

United States District Court
Western District of Kentucky
 LOUISVILLE DIVISION

UNITED STATES OF AMERICA
V.
John G. Tomes, Jr.

JUDGMENT IN A CRIMINAL CASE
 (For Offenses Committed On or After November 1, 1987)
Case Number: 3:16-CR-113-2-TBR
US Marshal No: 65925-112
 Counsel for Defendant: **Patrick J. Renn, Retained**
 Counsel for the United States: **Mac Shannon**
 Court Reporter: **Terri Turner**

THE DEFENDANT:

- ☒ Pursuant to a Rule 11(c)(1)(C) plea agreement.
- ☒ Pleaded guilty to count(s) 1, 11, 12, 14, 15, 16-18 of the Superseding Indictment, knowingly, willingly and voluntarily on March 1, 2018.
- ☐ Pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ Was found guilty on count(s) after a plea of not guilty

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

<u>Title / Section and Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
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FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☒ **Count 13 of the Superseding Indictment is dismissed on the motion of the United States and the Indictment is dismissed as to this defendant.**

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

6/7/2018
 Date of Imposition of Judgment

DEFENDANT: **Tomes Jr., John G.**CASE NUMBER: **3:16-CR-113-2-TBR****COUNTS OF CONVICTION**

<u>Title / Section and Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
21:846 - CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE METHAMPHETAMINE AND HEROIN	9/20/2016	1s
21:841 & 18:2 - POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE; AIDING & ABETTING	8/18/2016	11s
21:841 & 18:2 - POSSESSION WITH INTENT TO DISTRIBUTE HEROIN; AIDING & ABETTING	8/18/2016	12s
18:922 - FELON IN POSSESSION OF FIREARMS AND AMMUNITION	8/18/2016	14s
18:1956 - CONSPIRACY TO COMMIT MONEY LAUNDERING	9/20/2016	15s
18:1957 & 18:2 - ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY DERIVED FROM UNLAWFUL ACTIVITIES; AIDING & ABETTING	2/22/2016	16s-18s

DEFENDANT: **Tomes Jr., John G.**
CASE NUMBER: **3:16-CR-113-2-TBR**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 240 months as to each of Counts 1, 11, 12 and 15 in the Superseding Indictment, and 120 months as to each of Counts 14, 16, 17 and 18 all which shall be served concurrently, for a total term of 240 months imprisonment.

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
The Defendant be placed in a facility wherein he may participate in a Residential Drug Abuse Treatment Program (RDAP) for treatment of narcotic addiction and/or drug/alcohol abuse and be placed in a facility that is near as possible to Memphis, TN.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ A.M. / P.M. on _____
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ Before 2:00 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.
- ☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ To _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: **Tomes Jr., John G.**CASE NUMBER: **3:16-CR-113-2-TBR****SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years as to each of Counts 1 and 11, 6 years as to Count 12, and 3 years as to each of Counts 14 thru 18, all which shall run concurrently, for a total term of 10 years supervised release.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer.
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.
7. ☐ You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Tomes Jr., John G.**CASE NUMBER: 3:16-CR-113-2-TBR****STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **Tomes Jr., John G.**CASE NUMBER: **3:16-CR-113-2-TBR****SPECIAL CONDITIONS OF SUPERVISION**

14. The defendant must participate in a substance abuse treatment program as approved by the Probation Office and follow the rules and regulations of that program. The defendant shall contribute to the Probation Office's costs of service rendered based upon his/her ability to pay as reflected in his/her monthly cash flow as it relates to the court approved sliding fee scale.

15. The defendant shall abstain from the use of alcohol.

16. The defendant must submit to testing to determine if he/she has used a prohibited substance. The defendant shall contribute to the Probation Office's costs of service rendered based upon his/her ability to pay as it relates to the court approved sliding fee scale. The defendant must not attempt to obstruct or tamper with the testing methods.

17. The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers [as defined in 18 USC 1030(e)(1)], other electronic communications or data storage devices or media, or office to a search conducted by the United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of their release and that the areas to be searched may contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant_____
Date_____
U.S. Probation Officer/Designated Witness_____
Date

DEFENDANT: **Tomes Jr., John G.**CASE NUMBER: **3:16-CR-113-2-TBR****CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
Totals:	\$ 800.00		

- ☒ **The fine and the costs of incarceration and supervision are waived due to the defendant's inability to pay.**
- ☐ The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☒ **Restitution is not an issue in this case.**
- ☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

<u>Name of Payee</u>	<u>** Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order Or Percentage Of Payment</u>
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- ☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . \$
- ☐ The defendant shall pay interest on any fine of more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ The interest requirement is waived for the ☐ Fine and/or ☐ Restitution
- ☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **Tomes Jr., John G.**
CASE NUMBER: **3:16-CR-113-2-TBR**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A ☐ Lump sum payment of \$ _____ Due immediately, balance due
☐ not later than _____, or
☐ in accordance with C, D, or E below); or
- B ☐ Payment to begin immediately (may be combined with C, D, or E below); or
- C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of \$ _____
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after _____ The date of this judgment, or
- D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of \$ _____
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after _____ Release from imprisonment to a term of supervision; or
- E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least \$25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least \$60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ **The defendant shall forfeit the defendant's interest in the following property to the United States: Forfeiture shall be addressed by a separate order from the Court.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

v.

CRIMINAL ACTION NUMBER: 3:16-CR-113-JRW-2

JOHN G. TOMES, JR.

DEFENDANT

ORDER ON MOTION FOR SENTENCE REDUCTION UNDER 18 U.S.C. § 3582(c)(1)(A)
(COMPASSIONATE RELEASE)

Upon the Motion of the Defendant for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A) (DN 244), and after considering the applicable factors provided in 18 U.S.C. § 3553(a) and the applicable policy statements issued by the Sentencing Commission,

It is **ORDERED** that the Motion is **DENIED** after complete review of the Motion on the merits, the Defendant's Supplement to the Motion (DN 247), the United States' Response opposing the Motion (DN 248), and the Defendant's Reply (DN 249).

The Defendant is 33 years old. He argues that "extraordinary and compelling reasons justify compassionate release here. USSG §1B1.13 limits the "extraordinary and compelling reasons" for compassionate release to four categories: (1) the inmate's medical condition; (2) the inmate's age; (3) the inmate's family circumstances; and (4) other reasons "[a]s determined by the Director of the Bureau of Prisons." *See also* BOP Program Statement 5050.50.

The Court has carefully considered the Defendant's asserted reasons for release, including COVID-19, his argument that his sentence should be or would be lower today than when it was imposed, his rehabilitative efforts, his strong family support, and social inequities.

These are not “extraordinary and compelling reasons” for compassionate release. Although the Defendant says he has asthma, the Defendant has not identified any medical ailments that are so severe they would justify release. He is not infected with COVID-19. BOP has taken precautionary measures with regard to COVID-19. He has not shown that BOP is unable to treat him if he gets COVID-19. The Court does not “minimize the risks that COVID-19 poses in the federal prison system But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread.” *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020).

With regard to the Defendants’ other arguments, compassionate-release motion under § 3582(c)(1)(A)(i) is not the proper legal mechanism for arguments about whether the sentencing court should have imposed — or would impose today — a shorter sentence. As for rehabilitation, although the Court hopes that the Defendant has made the progress toward rehabilitation that he describes, rehabilitation is not alone – or in combination with the Defendant’s other reasons — an “extraordinary and compelling” reason. Neither is strong family support. And as for social inequities, even if the Defendant is correct that famous criminals serve too little time in prison, the proper systemic solution would be to lengthen their sentences, not shorten the sentences of others.

The Court has also considered each of the 18 U.S.C. § 3553(a) factors. Compassionate release here would not reflect the seriousness of the crime, deter criminal activity, or protect the public as well as the § 3553(a) sentencing factors. Although the Defendant has asserted reasons for release, the Defendant has not carried his burden of demonstrating reasons that are “extraordinary and compelling.”



Justin R. Walker, District Judge
United States District Court

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0061p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN G. TOMES, JR.,

Defendant-Appellant.

No. 20-6056

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:16-cr-00113-2—David J. Hale, District Judge.

Decided and Filed: March 9, 2021

Before: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Matthew M. Robinson, ROBINSON & BRANDT, PSC, Covington, Kentucky, for Appellant. L. Jay Gilbert, UNITED STATES ATTORNEY’S OFFICE, Louisville, Kentucky, for Appellee.

OPINION

NALBANDIAN, Circuit Judge. After pleading guilty in 2018 to federal drug and firearms charges, John Tomes Jr. was sentenced to twenty years in prison. Now, just a few years later, he asks for a reduced sentence and immediate release. His vehicle is a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). After reviewing Tomes’s motion and briefing, the district court denied his motion. Tomes appeals, and we **AFFIRM**.

I.

John Tomes Jr. has a colorful criminal past. His most recent run-in with the law landed him in federal prison after he got caught up in a drug distribution and money laundering scheme in Louisville. After a grand jury indicted Tomes on drug, firearm, and money laundering charges, Tomes pled guilty. Following this plea, the district court sentenced Tomes to twenty years in prison. But after serving just a small fraction of his sentence, Tomes moved for compassionate release. He says the presence of COVID-19 in prisons, coupled with his increased susceptibility to serious illness from the virus because of chronic asthma, constitutes an “extraordinary and compelling reason” for release. He also says the law has changed since his sentencing, and he would receive a shorter sentence today than he received a few years ago.

The district court ordered the government to respond to Tomes’s motion. But “after complete review” of the motion and its accompanying briefing, the court denied the motion. (R. 250, Order at 1, PageID # 1758.) It said that U.S.S.G. § 1B1.13 “limits the ‘extraordinary and compelling reasons’ for compassionate release” to just a few situations. (*Id.*) And Tomes had not “identified any medical ailments that are so severe they would justify release.” (*Id.* at 2, PageID # 1759.) Tomes had not contracted the virus; the Bureau of Prisons was taking precautionary measures to prevent an outbreak; and Tomes did not show that the Bureau could not treat him if he got sick. The court also rejected Tomes’s contention that his rehabilitation, strong family support, and apparently inequitable sentence were extraordinary and compelling reasons for release. And for good measure, the court “also considered each of the 18 U.S.C. § 3553(a) factors” and found that they did not favor release either. (*Id.*) Tomes now appeals.

II.

We review a district court’s denial of a compassionate release motion for abuse of discretion. *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020). A district court’s consideration of a compassionate release motion embraces three criteria: extraordinary and compelling reasons for release; the § 3553(a) factors; and any applicable policy statements. 18 U.S.C. § 3582(c)(1)(A); *see United States v. Jones*, 980 F.3d 1098, 1107–08 (6th Cir. 2020). And we can affirm a district court’s denial of a compassionate release motion based on the

defendant's failure to meet any one of those criteria. *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021); *Ruffin*, 978 F.3d at 1006.

A.

“The passage of the First Step Act in 2018 expanded access to compassionate release by allowing inmates to bring compassionate-release motions on their own behalf.” *Elias*, 984 F.3d at 518. A district court deciding a defendant's motion for compassionate release must do three things before granting the motion. It must determine that “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A)(i). Likewise, it must also find that “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* § 3582(c)(1)(A). And then the court *may* grant the motion after considering all relevant sentencing factors listed in 18 U.S.C. § 3553(a). *Id.*; *see also Jones*, 980 F.3d at 1108. If the court finds that the defendant fails at *any* one of these three steps, it need not address the others before denying the motion. *Elias*, 984 F.3d at 519. And in considering and weighing the § 3582(c)(1)(A) criteria, “[t]he district court has substantial discretion.” *Ruffin*, 978 F.3d at 1005.

At first blush, this framework seems simple enough. But one snag has beleaguered courts since the passage of the First Step Act. Before the Act's passage in 2018, only the Director of the Bureau of Prisons could move a district court to modify a defendant's sentence. *Id.* at 1003. Now, though, the Act allows for defendants themselves to do so. *Id.* at 1003–04. Yet the Act still prompts district courts to consider “applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A). The problem is, the Sentencing Commission has not updated its policy statement on compassionate release motions—U.S.S.G. § 1B1.13—since Congress passed the First Step Act. *Jones*, 980 F.3d at 1109. So § 1B1.13 still, by its terms, applies only “[u]pon motion of the Director of the Bureau of Prisons.” U.S.S.G. § 1B1.13. In other words, the guideline says nothing about defendant-initiated motions. Meanwhile, commentary to § 1B1.13 limits what constitutes “extraordinary and compelling reasons” for release to just four situations. *See* U.S.S.G. § 1B1.13 cmt. n.1. So the question became whether a district court is limited to just those four situations when determining whether a defendant

moving for compassionate release has shown extraordinary and compelling reasons for a sentence reduction.

We have grappled with this issue in a series of recent cases. *See Ruffin*, 978 F.3d at 1006; *Jones*, 980 F.3d at 1101; *Elias*, 984 F.3d at 519. And in *Elias*, we concluded that “§ 1B1.13 is *not* an applicable policy statement for compassionate-release motions brought directly by inmates, and so district courts need not consider it when ruling on those motions.” 984 F.3d at 519 (emphasis added). Thus, “district courts are not bound by § 1B1.13 in defining extraordinary and compelling reasons for release.” *Id.* at 521.

This all matters here because in denying Tomes’s motion, the district court believed that “USSG § 1B1.13 limits the ‘extraordinary and compelling reasons’ for compassionate release to” the four categories in the guideline’s application notes. (R. 250, Order at 1, PageID # 1758.) That is no longer true. We have now held that § 1B1.13 is not an “applicable policy statement” for *defendant-filed* motions for compassionate release. *Elias*, 984 F.3d at 519. And so the district court erred when it constrained itself to the § 1B1.13 factors in determining whether Tomes established “extraordinary and compelling reasons” for a sentence modification.¹

That is not to say, however, that the court’s error requires reversal. We have reversed a district court’s denial of a defendant’s compassionate release motion when the court’s reliance on § 1B1.13 was the *sole* reason for its denial. *See, e.g., United States v. Sherwood*, 986 F.3d 951, 953 (6th Cir. 2021) (“[W]here a district court relies on [§ 1B1.13] as the sole basis for denying relief, we must remand the case for further consideration.”); *United States v. Whited*, 835 F. App’x 116, 117 (6th Cir. 2021) (reversing and remanding after “district court denied relief on the sole ground that Whited failed to prove that he was not a danger to the community, [and]

¹That is not to say a district court cannot permissively consider those four categories as part of its discretionary inquiry into whether a case presents extraordinary and compelling reasons for release. Rather, the court may not proceed as though § 1B1.13 *constrains* its analysis of what constitutes extraordinary and compelling reasons for release. *See Elias*, 984 F.3d at 519–20. But because district courts are free “to define ‘extraordinary and compelling’ on their own initiative,” *id.*, they may look to § 1B1.13 as relevant, even if no longer binding. *See United States v. Byrd*, --- F. App’x ---, No. 20-20470, 2021 WL 435105, at *2 (5th Cir. Feb. 8, 2021) (per curiam) (affirming a denial of compassionate release after a court looked to § 1B1.13 as providing “helpful guidance” but did not treat it “as the dispositive boundary of what may be judicially determined to be extraordinary and compelling reasons for a sentence reduction.” (quoting *United States v. Gonzalez*, 819 F. App’x 283, 284 (5th Cir. 2020) (per curiam))).

its decision appear[ed] to rest exclusively on § 1B1.13(2)"). In these cases, the district courts did not reference § 3553(a) at all as an independent basis for their denial of the compassionate release motion.

But even if a district court wrongly constrains itself to § 1B1.13 to define extraordinary and compelling reasons for release, we can still affirm if the court uses § 3553(a) as an independent reason to deny relief. Thus, in *Ruffin*, 978 F.3d at 1008, we noted that "[e]ven if Ruffin could prove that the district court mistakenly limited itself to the commentary's list of extraordinary and compelling reasons, that legal conclusion would not entitle him to a reversal." That was because the court "alternatively denied Ruffin relief based on a discretionary balancing of the § 3553(a) factors." *Id.*; see also *United States Sorrell*, --- F. App'x ----, No. 20-1832, 2021 WL 807867 -----, at *2 (6th Cir. Mar. 3, 2021) ("[B]ecause the district court also explained that it would deny relief based on its weighing of the § 3553(a) factors, its application of § 1B1.13 does not require reversal.>").

This all flows from the statutory scheme. Before a district court can grant a defendant's motion for compassionate release, it must find that the defendant satisfies *all three* of § 3582(c)(1)(A)'s prerequisites. 18 U.S.C. § 3582(c)(1)(A); see *Jones*, 980 F.3d at 1108. So "district courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others." *Elias*, 984 F.3d at 519. And for that reason we have said repeatedly that we can affirm a court's denial of a defendant's compassionate release motion based on the court's consideration of the § 3553(a) factors alone. See *id.*; *Ruffin*, 978 F.3d at 1008.

We do so here. The district court denied Tomes's motion "after complete review" of the motion and other briefing the court ordered. (R. 250, Order at 1, PageID # 1758.) The court noted that it had "considered each of the 18 U.S.C. § 3553(a) factors," and a sentence modification "would not reflect the seriousness of the crime, deter criminal activity, or protect the public." (R. 250, Order at 2, PageID # 1759.) Neither did the remaining § 3553(a) factors favor release. So even though the district court incorrectly predicted how we would come to

understand the interplay between the First Step Act and the current § 1B1.13, it still denied Tomes's motion based on its alternative weighing of the § 3553(a) factors.²

We spot no abuse of discretion in the court's doing so. Tomes and his associates dealt in large quantities of various drugs, including methamphetamine, heroin, cocaine, and marijuana. And Tomes did so while armed, despite his status as a felon. Likewise, Tomes laundered tens of thousands of dollars, fruits of his illegal trade. So releasing Tomes after he served just a few years of a twenty-year sentence would not "reflect the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). And it was not an abuse of discretion for the court to find that an armed felon involved in a complex drug distribution scheme might still pose a danger to the public, despite Tomes's protestation that he has been rehabilitated. Nor was it an abuse of discretion for the court to reason that a defendant with a rap sheet like Tomes's might still pose a risk to the public if he was released. And finally, it was not an abuse of discretion for the district court to note that Tomes's release would not deter criminal activity—indeed, quite the opposite, it could put criminals on notice that they can commit serious crimes and serve only a few years in prison for it.

Tomes's arguments to the contrary are unpersuasive. He says he has chronic asthma, which increases his risk of serious illness from COVID-19. But Tomes "did not provide any records in [his] motion to support that [he] has" chronic asthma. *Elias*, 984 F.3d at 520. All he provided were a couple of letters from his parents. So the "district court could have denied [Tomes's] motion for compassionate release on this basis." *Id.* Likewise, Tomes's contention that the BOP cannot handle COVID-19 outbreaks does not persuade us either. *See Elias*, 984 F.3d at 521 ("It was not an abuse of discretion for the district court to conclude that speculation that COVID-19 *could* spread to FPC Alderson was insufficient to justify Elias's release.").

²Although the district court confined its § 3553(a) analysis to just a single paragraph, that was enough. Indeed, we have affirmed orders with less. *See United States v. Navarro*, 986 F.3d 668, 669 (6th Cir. 2021) (affirming form order denial of a compassionate release motion). And given the simplicity of the case, the district court's acknowledgement of Tomes's arguments, its consideration of the § 3553(a) factors, and the intuitive reason for the court's denial of Tomes's motion, "the judge's explanation . . . fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge." *United States v. Chavez-Meza*, 138 S. Ct. 1959, 1967–68 (2018).

One last point. Tomes says he should receive compassionate release because if he were sentenced today for the same crime, he would not have gotten the sentence he did. The district court noted that § 3582(c)(1)(A) was not an appropriate vehicle for Tomes to attack his sentence. Tomes says this was error. And he points out that before the First Step Act, a violation of 21 U.S.C. § 841(b)(1)(A) (one of the statutes to which Tomes pled guilty to violating) carried a mandatory minimum sentence of twenty years if the defendant had a prior conviction for a “felony drug offense.” *See* 21 U.S.C. § 841(b)(1)(A) (pre-2018 version). Section 401 of the First Step Act, however, amended § 841, and it now imposes a shorter mandatory minimum of fifteen years, and only when the prior offense was a “serious drug felony.” *Id.* (current version). Tomes argues that his prior state convictions for dealing in cocaine and trafficking in a controlled substance do not qualify as “serious drug felonies.” Thus, the mandatory floor no longer applies to him, and even if it did, it is shorter now than it was when the district court sentenced him.

Tomes’s argument fails. The First Step Act explicitly says that the amendment to which Tomes refers—§ 401—applies “only where ‘a sentence for the offense has not been imposed as of [the] date of [the Act’s] enactment.’” *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019) (quoting First Step Act of 2018, Pub. L. No. 115-391, § 401(c), 132 Stat. 5221). The district court sentenced Tomes on June 7, 2018. The First Step Act’s effective date is December 21, 2018. *Wiseman*, 932 F.3d at 417. Tomes’s sentence had therefore been imposed as of the Act’s enactment, making § 401 inapplicable. *Id.*; *see also United States v. Richardson*, 948 F.3d 733, 748 (6th Cir. 2018) (“Congress has, in essence, drawn a line in the sand. Defendants sentenced after December 21, 2018, may benefit from Congress’s amendment to § [841(b)(1)(A)], but defendants sentenced before that date cannot.”). And we will not render § 401(c) useless by using § 3582(c)(1)(A) as an end run around Congress’s careful effort to limit the retroactivity of the First Step Act’s reforms.

III.

We **AFFIRM** the district court’s denial of Tomes’s motion for compassionate release.

No. 20-6056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 08, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

JOHN G. TOMES, JR.,

Defendant-Appellant.

ORDER

BEFORE: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Wm L. Hunt

Deborah S. Hunt, Clerk

* Judge Thapar recused himself from participation in this ruling.