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)

REPLY MEMORANDUM OF LAW AND FACT IN SUPPORT OF APPELLANT

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April 27, 2021

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ARGUMENT

Excerpting a one-off statement and passing reference from the opinion below, the government argues that the district court did not rely on § 1B1.13 in denying Mr. Shabazz's motion and that § 3553(a) provides independent grounds for affirmance. It is wrong on both counts. The district court's reasoning repeatedly demonstrated its understanding that § 1B1.13 narrowed its discretion to grant relief. And the district court's brief mention of § 3553(a) did not constitute a proper balancing under that provision. In short, this Court should reverse because the district court's reliance on an inapplicable policy statement constituted abuse of discretion, and there are no alternate grounds for affirmance.

I. The District Court Relied on § 1B1.13 to Deny Mr. Shabazz Relief.

The government concedes that six circuit courts have held that "§ 1B1.13 is not applicable" to defendant-filed compassionate release motions, and it offers no argument that § 1B1.13 applies to Mr. Shabazz's motion. Gov't Mem. 18.[1] But the government contends that this Court

[1] The day the government filed its response, another circuit court joined that consensus. *See United States v. Aruda*, — F.3d —, 2021 WL 1307884, at *4 (9th Cir. Apr. 8, 2021).

need not address the issue because the district court assumed that § 1B1.13 did not bind its discretion. *See* Gov't Mem. 19. In doing so, the government points to a single clause in the opinion where the district court suggested that "even if courts are free to consider any reason a defendant raises," ECF No. 23 at 5, it would not find Mr. Shabazz's reasons extraordinary and compelling. *See* Gov't Mem. 19. But viewing that single clause in isolation obscures the opinion's repeated references to § 1B1.13. Indeed, from beginning to end, the district court relied on § 1B1.13 and viewed that provision as constraining its analysis.

The government agrees that the district court's opinion began by discussing and applying § 1B1.13. *See* Gov't Mem. 7. ("The court recognized . . . that in § 1B1.13, the [Sentencing] Commission had set forth [an applicable] policy statement."). Indeed, the district court first described § 1B1.13 as "the Commission's policy statement" applicable to defendant-filed § 3582(c)(1)(A) motions. ECF No. 23 at 2. Then, after listing the four circumstances § 1B1.13 deems extraordinary and compelling, the district court reasoned that "[t]hese circumstances are strictly circumscribed and do not encompass providing care to elderly parents." *Id.* at 4 (internal quotation marks omitted).

The district court next relied on § 1B1.13 when it cited opinions that denied relief because of § 1B1.13's narrowly circumscribed categories. The government attempts to diminish the central role that § 1B1.13 played in those opinions by arguing that their holdings were based not on § 1B1.13's narrow categories but on the potential availability of other caregivers. *See* Gov't Mem. 20 (discussing *United States v. Dotson*, 2020 WL 6294921 (E.D. Tenn. Oct. 27, 2020), and *United States v. Brown*, 2020 WL 3440941 (S.D. Miss. June 23, 2020)). That argument fails to recognize how and why the district court relied on those opinions and mischaracterizes the outcome-determinative role that § 1B1.13 played in those holdings. Specifically, the district court cited *Dotson*'s and *Brown*'s discussions of § 1B1.13—not their later discussions of other available caregivers—to support its conclusion that caring for an aging, sick parent "is not extraordinary." ECF No. 23 at 5–6 (internal quotation marks omitted). And *Dotson* held that the court would have had to "defy § 1B1.13 n.1(C)'s plain meaning and graft new language into this provision, exceeding its judicial authority," to find extraordinary and compelling the need to care for a sick parent. 2020 WL 6294921, at *5. Similarly, *Brown* held that the defendant failed to show extraordinary

and compelling reasons because he did not "meet any of the criteria set forth by [§ 1B1.13 n.1(C)]." 2020 WL 3440941, at *3. The district court thus based its conclusion that caring for an aging and ill parent is not an extraordinary and compelling circumstance on cases that expressly relied on § 1B1.13's narrow categories to deny relief.

The government concedes that the only other case similarly denying relief that the district court cited "appear[s] to have relied in part on language from § 1B1.13." Gov't Mem. 20 (discussing *United States v. Ingram*, 2019 WL 3162305, at *2 (S.D. Ohio July 16, 2019)). And the only additional rationale the government referenced from that case—that "a prisoner having aging and sick parents is not an extraordinary circumstance"—was based on an incorrect factual premise. *Id.*; *see* Appellant's Mem. 14 n.8 (citing BOP statistics to the contrary).

The government then points to two cases the district court cited that "did *not* apply § 1B1.13 and *granted* release." Gov't Mem. 20 (emphases added); *see* ECF No. 23 at 6 (discussing *United States v. Bucci*, 409 F. Supp. 3d 1 (D. Mass. 2019), and *United States v. Walker*, 2019 WL 5268752 (N.D. Ohio Oct. 17, 2019)). The government says that the district court distinguished these cases based on "extreme circumstances that are

not present here." Gov't Mem. 20. But that argument glosses over the central role that discretion unconstrained by § 1B1.13 played in the outcome of these two cases and makes no attempt to explain *how* those cases are distinguishable. In fact, it utterly fails to account for the extreme—and analogous—circumstances that *are* present here: Mr. Shabazz's mother is incapable of living on her own; his sister cannot provide the care his mother needs; and COVID-19 heightens the risk to his mother, makes interstate travel even less feasible, and renders Mr. Shabazz his mother's only available caregiver.[2] *See* Appellant's Mem. 17–19; *cf. Bucci*, 409 F. Supp. 3d at 2 (finding defendant's role as "only potential caregiver for his ailing mother" extraordinary and compelling);

[2] While this case has been on appeal, Mr. Shabazz's status as his mother's only caretaker has become even more evident. If this Court remands, there will be evidence that Mr. Shabazz's sister has relocated to South Carolina where she must remain for the next three to six months to provide full-time care to her husband while he recovers from knee surgery, so she can no longer periodically travel to her mother's house in New York. And although "other persons" may once have assisted Mr. Shabazz's mother with certain tasks, Gov't Mem. 9, the intermittent check-ins she now receives from her building's doorman do not begin to approach the degree of care she requires.

Walker, 2019 WL 5268752, at *3 (granting compassionate release where defendant had unique opportunity to assist in his ailing mother's care).[3]

Finally, the government equivocates on whether the district court "felt bound by" § 1B1.13 when it suggested it could deny relief on dangerousness grounds alone. Gov't Mem. 23. The court cited § 1B1.13(2) as "*requiring* that the defendant not 'pose a danger to the safety of any other person or to community.'" *See* ECF No. 23 at 7 (emphasis added). The government asserts that "[i]t is not clear why the court included that reference" to § 1B1.13(2). Gov't Mem. 24. But it is clear: The district court viewed § 1B1.13(2) as "requiring" it to make a dangerousness determination. And it reasoned that it could reduce Mr. Shabazz's term of imprisonment "only if" that determination favored Mr. Shabazz. ECF

[3] The government argues that the district court considered the impact of COVID-19 on Mr. Shabazz's sister and still found that Mr. Shabazz was not his mother's only available caregiver. Gov't Mem. 24. But the district court never considered the heightened risk of severe complications the pandemic poses to Mr. Shabazz's mother—an eighty-year-old woman with dementia and hypertension, among other diagnosed health conditions. *See* Appellant's Mem. 5. And the district court's reference to Mr. Shabazz's sister's "difficulty in traveling," Gov't Mem. 24, did not acknowledge COVID-19's effects on her—for example, the need for mandatory quarantine or her role as an essential worker—as opposed to the facts that she lives in North Carolina and cares for her granddaughter who has special needs. *See* ECF No. 17-3.

No. 23 at 6–7. But that singular reliance on § 1B1.13(2) is inconsistent with § 3553(a)'s holistic approach, and it requires reversal. *See United States v. Sherwood*, 986 F.3d 951, 953–54 (6th Cir. 2021) (reversing where the district court relied on § 1B1.13(2), "an impermissible consideration," to deny relief).[4]

In sum, the district court's opinion, beginning to end, demonstrates improper reliance on § 1B1.13. And the government is wrong to suggest that the phrase "even if courts are free to consider any reason a defendant raises" was a panacea. Gov't. Mem. 8. Rather, the district court relied on an inapplicable policy statement both in finding no extraordinary and compelling circumstances and in treating dangerousness as a sole basis to deny relief. That improper reliance constitutes reversible legal error. *See*, *e.g.*, *United States v. Aruda*, — F.3d —, 2021 WL 1307884, at *4 (9th Cir. Apr. 8, 2021) (vacating and remanding "[b]ecause the district court treated U.S.S.G. § 1B1.13 as binding").

[4] As Mr. Shabazz explained in his opening brief, if § 1B1.13 does not apply, district courts should consider a defendant's current dangerousness in a holistic balancing of § 3553(a) factors, rather than as a single element under § 1B1.13(2). *See* Appellant's Mem. 16 n.9; 19–20.

II. The District Court's Denial Cannot Be Affirmed on § 3553(a) Grounds.

The government argues that even if the district court improperly relied on § 1B1.13, this Court can nonetheless affirm because the district court "clearly relied on the § 3553(a) factors as an independent reason to deny relief." Gov't Mem. 23. That argument is inconsistent with the district court's opinion, which never mentioned a single § 3553(a) factor. Nor does the government respond to Mr. Shabazz's alternative argument that even if the district court did rely on the § 3553(a) factors as an independent basis for its holding, it abused its discretion by failing to explain its inconsistent dangerousness findings.

The government suggests that because the district court mentioned § 3553(a) when stating the legal standard for compassionate release motions, the court's denial was "based on appropriate statutory factors and not on § 1B1.13." *Id*. Not so. To be sure, the district court *identified* § 3553(a) as the last step of the compassionate release analysis and alluded to Mr. Shabazz's original sentencing range. But it never engaged in a "thorough renewed consideration of the § 3553(a) factors" that weighs both parties' arguments and all applicable sentencing factors. *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020). The district

court neither "discussed several of the § 3553(a) factors" nor addressed mitigating facts that Mr. Shabazz raised. Gov't Mem. 21; *see* Appellant's Mem. 20.[5] Indeed, the opinion's vague references to § 3553(a) contrast with other cases where this same district court rooted its denials of compassionate release in the language and purposes of specific § 3553(a) factors. *See, e.g.*, *United States v. King*, Cr. No. 18-318 (JDB), 2021 WL 880029, at *4 (D.D.C. Mar. 9, 2021) (reasoning that "in light of the large portion of [defendant's] sentence remaining to be served," the balance of specific § 3553(a) factors weighed against release); *United States v. Piles*, Cr. No. 19-292-5 (JDB), 2021 WL 1198019, at *4 & n.7 (D.D.C. Mar. 30, 2021) (identifying factors § 3553(a)(1)–(2) as "strongly weigh[ing] against" release and stating that dangerousness under § 1B1.13 provided only "an additional reason to deny [the] motion").

Unlike its other compassionate release denials, the district court's analysis of Mr. Shabazz's motion ultimately tracked § 1B1.13(2) rather

[5] As Mr. Shabazz explained in his opening brief the district court never considered mitigating facts regarding his age, time served, and stable release plans. Appellant's Mem. 22; *see* § 3553(a)(1) ("characteristics of the defendant"); § 3553(a)(2)(D) (rehabilitation); § 3553(a)(6) ("avoidance of sentencing disparities"); § 3553(a)(1)(3) ("kinds of sentences available").

than § 3553(a). The court's discussion focused on § 1B1.13(2)-specific factors such as Mr. Shabazz's "history relating to drug abuse" and that his "offense involve[d] [a] controlled substance." *See* § 3142(g)(1)–(2); ECF No. 23 at 7. And its analysis was limited to the single inquiry found only in § 1B1.13(2): whether Mr. Shabazz adequately demonstrated that he posed no danger to the community. *See* ECF No. 23 at 8–9. Finally, the court *explicitly stated* one reason for its denial of Mr. Shabazz's motion: "[a sentence] reduction [was] inconsistent with applicable sentencing policy." *Id*. at 10. The government cannot now recast the district court's § 1B1.13(2) analysis as having been an implicit § 3553(a) balancing. *See* Gov't Mem. 21–23; *United States v. Levay*, 76 F.3d 671, 674 (5th Cir. 1996) (refusing to affirm on the government's alternative argument "that the district court had implicitly considered three factors from § 3553(a)" because the court stated other reasons "upon which it based its finding").

Nor can the government rely on *United States v. Tomes*, 990 F.3d 500, 504 (6th Cir. 2021), which affirmed a district court's denial of compassionate release under § 3553(a) even though the court had elsewhere improperly relied on § 1B1.13(2). Unlike the district court in *Tomes,* the district court here never stated that it "considered each of the

18 U.S.C. § 3553(a) factors" when it denied Mr. Shabazz's motion. *Id.* at 504; *see United States v. White*, 984 F.3d 76, 81 (D.C. Cir. 2020) (remanding where it was "unclear whether the court properly weighed the factors listed in 18 U.S.C. § 3553(a)"). And because the district court noted § 1B1.13 as the reason for its denial, this Court should remand. *United States v. Martin*, 916 F.3d 389, 398 (4th Cir. 2019) (observing that appellate courts have broad discretion in reviewing sentence reduction motions and "[i]f the court of appeals considers an explanation inadequate in a particular case, it can send the case back to the district court for a more complete explanation" (internal quotation marks omitted)).

Finally, even if the district court balanced the § 3553(a) factors, it nonetheless abused its discretion by abruptly switching course on its pre-trial, pre-sentencing, and pre-incarceration findings that Mr. Shabazz was not a danger to the community. *See* Appellant's Mem. 20–21. The government wholly fails to address this argument, perhaps because there is no explanation that would adequately justify the district court's inconsistent dangerousness findings. That inconsistency independently requires remand. *See* Appellant's Mem. 22–23.

CONCLUSION

In sum, the district court's improper reliance on § 1B1.13 was reversible legal error. And § 3553(a) does not provide an alternative ground for affirming either because the district court failed to balance the sentencing factors or because it abused its discretion through inconsistent dangerousness findings. This Court should reverse the order below with instructions to order Mr. Shabazz's immediate release. At minimum, the order should be reversed and remanded for reconsideration under the correct legal standards.

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April 27, 2021

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 2465 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 April 27, 2021, a copy of this Reply 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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