 518 U.S. 81, 100 (1996); *see United States v. Saani*, 650 F.3d 761, 772 (D.C. Cir. 2011) (remanding "solely because the record is unclear as to whether an arguably improper consideration infected the district court's decisions"). In the alternative, even if § 1B1.13 did not constrain the district court's discretion, it still abused that discretion by failing to consider how COVID-19 simultaneously endangers Mr. Shabazz's mother and eliminates any other options for her care.

1. Section 1B1.13 Unduly Constrained the District Court's Analysis of Mr. Shabazz's Motion.

The district court began its analysis of Mr. Shabazz's evidence of his extraordinary and compelling circumstances by explaining, at some length, that § 1B1.13's strictly circumscribed categories of reasons do not include caring for "elderly or sick parents." *See* ECF No. 23 at 4. After recognizing the split in district court authority about § 1B1.13's applicability to defendants' motions, the court asserted that "even if courts are free to consider any reason that a defendant raises for compassionate release," Mr. Shabazz's circumstances still would not qualify. *Id.* at 5. But § 1B1.13 and cases relying on § 1B1.13 dominated the court's analysis of both whether Mr. Shabazz's mother's need for his care was extraordinary and whether he posed any risk of danger to the community.

The § 1B1.13 framework first pervaded the district court's analysis of extraordinary and compelling circumstances. Ms. Hunt's doctor concluded that "it [is] impossible for [Ms. Hunt] to continue living by herself," and Mr. Shabazz explained that he is "the only person able" to provide the care his mother requires. ECF No. 17-2; ECF No. 17 at 1, 3–4. Citing several cases, the district court asserted that "[m]ost courts to consider similar motions [of a child seeking release to care for an aging parent] have denied them." *See*

ECF No. 23 at 5–6. But those cases overwhelmingly relied on § 1B1.13's narrowly circumscribed categories to deny relief. *See id.* (citing *United States v. Dotson*, 2020 WL 6294921, at *5 (E.D. Tenn. Oct. 27, 2020), for its "collect[ed] cases"); *see also Dotson*, 2020 WL 6294921, at *5 (denying relief based on the "plain meaning" of § 1B1.13 n.1(C) and collecting cases that denied relief for similar reasons); *United States v. Brown*, 2020 WL 3440941, at *2–3 (S.D. Miss. June 23, 2020) (finding that defendant's claim that he should be permitted to take care of his ailing mother and brother did not qualify, in part, because "family circumstances . . . are limited to" the two categories described in § 1B1.13).[8]

To be sure, the district court did recognize two cases that granted compassionate release, suggesting that these cases granted relief only because of "extreme circumstances." *See* ECF No. 23 at 6. But the district court failed to recognize the critical role that expanded discretion—

[8] The district court also quoted *United States v. Ingram*, 2019 WL 3162305, at *2 (S.D. Ohio July 16, 2019), for the demonstrably erroneous assertion that caring for an aging and ill parent cannot be extraordinary because "[m]any, if not all inmates, have aging and sick parents." ECF No. 23 at 5 (quoting *Ingram*); *see Inmate Age*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last visited Mar. 4, 2021) (indicating that less than twenty percent of inmates are over fifty years old and more than half are forty or younger).

unconstrained by § 1B1.13's categorical limitations—played in those courts' conclusions. *See id.*; *United States v. Bucci*, 409 F. Supp. 3d 1, 2–3 (D. Mass. 2019) (granting motion for reduction of sentence after finding "no reason to discount" the role of a defendant who was "the only potential caregiver for his ailing mother"); *United States v. Walker*, 2019 WL 5268752, at *2–3 (N.D. Ohio Oct. 17, 2019) (granting compassionate release to inmate whose desire to aid his ailing mother was "his main reason for seeking immediate release" based on court's catch-all discretion). In sum, the district court erred both in relying on cases that expressly applied § 1B1.13 to deny compassionate release and in failing to recognize the critical role that discretion not strictly cabined by § 1B1.13 played for the courts that granted relief.

Likewise, the district court relied on § 1B1.13 to deny Mr. Shabazz's motion when it determined that Mr. Shabazz posed a risk of danger to the community. But the court failed to recognize that § 1B1.13(2)'s requirement that a defendant prove that he is "not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)" is not an independent basis for denying a defendant-filed compassionate release motion. *See, e.g.*, *United States v. Sherwood*, 986 F.3d 951, 953–54 (6th Cir.

2021) (holding that for defendant-initiated motions, "the policy statement's requirement that the defendant not be a danger to the community no longer provides an independent basis for denying compassionate release").[9]

From the outset, the court improperly assumed that it could "reduce [Mr. Shabazz's] term of imprisonment *only if* doing so [was] consistent with applicable sentencing policy." ECF No. 23 at 6–7 (emphasis added). Citing § 1B1.13(2) as a requirement, the court limited its analysis to a single question—whether Mr. Shabazz adequately demonstrated that he posed no danger to the community. *See id.* at 7. Finally, it concluded that reducing Mr. Shabazz's incarceration sentence would be inconsistent with the "*applicable* sentencing policy" of § 1B1.13(2). *Id*. at 10 (emphasis added).

Because § 1B1.13 drove the district court's consideration both of Mr. Shabazz's extraordinary and compelling reasons for release and of his risk of dangerousness, the district court committed legal error warranting reversal. *See, e.g.*, *United States v. White*, 984 F.3d 76, 92 (D.C. Cir. 2020) (reversing and remanding when the district court misunderstood its discretion under the First Step Act in a motion for a sentence reduction).

[9] To be sure, district courts can still consider dangerousness in deciding whether to grant relief but only as part of 18 U.S.C. § 3553(a)'s holistic balancing. *See infra* Part C.

2. The District Court Abused Its Discretion by Failing to Consider that, because of COVID-19, Mr. Shabazz is the Only Available Caretaker for his Increasingly Vulnerable Mother.

Even if the district court did not improperly rely on § 1B1.13, it abused its discretion by failing to consider evidence that COVID-19 has put Mr. Shabazz's mother at heightened risk[10] and prevented his sister, a nurse living in another state, from providing her with necessary care.[11] *See* ECF No. 17 at 4. That failure puts it out of step with other courts. *See, e.g.*, *United States v. Hernandez*, No. 16-20091-CR, 2020 WL 4343991, at *1 (S.D. Fla. Apr. 3, 2020) (finding extraordinary and compelling reasons where, "[b]ecause of the coronavirus pandemic," the defendant was the only potential caregiver for his eighty-four-year-old mother with mobility limitations and a condition requiring monitoring); *see also United States v. Wooten*, No. 3:13-cr-18, 2020 WL 6119321, at *7–8 (D. Conn. Oct. 16, 2020) (finding defendant's status as "only available caregiver for his aging mother and disabled sister" to be "[t]he most important factor" among other, less

[10] Mr. Shabazz does not contend that COVID-19 has had adverse effects on *him*. Rather, COVID-19 heightened the extraordinary and compelling circumstances warranting his release to care for his ailing mother—a claim "the parties agree" he exhausted. ECF No. 23 at 2–3.

[11] If § 1B1.13 does not apply to Mr. Shabazz's motion, *see supra* Part A, then Mr. Shabazz need only demonstrate extraordinary and compelling circumstances and need not disprove dangerousness.

significant factors, together adding up to extraordinary and compelling reasons).

The district court's failure to consider COVID-19 led it to erroneous conclusions about "tenable alternative[s]." ECF No. 23 at 6. For example, the district court pointed out that "[d]uring the three years that [Mr.] Shabazz has been incarcerated, his sister . . . ha[s] aided his mother." *Id.* But for the majority of Mr. Shabazz's incarceration, there was no global pandemic. Since its onset, Mr. Shabazz's sister, a nurse, has been deemed an "essential worker" in North Carolina and has continued to care for her granddaughter, who has autism and epilepsy. ECF No. 17-3; *see* ECF No. 17-2 (letter from doctor explaining that Ms. Hunt's daughter could no longer care for her). She also lives in North Carolina, which means that were she to travel back to New York in the midst of the pandemic, she would either need to quarantine for multiple days—extended periods during which Ms. Hunt, who cannot "continue living by herself," ECF No. 17-2, would be left alone—or expose her mother to "heightened risk of severe complications." ECF No. 17 at 4. In other words, the district court failed to consider the extent to which, especially for essential workers and their medically

vulnerable parents, "[t]raveling has been limited due to the Covid 19" pandemic. ECF No. 17-3.

As Mr. Shabazz's sister notes, there is a gap in their mother's care "which only [Mr. Shabazz] can fill." *Id.* And the district court's failure to consider the evidence that COVID-19 heightened the urgency of that extraordinary circumstance constituted abuse of discretion. *See, e.g.*, *Brooker*, 976 F.3d at 238 (observing that arguments in favor of compassionate release "interact with the present coronavirus pandemic, which courts around the country . . . have used as a justification for granting [relief]"). The final question, then, is whether the district court weighed the § 3553(a) factors before denying Mr. Shabazz relief. *See* 18 U.S.C. § 3582(c)(1)(A) (requiring the district court to consider any applicable § 3553(a) factors before granting sentence reduction). It did not.

C. Any § 3553(a) Analysis by the District Court Inexplicably Contradicted Its Prior Dangerousness Determination and Failed to Consider Mitigating Factors.

Whether and how the district court considered the § 3553(a) factors is at best murky and cannot constitute a basis for affirming the judgment below. The court fleetingly referred to § 3553(a), but did so only to support its dangerousness determination under § 1B1.13. And even if this Court

concludes that the district court engaged in a § 3553(a) balancing, the district court's dangerousness determination not only contradicted its own prior findings but also failed to consider mitigating facts such as Mr. Shabazz's age, time served, and stable release plans.

Although the district court identified § 3553(a) as part of the statutory compassionate release analysis, it failed to engage in *any* balancing of the §3553(a) factors. *See* ECF No. 23 at 6–7. Instead, the court considered only whether Mr. Shabazz met § 1B.13(2)'s requirement that he demonstrate that he is not a danger to the community. *See supra* Part B.1. Because the district court's analysis started and ended with dangerousness under § 1B1.13(2), it simply did not balance the § 3553(a) factors.

Even if the district court's opinion could be read to include a § 3553(a) balancing, the district court abused its discretion. Between Mr. Shabazz's arrest and imprisonment, the district court had repeatedly held that Mr. Shabazz was not a danger. Indeed, when the court permitted Mr. Shabazz's continued conditional release after his guilty plea, it found *by clear and convincing evidence* that he did not pose a risk of danger to the community. *See* ECF No. 167 at 8; Min. Entry, Mar. 3, 2017; 18 U.S.C. § 3143(a)(1) (requiring detention of a person who has been found guilty unless the district

court finds "by clear and convincing evidence" that the person does not pose a risk of danger to the community). There is no dispute that Mr. Shabazz adhered to all conditions of release in the sixteen-month period between his arrest and his surrender. ECF No. 23 at 9.

But in the compassionate release proceedings, the district court inexplicably found that Mr. Shabazz was dangerous because "[t]he danger posed . . . by drug offenses has been well-established." ECF No. 23 at 8; *United States v. Smith*, 896 F.3d 466, 474–75 (D.C. Cir. 2018) (finding abuse of discretion when the district court made unexplained inconsistent dangerousness findings between sentencing and resentencing). The district court identified only one post-imprisonment fact—Mr. Shabazz's sole disciplinary violation when prison officials found a cellphone in his shared cell. But it never explained how that one non-violent violation could be dispositive in a § 3553(a) balancing. *See, e.g.*, *United States v. Adams*, — F. Supp. 3d —, 2021 WL 126797, at *6, *10 (E.D. Mo. Jan. 11, 2021) (finding that § 3553(a) factors weighed in favor of compassionate release despite defendant's "single disciplinary violation for use of a cell phone" because defendant's "institutional conduct record [was] good, with only one non-violent disciplinary infraction").

Indeed, the district court could not have found that this was a sufficient, but not greater than necessary, sentence because it did not consider any mitigating facts. *Pepper v. United States*, 562 U.S. 476, 488 (2011) (recognizing that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence" (citation omitted)). For example, the court did not consider that Mr. Shabazz's age—fifty-five years old—makes him "about half as likely to be convicted of a crime as a defendant released in his twenties." *United States v. Clark*, 467 F. Supp. 3d 684, 694 (S.D. Iowa 2020) (citing U.S. Sent'g Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* 23 (2017)). Nor did it consider that he has already served more than half his sentence. Finally, the court neglected to consider that if released, Mr. Shabazz would live with his mother as her sole caretaker in the same apartment where he took care of his ailing father during all sixteen months of his pre-custody release with perfect compliance. Because the court did not engage in this holistic balancing, it erroneously denied relief. *See United States v. Martin*, 916 F.3d 389, 398 (4th Cir. 2019).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below with instructions to order Mr. Shabazz's immediate release, or in the alternative, remand for reconsideration of his motion under the correct legal standards.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and Circuit Rule 47.2 because it contains 4471 words, excluding the parts of the memorandum specified in Circuit Rule 28(a)(1).

This brief complies with the type-face requirements of Fed. R.App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on March 9, 2021, a copy of this Memorandum of Law and Fact in Support of Appellant was serviced via the Court's ECF system on all counsel of record.

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APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **RAHMAN SHABAZZ,** **Defendant.**	**Crim. Action No. 17-43 (JDB)**

MEMORANDUM OPINION & ORDER

Defendant Rahman Shabazz moves for compassionate release under 18 U.S.C. § 3582(c)(1)(A) in light of his desire to care for his elderly mother and the COVID-19 pandemic. He asks the Court to reduce his sentence and order his immediate release, or in the alternative, to allow him to serve the remainder of his sentence on home confinement. See Mot. Pursuant to 18 U.S.C. § 3582(c) for Order Reducing Sentence and Granting Immediate Release or, in the Alternative, Modifying J. to Allow Remainder of Sentence to be Served on Home Confinement ("Release Mot.") [ECF No. 17] at 1. Shabazz is fifty-four years old and currently incarcerated at Yazoo City Federal Correctional Institution ("FCI Yazoo"), a low-security facility in Yazoo City, Mississippi, where he has served about thirty-six months of a sixty-seven-month sentence for racketeering and conspiracy to distribute heroin and cocaine. See id. at 1–2; Presentence Investigation Report ("PSIR") [ECF No. 8] at 1, 4. His projected release date is September 6, 2022, but he now argues that "the combination of [his] filial duty to care for his elderly mother and the COVID-19 pandemic" constitute "extraordinary and compelling reasons" that warrant his immediate release. Release Mot. at 1–2.[1]

[1] Shabazz previously filed a letter motion for compassionate release on May 29, 2020. See Letter Mot. for Compassionate Release [ECF No. 12]. Because he did not demonstrate that he had exhausted administrative remedies,

The government opposes the motion, arguing that (1) Shabazz has not exhausted administrative remedies for his COVID-19 claim, (2) his desire to care for his mother does not qualify as an "extraordinary and compelling reason" for release under § 3582(c), (3) Shabazz remains a danger to community, and (4) the Court lacks authority to order home confinement (except by reducing Shabazz's sentence). See Gov't's Opp'n to Def.'s Mot. for Compassionate Release or Home Confinement ("Gov't's Opp'n") [ECF No. 22] at 1–2. For the reasons explained below, the Court agrees with the government and will deny Shabazz's motion for release.

Under the First Step Act of 2018, a court may, upon motion of the Bureau of Prisons ("BOP") or a defendant, reduce a defendant's term of imprisonment if, "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent that they are applicable," the court concludes that "extraordinary and compelling reasons warrant such a reduction" and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i); see also U.S.S.G. § 1B1.13 (setting forth the Commission's policy statement, which requires—among other things—that the defendant's release not pose "a danger to the safety of any other person or to the community"). "As the moving party, the defendant bears the burden of establishing that he is eligible for a sentence reduction under § 3582(c)(1)(A)." United States v. Demirtas, 2020 WL 3489475, at *1 (D.D.C. June 25, 2020) (Moss, J.). And a court may consider a defendant's motion for such a reduction only "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring [such] a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A).

To start, the parties agree that Shabazz has satisfied § 3582(c)(1)'s exhaustion requirement

as required by § 3582(c)(1)(A), the Court denied that motion without prejudice. See Order, June 2, 2020 [ECF No. 13] at 2.

for his claim that he should be released to care for his mother. See Release Mot. at 2–3; Gov't's Opp'n at 10–11. Indeed, on April 23, 2020, Shabazz requested release through FCI Yazoo's Administrative Remedy Program on the grounds that he wanted to care for his mother, and more than thirty days have since elapsed. See Release Mot. Ex. A [ECF No. 17-1]. But the government argues that Shabazz did not mention the COVID-19 pandemic in his administrative request, and thus his claim that he should be released in light of COVID-19 should be dismissed. See Gov't's Opp'n at 11. The Court agrees. The regulations implementing § 3582(c)(1)(A) clearly state that an inmate's request (which forms the basis of the later release motion) "shall at a minimum contain," among other things, "[t]he extraordinary or compelling circumstances that the inmate believes warrant consideration." 28 C.F.R. § 571.61(a). As in the past, this Court will "side with the weight of precedent, which requires 'the inmate to present the same factual basis for the compassionate-release request to the warden.'" United States v. Douglas, 2020 WL 5816244, at *2 (D.D.C. Sept. 30, 2020) (Bates, J.) (quoting United States v. Mogavero, 2020 WL 1853754, at *2 (D. Nev. Apr. 13, 2020)). To do otherwise would let inmates present one reason for relief to BOP and another to the Court, denying BOP the chance to consider the request. Id. Thus, to the extent that Shabazz's motion relies on COVID-19, the Court will deny that claim without prejudice.[2]

The Court now turns to the merits of Shabazz's argument that he should be released to care for his eighty-year old mother, who lives alone in New York, and suffers from slowly progressing dementia, hypertension, and other health problems that make it "impossible for her to continue

[2] Even if Shabazz had exhausted his COVID-19 claim, he has not demonstrated that the threat caused by COVID-19 constitutes an extraordinary and compelling reason for his release. Shabazz has not alleged any medical conditions that increase his susceptibility to COVID-19. Rather, he argues that he should be released to limit the spread of COVID-19 in prisons by reducing the prison population. See Release Mot. at 13–14. "But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020).

living by herself." See Letter from Dr. Donald C. Wallerson, Release Mot. Ex. B [ECF No. 17-2]. Shabazz claims he is the "only resource available" to support her full-time because his sister lives in North Carolina and no other family or friends can assist. See Release Mot. at 4; Letter from Deborah Rodgers, Release Mot. Ex. C [ECF No. 17-3]. Although the Court is sympathetic to Shabazz's desire to care for his mother, this does not qualify as an "extraordinary and compelling reason" for release.

Commentary to the Sentencing Commission's policy statement describes four "circumstances" that constitute "extraordinary and compelling reasons" for a sentence reduction under § 3582(c), including the following "Family Circumstances": (1) "[t]he death or incapacitation of the caregiver of the defendant's minor child or minor children" or (2) "[t]he incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner." U.S.S.G. § 1B1.13 cmt. n.1. These circumstances are "strictly circumscribed" and "do not encompass providing care to elderly parents." United States v. Goldberg, 2020 WL 1853298, at *4 (D.D.C. Apr. 13, 2020) (Howell, C.J.). Thus, "[w]hile certainly admirable, a desire to help care for one's elderly parents does not qualify as an 'extraordinary and compelling reason' for release under U.S.S.G. § 1B1.13, nor, therefore, under 18 U.S.C. § 3582(c)(1)(A)(i)." Id. To be sure, the four listed circumstances also include "Other Reasons"—"extraordinary and compelling reason[s] other than, or in combination with" the elucidated reasons (medical condition, age, and family circumstances). U.S.S.G. § 1B1.13 cmt. n.1(D). But these other reasons must be "determined by the Director of the Bureau of Prisons." Moreover, the fact that the policy statement does address family circumstances yet omits any mention of elderly or sick parents suggests that care for a parent is not covered.

Shabazz argues that because U.S.S.G. § 1B1.13 has not been modified since the passage

of the First Step Act, it applies only to compassionate release motions brought by BOP and there is no applicable policy statement for release motions (like this one) brought directly by a defendant. See Release Mot. at 8–11; Def.'s Notice of Suppl. Authority [ECF No. 19] at 1 (citing United States v. Brooker, 976 F.3d 228, 230 (2d Cir. 2020)). Thus, Shabazz contends, "in the absence of an applicable policy statement, Guideline 1B1.13 'cannot constrain district courts' discretion to consider whether any reasons are extraordinary or compelling' and therefore warrant compassionate release." Def.'s Notice of Suppl. Authority at 1 (quoting Brooker, 976 F.3d at 236). Judges in this District have split on whether the fact that § 3582(c) requires that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission" means that courts are limited to the reasons described in U.S.S.G. § 1B1.13, or whether courts have discretion to find that other reasons are extraordinary and compelling, too. Compare Goldberg, 2020 WL 1853298, at *4 ("[G]iven the plain text of § 3582(c)(1)(A), which requires a finding that any sentence reduction is 'consistent with applicable policy statements issued by the Sentencing Commission,' the limitations in U.S.S.G. § 1B1.13 apply and are binding.") with United States v. Price, 2020 WL 5909789, at *3 (D.D.C. Oct. 6, 2020) (Huvelle, J.) ("[T]his Court finds the many opinions that endorse an expansive reading of a sentencing court's power, given the changes instituted by the First Step Act and the fact that the policy statement has not been amended since its enactment, to be more persuasive.").

This Court need not decide the issue because even if courts are free to consider any reason that a defendant raises for compassionate release, Shabazz has failed to establish that his need to care for his mother is extraordinary and compelling. Most courts to consider similar motions have denied them. After all, "[m]any, if not all inmates, have aging and sick parents. Such circumstance is not extraordinary." United States v. Ingram, 2019 WL 3162305, at *2 (S.D. Ohio July 16, 2019)

(denying compassionate release to care for ill mother); see also, e.g., United States v. Dotson, 2020 WL 6294921, at *5 (E.D. Tenn. Oct. 27, 2020) (collecting cases); United States v. Brown, 2020 WL 3440941, at *3 (S.D. Miss. June 23, 2020) ("Several cases throughout the country have found that the need to care for elderly parents is not an 'extraordinary' circumstance under the First Step Act."). To be sure, some courts have granted such motions, but only in extreme circumstances. See United States v. Bucci, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) ("Mr. Bucci's role as the only potential caregiver for his ailing mother is an 'extraordinary and compelling reason' for compassionate release."); United States v. Walker, 2019 WL 5268752, at *3 (N.D. Ohio Oct. 17, 2019) (granting compassionate release where inmate's mother had leukemia requiring expensive treatment and he had "an unusual and lucrative job opportunity that would allow him to assist with his mother's medical costs").

Shabazz argues that his situation qualifies as extraordinary because he "is the only person available to care for his mother." Release Mot. at 12. However, Shabazz has not established that there is no tenable alternative. During the three years that Shabazz has been incarcerated, his sister and others have aided his mother, and there is no evidence that she has been neglected. See id. at 4. Although Shabazz's sister has difficulty traveling between her home in North Carolina and her mother's home in New York, see Letter from Deborah Rodgers, Shabazz has presented no evidence that these visits, though challenging, cannot be made, or that his mother could not move closer to her daughter. Nor has Shabazz demonstrated that his mother is ineligible for home healthcare assistance—he merely says that she was not eligible in 2017, before she had dementia and when Shabazz's father was still alive. See Release Mot. at 4; PSIR at 27.

Even if Shabazz had demonstrated "extraordinary and compelling reasons" for his release, this Court may reduce his term of imprisonment only if doing so is consistent with applicable

sentencing policy and the balance of the factors under § 3553(a) favor release. See United States v. Ayers, 2020 WL 2838610, at *2 (D.D.C. June 1, 2020) (Bates, J.); see also 18 U.S.C. § 3582(c)(1)(A)(i); USSG § 1B1.13(2) (requiring that defendant not pose "a danger to the safety of any other person or to the community"). But Shabazz's 67-month sentence remains appropriate and not greater than necessary to comply with the purposes of sentencing.

Shabazz pled guilty to racketeering in violation of 18 U.S.C. § 1962(d), and in case 1:16-cr-00005-JDB to conspiring to distribute and possess with intent to distribute 100 grams or more of heroin and 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(i) and (ii), and 846. See Plea Agreement [ECF No. 5] at ¶ 1. Shabazz's racketeering conduct involved delivering suboxone to a correctional officer for redistribution in the correctional institution from June 2015 to at least August 2015. PSIR at ¶¶ 35–39. His narcotics conspiracy charge involved facilitating the distribution of heroin and cocaine from New York to the Washington, D.C. area from July 2015 to January 2016. Id. at ¶¶ 29–34. He has two prior felony narcotics convictions—a 2004 conviction for distribution of a controlled substance and a 2006 conviction for possession with the intent to distribute a controlled substance and distribution of a controlled substance—along with convictions for illegal possession of a vehicle (1994), false statement to firearms dealer (1992), criminal possession of a weapon (1991), and attempted unauthorized use of a vehicle (1990). Id. at 19–26. The parties agreed that a sentence of 63 to 78 months of imprisonment followed by four years of supervised release would be appropriate. Plea Agreement at ¶ 4. The Presentence Investigation Report noted that Shabazz's mother had various ailments and said she relied on Shabazz "210%." PSIR at 27. Nevertheless, this Court sentenced Shabazz to 67 months of imprisonment followed by four years of supervised release in 1:16-cr-00005-JDB, to run concurrently to a sentence of 67 months' imprisonment followed by three years of supervised

release in this case. Judgment [ECF No. 10] at 2.

Shabazz suggests that his release is nonetheless warranted because he has never been convicted of a violent crime, he "has had no violent disciplinary issues while imprisoned," and he has "maintained perfect compliance with all restrictions imposed by this Court pending and following his plea and sentencing." Release Mot. at 15. But these contentions do not create sufficient reason to revisit the Court's original sentencing determination. First, the Court is not persuaded that Shabazz presents no danger to the community merely because his convictions did not involve allegations of violence. The danger posed to the community by drug offenses has been well-established. See, e.g., United States v. Zaragoza, 2008 WL 686825, at *3 (N.D. Cal. Mar. 11, 2008) ("In assessing danger, physical violence is not the only form of danger contemplated by the statute. Danger to the community can be in the form of continued narcotics activity."); see also United States v. Soto, 2020 WL 5821966, at *5 (E.D. Tex. Sept. 29, 2020) (denying compassionate release to defendant who posed safety concerns given her role in supplying coconspirators with methamphetamine and wiring drug proceeds in an international drug trafficking conspiracy); United States v. Sandoval, 2020 WL 3077152, at *6 (W.D. Wash. June 10, 2020) (denying a twenty-four-month reduction of defendant's 120-month sentence because, despite his serious health conditions, defendant had led a drug trafficking conspiracy prior to his incarceration and still posed a danger to community). Here, Shabazz has a long history of drug trafficking and serious felonies, including firearms offenses.

Moreover, Shabazz has not had a perfect track record while imprisoned. During his current period of incarceration, Shabazz received serious punishment for possessing a "hazardous tool," Release Mot. Ex. D [ECF No. 17-4], which disqualified him from being considered for home confinement by BOP, Gov't's Opp'n at 19 n.3. While the disciplinary record does not specify the

hazardous tool, Shabazz claims it was a cell phone. See Release Mot. at 5 n.5. Further, although Shabazz appears to have complied with his conditions of release immediately before he was incarcerated in this case, his longer-term history includes persistent recidivism. In addition to the criminal history already detailed, his probation for his 2004 Maryland drug trafficking conviction was revoked and he received an additional 8.5 years of incarceration. PSIR at 21. One short period of compliance is not sufficient to overcome this history.

Finally, this Court lacks the authority to release Shabazz to home confinement. Placement of a prisoner is the BOP's decision, and "a designation of a place of imprisonment . . . is not reviewable by any court." 18 U.S.C. § 3621(b). Under 18 U.S.C. § 3624(c)(2), as amended by the First Step Act, only BOP—and not this Court—has the authority to place prisoners into home confinement. Although the CARES Act extended the authorized term of home confinement under this provision, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281 (to be codified at 18 U.S.C. § 3621 note), "the law did not grant to courts the authority to determine whether a prisoner should be placed on home confinement." United States v. Orji, 2020 WL 5107545, at *4 (D.D.C. Aug. 31, 2020); see also, e.g., United States v. McCann, 2020 WL 1901089, at *3 (E.D. Ky. Apr. 17, 2020) ("While the CARES Act gives the BOP broad discretion to expand the use of home confinement during the COVID-19 pandemic, the Court has no authority under [§ 12003(b)(2) of the CARES Act] to order that a prisoner be placed on home confinement." (citation omitted)). Of course, the Court could, as Shabazz suggests, "reduc[e] his sentence to time served and modify[] his judgment to add the unserved portion of his original sentence to his term of supervised release so that it can be served on home confinement." See Release Mot. at 17. But this would still be a sentence reduction, and so would require the Court to make the requisite findings under § 3582(c). Thus, because the Court concludes that Shabazz is not eligible for a sentence reduction under

§ 3582(c), the Court will also deny Shabazz's request for home confinement.

In sum, the Court cannot conclude that Shabazz has exhausted his COVID-19 claim and denies that claim without prejudice. Nor can the Court conclude that he has established "extraordinary and compelling reasons" for a sentence reduction under § 3582(c)(1)(A) or that such reduction is consistent with applicable sentencing policy. As a result, the Court must deny his motion.

* * *

For the foregoing reasons, it is hereby **ORDERED** that [17] Shabazz's motion for compassionate release is **DENIED**.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: November 24, 2020

18 U.S.C. § 3142 – Release or detention of a defendant pending trial

(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

> **(1)** the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
>
> **(2)** the weight of the evidence against the person;
>
> **(3)** the history and characteristics of the person, including—
>
> > **(A)** the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> >
> > **(B)** whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
>
> **(4)** the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source

of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

18 U.S.C. § 3143 – Release or detention of a defendant pending sentence or appeal

(a) RELEASE OR DETENTION PENDING SENTENCE.—

> **(1)** Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).
>
> **(2)** The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—
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> > **(A)(i)** the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
> >
> > **(ii)** an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and
> >
> > **(B)** the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3553 – Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** the need for the sentence imposed—
>
> > **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> > **(B)** to afford adequate deterrence to criminal conduct;
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> > **(C)** to protect the public from further crimes of the defendant; and
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> > **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
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> **(3)** the kinds of sentences available;
>
> **(4)** the kinds of sentence and the sentencing range established for—
>
> > **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
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> > > **(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such

guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3582 – Imposition of a sentence of imprisonment

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

U.S.S.G. § 1B1.13 – Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) **(A)** Extraordinary and compelling reasons warrant the reduction; or

(B) The defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) The reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not

required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.>

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an

extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

2. Foreseeability of Extraordinary and Compelling Reasons.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

3. Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

4. Motion by the Director of the Bureau of Prisons.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community. This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

5**. Application of Subdivision (3).**—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.