No. 19-14267

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS BRYANT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Appellant, Thomas Bryant, Jr., by his counsel, files its Certificate of Interested Persons and Corporate Disclosure Statement as follows:

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Alexander, Christopher, Co-Defendant

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Graham, Hon. James E., United States Magistrate Judge

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No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Signature: /s/ Shon Hopwood Date: January 27, 2020

Counsel for Appellant Thomas Bryant

STATEMENT REGARDING ORAL ARGUMENT

Bryant requests oral argument in this case, which presents an issue of first impression before this Court involving the interplay between the First Step Act's changes to the federal compassionate-release program and related commentary in the United States Sentencing Guidelines. *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, § 603(b) (2018). Lower courts are divided on whether the Guidelines commentary—published a decade before the First Step Act's enactment—prevents district courts from issuing sentence reductions for reasons other than enumerated medical, age-related, and family reasons, despite the intervening statutory change. *See United States v. Willingham*, No. CR 113-010, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019) (noting district court decisions on both sides of the issue).

This will likely be the first court of appeals to decide this issue of the interplay between the First Step Act's changes to the compassionate-release regime and the Guidelines commentary. Because the case presents novel issues involving a new statutory scheme, oral argument will aid the Court.

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INTRODUCTION

This case presents an issue of first impression involving the interplay between the First Step Act's changes to the federal compassionate-release program and related commentary in the United States Sentencing Guidelines that predates those changes. *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, § 603(b) (2018) ("First Step" or "Act"). Bryant filed a motion for compassionate release in the district court, claiming that extraordinary and compelling reasons warranted a sentence reduction under the compassionate-release statute. Bryant cited his remarkable record of rehabilitation and the length of his sentence (over 49 years), which resulted from a trial penalty and was imposed under a statute that Congress recently amended to make it less punitive. The district court, however, held that it was without statutory authority to grant Bryant a compassionate-release sentence reduction because he had failed to allege a ground provided in Guidelines commentary that predates the Act.

Under the compassionate-release statute, a district court may reduce a defendant's otherwise final sentence if it finds that "extraordinary and compelling reasons warrant such a sentence

reduction." 18 U.S.C. § 3582(c)(1)(A)(i). When a court issues a compassionate-release sentence reduction, it must be "consistent with *applicable* policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A) (emphasis added). In 2007, the Sentencing Commission promulgated criteria for compassionate release in the commentary to U.S.S.G. § 1B1.13, but, for reasons explained below, portions of that commentary have been superseded by the Act. Those parts of the commentary are thus no longer "applicable."

Before First Step's enactment, a defendant was eligible for compassionate release only if the Director of the Federal Bureau of Prisons ("BOP") filed a motion for release on the defendant's behalf. Consistent with that prior statutory scheme, the Guidelines commentary to U.S.S.G. § 1B1.13 was drafted to permit a sentence reduction for enumerated medical, age-related, and family reasons, and for "other reasons" as "determined by the Director" of the BOP. U.S.S.G. § 1B1.13 appl. n. 1(D). The same commentary states that a reduction "may be granted only upon motion by the [BOP] Director." *Id.* at appl. n. 4. In 2007, when this Guidelines commentary went into effect, that was true.

But in 2018, Congress transformed the compassionate-release process so that district courts are now empowered to grant sentence reductions on a defendant's motion even if the BOP Director opposes the reduction. *See* 18 U.S.C. § 3582(c)(1)(A). The Sentencing Commission has been without a quorum since this enactment, leaving in place only the pre-Act Guidelines commentary. That commentary, which purports to require the BOP Director to determine a defendant's eligibility for compassionate release and to move for relief on the defendant's behalf, is plainly superseded by First Step. It is no longer an "applicable" policy statement with which a district court's compassionate-release sentence reduction must be consistent. *See United States v. Labonte*, 520 U.S. 751, 757 (1997) (holding that Guidelines commentary "at odds with [a statute's] plain language . . . must give way" to the statute); *cf. Stinson v. United States*, 508 U.S. 36, 38 (1993) (explaining that Guidelines commentary is authoritative "unless it violates the Constitution or a federal statute").

Congress expressly altered the compassionate-release statute to end the BOP's role as gatekeeper for this means of sentence reduction. Congress did so by giving district courts the statutory authority to

reduce a sentence for its own "other reasons" whenever they find "extraordinary and compelling" circumstances. Such a reduction would be consistent with the "applicable" Guidelines policy statements—at least until the Commission publishes new and different policy statements that are consistent with the Act.

The district court thus erred in holding that it was without statutory authority to find Bryant's circumstances were extraordinary and compelling "other reasons" that permit a compassionate-release sentence reduction. This Court should reverse and remand for the district court to exercise its discretion and decide whether Bryant has "extraordinary and compelling reasons" warranting a compassionate-release sentence reduction.

JURISDICTIONAL STATEMENT

The district court entered an order on October 2, 2019, denying Bryant's motion for compassionate release. App. 94.[1] Bryant filed a motion for a certificate of appealability on October 18, 2019, *see* Doc.

[1] "App." refers to the submitted Appendix. "Doc." refers to the district court docket sheet in case number: 4:97-cr-00182-JRH-BKE-1.

266, and the district court construed that motion as a timely notice of appeal, *see* Doc. 265. *See also* Fed. R. App. P. 4(b)(4).

The district court possessed jurisdiction under 18 U.S.C. § 3231. This Court thus possesses jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the district court had statutory authority to grant Bryant a compassionate-release sentence reduction under 18 U.S.C. § 3582(c)(1)(A) on the basis of "other reasons."

STATEMENT OF THE CASE

This case arises from the changes made to the federal compassionate-release statute by the First Step Act of 2018, and it poses the question whether the entirety of the Guidelines commentary that predates First Step controls post-First Step consideration of compassionate release. The statutory text and its history are both important interpretative tools in answering the legal question here. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *Bourdon v. U.S. Dep't of Homeland Sec. (DHS)*, 940 F.3d 537, 543 (11th Cir. 2019) ("Statutory history sheds light on 'the context of the statute.'") (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012)). Accordingly, the following

sections discuss the historical context in which Congress amended the compassionate-release statute and then discuss Bryant's motion filed under the amended statute.

A. The federal compassionate-release program before and after the First Step Act's changes.

A long history of federal compassionate release informs the changes Congress made in passing the First Step Act.

1. In 1984, Congress creates the compassionate-release "safety valve," allowing district courts to reduce sentences for federal defendants on the basis of extraordinary and compelling reasons, but only when the BOP Director moves for a reduction.

Congress enacted the compassionate-release provision contained in 18 U.S.C. § 3582 as part of the Comprehensive Crime Control Act of 1984. Section 3582(c) states that a district court can modify even a final "term of imprisonment" in four situations, the broadest of which is directly relevant here. A sentencing court can reduce a sentence whenever "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). That provision conditioned the reduction of sentences on the BOP Director's initiating the judicial process by filing a motion in the sentencing court; without such a motion, sentencing courts had no authority to modify a defendant's

sentence for extraordinary and compelling reasons, even if the court disagreed with the BOP's determination. *See Cruz-Pagan v. Warden, FCC Coleman-Low*, 486 F. App'x 77, 79 (11th Cir. 2012) (holding that the pre-First Step version of § 3582(c)(1)(A) required "a motion by the Director as a condition precedent to the district court before it can reduce a term of imprisonment"); *Green v. Apker*, No. 5:13–HC–2159–FL, 2014 WL 3487247, at *2 (E.D.N.C. July 11, 2014) (collecting cases and noting that the "BOP's decision regarding whether or not to file a motion for compassionate release is judicially unreviewable").

Congress never defined what constitutes an "extraordinary and compelling reason" for a sentence reduction under § 3582(c)(1)(A). The Senate Report did, however, describe the provisions in § 3582 as "safety valves for modification of sentences," S. Rep No. 98-225, at 121 (1983), which would permit "later review of sentences in particularly compelling situations," *id*., such as the reduction "of an unusually long sentence," *id*. at 55–56.

2. In 2007, the U.S. Sentencing Commission publishes commentary on "extraordinary and compelling reasons."

Congress initially delegated the responsibility for determining what constitutes "extraordinary and compelling reasons" to the U.S. Sentencing Commission ("Commission"). *See* 28 U.S.C. § 994(t) ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."). Congress provided only one limitation to that delegation of authority: "Rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason." *Id.* (emphasis added).

For two decades, the Commission neglected its duty, leaving the BOP to fill the void and determine when extraordinary and compelling reasons warranted resentencing under § 3582(c)(1)(A).[2] The Commission finally acted in 2007, promulgating a policy statement declaring that extraordinary and compelling reasons include medical

[2] BOP promulgated policies governing compassionate release. The latest version before the First Step Act's enactment was Program Statement 5050.49, Compassionate Release/Reduction in Sentences (Mar. 25, 2015).

conditions, age, family circumstances, and "other reasons [as] determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 appl. n. 1. After two critical DOJ Inspector General reports found that the BOP had rarely moved courts for compassionate release even when prisoners met the Commission's objective criteria, the Commission amended its policy statement, expanding the qualifying conditions and admonishing the BOP to file motions for compassionate release whenever a prisoner was found to meet the criteria. U.S.S.G. § 1B1.13 appl. n. 4; *see also United States v. Dimasi*, 220 F. Supp. 3d 173, 175 (D. Mass. 2016) (discussing the progression from the OIG report to new "encouraging" guidelines).

3. In 2018, Congress changes compassionate release via the First Step Act.

These developments occurred against the backdrop of a statute limiting compassionate release to cases where the BOP Director elected to file a motion in the sentencing court. *See* Pub. L. No. 98–473 (H.J. Res 648), Pub. L. No. 98–473, 98 Stat 1837 (1984). If the Director filed such a motion, the sentencing court could then decide whether "the reduction was justified by 'extraordinary and compelling reasons' and

was consistent with applicable policy statements issued by the Sentencing Commission." *Id*.

Congress's decision in 1984 to give the BOP Director gatekeeping authority over compassionate release made the program dysfunctional. The Office of the Inspector General found that the BOP failed to set consistent criteria, failed to inform prisoners about compassionate release, and failed to track compassionate-release requests. *See* U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM i–iv (Apr. 2013) ("*BOP Compassionate Release Program*"). As a result of these problems, the OIG concluded that the "BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." *Id*.

Congress heard the complaints. In late 2018, Congress passed the First Step Act, part of which transformed compassionate-release requests.[3] *See* Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018). Section

[3] The First Step Act's compassionate-release provisions originally appeared as a standalone bill called the "GRACE Act." Granting Release and Compassion Effectively Act of 2018, S. 2471, 115th Cong.

603 of the Act—under a subsection titled "Increasing the Use and Transparency of Compassionate Release"—changed the process by which § 3582(c)(1)(A) compassionate release occurs; instead of depending upon the BOP Director to determine an extraordinary circumstance and then move for release, a court can now resentence "upon motion of the defendant," if the defendant has fully exhausted all administrative remedies or after "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). Once a defendant who has properly exhausted remedies has filed a motion, a court may, after considering the 18 U.S.C. § 3553(a) factors, resentence the defendant if the court finds that extraordinary and compelling reasons warrant a reduction. *Id*. The effect of these changes is to give federal judges the ability to act on a prisoner's compassionate-release application even where the BOP rejects or fails to act on a request in a timely manner.

Congress also responded to the DOJ Inspector General's report on the BOP's compassionate-release deficiencies by creating notification

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(2018). That bill explicitly sought to "improve the compassionate release process of the Bureau of Prisons." *Id*.

and reporting procedures. *See* Pub. L. No. 115-391, § 603(d) 132 Stat. 5194 (2018). The BOP must now notify people confined in federal prison of the availability of compassionate release, and it must submit a report once a year documenting to Congress, among other things, "the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence." *Id.* at § 603(d)(2), (d)(3).

B. Bryant is convicted and sentenced harshly for his role in drug and firearms offenses.

In 1994, the Federal Bureau of Investigation in Savannah, Georgia, began receiving complaints of police corruption. Presentence Investigation Report ("PSR") at 5.[4] Consequently, the FBI conducted a reverse sting operation by directing a cooperating witness to approach police officer Thomas Bryant Jr. about providing police protection to escort couriers transporting cocaine in and out of Savannah. PSR at 6. Along with other Savannah police officers, Bryant escorted what he thought were drug couriers possessing shipments of cocaine. *Id.* The

[4] A single paper copy of the PSR was filed under seal along with this Opening Brief and the Appendix. *See* 11th Cir. Instructions for Preparing an Appendix at 3 .

couriers were instead undercover FBI agents, and no cocaine was actually distributed. *Id.*

Bryant's conspiracy to aid and abet drug trafficking continued through 1995 and 1996. *Id.* at 6–7. Bryant sold small amounts of cocaine and provided protection for the cooperating witness. *Id.* at 7–8. During the conspiracy, Bryant and other officers were in their official police uniforms and carried firearms. *Id.* at 8. Bryant also sold, to an individual who he knew was a convicted felon, eight firearms, two of which had been previously reported as stolen. *Id.* at 10. Bryant received a total of $19,900 for his participation in the drug conspiracy and $1,700 for the sale of the firearms. *Id.* at 11.

Bryant was charged with and, after a jury trial, convicted of multiple offenses: three counts of conspiracy to distribute cocaine, *see* 21 U.S.C. § 846; one count of possessing cocaine with intent to distribute, *see* 21 U.S.C. § 841; one count of receiving stolen firearms, *see* 18 U.S.C. § 922(i); one count of selling firearms to a drug addict, *see* 18 U.S.C. § 922(d)(3); and two counts of using or carrying a firearm during a drug-trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A). Doc. 83 (Jury Verdict).

Bryant was initially sentenced in 1998. The district court sentenced him to life imprisonment for the drug conspiracy, and to 480 months, 240 months, and 120 months for the other drug and firearms offenses, to run concurrently. Doc. 98 (Judgment). The district court also sentenced Bryant to a consecutive 300 months for twice using or carrying a firearm during drug-trafficking crimes in violation of 18 U.S.C. § 924(c). *Id*. Bryant's total punishment was life plus a consecutive 300 months of imprisonment. His conviction and sentence were affirmed by this Court. *See United States v. Bryant*, 196 F.3d 1262 (11th Cir. 1999), cert. denied, 531 U.S. 857 (2000).

In 2015, Bryant filed a motion for resentencing, taking advantage of a new, retroactively applicable Guideline amendment. The district court resentenced Bryant to 292 months for the drug and firearms offenses and a consecutive 300 months for the two 18 U.S.C. § 924(c)(1)(A) firearm offenses, for a total of 592 months of imprisonment. Doc. 249 (Order Reducing Sentence). For non-violent crimes that profited him $21,600, Bryant is currently serving a sentence of 49 years and four months. The considerable time he has already

spent in prison—more than 22 years—constitutes less than half of his sentence.

C. Bryant moves for compassionate release and advances claims that the reasons for his harsh sentence, in addition to his remarkable record of rehabilitation, constitute "extraordinary and compelling reasons" for a sentence reduction.

On August 4, 2019, Bryant filed an administrative remedy with the Warden of his prison arguing that he had extraordinary and compelling reasons for a compassionate-release sentence reduction. App. 35–38. The BOP never responded to that request. App. 33.

Bryant filed a motion for compassionate release on September 11, 2019, arguing that three grounds, in combination, constituted extraordinary and compelling reasons for a sentence reduction. App. 17 (Motion for Compassionate Release). *See also* 18 U.S.C. § 3582(c)(1)(A) (stating that a court may consider a motion for compassionate release if the defendant has fully exhausted all administrative remedies or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier").

First, Bryant argued that, had he been sentenced after the First Step Act was passed, he would not have faced a consecutive 240 months

of imprisonment for a "second or subsequent" § 924(c) offense because the First Step Act removed the consecutive 25-year penalty for stacked § 924(c) charges. *See* First Step Act, 132 Stat. 5194, § 403; CONG. RESEARCH SERV., THE FIRST STEP ACT OF 2018: AN OVERVIEW 9 (2019) ("The [First Step Act] eliminates stacking by providing that the 25-year mandatory minimum for a 'second or subsequent' conviction for use of a firearm in furtherance of a drug trafficking crime or a violent crime applies only where the offender has a prior conviction for use of a firearm that is already final.").[5] Bryant argued that being sentenced under a statute that Congress has since amended so dramatically constituted extraordinary circumstances. *See United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019) (holding that the "injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed"

[5] Bryant received a consecutive 20 years, not 25 years, for his second or subsequent § 924(c) offense because, at the time of his initial conviction on November 19, 1997, the penalty for a second or subsequent § 924(c) offense was 20 years. Congress amended § 924(c) in 1998 and increased the sentence for a second or subsequent offense to 25 years. *See* Pub. L. No. 105–386, 112 Stat. 3469 (Nov. 13, 1998).

constituted an extraordinary and compelling reason for a compassionate-release sentence reduction).

Second, Bryant claimed that his long sentence was partially the result of a trial penalty because he refused the Government's plea offer and exercised his constitutional right to a jury trial. App. 22. *See also* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018) (describing the "trial penalty" as when "individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose"). Bryant noted that his co-defendants who had accepted plea deals were "all released [from prison] by 2008." App. 22. Only Bryant and his co-defendant who went to trial remain incarcerated for the offenses a dozen years later. *Id*. And Bryant still has more than a quarter-century to serve.

Third, Bryant argued that he has a documented record of rehabilitation. Although Bryant is serving a more-than-49-year sentence, he continues to serve as a model federal prisoner. App. 20. Bryant has served nearly 22 years in federal custody, and during that

time, he has completed over 19 years of educational courses. App. 42–43 (Attachments to CR Motion). Bryant worked in UNICOR Prison Industries for over 15 years, earning experience as a quality assurance inspector, payroll clerk, machine operator, and material handler. App. 20. Bryant has not spent his time solely on self-improvement, as he has also taught other prisoners music theory and creative writing through Adult Continuing Education classes. App. 46–53. And Bryant provided a list of people who supported his release, including his family, pastor, and several BOP staff. App. 76.

Bryant contended that the combination of his draconian sentence for a stacked § 924(c) offense, the trial penalty, and his demonstrated record of rehabilitation constituted extraordinary and compelling reasons for a sentence reduction under the compassionate-release statute. App. 28.

The Government responded in opposition to Bryant's motion for compassionate release. App. 83. The Government noted that the Sentencing Guidelines provided reasons for a compassionate-release sentence reduction and that the district court was "without authority" to determine other extraordinary and compelling reasons outside of the

situations contained in the Guidelines commentary. App. 90. Because Bryant failed to allege a "qualifying" reason under the Guidelines commentary or the BOP's regulations, the Government argued that Bryant was ineligible to receive a compassionate-release sentence reduction. App. 90–91.

The district court denied Bryant's motion for compassionate release in a one-page order. App. 94. It explained that Bryant's motion was denied "for the reasons stated in the Government's response in opposition filed on September 23, 2019." App. 94.

SUMMARY OF THE ARGUMENT

The district court held that it lacked statutory authority to grant Bryant a compassionate-release sentence reduction because he alleged "other reasons" that were not approved by the BOP Director. That holding was error.

Under the compassionate-release statute, a district court may reduce a defendant's otherwise-final sentence if it finds that "extraordinary and compelling reasons warrant such a sentence reduction." 18 U.S.C. § 3582(c)(1)(A)(i). A compassionate-release sentence reduction must be "consistent with *applicable* policy

statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

Before the First Step Act's enactment, a defendant was eligible for compassionate release only if the BOP Director filed a motion for release. Consistent with the prior statutory scheme, the Guidelines commentary to U.S.S.G. § 1B1.13 permits "other reasons" (reasons outside the enumerated medical, family, and elderly criteria) to qualify as extraordinary and compelling reasons only if "determined by the Director" of the BOP. U.S.S.G. § 1B1.13 appl. n. 1(D). The Commission promulgated the compassionate-release criteria in 2007.

But in 2018, Congress responded to complaints that the BOP Director failed to move for compassionate release even in cases in which individuals in federal prison met the Guidelines criteria. Congress included in the First Step Act provisions that transformed the compassionate-release process under a subsection expressly titled "Increasing the Use and Transparency of Compassionate Release." As a result, district courts are now empowered to grant such sentence reductions on a defendant's motion even if the BOP Director decides the defendant does not satisfy the BOP's view on extraordinary and

compelling reasons for a sentence reduction. *See* 18 U.S.C. § 3582(c)(1)(A).

The Guidelines commentary that requires the BOP Director to determine a defendant's eligibility for compassionate release has been plainly superseded by the First Step Act, and it is not an "applicable" policy statement with which a district court's compassionate-release sentence reduction must be consistent. *See United States v. Labonte*, 520 U.S. 751, 757 (1997) (holding that Guidelines commentary "at odds" with a statute "must give way" to the statute).

A district court has the authority to reduce a sentence for "other reasons" on its own whenever it finds that there are "extraordinary and compelling" circumstances. Such a reduction is still consistent with the "applicable" Guidelines policy statements until the Commission is able to publish new policy statements consistent with the Act. The district court thus erred in holding that it was without authority to grant Bryant a compassionate-release sentence reduction because the BOP concluded his circumstances were not extraordinary and compelling.

ARGUMENT

The district court erred in denying Bryant's motion for compassionate release and holding, as a matter of law, that it lacked authority to provide Bryant with a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The Court should reverse and remand to the district court for it to decide whether Bryant has presented sufficient "extraordinary and compelling" reasons for a compassionate-release sentence reduction, and, if so, whether it should exercise its discretion and give Bryant a sentence reduction.

I. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED STATUTORY AUTHORITY TO GRANT COMPASSIONATE RELEASE UNDER THE FIRST STEP ACT BECAUSE THE BUREAU OF PRISONS DID NOT FIND BRYANT'S REASONS EXTRAORDINARY AND COMPELLING ENOUGH TO WARRANT A SENTENCE REDUCTION.

A district court has authority to grant a compassionate-release sentence reduction whenever it finds extraordinary and compelling circumstances warrants a reduction. Even if a reduction is based on the district court's own "other reasons" (besides the medical, age-related, and family reasons enumerated in the Guidelines commentary), the reduction is still consistent with "applicable" Guidelines policy statements and is thus permitted under 18 U.S.C. § 3582(c)(1)(A). The district court here erred in concluding otherwise.

A. Standard of review

This Court reviews issues of law de novo. *See United States v. Daniels*, 685 F.3d 1237, 1244 (11th Cir. 2012). The Court also reviews de novo a district court's determination that it lacked jurisdiction.[6] *Howard v. Warden*, 776 F.3d 772, 775 (11th Cir. 2015). The issue in this case involves solely an issue of law because the district court, adopting the Government's argument, concluded Bryant was ineligible for failure to present a "qualifying" reason under the Guidelines commentary and the BOP's policy statements. App. 91, 94.

B. Both Congress and the Sentencing Commission intended to provide compassionate-release sentence reductions for reasons other than medical, age-related, or family reasons.

Although Congress has never defined what constitutes an "extraordinary and compelling reason" for a compassionate-release sentence reduction, the 1984 legislative history of the intial

[6] The government argued that the district court should deny relief because it lacked jurisdiction. App. 91. And the court denied relief "for the reasons stated in the Government's response in opposition filed on September 23, 2019." App. 94. But whether Bryant is eligible for compassionate release does not affect the district court's jurisdiction to decide his motion. *See* 18 U.S.C. § 3231 (district courts have jurisdiction over "all offenses against laws of the United States"). Instead, the question is non-jurisdictional: whether, post-First Step, a district court has the authority to reduce a sentence for "other reasons" under U.S.S.G. § 1B1.13.

compassionate-release statute provides an indication of how Congress thought the statute should be used by federal courts. One of Congress's initial goals in passing the Comprehensive Crime Control Act was to abolish federal parole and create a "completely restructured guidelines sentencing system." S. Rep. No. 98-225, at 52, 53 n.74 (1983). Yet, recognizing that parole historically played a key role in responding to changed circumstances, the Senate Committee stressed how some individual cases may still warrant a second look at resentencing:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55–56 (emphasis added). Rather than having the Parole Commission review every federal sentence in light of only the offender's rehabilitation, Congress decided that § 3582(c) would provide the means to respond to appropriate changes in circumstances by enabling courts to decide, in individual cases, if and when "there is a justification for reducing a term of imprisonment." *Id.* at 56.

Congress intended that the situations listed in § 3582(c) would act as "safety valves for modification of sentences," *id.* at 121, enabling judges to provide second looks for possible sentence reductions when justified by various factors that previously could have been addressed through the (now-abolished) parole system. These safety valves would "assure the availability of specific review and reduction to a term of imprisonment for 'extraordinary and compelling reasons' and [would allow courts] to respond to changes in the guidelines." *Id.* Noting that this approach would keep "the sentencing power in the judiciary where it belongs," rather than with a federal parole board, the statute permitted "later review of sentences in particularly compelling situations." *Id.*

Congress delegated the responsibility for determining what constitutes "extraordinary and compelling reasons" to the Commission. *See* 28 U.S.C. § 994(t). Congress provided only one limitation to that delegation of authority: "Rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason." *Id.* (emphasis added). Congress designated rehabilitation as the *sole* extraordinary circumstance to avoid the use of § 3582 as a full and direct substitute

for the abolished parole system. But Congress also contemplated that rehabilitation could be considered with other extraordinary and compelling reasons sufficient to resentence people in individual cases; the use of the modifier "alone" signifies that rehabilitation *could* be used in tandem with other factors to justify a reduction.

It took the Commission until 2007 to publish standards for extraordinary and compelling reasons warranting a sentence reduction under § 3582(c)(1)(A).[7] The Commission created four categories of qualifying reasons: (A) "Medical Conditions of the Defendant," including terminal illness and other serious conditions and impairments; (B) "Age of the Defendant," for those 65 and older with serious deterioration related to aging who have completed at least 10 years or 75 percent of their term of imprisonment; (C) "Family Circumstances," where a

[7] The Commission consists of seven voting members and requires four for a quorum to amend the Guidelines. *See* 28 U.S.C. §§ 991(a), 994(a). Currently, the Commission has only two voting members. *See* U.S. Sentencing Comm'n, 2018 Annual Report 2–3 (2019) ("[A]s of the second quarter of fiscal year 2019, Judge Breyer and Judge Reeves are the only voting members of the Commission."). Unlike the Commission, the BOP has revised its prior Program Statement on compassionate release in the wake of the First Step Act. The most recent version of the BOP's Program Statement on compassionate release can be found at Program Statement 5050.50.

child's caregiver or spouse dies or becomes incapacitated without an alternative caregiver; and (D) "Other Reasons," when the Director of the BOP determines there is "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." *Id*. appl. n. 1. The Commission "recognized that the specific examples provided in Subdivisions A through C were likely to exclude cases where compassionate release was nonetheless appropriate," *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *9 (M.D. N.C. Jun. 28, 2019), so it created a catch-all provision for "other reasons." U.S.S.G. § 1B1.13 appl. n. 1(D).

Recognizing that Congress intended compassionate release as a safety valve to correct unusually long sentences, the Commission concluded that reasons beyond medical, age, and family circumstances (i.e., "other reasons") could qualify as "extraordinary or compelling reasons" for resentencing. It made sense to put the BOP Director in the position to determine what those "other reasons" entail, because at that time only the BOP Director could file a motion for a sentence reduction in the first place. These "other reasons" are the grounds upon which Bryant based his motion for compassionate release. App. 28. *See also*

U.S.S.G. § 1B1.13 appl. n. 1(D) ("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)."") (emphasis added).

C. With the First Step Act, Congress stripped the BOP Director of the exclusive authority to decide when a court may consider and grant a compassionate-release sentence reduction.

Before Congress passed the First Step Act, the only way a sentencing court could reduce a sentence was if the BOP Director elected to file a motion in the sentencing court stating that a federal defendant's circumstances were extraordinary and compelling. *See* Pub. L. No. 98–473 (HJRes 648), Pub. L. No. 98–473, 98 Stat 1837 (1984). If such a motion was filed, the sentencing court could then decide whether the reduction was justified by extraordinary and compelling reasons and was consistent with the Commission's "applicable" policy statements. *Id*. So even if a defendant qualified under the Commission's definition of extraordinary and compelling reasons, unless the BOP Director filed a motion, the sentencing court had no authority to reduce the sentence, and the prisoner was unable to secure a sentence reduction. By controlling when a motion was made, the BOP Director

also controlled the criteria that determined when a court could choose to act upon a given federal prisoner's request.[8]

Leaving the BOP Director with ultimate authority for triggering and setting the criteria for compassionate-release sentence reductions created several problems. The Office of the Inspector General found that the BOP failed to: provide adequate guidance to staff on the criteria for compassionate release, set timelines for reviewing compassionate-release requests, create formal procedures for informing prisoners about compassionate release, and track compassionate-release requests. *See BOP Compassionate Release Program*, at i–iv. The OIG concluded that the "BOP does not properly manage the

[8] Before First Step, the DOJ argued that the BOP—and not the Commission—functionally had final say on what constituted an "extraordinary and compelling reason" for a sentence reduction because only the BOP could bring a compassionate-release motion under § 3582(c)(1)(A). *See* Letter from Michael J. Elston, Senior Counsel to the Assistant Attorney Gen., U.S. Dep't of Justice, to Hon. Ricardo H. Hinojosa, Chair, U.S. Sent. Comm'n 4 (Jul. 14, 2006) (noting that, because Congress gave the BOP the power to control which particular cases will be brought to a court's attention, "it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them" and that expanding compassionate release would be a "dead letter, because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside of the circumstances allowed by its policies").

compassionate-release program, resulting in inmates who may be eligible candidates for release not being considered." *Id.* at 11.

The OIG criticized the BOP again in 2016. *See* U.S. Dep't of Justice, Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (2016). In that report, the OIG analysis showed "that if the BOP reexamined these eligibility requirements its compassionate release program could result in significant cost savings for the BOP, as well as assist in managing the inmate population." *Id.* at iii. The OIG's conclusions were not the only criticism of the BOP's limited and arbitrary use of compassionate release. *See* CHARLES COLSON TASK FORCE ON FED. CONVICTIONS, TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CONVICTIONS 47 (2016) (noting that the BOP "rarely used" compassionate release) ("*Colson Task Force*");[9] Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of*

[9] The Colson Task Force was a congressionally mandated, nine-person, bipartisan, blue-ribbon panel charged with making recommendations to Congress, the President, and the Attorney General on federal corrections policy. *See Colson Task Force*, at Introduction.

Prisons Policies That Result in Overincarceration, 21 FED. SENT. RPTR. 167 (Feb. 2009) (same). The Colson Task Force, in fact, pointed out that only 100 prisoners benefited from the program in 2015, *see Colson Task Force* at 9, even though the federal prison population totaled 205,723 prisoners that year. *See* Federal Bureau of Prisons, Past Inmate Population Totals for 2015 (last visited Jan. 16, 2020).[10]

Congress listened to these many complaints. In 2017, a bipartisan group of United States Senators wrote to the Deputy Attorney General asking him to "take a serious look" at the BOP's use of compassionate release. Letter from 12 U.S. Senators to Deputy Attorney General J. Rod Rosenstein and Acting BOP Director Dr. Thomas R. Kane, at 1 (Aug. 3, 2017) ("Letter from 12 U.S. Senators"). The Senators noted that the Commission's recent amendment to its compassionate-release commentary "directly encourage[d] [the] BOP to file a motion for compassionate release if the defendant meets any of the criteria set by the Commission, explaining that the *sentencing court*, rather than the

[10] *See also* Christie Thompson, *Old, Sick and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018) ("For years, the [BOP] approved only prisoners who were near death or completely debilitated. While nonmedical releases were permitted, an inspector general report found in 2013, not a single one was approved over a six-year period.").

BOP, is best suited to decide if the prisoner deserves compassionate release." *Id*. at 2 (emphasis added). Although the BOP had been encouraged to file more compassionate-release motions, the Senators were "deeply concerned" that the BOP was "not fulfilling its role in the compassionate release process." *Id*. at 3.

When Congress acted in late 2018, passing the First Step Act, it profoundly transformed the process for seeking and granting compassionate release. *See* Pub. L. No 115-391, § 603, 132 Stat. 5194 (2018). Section 603 of the Act changed the process by which § 3582(c)(1)(A) compassionate release occurs. A district court can now resentence "upon motion of the defendant," if the defendant has fully exhausted all administrative remedies or after "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). Once a defendant who has properly exhausted remedies files a motion, a court may, after considering the 18 U.S.C. § 3553(a) factors, resentence the defendant if the court finds that extraordinary and compelling reasons warrant a reduction. *Id*.

The effect of these new changes is to give federal judges the authority to grant a prisoner's compassionate-release request even if the BOP opposes it or fails to respond to the request in a timely manner. *See Beck*, 2019 WL 2716505, at *5 (explaining that the First Step Act allows "courts to consider motions by defendants for compassionate release without a motion by the BOP Director so long as the defendant has asked the Director to bring such a motion and the Director fails or refuses").

Congress made these changes to expand the use of compassionate release. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (cleaned up). Congress labeled the changes, "*Increasing* the Use and Transparency of Compassionate Release." 164 Cong. Rec. H10,346, H10,358 (2018) (emphasis added). While noting that the First Step Act made several reforms to the federal prison system, Senator Cardin stated that "[t]he bill *expands compassionate release* under the Second Chance Act and expedites compassionate release applications." 164 Cong. Rec. S7774 (2018) (emphasis added). In the House,

Representative Nadler noted that First Step included "a number of very positive changes, such as . . . *improving application of compassionate release*, and providing other measures to improve the welfare of Federal inmates." 164 Cong. Rec. H10,346-04, 164 Cong. Rec. H10,346-04, H10362 (2018) (emphasis added).

Federal judges now have the power to order reductions of sentences even in the face of the BOP Director's views that a prisoner's circumstances are not extraordinary and compelling. *See Beck*, 2019 WL 2716505, at *6 (noting that the First Step Act "was enacted to further increase the use of compassionate release" and "explicitly allows courts to grant such motions even when BoP finds they are not appropriate"). That textual change did not occur by accident. The robust criticism of BOP's compassionate-release failures that led to First Step establishes that Congress intended the judiciary not only to take on the BOP's role held under the pre-First Step statute as adjudicator of compassionate-release requests, but also to grant sentence reductions on the full array of grounds reasonably encompassed by the Guidelines commentary.[11]

[11] The DOJ Inspector General's report noted several of the BOP's compassionate-release deficiencies, and in response, Congress also

Congress understood that the best way to expand compassionate release was to give the BOP's authority under the prior statute to federal courts.

The BOP, of course, still has a role to play within the compassionate-release program. It can bring motions supporting a defendant's request for a sentence reduction, and it can oppose those that it does not bring. But critically, the BOP is no longer the gatekeeper of the "other reasons" that qualify for compassionate release.

D. The Guidelines commentary that requires the BOP to determine "other reasons" for compassionate release is no longer applicable because it is inconsistent with congressional changes to compassionate release through the First Step Act.

The Sentencing Commission promulgated the Guidelines commentary on compassionate release in 2007—a full decade before Congress passed, and the President signed, the First Step Act. The Commission has not updated its commentary on compassionate release since the passage of the Act. In fact, the Commission currently cannot

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created notification and reporting procedures. *See* Pub. L. No. 115-391, § 603(d), 132 Stat. 5194 (2018).

change the commentary for compassionate release due to a lack of a quorum. And the current Guidelines commentary was adopted on the premise that the BOP, not federal district courts, was the sole arbiter of when compassionate release is available. *See United States v. Brown*, No. 4:05-CR-00227-1, 2019 WL 4942051, at *2 (S.D. Iowa Oct. 8, 2019) (noting that "the outdated policy statement still assumes compassionate release may be granted only upon motion by the Director of the Bureau of Prisons") (cleaned up).

As a result, the Guidelines commentary is inconsistent with the Act in two important respects. First, the Guidelines commentary states that a compassionate-release sentence reduction "may be granted only upon motion by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 appl. n. 4. But after First Step's changes to compassionate release, courts can now grant sentence reductions even if the BOP Director never files a motion or opposes a defendant's motion. *See* 18 U.S.C. § 3582(c)(1)(A).

Second, the Guidelines commentary states that there are other reasons—beyond medical, elderly, or family circumstances—that may supply extraordinary reasons for a sentence reduction, but only if those

reasons are "determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 appl. n. 1(D). Yet Congress reformed compassionate release to allow *courts* to grant a sentence reduction even in the face of an adverse BOP determination concerning whether a defendant's case is extraordinary or compelling.[12] Indeed, the very purpose of the First Step Act's changes to compassionate release was to put district courts in the position that the BOP Director formerly occupied because the BOP Director had, historically, failed to move for compassionate release even in cases in which the prisoner's circumstances met the Guidelines criteria for extraordinary and compelling reasons. *See e.g.*, *BOP Compassionate Release Program*, at 11 (concluding that the "BOP does

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[12] *See United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *4 (S.D. Tex. June 17, 2019) ("Before the First Step Act's amendments to § 3582, it made sense that the BOP would have to determine any extraordinary and compelling reasons—only the BOP could bring a motion for a reduction of sentence under § 3582(c)(1)(A). But defendants no longer need the blessing of the BOP to bring such motions. The BOP in fact may never weigh in or provide guidance when a § 3582(c) motion is brought by a defendant."); *United States v. Rodriguez*, No. 17-CR-00021-WHO-1, 2019 WL 6311388, at *7 (N.D. Cal. Nov. 25, 2019) ("Congress knew that the BOP rarely granted compassionate release petitions, and the purpose of the FSA was to allow defendants to file motions in district courts directly even after the BOP Director denies their petition.").

not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered"); Letter from 12 U.S. Senators, at 1–3. Conditioning release on a finding of "other reasons" by the BOP Director, rather than federal courts, therefore conflicts with the First Step Act's changes to compassionate release.

While a compassionate-release sentence reduction must be consistent with "applicable" policy statements of the Commission, the portions of the Guidelines commentary that purport to require BOP's determination of "other reasons" are no longer applicable, because they conflict with the compassionate-release statute as amended by First Step. As with any Guidelines commentary that is superseded by statute, those portions of the commentary are not "applicable" to a compassionate-release sentence reduction if the district court identifies "other reasons" that warrant release. *See United States v. Labonte*, 520 U.S. 751, 757 (1997) (holding that commentary "at odds with [a statute's] plain language . . . must give way" to the statute); *United States v. Johnson*, 694 F.3d 1192, 1195 n.10 (11th Cir. 2012) (same); *cf. Stinson v. United States*, 508 U.S. 36, 38 (1993) (holding that

commentary "is authoritative unless it violates the Constitution or a federal statute"); *United States v. Colon*, 707 F.3d 1255, 1261 (11th Cir. 2013) ("Congress can override any guideline or policy statement by statute.").

To the extent that the Commission's pre-Act commentary gives the BOP exclusive authority to determine whether a prisoner has extraordinary and compelling circumstances, it is a dead letter. After the First Step Act, two other actors can find extraordinary and compelling circumstances: the Commission and the courts. Section 994(t) gives the Commission express authority to describe what the criteria are, and the courts decide whether such circumstances are present in particular cases. The Commission envisioned there would be other reasons besides the three enumerated ones (medical, age-related, and family reasons). But while it previously delegated authority to the BOP to define those reasons, that authority can no longer validly rest solely with the BOP because Congress has removed it via the First Step Act. Certainly no agency has the authority to delegate to another agency new powers that Congress has not given it. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084–85 (11th Cir.

2013) ("Even if it were not axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegated to it by Congress, we would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency.") (cleaned up).

For example, if and when the Commission eventually reconsiders its compassionate-release commentary, it will not be able to give the BOP sole authority to determine what constitutes extraordinary and compelling reasons because Congress has taken away such authority. The commentary's most natural reading in light of First Step's changes is that "other reasons" can still form the basis of a sentence reduction, but those reasons are to be decided by courts and not the BOP. Put differently, the Commission's judgment that medical, age-related, and family reasons are not the only possible reasons for a sentence reduction does not disappear simply because it can no longer delegate to the BOP the authority to determine "other reasons" for a reduction. Rather, the substance of the "other reasons" provision remains,[13] but it

[13] *Cf. United States v. Booker*, 543 U.S. 220, 258–59 (2005) (holding that portions of the Sentencing Reform Act were unconstitutional and

is now up to courts to find such reasons, at least until the Commission promulgates new and different commentary.

E. The district court erred in holding that it was without statutory authority to find Bryant's reasons as extraordinary and compelling for a sentence reduction.

The district court held that it was without authority to grant Bryant a compassionate-release sentence reduction because Bryant did not allege a "qualifying" reason under the Guidelines criteria. App. 91, 94. That was error.

If a district court reduces a sentence for "other reasons," the court's reduction is still consistent with "applicable" Guidelines policy statements—as several courts have already concluded. *See Brown*, 2019 WL 4942051, at *4 (holding that for the First Step Act "to increase the use of compassionate release, the most natural reading of the amended

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keeping the portions of the Act that were (1) "constitutionally valid," (2) capable of "functioning independently," and (3) "consistent with Congress' basic objectives in enacting the statute") (cleaned up). To be sure, the conflicting Guidelines commentary is not an unconstitutional statute. But keeping the "other reasons" provision of the Guidelines commentary, and yet severing and excising "as determined by the Director of the Bureau of Prisons," would leave the valid portion of the commentary operational, would allow it to function independently, and would be consistent with Congress's goal of expanding compassionate release.

§ 3582(c) and § 994(t) is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it"); *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) (treating "the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts"); *United States v. Schmitt*, No. CR12-4076-LTS, 2020 WL 96904, at *3 (N.D. Iowa Jan. 8, 2020) ("I agree with those courts that have found that although the Guideline provides helpful guidance on what constitutes extraordinary and compelling reasons, it is not conclusive given the recent statutory changes."); *Urkevich*, 2019 WL 6037391, at *3 ("This Court infers that the Commission would apply the same criteria, including the catch-all provision of Application Note 1(D), in the wake of the First Step Act's amendment to § 3582(c)(1)(A), and that this Court may use Application Note 1(D) as a basis for finding extraordinary and compelling reasons to reduce a sentence."); *Cantu*, 2019 WL 2498923, at *5 (holding that application note 4(D) "no longer describes an appropriate use of sentence-modification provisions and is thus not part of the applicable

policy statement binding the Court").[14] The district court thus erred in holding that Bryant was ineligible for a compassionate-release sentence reduction because he alleged other reasons that the BOP did not support.

This does not mean that Bryant is entitled to a sentence reduction or that the district court must find his circumstances extraordinary or compelling. Rather, it means that the district court has authority to exercise its discretion in deciding whether Bryant's circumstances are so extraordinary and compelling as to warrant a compassionate-release sentence reduction, and whether a sentence reduction would be consistent with the purposes of sentencing. *See* 18 U.S.C. § 3553(a).

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[14] *But see United States v. Willingham*, No. CR 113-010, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019) (following "the policy statement in U.S.S.G. § 1B1.13" and denying the motion for compassionate release because Willingham did "not meet the specific examples of extraordinary and compelling reasons and the Director of the BOP has not determined that circumstances outside of these examples exist to afford her relief"); *United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) (holding that if the Commission's "policy statement needs tweaking in light of Section 603(b) [of the First Step Act], that tweaking must be accomplished by the Commission, not by the courts").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment and remand for the district court to decide whether Bryant provided sufficiently "extraordinary and compelling" reasons for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), and whether he is entitled to a compassionate-release sentence reduction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, Size 14.

Dated: January 27, 2020 /s/ Shon Hopwood

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CERTIFICATE OF SERVICE

I hereby certify that on this January 27, 2020 I electronically filed the foregoing Brief of Appellant and Appendix, and also sent seven paper copies of the Brief and two paper copies of the Appendix by first-class Priority mail to the Court. I further certify that the attorney registered below as an ECF participant will receive service of the brief and appendix via the CM/ECF system and one paper copy by first-class Priority mail.

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ADDENDUM

18 U.S.C. § 3582

(a) Factors To Be Considered in Imposing a Term of Imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(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; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) Notification Requirements.—

(1) Terminal illness defined.—

In this subsection, the term "terminal illness" means a disease or condition with an end-of-life trajectory.

(2) Notification.—The Bureau of Prisons shall, subject to any applicable confidentiality requirements—

(A) in the case of a defendant diagnosed with a terminal illness—

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and

submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

(3) Annual report.—Not later than 1 year after December 21, 2018, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.

(e) Inclusion of an Order To Limit Criminal Association of Organized Crime and Drug Offenders.—

The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998; amended Pub. L. 100–690, title VII, § 7107, Nov. 18, 1988, 102 Stat. 4418; Pub. L. 101–647, title XXXV, § 3588, Nov. 29, 1990, 104 Stat.

4930; Pub. L. 103–322, title VII, § 70002, Sept. 13, 1994, 108 Stat. 1984; Pub. L. 104–294, title VI, § 604(b)(3), Oct. 11, 1996, 110 Stat. 3506; Pub. L. 107–273, div. B, title III, § 3006, Nov. 2, 2002, 116 Stat. 1806; Pub. L. 115–391, title VI, § 603(b), Dec. 21, 2018, 132 Stat. 5239.)

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.

Background: The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(a)(2) and (t).

Historical Note Effective November 1, 2006 (amendment 683). Amended effective November 1, 2007 (amendment 698); November 1, 2010 (amendment 746); November 1, 2016 (amendment 799); November 1, 2018 (amendment 813)