ORAL ARGUMENT NOT YET SCHEDULED

MEMORANDUM OF LAW AND FACT FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3088

UNITED STATES OF AMERICA, Appellee,

v.

RAHMAN SHABAZZ, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANNING D. PHILLIPS
Acting United States Attorney

ELIZABETH TROSMAN
GEORGE ELIOPOULOS
Assistant United States Attorneys

SUZANNE GREALY CURT
D.C. Bar No. 349654
Assistant United States Attorney
555 Fourth Street, NW, Room 8104
Washington, D.C. 20530
Suzanne.G.Curt@usdoj.gov
(202) 252-6829

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3088

UNITED STATES OF AMERICA, Appellee,

v.

RAHMAN SHABAZZ, Appellant.

APPELLEE'S MEMORANDUM OF LAW AND FACT

Appellant Rahman Shabazz appeals the denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). He argues the district court erred in denying his request for release when it relied on a policy statement in USSG §1B1.13, and failed to consider conditions created by COVID-19. These claims lack merit. The trial court did not err in finding that appellant had not established "extraordinary and compelling reasons" warranting relief and that appellant's release was not appropriate in light of the factors listed in 18 U.S.C. § 3553(a).

BACKGROUND

The Offenses and Sentences

On March 3, 2017, appellant pled guilty before the Honorable John D. Bates, pursuant to a plea agreement, in two factually distinct cases. In case 16-CR-00005, appellant pled guilty to conspiracy to distribute one hundred grams or more of heroin and five hundred grams or more of cocaine (SA:1 at 2-3).[1] In that case appellant facilitated the distribution of heroin and cocaine from New York to Washington, D.C. and Maryland between July 31, 2015, through January 8, 2016 (*id.* at 3) Appellant acknowledged responsibility for two kilograms of cocaine and 295 grams of heroin (*id.*).

In case 17-CR-00043, appellant pled guilty to participating in a racketeering conspiracy (SA:1 at 2).[2] Appellant acknowledged that during the summer of 2015, he had conspired to smuggle suboxone strips into the Eastern Correctional Institution in Westover, Maryland (*id.* at

---

[1] "SA" refers to appellee's Supplemental Appendix; "App" refers to appellant's appendix; "PSIR" refers to the June 30, 2017, Presentence Investigation Report.

[2] Case 17-CR-00043 was transferred to this jurisdiction from the District of Maryland.

3; PSIR at pps.11-12). Corrupt corrections officers distributed the contraband to inmates (PSIR at pps. 11-12).

On July 7, 2017, the court sentenced appellant in each case to concurrent terms of 67 months' incarceration. The court also imposed concurrent terms of 48 months' supervised release in case 16-cr-00005, and 36 months in case 17-cr-00043 (SA:2 at 2, n.1).

Appellant is serving his sentence at FCI Yazoo City Low, Mississippi; his projected release date is September 6, 2022.

Appellant's Criminal History

In addition to these cases, appellant's criminal history includes six other convictions, four of which resulted in periods of incarceration. *See* PSIR at pp.19-24. In January 1990, appellant was convicted in the District of Columbia Superior Court of attempted unauthorized use of a vehicle and received a suspended sentence and one year of supervised probation (*id.* ¶123). In May 1991, appellant was sentenced to one year of incarceration in New York for criminal possession of a weapon (*id.* ¶ 124). In 1992 appellant was sentenced in the United States District Court for the Eastern District of Virginia to three years' incarceration for making a false statement to a firearms dealer (*id.* ¶ 125). And in 1994, in

Bronx, NY, appellant was sentenced to 15 days' incarceration for Illegal Possession of a Vehicle (*id.* ¶ 126).

Thereafter, appellant incurred two felony narcotics convictions. In 2004, in Montgomery County, Maryland, appellant was sentenced to ten years in prison, with all but three years suspended, for Distribution of a Controlled Substance (PCP), and Unattended Child (PSIR ¶ 127). Appellant's probation was revoked, and in March 2006, he was sentenced to eight and one-half years' incarceration (*id.*). Finally, also in Montgomery County, appellant was sentenced to ten years' incarceration on May 12, 2006, for Possession with Intent to Distribute and Distribution of a Controlled Substance, PCP (*id.* ¶ 128).

Appellant's Request for Release and the Government's Opposition

On September 10, 2020, appellant filed a motion seeking early release or home confinement for the remainder of his sentence (SA:2). Appellant stated that he had filed a release request with his warden on April 23, 2020, more than 30 days earlier (*id.* at 2). Appellant requested release 1) to care for his elderly mother (*id.* at 3-4, 11-12), and 2) because

of COVID-19 conditions in the BOP (*id.* at 5, 13-14). Appellant's request to the warden had been grounded on the former but not the latter ground.

Regarding his mother, appellant stated that she was 80 years old, lived in New York, and suffered from dementia, gait instability, hypertension, deafness in one ear, and hearing loss in the other (SA:2 at 3). Appellant's motion included an August 2020 letter from his sister, Deborah Rogers, a nurse who lives in North Carolina (*id.* Exh. C). The letter stated Ms. Rogers "need[ed] some help with taking care of [her] mother" (*id.*), and that she had been going to New York to attend to her mother's needs, such as shopping, doctors' appointments, and meal preparation (*id.*). Ms. Rogers' letter indicated that she would continue to care for her mother but needed "some help" with doing so (*id.*). Appellant's motion also mentioned that appellant has a childhood friend check on his mother periodically, and that an employee in his mother's apartment building sometimes assists her with tasks (*id.* at 4).

The government's opposition argued that appellant's desire to care for his mother was not an extraordinary circumstance justifying his release (SA:1 at 14-15), and that appellant's assertion that he was the only individual available to care for his mother was factually

unsupported because his sister and others had been assisting her while appellant was incarcerated (*id.* at 15). The government also argued 1) that appellant had not exhausted his administrative remedies with respect to his claim based on Covid-19, 2) that he had not claimed to have any health problems warranting release due to the pandemic (*id.* at 4, 15-16); 3) that the court did not have jurisdiction to order home confinement for the remainder of appellant's sentence (*id.* at 16-17); and 4) that appellant remained a danger to the community due to his criminal history, violation of supervision, and the criminal conduct underlying his convictions (*id.* at 18-19).

The Trial Court's Ruling

On November 24, 2020, Judge Bates denied appellant's motion (App:1). Judge Bates found that appellant had satisfied 18 U.S.C. § 3582(c)(1)(A)'s exhaustion requirement with respect to his request for release to care for his mother (App:1 at 2-3),[3] but that because appellant's

[3] Title 18 U.S.C.§ 3582(c)(1)(A) provides that a court may consider a request for modification of a term of imprisonment after a defendant has submitted such a request to the Bureau of Prisons and has exhausted his administrative rights to appeal the denial thereof, or 30 days have passed since the request was submitted to the warden, whichever occurs earlier.

request for release based on Covid-19 had not been presented to the warden, Judge Bates would not consider that ground (*id.* at 3).[4]

Addressing the merits of appellant's preserved claim, the court discussed the applicable provisions of the First Step Act of 2018 (App:1 at 2), and concluded that appellant's desire to care for his mother did not constitute an extraordinary and compelling reason justifying his release (*id.* at 3-6). The court recognized the requirement in § 3582(c)(1)(A) that a decision to reduce a term of imprisonment must be "consistent with applicable policy statements issued by the Sentencing Commission" (App:1 at 2), and that in §1B1.13, the Commission had set forth such a policy statement (*id.*). The court observed that §1B1.13 describes four instances that constitute extraordinary and compelling circumstances, but that caring for an elderly parent was not one of them (*id.* at 4).

---

[4] When preparing this pleading, the undersigned AUSA learned that on October 7, 2020, the warden denied appellant's request in a letter which (incorrectly) described appellant's request as "based on concerns about COVID-19." We have contacted the BOP and have verified that the denial was sent in a form letter that included Covid language, and that appellant filed only one request for release, dated April 23, 2020, as described above.

Judge Bates noted appellant's argument that §1B1.13 was applicable only to motions brought by the BOP. Judge Bates observed that district judges in this jurisdiction have disagreed as to whether §1B1.13 applies to defendant-generated motions, or whether judges are free to find that other circumstances not listed in the policy statement constitute extraordinary and compelling reasons warranting relief (App:1 at 4-5). Judge Bates stated that he did not need to resolve that issue because, even if he were free to consider a circumstance not listed in §1B1.13, he did not find that appellant's need to care for his mother was an extraordinary and compelling circumstance (App:1 at 5). Judge Bates reasoned that many inmates face similar issues with respect to aging and sick parents, and observed that a number of district courts from other jurisdictions had denied relief on that ground (*id.* at 5-6; citing cases).[5]

The court found that appellant had not supported his claim that he was "the only person available to care for his mother" (App:1 at 6). The

[5] The court acknowledged that two district courts had released defendants to care for ailing parents, but that those circumstances were "extreme" (App:1 at 6).

court noted that appellant's sister and other persons had been caring for appellant's mother, and that there was no evidence that she had been neglected (*id.*). The court specifically acknowledged that it was difficult for appellant's sister to travel from North Carolina to care for her mother, but found that appellant had not presented any evidence that the trips could not be made, that his mother could not relocate to be closer to her daughter, or that his mother was otherwise ineligible for healthcare assistance (*id.*).

Judge Bates further ruled that even if appellant had demonstrated an extraordinary and compelling reason for his release, he still would not reduce appellant's term of imprisonment, because to do so would not be consistent with applicable sentencing policy and the factors set forth in § 3553(a) (App:1 at 6-7). The court first found that appellant's 67-month sentence was appropriate and not greater than necessary to comply with the purposes of sentencing (App:1 at 7), as required by § 3553(a). The court discussed the circumstances underlying appellant's guilty plea in both cases at issue here, as well as appellant's criminal history, noting that it included two earlier felony narcotics convictions. The court also noted that at the time of appellant's guilty plea, the parties had agreed

to a sentencing range of 63-78 months. Further (in keeping with that agreement), the court had imposed a 67-month term even in light of the PSIR's discussion of appellant's mother's health problems and her reliance on appellant (App:1 at 7-8).

Judge Bates also rejected appellant's claim that his release was warranted because he was not convicted of a "violent" crime, had no violent disciplinary issues while incarcerated, and had complied with his release conditions pending his guilty plea and sentencing (App:1 at 8). First, the court found that although appellant's convictions did not involve allegations of violence, the dangers posed to the community by drug offenses was "well-established" (*id.* (citing cases)), and appellant had a long history of drug trafficking, which included serious felonies and firearms offenses (*id.*). Second, appellant had not maintained a "perfect track record" while imprisoned, having incurred a disciplinary infraction and serious punishment for possessing a hazardous tool (*id.* at 8-9).[6]

[6] As the trial court noted, appellant stated that the item was a cell phone (App:1 at 8-9; referring to appellant's release motion). Appellant's release motion stated that he had accepted responsibility for the cell phone, which had been found in a shared cell (SA:2 at 5, n.5). However, the Inmate Disciplinary Data appellant attached to his motion stated that he (continued . . .)

Finally, the court acknowledged that appellant had complied with his release conditions, but found that his longer term criminal history included "persistent recidivisim," including a revocation of release in Maryland, and opined that "one short period of compliance" was not sufficient to overcome appellant's criminal history (*id.* at 9).[7] On December 8, 2020, appellant noted this appeal.

ARGUMENT

A. Standard of Review and Legal Principles

1. Standard of review

A defendant bears the burden of establishing eligibility for compassionate release. *See United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) ("A party with an affirmative goal and presumptive access to proof on a given issue normally has the burden of proof as to that

---

declined to comment on the incident, *id.* at Exh. D, and that as a sanction appellant was disallowed 41 days of good conduct time, and given 30 days in disciplinary segregation, loss of visits for six months, and a fine (*id.*).

[7] Judge Bates also found that he lacked the authority to release appellant to home confinement because prisoner placement is committed to the Bureau of Prisons (App:1 at 9-10). Appellant does not challenge that ruling on appeal.

issue."); *cf. United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013) ("[T]he § 3582(c)(2) movant . . . bears the burden of establishing that a retroactive amendment has actually lowered his guidelines range[.]")

This Court reviews the denial of a motion for compassionate release under § 3582(c)(1)(A)(i) for abuse of discretion. *United States v. Chambliss,* 948 F.3d 691, 693 (5th Cir. 2020). *See also United States v. Smith,* 896 F.3d 466, 470 (D.C. Cir. 2018) (same as to motion brought under § 3582(c)(2)). A district court abuses its discretion if it "bases its decision on an error of law or a clearly erroneous assessment of the evidence." *Chambliss*, 948 F.3d at 693 (quoting *United States v. Chapple*, 847 F.3d 227, 229 (5th Cir. 2017)); *accord United States v. Kincaid*, 802 F. App'x 187, 189 (6th Cir. 2020) (following *Chambliss*, and holding that "[b]ecause the district court did not rely on an impermissible sentencing factor or fail to consider a relevant sentencing factor, the district court did not abuse its discretion in determining that [the defendant] was not entitled to early release"); *United States v. Pawlowski*, 967 F.3d 327, 330 (3d Cir. 2020) (same); *United States v. Hill*, 809 F. App'x 161, 162 (4th Cir. 2020) (same). This Court reviews preserved questions of statutory

interpretation *de novo*. *United States v. Wishnefsky*, 7 F.3d 254, 256 (D.C. Cir. 1993).

2. **Compassionate release**

The First Step Act of 2018 "significantly expanded access to compassionate release under 18 U.S.C. § 3582(c)(1)(A)." *United States v. McCoy*, 981 F.3d 271, 274 (4th Cir. 2020). Previously, § 3582(c)(1)(A), "which empowers courts to reduce sentences for 'extraordinary and compelling reasons,' had allowed review of sentences only at the request of the Bureau of Prisons (BOP)." *McCoy,* 981 F.3d at 274. "The First Step Act removed BOP from that gatekeeping role, authorizing defendants themselves to file motions for sentence reductions." *Id.*

The compassionate release statute, as amended by the First Step Act, provides in pertinent part:

> [T]he 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 [18 U.S.C. § 3553(a)] to the extent that they are applicable,[8] if it finds that –
>
> (i) 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) (italics indicating text added by First Step Act). In *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021), the court explained:

> A district court deciding a defendant's motion for compassionate release must do three things before granting the motion. It must determine that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). Likewise, it must also find that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Id. § 3582(c)(1)(A). And then the court may grant the motion after considering all relevant sentencing factors listed in 18 U.S.C. § 3553(a).

---

[8] Under 18 U.S.C. § 3553(a), the factors a district court must consider in imposing sentence include, among others, "(1) the nature and circumstances of the offense and the history and characteristics of the defendant," and "(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; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant . . . ." 18 U.S.C. § 3553(a)(1)-(2).

Id. at 502. If a defendant fails to demonstrate any one of these of these factors, the court does not need to consider the others before it denies the motion. *Id*. (relying on *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021)). For example, courts have repeatedly recognized that even if extraordinary and compelling circumstances exist, a court may nevertheless deny relief based on the sentencing factors set forth in 18 U.S.C. § 3553(a). *See United States v. Ruffin*, 978 F.3d 1000, 1008 (6th Cir. 2020); *Pawlowski*, 967 F.3d at 330–31; *United States v. Rodd*, 966 F.3d 740, 747–48 (8th Cir. 2020). Finally, a district court has considerable discretion when considering and weighing the criteria set forth in 18 U.S.C. § 3582(c)(1)(A). *See Ruffin*, 978 F.3d at 1005. A district court does not abuse its discretion in denying a sentence reduction motion as long as the record "satisf[ies the reviewing court] that [it] 'considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority.'" *Chavez-Meza v. United States,* 138 S. Ct. 1959, 1966-69 (2018) (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)).

"Section 3582(c)(1)(A)(i) does not attempt to define the 'extraordinary and compelling reasons' that might merit compassionate

release." *McCoy*, 981 F.3d at 276. Instead, Congress delegated to the Sentencing Commission the authority to promulgate policy statements "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). The Commission's policy statements are binding on the district court where a defendant seeks a reduced sentence. *See Dillon v. United States*, 560 U.S. 817, 827 (2010) (policy statements binding in § 3582(c)(2) proceedings).

The Sentencing Commission's policy statement governing compassionate release motions provides in pertinent part:

> Upon motion of the Director of [BOP] . . . the court may reduce a 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 . . .
>
> (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.

§ 1B1.13. The application notes to the policy statement further define (and provide examples of) "extraordinary and compelling reasons,"

including those relating to a defendant's medical condition, health and age, and family circumstances, *id.*, cmt. n.1(A)-(C), and a "catch-all category located at Application Note 1(D)," *McCoy*, 981 F.3d at 276-77, that authorizes the BOP Director to approve "other reasons" for compassionate release in addition to those already specified. § 1B1.13 cmt. n.1(D). The Commission last updated the Sentencing Guidelines in November 2018, before the First Step Act, but has lacked a quorum since that time and has thus "been unable to revise the Guidelines in response to" the Act. *McCoy*, 981 F.3d at 276, 282 n.6.

B. Discussion

Appellant argues (at 10-16) that §1B1.13 is inapplicable to compassionate release motions filed by defendants, as opposed to those filed by the BOP, and that the trial court thus erred in relying on § 1B1.13 when denying appellant's request for release. He also maintains (at 17-19) that the court failed to consider the impact of Covid-19 on his request to care for his mother, and (at 19-22) that the court incorrectly determined that he remains a danger to the public. Each of these claims lack merit. The court did not rely on §1B1.13 in denying appellant's request for release, nor did it abuse its discretion when it declined to

release appellant. The court correctly applied the law and did not clearly err when assessing the facts relevant to appellant's request.

1. The Court did not rely on § 1B1.13

a. Extraordinary and Compelling Reasons

Appellant argues that when Judge Bates found that appellant had not established an extraordinary and compelling reason warranting release, he incorrectly relied on §1B1.13. This Court has not yet addressed whether that Guideline applies to requests for compassionate release filed by defendants.[9] We recognize that six circuit courts have held that it does not, based on the reasoning that 18 U.S.C § 3582(c)(1)(a) requires that sentence reductions be "consistent with *applicable* policy statements" (emphasis added), and that §1B1.13 is not applicable because it refers only to motions filed by the BOP. *See, e.g., United States v. Shkambi,* 2021 WL 1291609, No. 20-40543 at *4 (5th Cir. April 7, 2021); *United States v. McGee,* 2021 WL 1168980, No. 20-5047 at *12

[9] The question of whether §1B1.13 applies to motions filed by defendants is pending before this Court in *Long v. United States*, 20-3064, argued on April 8, 2021, *United States v. Johnson*, 20-3059, scheduled for argument on May 14, 2021, and *United States v. Jackson*, Nos. 20-3026, -3046.

(10th Cir. March 29, 2021); *McCoy*, 981 F.3d 271; *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). We note that one other circuit has applied §1B1.13 to motions filed by defendants, albeit without deciding the applicability issue. *See United States v. Doe*, 833 F. App'x 366 (3d Cir. 2020).

In this case the Court need not address the issue. After noting the conflict among courts, Judge Bates stated that he was basing his analysis of whether appellant had established the requisite circumstances on the premise that he was not bound by §1B1.13 (App:1 at 5) (explaining that court was proceeding on the assumption that "courts are free to consider any reason a defendant raises for compassionate release"). The court's statement belies appellant's claim that the court relied on §1B1.13 in this respect.

Despite the court's unequivocal language, appellant argues (at 12) that the court "grounded its denial of relief" in §1B1.3. Appellant first states (at 13-14) that the court's analysis was "dominated" by opinions that relied on §1B1.13 to deny compassionate relief to assist elderly parents. This assertion does not accurately describe the holdings in the

cases the court cited. In both *United States v. Dotson*, 2020 WL 6294921 at*5 (E.D. Tenn. October 27, 2020), and *United States v. Brown*, 2020 WL 3440941 at *4 (S.D. Miss. June 23, 2020), the courts ruled in the alternative that even apart from the language in §1B1.13, they would deny relief because (as here) the defendants had not established that they were the sole caregiver for elderly parents, and thus had not established extraordinary and compelling circumstances. And in *United States v. Ingram*, 2019 WL 3162305 at 2* (S.D. Ohio July 16, 2019), although the court appeared to have relied in part on language from §1B1.13, it also observed that a prisoner having aging and sick parents is not an extraordinary circumstance.

As appellant admits (at 14-15), Judge Bates did acknowledge two cases in which courts did not apply § 1B1.13 and granted release (App:1 at 6). But Judge Bates did not, as appellant claims (at 14-15), fail to appreciate the role that "discretion unconstrained by §1B1.13" played in those decisions. Instead, he found that those cases presented extreme circumstances that are not present here (App:1 at 6). As described above, Judge Bates then explained why appellant had not met the essential requirement of demonstrating extraordinary and compelling reasons,

because his claim that he was the only person available to care for his mother was not supported by the record (App:1 at 6).

b. § 3553(a) Factors

After Judge Bates found that appellant had not established extraordinary and compelling reasons, he did not, as appellant maintains (at 15-16), inexplicably revert to applying §1B1.13 and rely on that Guideline to "determine that [appellant] posed a risk of danger to the community." Specifically, Judge Bates said:

> Even if [appellant] 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) for 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 § 1 B1.13(2) (requiring that defendant not pose a "danger to the safety of any other person or to the community")."

(App:1 at 6-7). Thereafter, Judge Bates discussed several of the § 3553(a) factors (App:1 at 7-9). The court's analysis (*id.* at 7) of the two offenses for which it had sentenced appellant, narcotics distribution and racketeering conspiracy, and appellant's significant criminal history, including two prior drug felonies (*id.* at 7) related directly to the "nature

and circumstances of the offense(s)" and appellant's "history and characteristics." *See* § 3553(a)(1). The court's reference to the parties' agreement that a range of 63 to 78 months was appropriate, and that the court had sentenced appellant to 67 months at a time when the PSIR had discussed appellant's mother's health issues (App:1 at 7-8), related to the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide for just punishment. *See* § 3553(a)(2)(A). Thereafter, when discounting appellant's assertion that his crimes were not violent, in light of the clear danger that narcotics trafficking poses to the community and appellant's long history of that type of offense (App:1 at 8), the court's attention was again focused on the need for the sentence to reflect the seriousness of the offense, and on the need to protect the community from further similar crimes. *See* § 3553(a)(2)(A), (C). Finally, the court again focused on the latter concern when it found that appellant's compliance with release conditions was outweighed by his unquestioned history of "persistent recidivism," and that his prison disciplinary record was not unblemished, but instead included serious punishment for possessing what was reportedly a cell phone (App:1 at 8-9). Accordingly, a fair assessment of this portion of Judge Bates' ruling

supports the conclusion that his decision was based on appropriate statutory factors and not on §1B1.13.

Appellant appears (at 16) to rely on Judge Bates' "see also" citation to §1B1.13 as an indication that the court felt bound by that Guideline in this portion of its opinion. It is not clear why the court included that reference, when it had earlier forgone reliance on the Guideline. In any event, even if Judge Bates had intended to incorporate §1B1.13 into its analysis here (or earlier, when it did not find extraordinary and compelling circumstances), that would not matter, because the court clearly relied on the § 3553(a) factors as an independent reason to deny relief, as we have just shown. *See Tomes*, 990 F.3d at 503 (affirming denial of compassionate release where district court incorrectly relied on §1B1.13, but also used § 3553(a) as an independent reason to deny release): *Ruffin*, 978 F.3d at 1008 (same).[10]

2. Covid-19 concerns

[10] Accordingly, *United States v. Sherwood*, 986 F.3d 951 (6th Cir. 2021), upon which appellant relies, does not aid him. As the court pointed out in *Tomes*, 990 F.3d at 503, the district court's decision to deny relief in *Sherwood* was reversed because it relied on §1B1.13 as the sole reason for denying relief.

Finally, there is no merit to appellant's claim (at 17-19) that the district court ignored the impact of COVID-19 on his request to care for his mother. As an initial matter, we note that the main focus of appellant's claim as it related to COVID-19 was on the impact it had on appellant's incarceration (SA:2 at 5, 13-14), a claim that he did not present to the BOP. COVID-19 was mentioned by appellant's sister in her August 2020 letter as limiting her ability to travel, and creating a need to quarantine (SA:2 at Exh. C). Judge Bates specifically addressed this contention when he referred to the sister's letter and acknowledged the challenge posed by her difficulty in traveling to see her mother (App:1 at 6). But, as the court pointed out, appellant had not established why either of those facts, or his assertion (at 17) that his mother was at increased risk of COVID-19, led to the conclusion that he was the only individual who was able to care for his mother.

* * * * *

In sum, appellant has not established that the district court abused its discretion. The court considered the parties' arguments, had a reasoned basis for its decision, applied the law correctly, and made no clear error of fact. *See Chavez-Meza*, 138 S. Ct. at 1966-69; *Chambliss*,

948 F.3d at 693. Accordingly, the Court should affirm the trial court's ruling.

CONCLUSION

WHEREFORE, the government respectfully requests that the Court affirm the district court's Order.

Respectfully submitted,

CHANNING D. PHILLIPS
Acting United States Attorney

ELIZABETH TROSMAN
GEORGE ELIOPOULOS
Assistant United States Attorneys

/s/
SUZANNE GREALY CURT
D.C. Bar No. 349654
Assistant United States Attorney
555 Fourth Street, NW, Room 8104
Washington, D.C. 20530
Suzanne.G.Curt@usdoj.gov
(202) 252-6829

CERTIFICATE OF COMPLIANCE WITH RULE 27(d)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(g) that this motion contains 4906 words, and therefore complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). This motion has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
SUZANNE GREALY CURT
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing motion to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Erica Hashimoto, Georgetown University Law Center, Appellate Litigation Clinic, 111 F Street NW, Suite 306 Washington, D.C. 20001 on April 8, 2021.

/s/
SUZANNE GREALY CURT
Assistant United States Attorney