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U.S. DISTRICT COURT
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DEFENDANT PRO SE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Case No. 4:89-CR-94
)
 RALPH CHAVOUS DUKE,)
)
 Defendant.)

**DEFENDANT'S SUGGESTIONS IN SUPPORT OF MOTION FOR
REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)**

Defendant, RALPH CHAVOUS DUKE, pro se, respectfully submits suggestions in support of his motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), as amended by § 603(b)(1) of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018), seeking an order reducing his sentence because he presents "extraordinary and compelling reasons" for compassionate release.

In addition, given his age, length of time served, changes in the sentencing law, as well as his serious medical condition, the defendant is seeking mercy from the Court in the form of compassionate release.

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U.S. DISTRICT COURT MPLS

INTRODUCTION

"Unlike most other sentences, a life sentence forbids an inmate from ever seeing the other side of a prison wall again. To put it bluntly, the inmate will die in his cell. While a life sentence may be justified (or required) in certain situations, it leads to a slow, tortuous demise that makes rehabilitation and personal development immaterial. In that sense, and as the Supreme Court has observed, a life sentence is unique as it is the only sentence that shares some characteristics with a death sentence." *United States v. Liscano*, No. 02-CR-719-16 (N.D. Ill. Sept. 27, 2021) (ECF 751 at 10).

People grow, mature and evolve, and because conditions and circumstances change, it is virtually impossible to make sound decisions when first imposing sentence about precisely how long someone should spend behind bars. But, that is exactly how the federal criminal justice system works. Judges are required to act as if they are omniscient and the prison terms they impose are--for all intents and purposes--final. Despite having no realistic hope of ever being released from prison, defendant has done everything within his power to rehabilitate himself as demonstrated by the record.

The defendant does not seek to justify, diminish, or detract from the seriousness of his offenses, and he unequivocally accepts responsibility for his conduct. Defendant seeks mercy from the Court in that he is now 76 years old, has been in the federal prison system for over three decades, and he has serious medical issues.

A defendant from the Western District of Missouri was shown mercy and given a second chance after 30 years imprisonment. *United States v. Marks*, No. 91-CR-3272 (W.D. Mo. 2020). (ECF 399). Russell Marks had three prior serious drug convictions when he was convicted of his fourth drug offense, and he attempted to kill a government

witness. Marks was sentenced to mandatory life pursuant to 21 U.S.C. §§ 841 and 851. On December 2, 2020, Chief Judge Phillips granted Marks mercy and a last chance by reducing his sentence to time served. In another case out of the Western District of Missouri, on June 17, 2021, Judge Fenner granted Eddie Cox mercy and released him pursuant to 18 U.S.C. § 3582(c)(1)(A) after he had served over three decades in federal prison. *United States v. Cox*, 89-CR-196 (W.D. Mo. 2021). (ECF 122). Cox was a career offender who was alleged to have been the boss of the Black Mafia and participated in 17 homicides in the Kansas City area ("*How Did Eddie Cox, A White Man, Become A Top Leader In The Kansas City's Black Mafia*"), Kansas City Star, June 2, 2021. The court showed Cox mercy, and reduced his sentence to time served.

Numerous courts have granted compassionate release to federal defendants who have committed murder. *United States v. Gluzman*, 2020 U.S. Dist. LEXIS 131749, at *7, 2020 WL 4233049 (S.D. N.Y. July 23, 2020) (granting compassionate release to a defendant who was serving a life sentence for murder); *United States v. Asaro*, 2020 U.S. Dist. LEXIS 68044, at *2, 2020 WL 1899221 (E.D. N.Y. Apr. 17, 2020) (defendant was a high-level Mafia member who was convicted of murdering a cooperating witness); *United States v. Trenkler*, 537 F. Supp. 3d 91, 114 (D. Mass. May 6, 2021) (defendant was convicted of killing a police officer and maiming a second officer was granted compassionate release); *United States v. Greene*, 516 F. Supp. 3d 1, 27 (D. D.C. Feb. 2, 2021) (defendant was convicted of murdering a United States Marshal, and his time was reduced to time served); *United States v. Fisher*, 493 F. Supp. 3d 231, 232 (S.D. N.Y. 2020) (defendant was serving life for operating a CCE, and conspiring to murder a government witness, sentence reduced to time served); *United States v. Qadar*, 2021 U.S.

Dist. LEXIS 136980, 2021 WL 3087956 (E.D. N.Y. July 22, 2021) (defendant was convicted of murder for hire and conspiracy to commit murder, sentence reduced to time served); *United States v. Rios*, 2020 U.S. Dist. LEXIS 230074, at *2-3, 2020 WL 7246440 (D. Conn. Dec. 8, 2020) (Rios was a Latin King who was convicted of RICO and VICAR (murder), sentence reduced to time served); *United States v. Jenkins*, 2021 U.S. Dist. LEXIS 194006, at *15-16, 2021 WL 4691025 (D. S.C. Oct. 7, 2021) (defendant convicted of murder in relation to a drug trafficking crime, sentence reduced to time served); *United States v. Perez*, 2021 U.S. Dist. LEXIS 41040, at *1-2, 2021 WL 837425 (D. Conn. Mar. 4, 2021) (Perez was convicted of murder for hire, and his sentence was reduced to time served). Courts have granted compassionate release to over 50 inmates who were convicted of murder. U.S. Sentencing Commission, *Compassionate Release Data Report*, Calendar Years 2020 to 2021, Table 8 (Sept. 2021). The defendant's life sentence for drug trafficking offenses exceeds the average prison sentence imposed nationally for murder. See U.S. Sentencing Commission, *2021 Annual Report and 2021 Sourcebook for Federal Sentencing Statistics*, Table 15 (stating the average prison sentence imposed nationally for murder in federal court in 2021 was approximately 231 months for all offenders). [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table 15.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table%2015.pdf). The average sentence for drug trafficking during this same period-of-time was 60 months imprisonment. *Id.* Defendant's drug trafficking sentence far exceeds the national average sentence imposed on convicted murders, and there is no comparison to the average sentence which was imposed on defendants for trafficking drugs during this same period-of-time as the average sentence imposed was 60 months imprisonment.

Numerous CCE defendants with life sentences have been granted compassionate release. *United States v. Dean*, 2020 U.S. Dist. LEXIS 86324, at *1, *11, 2020 WL 2526476 (D. Minn. May 18, 2020) (defendant's sentence reduced to time served, 21 U.S.C. § 848(a)); *United States v. Torres*, 464 F. Supp. 3d 651, 652 (S.D. N.Y. 2020) (life sentence reduced to time served, 21 U.S.C. §§ 848(a), (b)); *United States v. Tidwell*, 476 F. Supp. 3d 66, 68, 80 (E.D. Pa. 2020) (life sentence reduced to time served, 21 U.S.C. §848(e)(1)(A)); *United States v. Cano*, 2020 U.S. Dist. LEXIS 239859, at *11, 2020 WL 7415833 (S.D. Fla. Dec. 16, 2020) (life sentence reduced to time served, 21 U.S.C. §§ 848(a), (c)); *United States v. Davis*, 2021 U.S. Dist. LEXIS 216822, 2021 WL 5816283 (N.D. Calif. Nov. 9, 2021) (life sentence reduced to time served, 21 U.S.C. §848(b)); *United States v. Williams*, 2021 U.S. Dist. LEXIS 216129, at *3, 2021 WL 5206206 (D. D.C. Nov. 9, 2021) (life sentence reduced to time served, 21 U.S.C. §§ 848(a), (b)(1)(B)); *United States v. Moore*, 2020 U.S. Dist. LEXIS 147754, at *1, *9, 2020 WL 4748154, at *3 (N.D. Ill. Aug. 17, 2020) (a leader in the Gangster Disciples life sentence was reduced to 260-months imprisonment, 21 U.S.C. § 848(b)); *United States v. Millan*, 2020 U.S. Dist. LEXIS 59955, at *48, 2020 WL 1674058 (S.D. N.Y. Apr. 6, 2020) (life sentence reduced to time served, 21 U.S.C. § 848(b)); *United States v. Piggott*, 2022 U.S. Dist. LEXIS 5293, at *11-12, 2022 WL 118632 (S.D. N.Y. Jan. 11, 2022) (life sentence reduced to time served, 21 U.S.C. § 848(a), (b)(2)(A)); *United States v. Kwok-Ching Yu*, 2020 U.S. Dist. LEXIS 220458, at *2, 2020 WL 6873474 (S.D. N.Y. Nov. 23, 2020) (life sentence reduced to time served); *United States v. Dusenbery*, 2020 U.S. Dist. LEXIS 212639, at *2, 2020 WL 6694408 (N.D. Ohio Nov. 13, 2020) (life sentence reduced to time served); *United States v. Jenkins*, 2021 U.S. Dist. LEXIS 194006, at *17, *25, 2021 WL 4691025 (D. S.C. Oct. 7, 2021) (life sentence

pursuant to 21 U.S.C. § 848(e)(1)(A) reduced to time served); *United States v. Brown*, 2020 U.S. Dist. LEXIS 102685, at *1, *11, 2020 WL 3106320 (W.D. Va. June 11, 2020) (defendant's sentence reduced to time served, 21 U.S.C. §§ 848(a), (b)).

U.S. Sentencing Commission, "life imprisonment sentences are rare in the federal criminal justice system" as "[v]irtually all offenders convicted of a federal crime are released from prison eventually and return to society." See U.S. Sentencing Commission, *Life Sentences in the Federal Criminal Justice System* (2015). <https://www.ussc.gov/research/research-publications/life-sentences-federal-criminal-justice-system>. Several data points make this clear. For example, in fiscal year 2005, of the 72,000 federal sentences imposed, only 250 or so involved a life sentence. *Id.* at 4; U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics*, Introduction (2005). <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2005>. Similarly, in 2016, the percentage of offenders convicted of an offense carrying a drug mandatory minimum penalty of life imprisonment was just .4 percent. See U.S. Sentencing Commission, *Mandatory Minimum Penalties For Drug Offenses in the Federal Criminal Justice System*, at 23 (2017). <https://www.ussc.gov/research/research-reports/mandatory-minimum-penalties-drug-offenses-federal-system>. And based on the latest data available, federal prisoners who have received a life sentence for any crime account for only 2.7 percent of all prisoners in the entire BOP system. See Federal Bureau of Prisons, *Sentences Imposed*. <https://www.bop.gov/about/statistics/sentences.jsp>.

ADMINISTRATIVE REMEDIES

The defendant has exhausted all administrative remedies. On March 10, 2022, Warden Segal at the Federal Correctional Institution ("FCI") at Pekin, Illinois denied defendant's RIS request. *Exhibit 1*.

FIRST MOTION

The defendant filed his first compassionate release motion on May 17, 2021. (ECF 310). On July 29, 2021, the Court denied the motion. (ECF 319).

SECOND MOTION

The defendant has exhausted all administrative remedies prior to filing this motion. *See Exhibit 1*. This Court has jurisdiction to consider a second motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). *United States v. Reyes*, 2021 U.S. Dist. LEXIS 238866, at *5 n.4, 2021 WL 5909849 (W.D. N.C. Dec. 14, 2021) (there are no prohibitions against filing successive compassionate release motions); *United States v. Holt*, 849 Fed. Appx. 63, 63 (4th Cir. 2021).

APPOINT COUNSEL

The defendant respectfully moves the Court to appoint the Federal Public Defender to represent him in the case at bar. The Federal Public Defender will be able to obtain defendant's medical records, as well as other allied records which support this motion. A court may appoint counsel in a compassionate release proceeding. *United States v. Offord*, 2020 U.S. Dist. LEXIS 177286, at *3-4, 2020 WL 5748091 (C.D. Ill. Sept. 25, 2020) (court appointed counsel to obtain defendant's medical records); *United States v. Kerby*, 2021 U.S. Dist. LEXIS 241690, at *2 (D. Neb. Dec. 17, 2021) (appointed counsel to file a brief in support of a § 3582(c)(1)(A) motion); *United States v. Glynn*, 2022 U.S. Dist. LEXIS

32794, at *2, 2022 WL 562652 (S.D. N.Y. Feb. 24, 2022) (Court appointed counsel under the *Criminal Justice Act* to supplement defendant's motion).

JURISDICTION

The Court may reduce a sentence to time served pursuant to 18 U.S.C. § 3582(c)(1)(A) by applying the application of 18 U.S.C. § 3553(a). The § 3553(a) factors are: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed to reflect the seriousness of the offense"; (3) "the kinds of sentences available"; (4) "the kinds of sentences available and the sentencing range established for" the offense at the time of sentencing; (5) "any pertinent policy statement" in effect at the time of the defendant's sentencing; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victims of the offense." *Id.* § 3553(a)(1)-(7).

Ten United States Courts of Appeals have held that, absent updated guidance from the Sentencing Commission ("U.S.S.G."), the First Step Act ("FSA"), allows a district court to consider any extraordinary and compelling reason to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). *United States v. Ruvalcaba*, 26 F.4th 14, 24-28 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 230, 235 (2d Cir. 2020); *United States v. Andrews*, 12 F.4th 255, 259-60 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392-93 (5th Cir. 2021); *United States v. Ellis*, 984 F.3d 516, 519-20 (6th Cir. 2021); *United States v. Gunn*, 980 F.3d 1178, 1180-81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States*

v. Maumau, 993 F.3d 821 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355, 359 (D.C. Cir. 2021). Two circuits disagree, *United States v. Crandall*, 25 F.4th 582, 585 (8th Cir. 2022); *United States v. Bryant*, 996 F.3d 1243, 1247-48 (11th Cir. 2021).

Federal criminal sentencing is inherently retrospective. But many of the goals of sentencing--rehabilitation, just punishment, deterrence--implicate prospective concerns. Compassionate release gives a court the opportunity to take a second look at sentences to account for unusual and changed circumstances. As the Sentencing Commission has noted, "[t]he court is in a unique position to determine whether the circumstances warrant a reduction." U.S.S.G. § 1B1.13 & cmt. (nn. 1, 4); U.S.S.G. § Amend. 799 (Nov. 1, 2016). At sentencing, this Court considered the nature and circumstances of defendant's conviction, as well as his role in the offense, his criminal history, among other things. See 18 U.S.C. § 3553; *Federal Sentencing Guidelines Manual* (2018). The Court relied on guidance reflecting society's then current understanding of criminal culpability and punishment. But, what the Court could not confidently measure at the time of sentencing was defendant's capacity for change. See Shon Hopwood, *Second Looks and Second Chances*, 41 *Cardozo L. Rev.* 83, 85 (2019) (Professor Hopwood himself is a convicted bank robber who served a lengthy prison sentence. But, he later graduated from law school, clerked for the D.C. Circuit, and became a member of the Georgetown Law Center faculty as well as a member of the Bar of the Supreme Court).

Individuals who commit serious crimes are not beyond rehabilitation. The availability of a second chance through compassionate release can incentivize individuals serving seemingly hopeless sentences to rehabilitate themselves in ways they might otherwise never have attempted. See id. at 97.

As Congress legislates to account for changed views on punishment, many individuals are left serving federal sentences far longer than society deems necessary for the same conduct today. The defendant is one of those individuals serving a sentence far longer than society deems necessary.

Everyone has a gift and something to offer to society, people can change, and incarcerated persons who do not pose a danger to public safety, and have paid their debt to society, deserve to have a chance to rejoin their families and communities and become contributing members of society. Examples abound of individuals who despite being incarcerated have managed to grow from whatever mistakes they made, overcome obstacles, and use their unique experiences and gifts to benefit society. See Charles Koch and Brian Hooks, *Believe in People: Bottom-Up Solutions for a Top-Down World*, 109-116, 205-06, 214-16 (2020); Shon Hopwood, *Second Looks & Second Chances*, 41 *Cardozo L. Rev.* 82, 84-88 (2019); Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 *Yale L.J. F.* 759 (2019).

Backend sentencing reforms, like the First Step Act, allow courts to account for an incarcerated person's efforts at rehabilitation while determining whether a sentence reduction is warranted, are not only sound public policy, but a moral imperative.

The defendant has a strong network of people who support him and are willing to assist him when he is released from confinement.

PROCEDURAL HISTORY

The defendant is currently confined at the Federal Correctional Institution in Pekin, Illinois. In 1989, defendant was convicted by jury of participating in a continuing

criminal enterprise ("CCE") to possess and distribute cocaine in violation of 21 U.S.C. § 848 (1988) (count 1); aiding and abetting the attempt to possess with intent to distribute twenty kilograms of cocaine on May 17, 1989, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988) and 18 U.S.C. § 2 (1988) (count 2); other instances of aiding and abetting the possession with intent to distribute smaller quantities of cocaine on various dates in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (counts 4, 5, 6, 7, 8); three counts of using or carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1) (1988) (counts 28, 29, 30); and conspiracy from 1984 to May 18, 1989, to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (count 32). *United States v. Duke*, 940 F.2d 1113, 1115 (8th Cir. 1991). Defendant initially received separate but concurrent life sentences on counts 1, 2, and 32, but the Eighth Circuit remanded the case and ordered that either his conviction on count 1 or count 32 be vacated because the convictions for both continuing criminal enterprise and conspiracy violated the Double Jeopardy clause of the Fifth Amendment. Defendant's conviction and sentence were affirmed by the Eighth Circuit in all other respects. The Court vacated the CCE count. (ECF 140). In addition to the sentences in relation to counts 1, 2 and 32, defendant was sentenced to concurrent forty-year sentences on each of counts 4-8. *Id.* 940 F.2d at 1115. The defendant was sentenced to mandatory consecutive sentences of thirty years, five years, and five years for counts 28, 29, and 30, respectively, totaling forty consecutive years. *Id.* This Court granted a motion to reduce defendant's sentence under 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the Sentencing Guidelines and reduced defendant's sentence of life plus 40 years consecutive to 365 months plus 40 years consecutive. *United States v. Duke*, No. 4:89-CR-94-DSD-1 (D. Minn. July 27, 2016)

(ECF 264). In 2017, the United States District Court for the Central District of Illinois granted defendant's 28 U.S.C. § 2241 motion and ordered a new trial on Counts 28, 29, and 30. *Duke v. Thompson*, 17-CV-01024-JBM (C.D. Ill. Sept. 29, 2017). In February 2018, the Court resentenced defendant to life imprisonment. (ECF 290). Defendant filed his first compassionate release motion on May 17, 2021. (ECF 310). The Court denied on July 29, 2021. (ECF 319).

MANDATORY SENTENCING GUIDELINES

When the defendant was sentenced in 1989, the sentencing guidelines were mandatory. In a post-*Booker* (*United States v. Booker*, 543 U.S. 220 (2005)) era, wherein significant changes have been made to the guidelines, there is a real possibility the defendant would receive a different sentence today. There were guidelines in effect at the time defendant was sentenced which would not be applied if he was resentenced today. The changes in the mandatory sentencing laws presents an extraordinary and compelling reason for granting compassionate release. See U.S.S.G. § 1B1.13 cmt. n.1(D). Numerous defendants whose sentences were imposed based on since-invalidated sentencing guidelines have been granted compassionate release. *United States v. Gray*, 2021 U.S. Dist. LEXIS 169799, at *10, 2021 WL 4096030 (W.D. Mo. Sept. 8, 2021) (citations omitted). Today, in a post-*Booker* world, the defendant would not be faced with mandatory sentencing guidelines, and he would likely face a different sentence.

COVID-19

Defendant's medical history places him at an increased risk to severe and potentially fatal complications if he is reinfected with COVID-19. The defendant was infected and recovered from COVID-19 in October 2020. See *Exhibit 5-2*.

In *United States v. Rose*, 2022 U.S. Dist. LEXIS 706, at *2, 2022 WL 19174 (S.D. N.Y. Jan. 3, 2022), the court held "the COVID-19 pandemic, including the wildly contagious Omicron variant, constitutes an extraordinary and compelling reason to grant the requested relief." In *United States v. Brunetti*, 2022 U.S. Dist. LEXIS 4604, at *10 (S.D. N.Y. Jan. 10, 2022), the court stated: "In light of the rapid spread of the Omicron variant and its partial resistance to the COVID-19 vaccines, the Court finds the Government's argument unpersuasive and concludes that Brunetti has established that "extraordinary and compelling circumstances" support his release." ... "Although the COVID-19 vaccines remain effective at preventing severe illness, they provide comparatively little protection against Omicron infection." *Id.* at *11. ... "The variant's ability to evade vaccine-related immunity has resulted in an exponential increase in 'breakthrough' infections in vaccinated individuals." *Id.* at 12.

Vaccination, while it should be considered, is not determinative of whether defendant's medical conditions rise to the level of "extraordinary and compelling reasons" for compassionate release. *United States v. Garcia*, 2021 U.S. Dist. LEXIS 200152, at *6, 2021 WL 4846937 (D. Md. Oct. 15, 2021). *See United States v. Spriggs*, 2021 U.S. Dist. LEXIS 88859, 2021 WL 1856667 (D. Md. May 10, 2021). CDC, *Update on Omicron Variant*, Dec. 16, 2021. <https://www.cdc.gov/vaccines/acip/meetings/download/slides-2021-12-16/06-COVID-Scobie-508.pdf>. (The Pfizer-BioNTech vaccine is only 33% effective at preventing Omicron infection.); CDC, *Reinfection with COVID-19*. <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html>. *United States v. Valencia-Lopez*, 2022 U.S. Dist. LEXIS 11461, at *4, 2022 WL 198604 (E.D. N.Y. Jan 21, 2022). Courts have diverged in their views on how the state of the ongoing COVID-19 pandemic,

including the emergence of recent variants of concern ("VOCs"), impacts their *Brooker* analyses of extraordinary and compelling circumstances. *6-7 As a threshold matter, the COVID-19 landscape has changed dramatically within the past month alone as the current surge, driven by the Omicron and Delta VOCs. The rapid spread of these highly transmissible VOCs has resulted in higher rates of breakthrough infections generally, with prison and immunocompromised populations increasingly susceptible to those breakthrough cases. In *United State v. Moore*, 2022 U.S. Dist. LEXIS 7632, at *19, 2022 WL 137865 (D. Md. Jan. 14, 2022), the court held that the emergence of the Omicron variant, both around the world and in the United States, has sparked further cause for concern. Although much remains unclear about Omicron, it is believed to be highly contagious. See *Omicron Variant: What You Need to Know*, CDC. <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>. Indeed, Omicron has contributed to a substantial spike in COVID-19 cases in recent weeks. See, e.g., Aya Elamroussi, "Omicron surge is unlike anything we've ever seen, expert says," CNN (Dec. 31, 2021). <https://www.cnn.com/2021/12/30/health/us-coronavirus-thursday/index.html>. *33-34. Indeed, recent developments make clear that the pandemic may be with us indefinitely. The media, as well as the CDC, are filled with reports of breakthrough infections of COVID-19 among vaccinated individuals. And, albeit in rare cases, they can result in death. See *Rates of COVID-19 Cases and Death by Vaccination Status*, Centers for Disease Control. <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status>. Breakthrough infections seem to be particularly common with the highly contagious Omicron variant, although vaccination seems effective at preventing serious illness. See,

e.g., *Omicron Variant: What You Need to Know*, Centers for Disease Control. <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>.

With the new strains of the virus in the United States which are spreading very rapidly, there is a very real possibility the defendant will be subjected to one of the strains, and if so, it could be very serious. Many individuals who have been vaccinated and had the virus are contracting new strains of the virus. publichealth.jhu.edu/2021/new-data-on-covid-19-transmission-by-vaccinated-individuals. Only 73.8% of all Federal Bureau of Prisons employees have been vaccinated, although vaccination has been offered to every employee. BOP staff members transmit the virus into the institution as inmates have no outside contacts other than BOP staff. As of March 7, 2022, the BOP has 134,342 federal inmates in BOP-managed institutions and 12,631 in community-based facilities. The BOP staff compliment is approximately 36,000. There are 358 federal inmates and 467 BOP staff members who have confirmed positive test results for COVID-19 nationwide. Currently, 54,470 inmates and 12,144 staff have recovered. There have been 287 federal inmate deaths and 7 BOP staff member deaths attributed to COVID-19 disease. www.bop.gov/coronavirus (March 7, 2022). In the case of *United States v. Groat*, 2021 U.S. Dist. LEXIS 65194, 2021 WL 1238101 (D. Utah Apr. 2, 2021), the government argued that Groat was immune from COVID-19 infection as he had already contracted it once. The court rejected that argument finding that COVID immunity only lasts about 90 days. Courts have recognized the "various shortcomings" of the BOP COVID-19 Action Plan. *United States v. Gorai*, 2020 U.S. Dist. LEXIS 72893, 2020 WL 1975372 (D. Nev. 2020). Inmates are being released on their vulnerability to COVID-19. *United States v.*

Stephenson, 461 F. Supp. 3d 864, 869 (S.D. Iowa 2020); *United States v. White*, 466 F. Supp. 3d 666, 672 (S.D. W.Va. 2020).

The defendant suffers from the following medical issues (*Exhibit 5*):

Kidney Disease:

The defendant's GFR is 39 which is Stage 3 kidney disease. *Exhibit 5-3*. There are five (5) stages of chronic kidney disease: (1) at stage I, an individual's kidneys function at 90 percent or higher; (2) at stage II, an individual's kidneys function at 60-89 percent, which does not require radical treatment; (3) at stage III, an individual experiences "moderately reduced kidney function" and their kidneys operate at about 30-59 percent; (4) stage IV is marked by "severely reduced kidney function" and an individual "may be feeling quite ill at this stage," as their kidneys only function at about 15-29 percent; and (5) at stage V, an individual's kidneys function at less than 15 percent and they are either waiting for a kidney transplant or are on dialysis. *What are the Stages of Chronic Kidney Disease?*, National Kidney Foundation. <https://bit.ly/30eB0u8>.

National Kidney Foundation, *High Blood Pressure and Chronic Kidney Disease* (2021). [https:// kidney.org/news/newsroom/factsheets/High-Blood-Pressure-and-CKD](https://kidney.org/news/newsroom/factsheets/High-Blood-Pressure-and-CKD). Hypertension and hyperlipidemia, over time, increase the risk of heart attack, and other serious health conditions, especially among those over the age of 65. Also noteworthy is the interplay between high blood pressure and kidney disease. High blood pressure can exacerbate kidney disease and accelerate the loss of kidney function. The defendant suffers from hypertension and takes Lisinopril 40 mg. daily, and for hyperlipidemia he takes Atorvastatin 40 mg. daily. See *Exhibit 5-1*.

M. Gasparini et al., *Renal impairment and its impact on clinical outcomes in patients who are critically ill with COVID-19: a multicentre observational study*, *Anaesthesia* (Oct. 16, 2020). <https://bit.ly/3tgnBzo>; Jennifer E. Flythe et al., *Characteristics and Outcomes of Individuals with Pre-existing Kidney Disease and COVID-19 Admitted to Intensive Care Units in the United States*, 77 *Am. J. of Kidney Diseases* 190-203 (Sep. 19, 2020). <https://bit.ly/3tgo6cK>; Hua Su et al., *Renal histopathological analysis of 26 postmortem findings of patients with COVID-19 in China*, 98 *Kidney International* 219-27 (April 9, 2020). <https://bit.ly/2YByWvC>.

Courts have granted compassionate release to hundreds of defendants who have kidney disease. Here is a sampling: *United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219, at *5, 2019 WL 3340699 (D. Minn. July 25, 2019) (chronic diabetic kidney disease); *United States v. Wilson*, 2020 U.S. Dist. LEXIS 215732, at *5, 2020 WL 6785109 (N.D. Iowa Nov. 18, 2020) (chronic kidney disease, Stage III); *United States v. Tran*, 2021 U.S. Dist. LEXIS 19878, at *4 (D. Neb. Feb. 2, 2021); *United States v. Picardo*, 2022 U.S. Dist. LEXIS 29495, at *1 (D. N.J. Feb. 22, 2022) (Stage III Kidney Disease); *United States v. Fillingame*, 2022 U.S. Dist. LEXIS 32873, at *3 (D. Or. Feb. 24, 2022) (Stage III kidney disease); *United States v. Picardo*, 2022 U.S. Dist. LEXIS 29495, at *1 (D. N.J. Feb. 22, 2022) (Stage III kidney disease).

Diabetes Mellitus, Type II:

The American Diabetes Association has recommended: "Local officials should explore all possible strategies to release people with diabetes and other serious risk factors related to COVID-19, and to reduce the level of crowding in detention facilities." Medical furloughs, compassionate release, and pretrial or early release. <https://www.>

diabetes.org/sites/default/files/2020-03/COVID19%20Letter%20to%20Detention%20Centers.pdf. See *United States v. Weems*, 477 F. Supp. 3d 1301, 1309 (S.D. Fla. 2020) (defendant had Type II diabetes mellitus and hypertension which demonstrated extraordinary and compelling reason for sentence reduction due to increased risk from COVID-19); *United States v. Feucht*, 462 F. Supp. 3d 1339, 1342 (S.D. Fla. 2020) (defendant had Type II diabetes mellitus and hypertension which demonstrated extraordinary and compelling reasons for sentence reduction based on heightened vulnerability to severe illness from COVID-19).

The following cases from the Eighth Circuit area were granted compassionate release with diabetes being their primary ailment. *United States v. Wheelock*, 2021 U.S. Dist. LEXIS 99684, at *4, 2021 WL 2143136 (D. Minn. May 26, 2021) (Type II); *United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219, at *5, 2019 WL 3340699 (D. Minn. July 25, 2019); *United States v. Wilson*, 2020 U.S. Dist. LEXIS 215732, at *5, 2020 WL 6785109 (N.D. Iowa Nov. 18, 2020); *United States v. Eck*, 2020 U.S. Dist. LEXIS 236959, at *4, 2020 WL 7390516 (D. S.D. Dec. 16, 2020) (Type II diabetes mellitus with neuropathy); *United States v. Gray*, 2021 U.S. Dist. LEXIS 169799, at *6, 2021 WL 4096030 (W.D. Mo. Sept. 8, 2021).

Gastro-Esophageal Reflux Disease With Esophagitis:

Numerous courts have granted compassionate release to defendant's who suffer from gastro-esophageal reflux disease with esophagitis. *United States v. McElrath*, 2020 U.S. Dist. LEXIS 165635, at *2, 2020 WL 5423067 (D. Minn. Sept. 10, 2020); *United States v. Luna*, 478 F. Supp. 3d 859, 861 (N.D. Calif. 2020); *United States v. Figueroa*, 2022 U.S. Dist. LEXIS 11870, at *4, 2022 WL 167536 (W.D. N.Y. Jan. 19, 2022); *United*

States v. Chandler, 2021 U.S. Dist. LEXIS 221056, at *2, 2021 WL 5348667 (D. Or. Nov. 16, 2021); *United States v. Hicks*, 2022 U.S. Dist. LEXIS 7677, at *7, 2022 WL 138690 (D. W.Va. Jan. 14, 2022); *United States v. Blake*, 2020 U.S. Dist. LEXIS 144632, at *2, 2020 WL 4677309 (S.D. Fla. Aug. 12, 2020); *United States v. Stockton*, 2020 U.S. Dist. LEXIS 169584, at *19, 2020 WL 5544203 (D. Md. Sept. 16, 2020); *United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219, at *5, 2019 WL 3340699 (D. Minn. July 25, 2019).

Hyperlipidemia:

There are hundreds of grants to defendants with hyperlipidemia, and here is a sampling in the Eighth Circuit: *United States v. Wheelock*, 2021 U.S. Dist. LEXIS 99684, at *3, 2021 WL 2143136 (D. Minn. May 26, 2021); *United States v. McElrath*, 2020 U.S. Dist. LEXIS 165635, at *2, 2020 WL 5423067 (D. Minn. Sept. 10, 2020); *United States v. Hassan*, 2020 U.S. Dist. LEXIS 165638, at *3, 2020 WL 5424797 (D. Minn. Sept. 10, 2020); *United States v. Gravens*, 2020 U.S. Dist. LEXIS 236957, at *5, 2020 WL 7390514 (D. S.D. Dec. 16, 2020); *United States v. Eck*, 2020 U.S. Dist. LEXIS 236959, at *4, 2020 WL 7390516 (D. S.D. Dec. 6, 2020); *United States v. Wiley*, 487 F. Supp. 3d 782, 783 (D. Neb. 2020).

Hypertension:

Vikramaditya Reddy Samala Venkata et al., *Abstract P135: Covid-19 And Hypertension: Pooled Analysis of Observational Studies, Hypertension (2020)*. https://doi.org/10.1161/hyp.76.suppl_1.P135. "Hypertension by itself was associated with higher rates of mortality [from COVID-19]." According to the American Heart Association, a systolic blood pressure reading above 140 places an individual in the Hypertension Stage 2 category. *See Understanding Blood Pressure Readings*, Am. Heart

Association. <https://www.heart.org/en/health-topics/high-blood-pressure/understanding-blood-pressure-readings>. CDC, *High Blood Pressure Symptoms and Causes*. <https://www.cdc.gov/bloodpressure/about.htm>).

The defendant has been prescribed lisinopril to control his hypertension. In the case of *United States v. Salvagno*, 456 F. Supp. 3d 420, 427-28 (N.D. N.Y. 2020), the court held "[d]efendant faces heightened risk of developing severe symptoms once infected, due to his hypertension, and may even face a heightened risk of contracting COVID-19 in the first place, due [to] his treatment with Lisinopril."; *United States v. Roman*, 2020 U.S. Dist. LEXIS 53956, at *17-18, 2020 WL 1908665 (S.D. N.Y. Mar. 27, 2020) ("the fact that he takes Lisinopril, an ACE inhibitor, to treat hypertension likely places him 'at higher risk of severe COVID-19 infection.'" Quoting Lei Fang et al., Are Patients with Hypertension and Diabetes Mellitus at Increased Risk for COVID-19 Infection? *The Lancet* (2020). <https://thelancet.com/journals/lanres/article/PIIS2213-26002030116-8/fulltext>). The defendant takes 40 mg. Lisinopril daily.

The following defendants were granted compassionate release with the major issue being hypertension. *United States v. Hassan*, 2020 U.S. Dist. LEXIS 165638, at *3, 2020 WL 5424797 (D. Minn. Sept. 10, 2020); *United States v. Sawicz*, 453 F. Supp. 3d 601, 603-05 (E.D. N.Y. 2020) The Court concluded that because the defendant suffers from hypertension, he is vulnerable to COVID-19 and thus "the risk of serious illness or death that he faces in prison constitutes an extraordinary and compelling reason militating in favor of his release." *United States v. Sanders*, 2020 U.S. Dist. LEXIS 67595, at *10, 2020 WL 1904815 (E.D. Mich. Apr. 17, 2020). "Several courts ... have identified hypertension as an underlying medical condition that renders a prisoner higher-risk, weighing against

continued detention during the COVID-19 pandemic." *United States v. Rosso*, 2021 U.S. Dist. LEXIS 74288, at *5, 2021 WL 1394466 (W.D. Ark. Apr. 12, 2021); *United States v. Wiley*, 487 F. Supp. 3d 782, 783 (D. Neb. 2020); *United States v. Gray*, 2021 U.S. Dist. LEXIS 169799, at *6, 2021 WL 4096030 (W.D. Mo. Sept. 8, 2021); *United States v. Brown*, 457 F. Supp. 3d 691, 703 (S.D. Iowa. 2020).

Polyneuropathy:

United States v. Phipps, 2021 U.S. Dist. LEXIS 216453, at *3, 2021 WL 5235124 (S.D. Ind. Nov. 9, 2021); *United States v. Camacho-Duque*, 2020 U.S. Dist. LEXIS 188532, at *4, 2020 WL 5951340 (S.D. Fla. Oct. 5, 2020).

Pulpitis

United States v. Coles, 2020 U.S. Dist. LEXIS 72327, at *16, 2020 WL 1976296 (C.D. Ill. Apr. 24, 2020); *United States v. Clark*, 2021 U.S. Dist. LEXIS 45621, at *7, 2021 WL 925760 (S.D. Ohio Mar. 11, 2021); *United States v. Rivera*, 2020 U.S. Dist. LEXIS 157192, at *10, 2020 WL 5105090 (E.D. Mich. Aug. 31, 2020).

BPH – Benign Prostrate Hyperplasia:

United States v. Buenrostro, 2020 U.S. Dist. LEXIS 245390, at *10, 2020 WL 7773620 (N.D. Calif. Dec. 30, 2020); *United States v. McPeck*, 2022 U.S. Dist. LEXIS 24824, at *7, 2022 WL 429249 (N.D. Iowa Feb. 11, 2022); *United States v. Samuels*, 2020 U.S. Dist. LEXIS 232495, at *4, 2020 WL 7265378 (W.D. La. Dec. 10, 2020).

Spinal Stenosis:

United States v. Cheese, 2021 U.S. Dist. LEXIS 25218, at *4, 2021 WL 461851 (D. Md. Feb. 9, 2021); *United States v. Locke*, 2020 U.S. Dist. LEXIS 102592, at *10, 2020 WL 3101016 (W.D. Wash. June 11, 2020); *United States v. Almonte*, 2020 U.S. Dist. LEXIS

62524, at *15, 2020 WL 1812713 (D. Conn. Apr. 9, 2020); *United States v. Ennis*, 2020 10U.S. Dist. LEXIS 84957, at *7, 2020 WL 2513109 (W.D. Tex. May 14, 2020).

The defendant takes the following medications: Amlodipine, 10 mg.; Aspirin 81 mg.; Atorvastatin 40 mg.; Lisinopril 40 mg.; metFORMIN HCl 500 mg.; Omeprazole 20 mg.; Potassium Chloride 10 mEq ER Tab; Triamterene/HCTZ 75 mg/50 mg. Tab; Insulin NPH (10 ML) 100 Units/ML Inj.; Albuterol Inhaler HFA (8.5 GM) 90 MCG/ACT. *Exhibit 5*. See *Exhibit 5-1*.

If this Court grants compassionate release, the defendant will have full medical coverage under the Social Security Medicare plan due to fact he has earned enough credits to retire and obtain full benefits as well as Medicare.

UNUSALLY HARSH PRISON CONDITIONS

The defendant has experienced unusually harsh conditions as a consequence of the lockdown measures undertaken to control the spread of COVID-19 by the Federal Bureau of Prisons. Numerous courts have considered harsh conditions not foreseen at sentencing. *United States v. Rengifo*, 2021 U.S. Dist. LEXIS 209387, 2021 WL 5027334 (S.D. N.Y. Oct. 29, 2021). These conditions include "constant lockdowns and other unusually severe conditions of confinement necessary to reduce the risk of COVID infection in the close quarters of prison." *United States v. Henareh*, 2021 U.S. Dist. LEXIS 6855, at *5, 2021 WL 119016 (S.D. N.Y. Jan. 13, 2021). These lockdown measures rendered the last year and a half as significantly "harsher and more punitive than would otherwise have been the case." *United States v. Rodriguez*, 492 F. Supp. 3d 306, 311 (S.D. N.Y. 2020); *United States v. Coops*, 2021 U.S. Dist. LEXIS 215976, at *5, 2021 WL 5177870 (N.D. Ohio Nov. 8, 2021). See also *United States v. Garcia*, 505 F. Supp. 3d 328, 333 (S.D. N.Y. 2020)

("[H]eightedened restrictions imposed upon all prisoners during the pandemic ... ma[de] the conditions of confinement harsher, both physically and psychologically, than they would otherwise normally be."). The courts have recognized that incarceration under these conditions may render the sentence served by a defendant "materially different from the sentence the Court envisioned." *Henareh*, 2021 U.S. Dist. LEXIS 6855, at *5.

EXTRAORDINARY CIRCUMSTANCES

Under the first prong of § 3582(c)(1)(A), a defendant may be eligible for compassionate release if "extraordinary and compelling reasons" justify reducing his term of imprisonment. 18 U.S.C. § 3582(c)(1)(A). Congress does not specify what counts as an "extraordinary and compelling reason[.]" *see id.*, but it expressly delegated to the Sentencing Commission the authority to define the circumstances that, if present, would satisfy that standard, *see* 28 U.S.C. § 994(t). Accordingly, the Sentencing Commission has identified four general categories of circumstances that qualify as "extraordinary and compelling" reasons for release, including a defendant's age, medical issues, family circumstances, or "other" exceptional situations. *See U.S. Sentencing Guidelines Manual* § 1B1.13 cmt. n.1. For example, under the "Age of the Defendant" provision of § 1B1.13 of the *Sentencing Guidelines Manual* extraordinary and compelling circumstances that warrant a sentence modification exist where 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." *Id.* § 1B1.13 cmt. n.1(B).

A defendant can demonstrate eligibility for compassionate release under the second prong of § 3582(c)(1)(A) (without having to establish extraordinary and compelling

circumstances) if he is "at least 70 years of age, has served at least 30 years in prison," and "a determination has been made by the Director of the [BOP] that the defendant is not a danger to . . . the community[.]" 18 U.S.C. § 3582(c)(1)(A)(ii).

The defendant is 76 years old and has spent over three decades in federal prison. During defendant's incarceration, he has demonstrated his commitment to change through rehabilitative programming. See *Exhibit 2*.

Section 3582(c) "provides a path for defendants in 'extraordinary and compelling circumstances' to be released from prison early." *United States v. Rodriguez*, 424 F. Supp. 3d 674, 681 (N.D. Calif. 2019) (quoting 18 U.S.C. § 3582(c)(1)(A)). "Congress provided no statutory definition of 'extraordinary and compelling reasons.'" *United States v. Aruda*, 993 F.3d 797, 800 (9th Cir. 2021). Instead, Congress tasked the Sentencing Commission with "promulgating general policy statements regarding the sentencing modification provision in section 3582(c)(1)(A)," including "what should be considered extraordinary and compelling reasons for sentence reduction . . ." 28 U.S.C. § 994(t).

The Sentencing Commission issued a policy statement regarding "*Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)*" at U.S.S.G. § 1B1.13. However, this policy statement pre-dated the FSA, and the Ninth Circuit held it is not an "applicable policy statement[]" under § 3582. *Aruda*, 993 F.3d at 802; see 18 U.S.C. § 3582(c)(1)(A)(i). In so doing, the Ninth Circuit cited approvingly to the Fourth Circuit's decision stating that in the absence of an applicable policy statement, "district courts are 'empowered . . . to consider *any* extraordinary and compelling reason for release that a defendant might raise.'" *United States v. McCoy*, 981 F.3d 271, 28 (4th Cir. 2000) (quoting

United States v. Brooker, 976 F.3d 228, 234-35 (2d Cir. 2020)) (alteration and emphasis in original).

Our criminal justice system evolves in response to changes in how we, as a society, perceive criminal acts and the appropriate penalties for them. Like the system, the individual penalized also can evolve and mature. The importance of giving those individuals meaningful second chances cannot be overlooked. When ruling on a compassionate release motion, "the Court must consider every prisoner individually and should be cautious about making blanket pronouncements." *United States v. Terry*, 2021 U.S. Dist. LEXIS 175946, at *19 (E.D. Tex. Sept. 15, 2021) (quoting *United States v. Chavez*, 2020 WL 4500633, at *3 (N.D. Tex. Aug. 5, 2020); *United States v. Delgado*, 2020 WL 2542624, at *3 (N.D. Tex. May 19, 2020) (same); see *United States v. Ashley*, 2020 WL 7771215, at *4 (S.D. Ala. Dec. 30, 2020) (holding that, in considering a motion for compassionate release, the court must take an "individualized and particularized review" of the defendant's characteristics (citing *United States v. Tobias*, 2020 WL 4673414, at*5 (D. D.C. Aug. 12, 2020); *United States v. Brown*, 2020 WL 4346911, at *3 (D. D.C. July 29, 2020); *United States v. Joaseus*, 2020 U.S. Dist. LEXIS 121434, at *5, 2020 WL 3895087 (S.D. Fla. July 10, 2020))). *United States v. Staats*, 502 F. Supp. 3d 958, 969 (E.D. Pa. 2020) ("Mr. Staats's sentence was never intended to include a grave risk of severe illness or death from an unforeseen pandemic.").

Extraordinary and compelling should be considered from the real, practical, world of crime and criminals, prisons and prosecution, citizens, and victims, and judges, seeking justice for all, and not only from a hyper-technical legal approach. The terms "extraordinary and compelling" should be applied in their ordinary meaning, and within

that application, there is room for substantial differences of opinion, of which the Court must be the final arbiter.

Mann Tracht, Un Gott Lacht (Man Plans, And God Laughs).

A. Rehabilitation

The defendant is very remorseful about his past conduct and actions, and apologizes to his family as well as society at large. The defendant seeks the opportunity to prove to society he is a changed man, and this can only be accomplished if the Court shows mercy and reduces his sentence to time served. While confined, the defendant has taken advantage of every rehabilitation program which has been made available to him. See *Exhibit 2*. The defendant's recidivism rate which is calculated by the Bureau of Prisons as MINIMUM (PATTERN Score). See *Exhibit 3*. The defendant has very low security points and would be housed at a minimum security facility if he did not have a life sentence. See *Exhibit 3-1*. Attached are supportive letters from Staff. *Exhibit 6*.

B. Over 70 Years of Age

BOP Program Statement 5050.50 on compassionate release provides that extraordinary and compelling reasons exist supporting a reduction in sentence when an inmate is 70 years or older and has served 30 or more years of their term. https://www.bop.gov/policy/progstat/5050_050_EN.pdf. U.S.S.G. § 1B1.13, cmt. (1)(B) also recognizes age-related reasons for compassionate release, requiring a person to be at least 65 years old, experiencing serious deterioration in physical health due to aging, and has served at least 10 years of their sentence. The defendant has been in federal prison over 30 years, he is 76 years old, and there has been a serious decline in his health. Accordingly, defendant satisfies both the BOP's criteria and U.S.S.G. § 1B1.13, and his

age and length of time served should weigh in favor of finding that extraordinary and compelling reasons exist supporting a reduction in sentence. See BOP Program Statement 5050.50; U.S.S.G. § 1B1.13, cmt. 1(B), (D).

Pursuant to 18 U.S.C. § 3582(c)(1)(C)(ii), the defendant has served over 30 years on his sentence, and he is 76 years old at present. A defendant is eligible for compassionate release: (1) if the court finds "extraordinary and compelling reasons" to warrant a sentence reduction; or (2) if the defendant is at least 70 years old, has served at least 30 years in prison pursuant to a sentence imposed for the offense in which the defendant is currently imprisoned, and the defendant is determined not to pose a risk of danger to the community.

18 U.S.C. § 3553 FACTORS

§ 3553(a)(1) – The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

In no way does the defendant seek to minimize his past conduct, but, for the record, he will never commit another illegal act due to the fact he clearly understands the consequences of any type of misbehavior.

Evidence of post-conviction rehabilitation may plainly be relevant to "the history and characteristics of the defendant." *Pepper v. United States*, 562 U.S. 476, 491 (2011) (citing 18 U.S.C. § 3553(a)(1)). A district court cannot artificially limit itself to a defendant's past history and circumstances while ignoring more recent developments. *Id.* at 488-49. Several courts have considered a defendant's rehabilitation in granting compassionate release. *United States v. Brown*, 2020 U.S. Dist. LEXIS 87133, at *12, *17-18, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020); *United States v. Decator*, 452 F. Supp. 3d 320, 325-26 (D. Md. 2020); *United States v. Redd*, 444 F. Supp. 3d 717, 727 (E.D. Va.

2020); *United States v. Perez*, 2020 U.S. Dist. LEXIS 45635, at *7, 2020 WL 1180719 (D. Kan. Mar. 11, 2020) (finding that inmate's rehabilitation favored compassionate release where inmate "gained his GED while in prison and has availed himself to various educational programs.").

The defendant's family is willing to assist him upon his return to the community, and he will have family support in his readjustment after three decades of confinement. Family assistance and support is very important for adjustment for a man who has been confined over three decades.

The defendant will have spiritual support due to the fact he has returned to the Church for moral guidance. The defendant has sought religious counselling since being incarcerated, in that he had strayed from the Church, and lost his moral compass.

§ 3553(a)(2)(A) – Just Punishment

Section 3553(a)(2) considers whether a given sentence complies with "the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation." *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017). While the defendant's underlying criminal offense is undeniably serious, this sentence has consumed a large part of his life and by any measure represents a very substantial punishment that reflects the seriousness of his offense and the need for general or specific deterrence. Also, this period of time promotes respect for the law and provides just punishment for his offenses. *United States v. Parker*, 461 F. Supp. 3d 966, 982 (C.D. Calif. 2020); *Redd*, 444 F. Supp. 3d at 728-29.

Incarceration is not the only type of sentence available. *Brown*, 457 F. Supp. 3d at 697. Noncustodial sentences curtail prized liberty interests and the defendant would

always face the harsh consequences that await him if he violates the conditions attached to compassionate release. Early release will not denigrate the seriousness of defendant's offense or undermine respect for the law. The defendant's conduct would continue to be monitored on supervised release, and he well knows he will be reincarcerated if he violates the conditions of release.

§ 3553(a)(2)(B) – Adequate Deterrence

The United States Department of Justice (“DOJ”) published a paper entitled “*Five Things About Deterrence*,” 42 Crim. & Just. 199, 201 (2013), U.S. Department of Justice, National Institute Justice, *Five Things About Deterrence 1* (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/PV5R-9QP4>]. *United States v. Browning*, 2021 U.S. Dist. LEXIS 38058, 2021 WL 795725 (E.D. Mich. 2021). In the paper, the DOJ explains that, in terms of both specific and general deterrence, there is overwhelming evidence in the scientific literature that the certainties of being caught is a vastly more powerful deterrent than the [severity of the] punishment. *Id.* at *12.

Statistically speaking, the defendant is very unlikely to reoffend. See U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders 3*. https://www.ussc.gov/sites/default/files/pdf/research-publications/2017/20171207_Recidivism-Age.pdf.

§ 3553(a)(2)(C) – Protecting the Public

The defendant poses no danger whatsoever to the public, as he knows the consequences of any type of misbehavior, and he would never put himself, family, or the public in jeopardy. The defendant's record in prison clearly reflects the fact he poses no danger to the community.

President Abraham Lincoln once wrote "*I have always found that mercy bears richer fruit than strict justice.*" Letter to George Robertson in Lexington, Kentucky dated August 15, 1855. The defendant is seeking the same mercy that President Lincoln spoke about.

§ 3553(a)(2)(D) - Needed Education and Vocational Training

The defendant has engaged in every rehabilitative program which has been made available to him. Due to defendant's life sentence, he has been denied many programs due to the fact he is not eligible for transfer to a lower security facility where many of the rehabilitative programs are made available to the inmate population.

DANGER TO SOCIETY

In the case of *United States v. Marks*, 455 F. Supp. 3d 17 (W.D. N.Y. 2020), the court found that any risk of danger associated with sentence reduction "can be mitigated by supervised release." In *United States v. Williams*, 2020 U.S. Dist. LEXIS 63824, at *9 2020 WL 1751545 (N.D. Fla. Apr. 1, 2020), the court noted with respect to Williams' motion for compassionate release, that while "the Court cannot conclude . . . that he poses no risk at all to public safety . . . the risk of him engaging in further criminal conduct is minimal and can be managed through . . . the terms of his supervised release." See also *United States v. Mondaca*, 2020 U.S. Dist. LEXIS 37483, at *13, 2020 WL 1029024 (S.D. Calif. Mar. 3, 2020), the court noted that the inmate's compassionate release posed minimal danger because inmate "will be supervised by the Probation Department upon his release from custody through a five-year term of supervised release."

At sentencing, the Court imposed a term of five years supervised release on the defendant. Considering defendant's age along with his efforts toward rehabilitation, as

well as his almost exemplary good conduct while in prison, it is almost a certainty that the defendant will never engage in any type of further criminal activity when he is released from prison.

The defendant is not the same person who stood before the Court for sentencing in 1989, and he does not pose any type of threat to any individual or to society at large. The impact of 32 years confinement has been one of nightmare proportion.

RELEASE PLANS

The defendant has a family that loves him, cares about him, and his family is ready and willing to assist him with a successful reentry. The defendant's nephew [REDACTED] is going to provide defendant with an apartment at no cost when he is released. *Exhibit 4.*

CONCLUSION

The defendant presents extraordinary and compelling reasons in support of compassionate release as envisioned by the passage of the First Step Act. Granting a reduction in sentence would not undermine the goals of sentencing under 18 U.S.C. § 3553(a), and is consistent with any policy statements. The defendant poses no danger to the community.

In the interest of justice, the Court should conclude that it is unnecessarily punitive to keep the defendant imprisoned any longer, and he respectfully moves the Court to reduce his sentence to time served, and, if this Court deems it necessary, modify

the supervised release term to include home confinement.

Respectfully submitted,

Ralph Chavous Duke

Ralph Chavous Duke
Defendant pro se

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury I mailed a copy of DEFENDANT'S SUGGESTIONS IN SUPPORT OF MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A), first class postage affixed to:

United States Attorney
District of Minnesota
300 South 4th Street, Suite 600
Minneapolis, MN 55415

for the purpose of service herein. Executed on this 16th day of May, 2022. 28 U.S.C. § 1746.

Ralph Chavous Duke

Ralph Chavous Duke

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4:89-94 (DSD)

UNITED STATES OF AMERICA,

Plaintiff,

v.

RALPH CHAVOUS DUKE,

Defendant.

**GOVERNMENT'S RESPONSE
IN OPPOSITION TO
DEFENDANT'S SECOND
MOTION FOR
COMPASSIONATE RELEASE
UNDER 18 U.S.C.
§ 3582(c)(1)(A)**

Ralph Chavous Duke is serving a life sentence for notorious drug trafficking crimes he committed in the 1980s. This Court denied the defendant's 2021 motion for compassionate release. He is again before this Court asking for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). As in 2021, his motion is based on his health and the length of sentence he is serving. Duke claims those issues are "extraordinary and compelling" reasons warranting compassionate release.

The government respectfully opposes this motion. Duke's motion rehashes the arguments he made when he was resentenced in 2018 and in his 2021 compassionate release motion. No circumstances have materially changed, and this Court should deny Duke's motion.

Procedural and Factual Background

I. Duke's crimes and conviction.

This Court is well familiar with the facts underlying Duke's conviction. With a direct connection to a Columbian cartel, Duke ran a cocaine trafficking empire in the Twin Cities. He moved countless kilograms of cocaine in the 1980s. For instance, trial testimony established Duke was distributing 100 kilograms of cocaine per month in 1988. Revised PSR ¶ 111; *see also* Vol. IV of Trial Transcript at 107-09. At one time, Duke boasted he had a thousand kilograms of cocaine stored in the garage of his house in Los Angeles. Revised PSR ¶ 111.

Duke protected his drug empire with an arsenal of firearms. When police searched his fortified compound in Delano, Minnesota in May 1989, they found a total of eight guns, including a loaded Uzi semiautomatic pistol, two assault shotguns, and two AR-15 semiautomatic rifles. Revised PSR ¶ 70. Police also searched a storage locker in Minneapolis belonging to Duke the same day and found a semiautomatic pistol with a silencer. Revised PSR ¶ 71.

Duke was convicted of a variety of charges: engaging in a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848 (Count 1); aiding and abetting in the attempt to possess 20 kilograms of cocaine with the intent to distribute it (Count 2); five counts of distributing cocaine (Counts 4-8); using a firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c)

(Counts 28-30); and conspiring to distribute cocaine from 1984 to 1989 (Count 32). Original PSR at 1-2.

At Duke's original sentencing, this Court sentenced Duke to concurrent life sentences on the CCE count and the drug conspiracy count, and the attempted possession with intent to distribute 20 kilograms of cocaine count. Revised PSR ¶ 30. The Court added a total of 40 years consecutive for the three firearms counts. *Id.*

After the Eighth Circuit held that the CCE count was duplicative of the Count 32 drug conspiracy, this Court vacated Count 32 on remand. *United States v. Duke*, 940 F.2d 1113, 1120 (8th Cir. 1991); *see also* Doc. No. 140. Then, in 2016, Duke filed a § 2241 petition in the Central District of Illinois based on the 1995 decision the Supreme Court's 1995 decision in *Bailey v. United States*, 516 U.S. 137 (1995), holding that the term "use" in 18 U.S.C. § 924(c) does not include mere possession but "requires evidence sufficient to show an active employment of the firearm by the defendant." *Id.* at 142-43. The court granted the motion as to two of the three § 924(c) counts of conviction, Counts 29 and 30. *See Duke v. Thompson*, C.D. Ill. 17-cv-1024 (JBM) (Sept. 29, 2017). It vacated all three § 924(c) counts, however, and transferred the case back to the District of Minnesota, where it held that Count 28 could be retried. *Id.* at 11.

Upon his return for resentencing in February 2018, this Court resentenced Duke to concurrent life sentences on Counts 2 and 32. Prior to

sentencing, though, Duke submitted a 35-page sentencing memorandum. Doc. No. 282. Duke argued that sentencing law had “changed dramatically” since then, and that “[w]hile a life sentence may have been appropriate in 1990, it no longer is.” *Id.* at 5. He quoted extensively from articles by Judge Patti B. Saris, a former chair of the United States Sentencing Commission. *Id.* at 9-10, 22, 23. He emphasized his age, describing himself as “a sickly 72-year-old man.” *Id.* at 24. Duke next summarized five years of his BOP medical records, which he claimed ran to more than 1400 pages. *Id.* at 26. Duke listed his medical diagnoses including type 2 diabetes, obesity, diabatic retinopathy, diabetic polyneuropathy, high blood pressure, high cholesterol, asthma, osteoarthritis of the knee, spinal stenosis, venous insufficiency, enlarged prostate, intense neck and back pain, heartburn, gastroesophageal reflux disease, constipation, and tooth decay. *Id.* at 24. He described falls that caused injuries and his need for assistance with basic tasks like trimming toenails. *Id.* at 25, 29. Duke also decried the state of care for elderly inmates within the BOP, citing reports about rising number of older inmates and limitations on BOP geriatric care. *Id.* at 25-30.

The Eighth Circuit affirmed Duke’s resentencing on appeal. *United States v. Duke*, 932 F.3d 1056 (8th Cir. 2019). He filed a § 2255 motion attacking his resentencing. Doc. No. 303. This Court denied Duke’s motion in March 2020; Duke did not appeal. Doc. No. 308.

Then, in 2020, after the COVID-19 pandemic set in, Duke began the process of seeking compassionate release. He filed a motion with this Court, emphasizing his age and the same health concerns he raised at his 2018 sentencing. This Court stated that the risk of contracting COVID-19 was a valid concern but one that the BOP was addressing and one that the defendant could mitigate by getting vaccinated. Doc. No. 319, at 5. It also reasoned that “[a]lthough [the defendant] is 75 years old and has served more than 10 years of his sentence, he has not established that he is experiencing a serious deterioration in physical or mental health because of the aging process.” *Id.* Nevertheless, even if the defendant’s concerns were extraordinary and compelling, this Court explained that it would not reduce the defendant’s sentence after considering the § 3553(a) factors. *Id.* The Eighth Circuit summarily affirmed after the defendant appealed. *United States v. Duke*, Appeal No. 21-2808 (Aug. 19, 2021).

II. Duke’s medical condition.

Duke is serving his sentence at FCI Pekin in Illinois. BOP, *Find an inmate*, <https://www.bop.gov/inmateloc/> (last accessed May 26, 2022). In his most recent motion, Duke notes he recovered from covid in 2020 and that he continues to suffer from kidney disease, type II diabetes, acid reflux, high cholesterol, high blood pressure, polyneuropathy, pulpitis, spinal stenosis, and benign prostate hyperplasia. He does not make any effort to explain how those

conditions affect his ability to provide self-care within the prison environment but rather pulls cases where courts have considered each individual condition. Doc. No. 329.

III. Compassionate release proceedings.

Duke made a request for compassionate release to the Warden of FCI Pekin, which was denied on March 10, 2022. Ex. 1 to Def.'s Motion, Doc. No. 329.

Duke's current motion is very similar to his 2018 resentencing position, as rehashed in his first compassionate release motion.. He describes his medical problems, argues covid-related lockdowns have created harsh imprisonment conditions, argues he has been rehabilitated and, primarily, claims that his sentence is unduly lengthy. His claims fail.

Legal Framework

Under 18 U.S.C. § 3582(c)(1)(A), this Court may, in certain circumstances, grant a defendant's motion to reduce his or her term of imprisonment. When the statutory exhaustion requirement is met, and the Court finds that (i) "extraordinary and compelling reasons warrant such a reduction" and (ii) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," then a court may reduce the defendant's term of imprisonment "after considering the factors set forth

in [18 U.S.C. § 3553(a)]”, as they are applicable. § 3582(c)(1)(A)(i). As the movant, the defendant bears the burden to establish that he is eligible for a sentence reduction. *United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016); *United States v. Green*, 764 F.3d 1352, 1356 (11th Cir. 2014).

The Sentencing Commission issued a policy statement addressing reduction of sentences under § 3582(c)(1)(A) prior to the passage of the First Step Act; it has not been amended since then because the Commission lacks a quorum, though recently members have been nominated. The policy statement in pertinent part provides that a court may reduce the term of imprisonment after considering the § 3553(a) factors if the Court finds that (i) “extraordinary and compelling reasons warrant the reduction;” (ii) “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 (iii) “the reduction is consistent with this policy statement.” U.S.S.G. § 1B1.13.

The policy statement includes an application note that specifies the types of medical conditions that qualify as “extraordinary and compelling reasons.” First, that standard is met if the defendant is “suffering from a terminal illness,” such as “metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, [or] advanced dementia.” U.S.S.G. § 1B1.13, cmt. n.1(A)(i). Second, the standard is met if 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.

U.S.S.G. § 1B1.13, cmt. n.1(A)(ii).

The application note also sets out other conditions and characteristics that qualify as “extraordinary and compelling reasons” related to the defendant’s age and family circumstances. U.S.S.G. § 1B1.13, cmt. n.1(B)-(C). Finally, the note recognizes the possibility that the BOP could identify other grounds that amount to “extraordinary and compelling reasons.” U.S.S.G. § 1B1.13, cmt. n.1(D).

Since the First Step Act was enacted, numerous courts granted compassionate release based on factors other than the age, health, and/or family circumstances of a prisoner as provided for in the policy statement. The Eighth Circuit, though, has rejected that approach, at least in part, as contrary to the statute. Although the Eighth Circuit did not need to decide the question of whether a district court is constrained to the factors outlined in § 1B1.13, it expressly found that non-retroactive changes in sentencing law categorically are not extraordinary and compelling circumstances within the meaning of § 3582. *See United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022). The court explained that “[t]he compassionate release statute is not a freewheeling

opportunity for resentencing based on prospective changes in sentencing policy or philosophy.” *Id.*

Yet, that change in philosophy is precisely the primary basis for the defendant’s motion here. He has come forward with no changed circumstances from his last compassionate release motion. The defendant’s bases for relief do not rise to the level of extraordinary and compelling but rather are ordinary signs of aging and are foreseeable of someone serving a life sentence. When this Court denied Duke’s request less than a year ago in July 2021, it was well aware of Duke’s age, his health concerns, and the time he had spent in prison. *See* ECF 319, at 5. However, it concluded that Duke “has not established that he is experiencing a serious deterioration in physical or mental health because of the aging process.” *Id.* The same is true of Duke’s current motion.

Nor has Duke established that a reduction of sentence is warranted. This Court has had occasion to reconsider the § 3553(a) factors as to Duke’s sentence in 2018 when it resentenced him following the vacation of Duke’s § 924(c) convictions and in 2021 when Duke first sought compassionate release. He has come forward with nothing new in this 2022 motion that would dictate a different result.

This Court previously found that “[e]ven if [the defendant] could meet the criteria set forth in U.S.S.G. § 1B1.13(1), the court is not amenable to reducing his sentence. Specifically, the court finds that Duke would pose a

danger to the community if he were to be released given the nature of his crimes of conviction.” Doc. No. 319, at 5. In addition to posing a danger to the community, this Court explained that “a reduction in sentence would not reflect the seriousness of the crime, provide just punishment, or take into account Duke’s history and characteristics.” *Id.*

That remains true today. As the government explained in its previous response, Duke’s drug empire has never been duplicated or surpassed in this District. He is truly a unique defendant, who richly merits his life sentence. His sentence was well earned and reflects the seriousness of such a crime and promotes respect for the law. This Court should deny his motion.

Conclusion

For these foregoing reasons, the defendant’s Second Motion for Compassionate Release should be denied.

Date: June 6, 2022

Respectfully submitted,

ANDREW M. LUGER
United States Attorney

s/Lisa D. Kirkpatrick

BY: LISA D. KIRKPATRICK
Assistant U.S. Attorney
Attorney ID No. 17399IA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

RECEIVED BY MAIL

JUN 22 2022

CLERK, U.S. DISTRICT COURT
MINNEAPOLIS, MINNESOTA

UNITED STATES OF AMERICA
Plaintiff,

v.

Case No. 4:89-cr-94-DSD

RALPH CHAVOUS DUKE
Defendant,

SCANNED
JUN 22 2022
U.S. DISTRICT COURT MPLS

REPLY IN SUPPORT OF COMPASSIONATE RELEASE
UNDER 18 U.S.C. § 3582(c)(1)(A)

The defendant is 76 years old. On February 2, 2022, the defendant requested the Warden at FCI Pekin for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) based on a variety of serious medical ailments, his 32 years of imprisonment, his exemplary conduct while in custody, his work history, and his vulnerability to a COVID-19 infection. On March 10, 2022, the Warden denied the request (ECF 329, Ex.1). The defendant moved for compassionate release with this Court on May 20, 2022 (ECF 328, 329). The legislative intent behind passing the First Step Act was to promote rehabilitation, "unwind decades of mass incarceration," and increase the use and transparency of compassionate release. *United States v. Brown*, 411 F.Supp.3d 446, 448 (S.D. Iowa 2019). Having exhausted his administrative remedies, the defendant requests this Court to exercise its discretion to reduce his sentence to time served under 18 U.S.C. § 3582(c)(1)(A) as amended by the First Step Act.

A. The First Step Act imbues the court with broad discretion to determine what constitutes extraordinary and compelling reasons for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

Before the enactment of the First Step Act, defendants were precluded from moving for sentence reductions based on extraordinary and compelling reasons under 18 U.S.C. § 3582(c)(1)(A)(i). Only the BOP director could

move for such a reduction. Section 603 of the First Step Act amended § 3582(c)(1) to permit a sentence reduction upon a motion by a defendant who has exhausted all administrative remedies. 18 U.S.C. § 3582(c)(1)(A). The statute now permits a court to grant, upon a defendant's motion and after consideration of the applicable sentencing factors in 18 U.S.C. § 3553(a), a sentence reduction if the court finds "extraordinary and compelling reasons warrant such a reduction" and "such reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

B. Even aside from his vulnerability to COVID-19 based on his advanced age and deteriorating medical condition, a sentence reduction to time served is warranted based on defendant's age, the 32+ years of imprisonment he has served, and his minimal risk of recidivism.

Section § 3582(c)(1)(A) provides the Court with broad discretion to reduce the defendant's sentence in two distinct ways. First, the Court may reduce defendant's sentence by finding extraordinary and compelling reasons warrant a reduction under subsection (c)(1)(A)(i). The Government is aware that defendant suffers from a variety of medical conditions, including chronic kidney disease (this issues was never addressed in the first motion), which renders him especially vulnerable to a COVID-19 infection. Studies indicate a 76-year-old male with a "glomerular filtration rate" ["GFR"] between 45-59 has a life expectancy of 6.2 years. [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203814/at Table 1: Chronic kidney disease and life expectancy](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203814/at%20Table%201%3A%20Chronic%20kidney%20disease%20and%20life%20expectancy) (last accessed June 7, 2022). Also, defendant's Type II diabetes is out of control, and he has not seen a specialist regarding this condition since 2019 due to the virus. *United States v. Jeanetta*, 2020 U.S. Dist. LEXIS 226939, 2020 WL 7074620 (D. Minn. Dec. 3, 2020) (finding defendant's medical conditions, including Type-II Diabetes and his age, 65, constitute extraordinary and compelling reasons meriting a sentence reduction).

As noted in his intital pro se motion, the defendant's vulnerability to a COVID-19 infection given his advanced age and deteriorating medical condition constitute extraordinary and compelling reasons for a reduction to time served under § 3582(c)(1)(A)(ii). It is almost impossible for the

defendant to obtain his medical records whereas the Government could obtain the records with a single telephone call. The Government should submit up-to-date medical records to the Court in the case at bar.

Second, the Court has broad discretion to reduce defendant's sentence under 18 U.S.C. § 3582(c)(1)(A)(ii), which provides for relief if... 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). The Government erroneously contends a court must find defendant's age constitutes an extraordinary and compelling reason for relief, but a reduction under § 3582(c)(1)(A)(ii) does not include that language or require any such finding. Instead, subsection (ii) enumerates three factors: defendant's age, the length of imprisonment the defendant has served, and whether release would pose a danger to the community under 18 U.S.C. § 3142(g). The defendant satisfies all three.

1. Age.

Both Congress and the Sentencing Commission have provided a defendant's advanced age is a basis for a sentence reduction under § 3582(c)(1)(A)(ii). Congress established a 70-year-old threshold under § 3582(c)(1)(A)(ii) for age. The Sentencing Commission established a 65-year-old threshold for age. See U.S.S.G. § 1B1.13, comment. n.(1)(B)(i). Though the court's discretion is not confined by the policy statement at § 1B1.13, this pronouncement constitutes persuasive authority regarding when a defendant's age becomes a basis for relief. Defendant is over six years past the threshold set by § 3582(c)(1)(A)(ii), and over eleven years past the 65-year-old threshold established by the Sentencing Commission. Because defendant is well beyond both of these thresholds, the court has authority to reduce his sentence based on his advanced age.

2. Length of imprisonment already served.

Congress has provided a defendant who has served over thirty years' imprisonment is eligible for a sentence reduction under § 3582(c)(1)(A)(ii).

The Sentencing Commission has provided that a defendant is eligible for a sentence reduction if he has served at least ten years of imprisonment or 75% of his term of imprisonment, whichever is less. See U.S.S.G. § 1B1.13, comment. n.(1)(B)(iii). Here, defendant has served over 32+ years in prison, which is beyond the thirty-year threshold established by § 3582(c)(1)(A)(ii). Moreover, defendant has served over three times the 10-year threshold for relief established by the Sentencing Commission. The defendant is not serving a life sentence imposed under 18 U.S.C. § 3559(c), the federal three strikes law, which was not enacted until September 13, 1994. See *United States v. Farmer*, 73 F.3d 836, 839 (8th Cir. 1996). That distinction, however, renders defendant more deserving of leniency here. There is not valid policy basis to treat defendants serving statutorily mandated life sentences more favorably than other defendants, such as the defendant. And if a defendant serving a mandatory life sentence under § 3559(c) is eligible for relief based on the criteria at § 3582(c)(1)(A)(ii), then defendant's satisfaction of the same criteria would constitute extraordinary and compelling reasons for relief under § 3582(c)(1)(A)(i). The district court has "broad discretion in determining whether proffered circumstances warrant a reduction in sentence," *United States v. Loggins*, 966 F.3d 891, 893 (8th Cir. 2020), and the First Step Act placed no limit on the factors a district court may rely upon in making that determination. The very purpose of § 3582(c)(1)(A) is "to provide a safety valve that allows for sentence reductions when there is not a specific statute that already affords relief but 'extraordinary and compelling' reasons nevertheless justify a reduction." *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020)(citing *United States v. Jones*, 482 F. Supp. 3d 969, 980-81(N.D. Calif. 2020)). Relief for the defendant is warranted under both subsections (i) and (ii) of § 3582(c)(1)(A).

3. The defendant no longer poses a danger to the community based on his advanced age, his exemplary conduct in custody, and the substantial rehabilitative efforts he has completed.

The Government opposes relief by defendant's release will endanger the community. The defendant acknowledges the severity of his offense conduct, but the question remains - does the defendant, at age 76 and having served over 32 years in prison, now pose a danger to the community. The science is

undisputed that the risk of an offender's recidivism decreases with age. A federal offender's age upon release closely correlates with recidivism rates. See U.S.S.C., *Recidivism Among Federal Offenders: A Comprehensive Overview* (Mar. 2016). The Sentencing Commission has observed that "recidivism rates decline relatively consistently as age increases." *United States v. Payton*, 754 F.3d 375, 378 (6th Cir. 2014)(citing U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12 (2004)). Bureau of Justice Statistics also support the conclusion that recidivism rates decrease as prisoners age. *Id.* at 379 (citing *United States Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010-12*, NCJ 244205 (April 2014)). The sentencing guidelines also recognize a defendant's age is a relevant consideration at sentencing. *Id.* (citing U.S.S.G. § 5H1.1). The most recent Sentencing Commission study on recidivism found that the recidivism rate of offenders age 65 or older at the time of release is only 13.4%. U.S.S.C., *The Effects of Aging on Recidivism Among Federal Offenders*, p.3 (Dec. 2017). And recidivism is "extremely rare" for inmates that qualify for compassionate release. *United States v. Beck*, 435 F. Supp. 3d 573, 585 (M.D. N.C. June 28, 2019) (citing U.S. Department of Justice, *The Federal Bureau of Prisons' Compassionate Release Program* iv (Apr. 2013)). The defendant was 65 over 11 years ago; the risk of recidivism at this point is minuscule. Elderly offenders pose so low a risk to the public that long or otherwise harsh sentences have little to no utilitarian benefit. *Payton*, 754 F.3d at 379 (citing Dawn Miller, *Sentencing Elderly Criminal Offenders*, 7 Nat'l Acad. Elder L. Att'ys. J. 221, 232 (2011)). Elderly offenders have the lowest rate of recidivism of all types of offenders; only about 1% of elderly offenders ever face a second conviction. *Id.* The defendant's exemplary conduct while in prison also confirms he poses no risk to reoffend. Rehabilitation is a proper consideration in determining whether compassionate release is warranted. See, e.g., *United States v. Marks*, 455 F. Supp. 3d 17, 26 (W.D.N.Y. 2020)(collecting cases). *United States v. Moore*, 2022 U.S. Dist. LEXIS 7632, at *38, 2022 WL 137865 (D. Md. Jan. 14, 2022). Courts place significant weight on a defendant's post-sentencing conduct because it "provides the most up-to-date picture of [his] 'history

and characteristics.'" *Pepper v. United States*, 562 U.S. 476, 492 (2011) (citing 18 U.S.C. § 3553(a)(1)). That said, as noted, rehabilitation alone cannot serve as a basis for compassionate release. *United States v. Johnson*, 2022 U.S. Dist. LEXIS 86081, at *19-20 (S.D. W.Va. May 12, 2022) (Defendant's behavior while in BOP custody is an important indicator of whether he remains a danger to the community. See 18 U.S.C. § 3582(c)(1)(A)(ii). courts place significant weight on a defendant's post-sentencing conduct because it "provides the most up-to-date picture of [his] 'history and characteristics.'"). *United States v. Randall*, 837 Fed. Appx. 1008, 1009 (4th Cir. 2021) ("a district court must provide an individualized explanation for denying a sentence reduction motion under the First Step Act when the defendant presents evidence of his post-sentencing rehabilitation.").

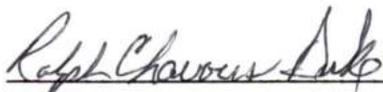
Throughout his 32 years of imprisonment, the defendant has consistently worked in a variety of jobs and received good work evaluations throughout them all. Most important, the defendant has not had any serious incident reports during his 32+ years of incarceration. The defendant also has a stable home plan. Given these circumstances, there is not genuine basis to infer that the defendant would pose a danger to reoffend if released.

A reduction to time served satisfies the statutory objectives of sentencing under 18 U.S.C. § 3553(a)(2). It cannot be reasonably disputed that such a sentence has achieved the statutory sentencing goals of providing just punishment, affording adequate deterrence, protection of the public, and providing for rehabilitation under 18 U.S.C. § 3553(a)(2)(A-D). The defendant is now 76 years old and suffers from a variety of serious illnesses, including Stage 3 kidney disease and Type II diabetes which will most likely cause his death in the next five years, the defendant is close to end-of-life. The defendant seeks mercy from this Court and the privilege of spending the limited time he has left in this life with his family as a free individual. *United States v. Kibble*, 992 F. 3d 326, 334 (4th Cir. 2021) (Gregory, C.J.) ("I recognize the breadth of 18 U.S.C. § 3582(c)(1)'s text not to discount the seriousness of some criminal offenses, but to give effect to the policy choice that

Congress made plain: when extraordinary and compelling circumstances exist, even the most serious offenders may be eligible for mercy.").

WHEREFORE, the defendant moves the Court for mercy, and the reduction of his sentence to time served pursuant to 18 U.S.C. § 3582(c)(1)(A).

Respectfully submitted,

A handwritten signature in cursive script that reads "Ralph Duke Charous". The signature is written in black ink and is positioned above the printed name.

Ralph Duke Charous

Defendant pro se

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4:89-94 (DSD)

United States of America,

Plaintiff,

v.

ORDER

Ralph Chavous Duke,

Defendant.

This matter is before the court upon defendant Ralph Chavous Duke's second pro se motion for compassionate release under 18 U.S.C. § 3582. Based on a review of the file, record, and proceedings herein, and for the following reasons, the motion is denied.

BACKGROUND

In 1989, a jury convicted Duke of numerous drug trafficking and firearm offenses. The court sentenced him to life imprisonment plus forty years, to be served consecutively. The court later vacated count 1 after the Eighth Circuit determined that the convictions on counts 1 and 32 violated the Double Jeopardy Clause. See United States v. Duke, 940 F.2d 1113, 1120 (8th Cir. 1991). On remand, the court re-imposed the original sentence.

In 2016, the court determined that Duke was eligible for a two-level decrease in his base offense level for the drug offenses under a retroactive amendment to the sentencing guidelines. The court reduced his sentence to 365 months plus 40 years, to be served consecutively.

In 2017, Duke moved for relief under 28 U.S.C. § 2241 in the Central District of Illinois, the district in which he was incarcerated. The Illinois court determined that the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995), mandated vacatur of Duke's firearm convictions (counts 28, 29, 30). See Duke v. Thompson, No. 17-cv-1024, 2017 WL 4397950 (C.D. Ill. Sept. 29, 2017). The court then transferred the case to the District of Minnesota for resentencing.

The court resentenced him to life imprisonment on counts 2 and 32 and forty years on counts 4-8, all to be served concurrently. Duke appealed and the Eighth Circuit affirmed. See United States v. Duke, 932 F.3d 1056 (2019). Duke then moved to vacate his new sentence under 28 U.S.C. § 2255. The court denied the motion.

In 2020, Duke moved for compassionate release due to the COVID-19 pandemic. ECF No. 310. The court denied the motion and the Eighth Circuit summarily affirmed that decision. ECF Nos. 319, 324.

On March 10, 2022, the warden of Duke's facility - FCI-Pekin - denied his second request for compassionate release. ECF No. 329, at 7. One inmate at FCI-Pekin is currently infected with the virus and no staff members are positive for COVID-19. See <https://www.bop.gov/coronavirus> (last updated June 22, 2022). Duke has been offered the COVID-19 vaccine but has declined. ECF No. 316, at 158. He cites no medical reason for doing so. His medical records indicate that he contracted COVID-19 in October 2020, was asymptomatic, and recovered without incident. Id. at 85, 92-94.

Duke now moves again for compassionate release, arguing (as he did before) that his age and medical conditions - obesity and diabetes or immunocompromised, among other less concerning diagnoses - are extraordinary and compelling reasons warranting his release from imprisonment. He also argues more generally that his sentence is too harsh and that he is rehabilitated. The government opposes the motion.

DISCUSSION

The First Step Act allows for a reduction in sentence or compassionate release where "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). The court has carefully reviewed the submissions by the parties and finds that Duke has not

established that "extraordinary and compelling reasons" warrant his release under the First Step Act. 18 U.S.C. § 3582(c)(1)(A)(i).

The Sentencing Commission has issued policy statements setting forth the circumstances under which relief may be warranted under § 3582. Among them includes "suffering from a serious physical or mental condition ... 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." U.S.S.G. § 1B1.13, cmt. 1(A). In addition, age may warrant a reduction in sentence if the defendant "(i) is that least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less." U.S.S.G. § 1B1.13, cmt. 1(B).¹

As the court previously held, Duke has not established that he is incapable of providing self-care while in prison or in the event he contracts the virus again, given his age and medical conditions. Nor has he provided additional information that

¹ Age may also warrant release if the defendant is at least 70 years old, has served at least 30 years in prison, and the Director of the Bureau of Prisons (BOP) has determined that the defendant is not a danger to any person or the community. 18 U.S.C. § 3582(c)(1)(A)(ii). Given that the BOP has made no such determination as to Duke, that provision does not apply here.

would change the court's previous analysis and determination. As a result, Duke's health or age still do not provide a basis for compassionate release.

Further, as stated in the previous order, even if Duke could meet the criteria set forth in U.S.S.G. § 1B1.13(1), the court is not amenable to reducing his sentence. The court specifically finds that Duke would pose a danger to the community if he were to be released given the nature of his crimes of conviction. See U.S.S.G. § 1B1.13(2) (providing that the court must deny a sentence reduction unless it determines the Defendant "is not a danger to the safety of any other person or to the community").

Likewise, a reduction in sentence would not reflect the seriousness of the crime, provide just punishment, or take into account Duke's history and characteristics. See 18 U.S.C. § 3553(a)(1), (a)(2)(A).

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that the motion for compassionate release [ECF No. 328] is denied.

Dated: June 28, 2022

s/David S. Doty
David S. Doty, Judge
United States District Court

July 6, 2022

The Honorable Judge David S. Doty
United States District Court for
the District of Minnesota
300 South Fourth Street
Minneapolis, MN 55415

Ralph Chavous Duke
Reg. #04061-041
FCI Pekin
P.O. Box 5000
Pekin, IL 61555

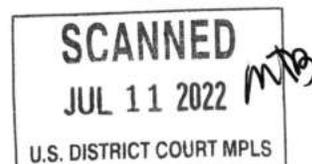
RECEIVED BY MAIL
JUL 11 2022
CLERK, U.S. DISTRICT COURT
MINNEAPOLIS, MINNESOTA

Dear Judge David S. Doty,

In light of the Supreme Court recent decision in *Concepcion*, I respectfully request a reconsideration of my second motion for compassionate release. I have spent the past 3 decades of my life rehabilitating myself through any means available to me. This continued dedication has lowered my pattern score to a "minimal" risk of recidivism.

This BOP verified level regarding the lack of danger that I would currently pose to the safety of the public coupled with the facts below, I believe, at least warrant a second look. I urge this court to please consider the man I am today, not the man I was thirty years ago.

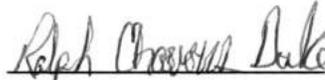
At my resentencing in 2018, a 2 point enhancement under 2D1.1(b)(1) was added to my existing sentence which did not need to be disturbed when my firearms counts (counts 28, 29, and 30) were vacated. This enhancement was applied as if it were mandatory at this resentencing hearing. The 2D1.1(b)(1) enhancement was available at both my original sentencing and when my sentence for these same counts (counts 2 and 32) was reduced from Life to 365 months in 2016 but it was never applied. The application of this guideline enhancement by the government who refused the opportunity to take this conduct to trial, resulted in a Life sentence which also bars me from any relief for recidivism reduction programs under the First Step Act.



The First Step Act was written specifically to address harsh sentences for drug trafficking crimes and it was under this act that I filed for compassionate release.

This court justified its sentence decision based on conduct that occurred thirty years prior but also relied on the application of a new enhancement that added further punishment. This court seemingly did not give consideration to my rehabilitation efforts, the intervening circumstances regarding the current length of my sentence and the steps Congress has taken to provide relief for offenders that demonstrate a clear example of a reformed and remorseful man. I again plead for the court to reconsider it's denial of my compassionate release.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Ralph Chavous Duke".

Ralph Chavous Duke

cc: United States Attorney

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JUL 11 2022

CLERK, U.S. DISTRICT COURT
MINNEAPOLIS, MINNESOTA

DATE REVIEWED: 1/2/2020

INSTITUTION: FCI Pekin UNIT: IN 1

INMATE NAME: DUKE, Ralph REG NO: 04061-041

FIRST STEP ACT (Circle One): ELIGIBLE / INELIGIBLE

RECIDIVISM RISK LEVEL (Circle One): MINIMUM LOW MEDIUM HIGH

SCANNED
JUL 11 2022
U.S. DISTRICT COURT MPLS

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4:89-94(DSD)

United States of America,

Plaintiff,

v.

ORDER

Ralph Chavous Duke,

Defendant.

This matter is before the court upon defendant Ralph Chavous Duke's motion for reconsideration of the court's recent denial of his second motion for compassionate release under 18 U.S.C. § 3582. Based on a review of the file, record, and proceedings herein, and for the following reasons, the motion is denied.

Duke argues that the court should revisit his sentence, consistent with Concepcion v. United States, 142 S. Ct. 2389 (2022), and determine that he is rehabilitated to such a degree that his immediate release is warranted. The court disagrees. First, motions to reconsider require the express permission of the court and will be granted only upon a showing of "compelling circumstances." D. Minn. LR 7.1(j). A motion to reconsider should not be employed to relitigate old issues but rather to "afford an opportunity for relief in extraordinary circumstances." Dale & Selby Superette & Deli v. U.S. Dep't of

Agric., 838 F. Supp. 1346, 1348 (D. Minn. 1993). Duke does not meet this standard here.

Second, Concepcion does not dictate the result Duke seeks. In that case, the United States Supreme Court held that "district courts [may] consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." Concepcion, 142 S. Ct. 2404. In so holding, however, the Court noted that "a district court is not required to be persuaded by every argument parties make, and it may, in its discretion, dismiss arguments that it does not find compelling without a detailed explanation." Id. "Nor is a district court required to articulate anything more than a brief statement of reasons." Id. Here, there is no intervening law or fact that could lead to a reduction in sentence. Although the court continues to commend Duke for his rehabilitation efforts while in prison, it does not serve as a basis for his release.

Third, although Duke noted his rehabilitation in his second motion for compassionate release, he based that motion on his various medical conditions. Nothing in his current motion addresses any change in his health that would warrant reconsideration.

Accordingly, **IT IS HEREBY ORDERED** that the motion for reconsideration [ECF No. 336] is denied.

Dated: July 18, 2022

s/David S. Doty
David S. Doty, Judge
United States District Court