

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

RYAN SCOTT KIBBLE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN D. BYRNE
APPELLATE COUNSEL

Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER

DAVID R. BUNGARD
ASSISTANT FEDERAL PUBLIC DEFENDER

I. QUESTION PRESENTED FOR REVIEW

Whether a district court abuses its discretion by refusing to grant compassionate relief to defendant under 18 U.S.C. § 3582(c)(1)(A)(i) where that defendant suffers from multiple chronic health issues and is incarcerated during a global pandemic in a facility where the disease is running rampant.

II. TABLE OF CONTENTS

I.	QUESTIONS PRESENTED FOR REVIEW	1
II.	TABLE OF CONTENTS	2
III.	TABLE OF AUTHORITIES	4
IV.	LIST OF ALL DIRECTLY RELATED PROCEEDINGS.....	7
V.	OPINIONS BELOW.....	7
VI.	JURISDICTION.....	7
VII.	STATUTES AND REGULATIONS INVOLVED.....	8
VIII.	STATEMENT OF THE CASE	9
A.	Federal Jurisdiction	9
B.	Facts Pertinent to the Issue Presented	10
1.	Kibble pleads guilty to interstate travel for illicit sexual purposes and is sentenced to 57 months in prison.	10
2.	Kibble files a motion for compassionate release in response to an outbreak of COVID-19 at FCI Elkton	12
3.	The Fourth Circuit affirms the denial of Kibble’s motion for compassionate release.....	15
IX.	REASON FOR GRANTING THE WRIT.....	17
	The Petition should be granted to determine whether a district court abuses its discretion by refusing to grant compassionate relief to a defendant under 18 U.S.C. § 3582(c)(1)(A)(i) where that defendant suffers from multiple chronic health issues and is incarcerated during a global pandemic in a facility where the disease is running rampant.....	17
A.	The district court had authority to grant Kibble’s request for compassionate release.....	17

B.	The district court abused its discretion by denying Kibble compassionate release based on its evaluation of the § 3553(a) factors.	19
X.	CONCLUSION.....	26
APPENDIX A:	Opinion of the United States Court of Appeals for the Fourth Circuit <i>United States v. Ryan Scott Kibble</i> , 992 F.3d 326 (4th Cir. 2021).....	A-1
APPENDIX B:	Memorandum Opinion and Order of The Honorable David A. Faber entered June 25, 2020 <i>United States v. Ryan Scott Kibble</i> , USDC SDWV Case No. 2:19-cr-00077.....	B-1

III. TABLE OF AUTHORITIES

Cases

<i>Dillon v. United States</i> , 560 U.S. 817 (2010)	17
<i>Smith v. Doe</i> , 538 U.S. 84 (2003).....	23
<i>United States v. Babbitt</i> , 496 F. Supp. 3d 903 (E.D. Pa. 2020).....	17-18
<i>United States v. Ben Yhwh</i> , 453 F. Supp. 3d 1324 (D. Haw. 2020)	20
<i>United States v. Bredimus</i> , 352 F.3d 200 (5th Cir. 2003)	22
<i>United States v. Brown</i> , 2:18-cr-360 (N.D. Ala. 2020).....	20
<i>United States v. Delgado</i> , 457 F. Supp. 3d 85 (D. Conn. 2020).....	20
<i>United States v. Kibble</i> , 992 F.3d 326 (4th Cir. 2021).....	15, 18, 19
<i>United States v. Locke</i> , 2020 WL 3101016 (W.D. Wash. 2020).....	20
<i>United States v. McCoy</i> , 981 F.3d 271 (4th Cir. 2020)	15
<i>United States v. Murphy</i> , 942 F.3d 73 (2d Cir. 2019).....	22
<i>United States v. Phillips</i> , 597 F.3d 1190 (11th Cir. 2010)	18
<i>United States v. Walker</i> , 11-cr-00381 (D. Minn. 2020).....	20
<i>United States v. White</i> , 2:17-cr-00198 (S.D. W.Va. 2020).....	18
<i>United States v. Winston</i> , 1:13-cr-639-RDB (D. Md. 2020)	20

Federal Statutes

18 U.S.C. § 2250.....	23
18 U.S.C. § 2422(b)	9
18 U.S.C. § 2423(b)	9, 21
18 U.S.C. § 3014.....	12

18 U.S.C. § 3156(a)(4)(A)	21
18 U.S.C. § 3156(a)(4)(C)	21
18 U.S.C. § 3231.....	9
18 U.S.C. § 3553(a)	<i>Passim</i>
18 U.S.C. § 3553(a)(1)	19
18 U.S.C. § 3553(a)(2)	19
18 U.S.C. § 3553(a)(3)-(7)	19
18 U.S.C. § 3582(c).....	8
18 U.S.C. § 3582(c)(1)(A)	18
18 U.S.C. § 3582(c)(1)(A)(i)	1, 12, 17
18 U.S.C. § 3583(e)(2)	23
18 U.S.C. § 3583(e)(3)	22
28 U.S.C. § 1254.....	7
28 U.S.C. § 1291.....	9
34 U.S.C. § 20913.....	23

Rules

Fed. R. Crim. P. 11(c)(1)(C)	11
Sup. Ct. R. 10(c)	17
Sup. Ct. R. 13.1	7
Sup. Ct. R. 13.3	7

Guidelines

U.S.S.G. § 1B1.13.....	15
------------------------	----

U.S.S.G. § 1B1.13(B)(2)	21
-------------------------------	----

Other Authorities and Sources

Apoorva Mandabilli, <i>Could You Get Covid-19 Again? It's Very Unlikely, Experts Say</i> , New York Times, July 22, 2020.....	25
---	----

IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Kibble*, No. 2:19-0077, U.S. District Court for the Southern District of West Virginia. Judgment entered June 25, 2020.
- *United States v. Kibble*, 992 F.3d 326 (4th Cir. 2021), U.S. Court of Appeals for the Fourth Circuit. Judgment entered on April 1, 2021.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the denial of Kibble's motion for compassionate release is attached to this Petition as Appendix A. The district court's written order denying Kibble's motion is attached to this Petition as Appendix B.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 1, 2021. No petition for rehearing was filed. This Petition is filed within 150 days of the date the court's judgment, pursuant to this Court's order of March 19, 2020. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

This Petition requires interpretation and application of 18 U.S.C. § 3582(c), which provides, in pertinent part:

- (1)** in any case—
 - (A)** the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
 - (i)** extraordinary and compelling reasons warrant such a reduction.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On March 4, 2019, a criminal complaint was filed in the Southern District of West Virginia charging Ryan Scott Kibble with traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b). J.A. 9.¹ On March 19, 2019, a two-count indictment was filed charging Kibble with the same offense (Count One), in addition to using a facility and means of interstate commerce to persuade, induce, entice, or coerce a person under 18 years of age to engage in sexual activity, in violation of 18 U.S.C. § 2422(b) (Count Two). J.A. 10-12. Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. Kibble pleaded guilty to Count One of the indictment. J.A. 49-52. A Judgment and Commitment Order was entered on February 3, 2020. J.A. 158-166. Kibble filed a timely notice of appeal on February 5, 2020. J.A. 166.²

On May 15, 2020, Kibble filed an emergency motion for compassionate release before the district court. J.A.168-188. On June 25, 2020, the district court denied Kibble's motion. J.A. 360-372. On July 1, 2020, Kibble filed a timely notice of appeal. J.A. 373. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

¹ "J.A." refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

² That appeal is currently pending before the Fourth Circuit. *United States v. Kibble*, Appeal No. 20-4106.

B. Facts Pertinent to the Issue Presented

This Petition arises from Kibble's incarceration following his conviction for interstate travel to engage in illicit sexual conduct. After being sentenced and reporting to FCI Elkton in Ohio, Kibble was stuck in the middle of one of the original outbreak hotspots for the COVID-19 pandemic. He sought relief from the district court due to his particular chronic medical conditions that make him unusually susceptible to suffering serious consequences due to COVID-19. The issue in this Petition is whether the district court should have granted Kibble's request and released him from incarceration.

1. Kibble pleads guilty to interstate travel for illicit sexual purposes and is sentenced to 57 months in prison.

Around March 1, 2019, Kibble began talking with an undercover law enforcement officer, whom he believed was a 14-year-old girl, on a social media application. They eventually began communicating via text messages and telephone. During these conversations Kibble arranged to meet with the fictitious girl and discussed various sexual acts. On March 2, 2019, after Kibble finished work in Ohio, he returned to West Virginia (where he lived) and proceeded to the location where the two had agreed to meet. J.A. 62-63. He was arrested at that time. J.A. 379. Kibble was eventually released on bond after approximately a month of detention. J.A. 375.

Kibble was initially charged via complaint with interstate travel to engage in illicit sexual activity. J.A. 9. He was then charged in a two-count indictment with that offense as well as attempted enticement of a minor. J.A. 10-12. Kibble entered into a binding plea agreement with the Government under Rule 11(c)(1)(C) of the Rules of Criminal Procedure³ in which he agreed to plead guilty to the interstate travel count and the Government would dismiss the other charge. J.A. 53-54. Kibble entered a guilty plea on August 12, 2019. J.A. 376.

Following Kibble's guilty plea a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. J.A. 374-401. The recommended advisory Guideline range calculated in the PSR was 46 to 57 months in prison. J.A. 390. Neither party objected to that calculation. J.A. 397-401. In the PSR the probation officer provided a lengthy summary of Kibble's physical condition, which includes a heart disease Kibble has suffered from since birth (tricuspid atresia) and recently-diagnosed non-alcohol-related cirrhosis of the liver. J.A. 384-388.

Kibble's sentencing hearing was held on January 14, 2020. J.A. 120-156. The district court adopted the Guideline calculations in the PSR and imposed a sentence of 57 months in prison, followed by a 15-year term of supervised release with numerous special conditions. J.A. 133, 145. The district court also imposed a \$5000

³ The agreement called for the district court to impose sentence of imprisonment between 46 and 78 months and a 15-year term of supervised release. J.A. 57.

special assessment upon Kibble under 18 U.S.C. § 3014, over Kibble's objection. J.A. 151, 153.

Following the imposition of sentence, Kibble filed a notice of appeal. He has argued that the district court erred in imposing the \$5000 special assessment. *United States v. Kibble*, Appeal No. 20-4106 (4th Cir.), Dkt. No. 10 at 6-16. He did not challenge any other aspect of his sentence. That appeal is currently pending before the Fourth Circuit.

2. Kibble files a motion for compassionate release in response to an outbreak of COVID-19 at FCI Elkton.

On May 15, 2020, Kibble filed an emergency motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). J.A. 168-188. Kibble argued that the COVID-19 pandemic, combined with Kibble's particular chronic medical conditions, created "extraordinary and compelling" reasons to justify compassionate release. J.A. 176-178. That was particularly true because Kibble was incarcerated at FCI Elkton, which was hit especially severely by the pandemic. J.A. 178-182. Kibble argued that releasing him was consistent with the sentencing factors set out in 18 U.S.C. § 3553(a) and consistent with applicable Guideline provisions (to the extent they applied at all). J.A. 182-188. The Government countered that "after serving only 3 months in prison, the assessment of § 3553(a) factors does not warrant compassionate release" in light of Kibble's "offense and the inherent risk to the community by release of a sex offender prior to any meaningful rehabilitation or

treatment.” J.A. 225. The parties refined their arguments over successive rounds of pleadings.

The district court denied Kibble’s request on June 25, 2020. J.A. 360-372. The court noted that Kibble was “born with a serious heart condition” and his regular cardiologist (whom Kibble had seen before reporting to FCI Elkton) “had indicated that patients with ‘complex congenital heart disease carry an increased risk if exposed to the COVID-19 virus.” J.A. 361. The court also noted that Kibble suffered from “non-alcohol related cirrhosis of the liver.” *Ibid.* In addition, during the pendency of his compassionate release motion, Kibble tested positive for COVID-19, a development which led the Government to argue that Kibble’s request should be considered as being moot. J.A. 362.

The district court concluded that Kibble had exhausted his administrative remedies in the Bureau of Prisons by asking for compassionate release and having that request denied. Therefore, the district court could proceed to the merits of Kibble’s claim. It explained that to “warrant compassionate release,” Kibble had to show “(1) extraordinary and compelling reasons warrant a sentence reduction; (2) he is not a danger to the safety of others or the community; and (3) the reduction satisfies the sentencing factors in 18 U.S.C. § 3553(a).” J.A. 364.

The district court did conclude that Kibble had shown there were extraordinary and compelling reasons in his case. J.A. 364-366. That was because Kibble suffered from two medical conditions that “make a person of any age at

higher risk for serious illness from COVID-19” and could show “a particularized risk of contracting the disease” given his incarceration at FCI Elkton. J.A. 365. Even though at the time of the district court’s order Kibble had already contracted COVID-19, the court “finds there are ‘extraordinary and compelling reasons’ . . . to support a reduced sentence or early release.” J.A. 366.

However, the district court ultimately concluded that Kibble could not make the other showings required for compassionate release. First, the district court concluded that it “cannot find that a sentence reduction would not result in danger to the safety of others in the community,” noting that Kibble, “armed with condoms, crossed state lines for the express purpose of having sex with a fourteen-year-old girl.” J.A. 366. “This,” the district court concluded, “is a crime of violence.” *Ibid.* Although this was Kibble’s first offense and no actual child was ever put at risk, the district court “cannot . . . ignore the dangerous nature of [Kibble]’s conduct.” *Ibid.*

The district court went on to conclude that even if it held that Kibble was not a danger to the community, “the factors set forth in 18 U.S.C. § 3553(a) compel the denial” of Kibble’s motion. J.A. 367. The district court noted that the initial 57-month sentence it imposed was based “on the seriousness of [Kibble]’s crime, and the need to promote respect for the law, to provide just punishment for the offense, to adequately deter criminal conduct, and to avoid unwarranted disparities.” J.A. 368. In light of those considerations, the district court “finds it very significant that [Kibble] has served less than a tenth of his sentence,” concluding that “a sentence

reduction of approximately 90 percent would be entirely inconsistent with the sentencing factors set forth in § 3553(a).” *Ibid.* The district court also concluded that, while recognizing Kibble’s heightened risk with regards to COVID-19, it “cannot ignore that [Kibble] has already contracted the virus and has not suffered any serious complications.” J.A. 370. The district court reiterated that the “§ 3553 factors are dispositive in this case – especially the very small amount of time that [Kibble] has served for his crime.” J.A. 371. Even “converting [Kibble]’s sentence to one of home confinement . . . would disserve these important § 3553(a) factors.” J.A. 372.

3. The Fourth Circuit affirms the denial of Kibble’s motion for compassionate release.

Kibble appealed, challenging the district court’s denial of his motion for compassionate release. The Fourth Circuit affirmed, concluding that the district court did not abuse its discretion in rejecting Kibble’s request for compassionate release. *United States v. Kibble*, 992 F.3d 326 (4th Cir. 2021). Initially, the court held that the district court had improperly relied on U.S.S.G. § 1B1.13 and its requirement that the person seeking relief not be a danger to the community, based on recent precedent holding that there are no applicable Guidelines in such cases. *Id.* at 330-331, *citing United States v. McCoy*, 981 F.3d 271, 281-283 (4th Cir. 2020). However, the court went on to hold that there was no abuse of discretion in the district court’s evaluation of the relevant factors under 18 U.S.C. § 3553(a), concluding that the district court citing the short time Kibble had served on his

sentence as “very significant” was not the same as “dispositive.” *Id.* at 331. The court also concluded that the district court “reconsidered the § 3553(a) factors in view of the extraordinary and compelling circumstances” present in this case, including “the conditions at FCI Elkton, and the severe risks arising out of those circumstances.” *Id.* at 332. Therefore, the district court did not abuse its discretion.

IX. REASONS FOR GRANTING THE WRIT

The Petition should be granted to determine whether a district court abuses its discretion by refusing to grant compassionate relief to a defendant under 18 U.S.C. § 3582(c)(1)(A)(i) where that defendant suffers from multiple chronic health issues and is incarcerated during a global pandemic in a facility where the disease is running rampant.

This case arises from an unprecedented situation – the spread of a global pandemic in which incarcerated persons are particularly vulnerable to exposure and therefore serious (potentially fatal) illness. *United States v. Babbitt*, 496 F. Supp. 3d 903, 911 (E.D. Pa. 2020)(the “CDC has recognized the particular vulnerability of incarcerated persons to COVID-19 infection” as they “live, work eat, study and participate in activities in congregate environments, with few options for social distancing due to crowded conditions”). Courts have the authority under 18 U.S.C. § 3582(c)(1)(A)(i) to alleviate that risk by granting compassionate release to inmates who are particularly vulnerable to illness. Whether a district court in such a situation abuses its discretion in rejecting such a request, is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. The district court had authority to grant Kibble’s request for compassionate release.

A sentence imposed by a district court is final and cannot be revisited absent express Congressional authority to do so. *Dillon v. United States*, 560 U.S. 817, 819 (2010). Under § 3582(c)(1)(A)(i), a court “may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent they are

applicable, if it finds that extraordinary or compelling reasons warrant such a reduction.” Although the provision is colloquially referred to as “compassionate release,” the language of the statute only limits the reasons a court may reduce a defendant’s sentence to those that are “extraordinary or compelling,” regardless of how they arise. Among the reasons courts have found that meet that standard are the defendant’s medical condition as it relates to the current COVID-19 pandemic. *See, e.g., United States v. White*, 2:17-cr-00198 (S.D. W. Va. 2020), Dkt. No. 418 (reducing sentence due to defendant’s medical condition during COVID-19 pandemic); *Babbitt*, 496 F. Supp. 3d at 913-914.

Until recently the ability to seek a reduction in a defendant’s sentence on those grounds rested entirely with the Bureau of Prisons. *See, e.g., United States v. Phillips*, 597 F.3d 1190, 1194-1195 (11th Cir. 2010). However, after the passage of the First Step Act in 2018, a defendant may now seek a reduction from the court directly, provided that he first seeks a reduction from the Bureau of Prisons and that request has either been denied or 30 days has passed. 18 U.S.C. § 3582(c)(1)(A). There is no dispute that the combination of the COVID-19 pandemic, Kibble’s existing medical conditions, and his incarceration at FCI Elkton constituted extraordinary and compelling reasons to support a grant of compassionate release. J.A. 364-366; *Kibble*, 992 F.3d at 336 (noting the district court’s conclusion and that the Government “did not challenge that finding”) (Quattlebaum, J., concurring). At

issue is whether the district court abused its discretion in not using the authority that finding gave it to grant Kibble compassionate release.

B. The district court abused its discretion by denying Kibble compassionate release based on its evaluation of the § 3553(a) factors.

The district court concluded that “the factors set forth in 18 U.S.C. § 3553(a) compel the denial” of Kibble’s motion, which the Fourth Circuit found not to be an abuse of discretion. J.A. 367; *Kibble*, 982 F.3d at 332. A full consideration of those factors shows that granting Kibble compassionate release is appropriate and the district court abused its discretion by holding otherwise.

Section 3553(a) sets forth the Congressionally-designated purposes of sentencing. Those purposes are: (1) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment; (2) the need for adequate deterrence; (3) the need to protect the public from further crimes of the defendant; and (4) to ensure the defendant is provided “with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2). In addition, the district court must also consider the nature of the offense and characteristics of the defendant, the kind of sentences available, the type and extent of sentence set forth by the Guidelines and related policy statements, avoiding unwarranted disparity in sentencing, and the need of victims to receive restitution. 18 U.S.C. § 3553(a)(1), (3)-(7).

The district court's reasoning with regards to the § 3553(a) factors was that the 57-month sentence it imposed in January 2020 accurately captured the various factors and reducing Kibble's sentence would be "entirely inconsistent" with those factors. J.A. 368. That was particularly true because Kibble (at the time of the district court's order) had only served approximately four months of his sentence. *Ibid.* While relevant to the ultimate decision to grant compassionate release, that factor should not be dispositive. As one court recently noted, "while the length of time remaining on his sentence is significant . . . numerous district courts have found similar circumstances to justify compassionate relapse." *United States v. Walker*, 11-cr-00381 (D. Minn. 2020), Dkt. No. 282 at 14 (collecting cases). Indeed, numerous courts have granted motions for compassionate release where the defendant was only months into a lengthy sentence. *See, e.g., United States v. Locke*, 2020 WL 3101016, at *1, 6 (W.D. Wash. 2020)(granting release where defendant had "served no more than six months of his 62-month sentence"); *United States v. Brown*, 2:18-cr-360 (N.D. Ala. 2020), Dkt. No. 35 (granting release to defendant 11 months into 60-month sentence); *United States v. Ben Yhwh*, 453 F. Supp. 3d 1324, 1327-1328 (D. Hawaii 2020)(granting release to defendant less than 13 months into 60-month mandatory minimum sentence); *United States v. Delgado*, 457 F. Supp. 3d 85 (D. Conn. 2020)(granting release to defendant 29 months into 120-month sentence); *United States v. Winston*, 1:13-cr-639-RDB (D. Md. 2020), Dkt. Nos. 294, 295 (granting release to defendant 36 months into 120- month mandatory minimum

sentence). Kibble reported to FCI Elkton on February 14, 2020. J.A. 360. He has been now been incarcerated for more than eighteen months, not counting the month he spent in custody after his initial arrest. Granting him compassionate release now would be in line with what other courts have done in similar cases and would comply with the requirements of § 3553(a).

Although the Fourth Circuit correctly held that there were no applicable Guidelines for the district court to apply in this case, the district court's finding that Kibble was a "danger to the community," made in application of U.S.S.G. § 1B1.13(B)(2), nonetheless implicates the § 3553(a) factors. The record shows that, regardless of how his offense of conviction is designated by Congress, Kibble's release would not be a danger to the community.

While it is true that Congress had designated nearly every sex offense involving children as a crime of violence, 18 U.S.C. § 3156(a)(4)(C), the sheer breadth of that designation will necessarily sweep up offenses which are not, in the usual understanding, violent. Another subsection of that statute employs a more common and discerning definition of crime of violence: "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 3156(a)(4)(A). Categorically, the statute under which Kibble was convicted, 18 U.S.C. § 2423(b), does not have an element that involves violence or the threat of violence. All that is needed to secure a conviction is to prove that the defendant engaged in interstate travel for the

purpose of engaging in illicit sexual conduct. *United States v. Murphy*, 942 F.3d 73, 79 (2d Cir. 2019). Completed (or even attempted) sexual conduct is not required for a conviction. The offense is complete when the defendant crosses a state line with the requisite intent, regardless of what happens afterwards. *United States v. Bredimus*, 352 F.3d 200, 207 (5th Cir. 2003). In this case there was never a chance that anything would happen afterwards as the “minor” was an undercover police officer. J.A. 378.

Other evidence shows Kibble would not be a danger to the community if he was released. While the facts of Kibble’s offense are serious and disturbing, the granting of his motion will not result in Kibble being returned to society to fend for himself. As part of his sentence, Kibble is required to serve a 15-year term of supervised release.⁴ J.A. 161. That term includes numerous special conditions that will allow Kibble’s probation officer to monitor his behavior and further rehabilitation. For example, Kibble is required to take part in a “program of mental health treatment,” in addition to “submit[ting] to an evaluation by a qualified mental health professional . . . who is experienced in the treatment of sex offenders” and participate in treatment as deemed necessary. J.A. 163. Other conditions restrict Kibble’s ability to be around minors, use computers, and engage in certain activities. *Ibid.* If Kibble violates any of these conditions, he can be returned to prison. 18 U.S.C. § 3583(e)(3). In addition, if Kibble struggles on supervised release

and shows a need for continued supervision, the district court can extend his term of supervised release. 18 U.S.C. § 3583(e)(2).

Kibble's ability to do well on supervision is shown by his performance while on bond with a special condition of electronically monitored home confinement. After being in custody for approximately a month after his arrest, Kibble was released on bond. J.A. 374. While there were some issues related to Kibble's electronic monitoring, which "were related to issues associated with his home telephone line," there was no indication that Kibble was willfully flouting the conditions of his bond. J.A. 378. He was on bond for approximately nine months pending sentencing. J.A. 374. Indeed, after it imposed Kibble's 57-month sentence, the district court allowed him to remain on bond and self-report to prison, noting that the "problems were electronic and telephone problems that weren't your fault," concluding that "you're not a flight risk or a danger to any other person or the community under the present circumstances." J.A. 154. The district court offered no explanation of why that was true in January, but not now.

In addition to his supervision by a probation officer, Kibble will be required, as a condition of supervised release and under federal law, to register as a sex offender. J.A. 163; 34 U.S.C. § 20913; 18 U.S.C. § 2250. The purpose of such registration is to make the public aware of sex offenders in their community. *See Smith v. Doe*, 538 U.S. 84, 99 (2003)(the "purpose and the principal effect of

⁴ Kibble would begin that lengthy term of supervision at his home in Parkersburg,

notification are to inform the public for its own safety, not to humiliate the offender”). This provides an extra layer of protection to the community as anyone who does not want to have anything to do with Kibble can do just that.

The district court’s decision also gives insufficient weight to Kibble’s current medical condition and the potential impact of COVID-19 upon him. Kibble was born with a serious heart condition, tricuspid atresia, in which his heart had three, instead of four chambers. J.A. 382-386. This condition required Kibble to undergo two open heart surgeries and a cardiac catheterization procedure as a child. In 2018, Kibble underwent a surgical procedure which redirected the blood flow from his lower body to his lungs in order to increase the oxygen level in his blood. Kibble’s heart has never fully developed and he continues to be treated by a pediatric cardiologist at West Virginia University Hospitals. This condition is one which will require constant oversight and monitoring for the rest of Kibble’s life. Kibble’s non-alcohol related cirrhosis of the liver was only recently diagnosed after his arrest. This condition also one that will remain with Kibble for the rest of his life and require constant monitoring. The fact that Kibble has previously tested positive for the COVID-19 virus does not prevent him from suffering a re-occurrence of the virus given its continued active presence at FCI Elkton. *See Babbitt*, 496 F. Supp. 3d at 913-914 (detailing examples of reinfection).

West Virginia where his wife and three-year-old daughter reside.

Given the novelty of this virus, no medical expert can predict what the long-term health effects will be for those who survive a COVID-19 infection. Some hospitalized patients are reporting that their symptoms remain weeks and months after becoming infected.⁵ Some of the persistent complications which have arisen is permanent scarring of the lungs, damage to the heart's muscle cells, and damage to the central nervous system. *Ibid.* One study published in the New England Journal of Medicine documented the ongoing neurological problems in COVID-19 patients ranging from cognitive difficulties to confusion.⁶ The National Heart, Lung, and Blood Institute is about to undertake a clinical study of 3,000 adult patients who were admitted to a hospital for a confirmed case of COVID-19 to look for the long-term effects on their health.⁷ Therefore, the district court's conclusion that Kibble was asymptomatic for four weeks after testing positive does not mean that Kibble's body may not have sustained some type of long term damage which has yet to be noticed. It also does not prevent Kibble from getting re-infected while he remains incarcerated at FCI Elkton. Nor does it preclude a scenario where the initial positive test was false and Kibble remains susceptible to infection. *See* Apoorva Mandabilli, *Could You Get Covid-19 Again? It's Very Unlikely, Experts Say*, New

⁵ *See* <https://www.futurity.org/long-term-covid-19-effects-2400212-2/>;
www.healthline.com/health-news/lifelong-lung-damage-the-serious-covid-19-complication-that-can-hit-people-in-their-20s;

⁶ *See* <https://www.bbc.com/future/article/20200622-the-long-term-effects-of-covid-19-infection>

⁷ *See* <https://www.nhlbi.nih.gov/news/2020/looking-forward-understanding-long-term-effects-covid-19>

York Times, July 22, 2020 (examining cases where someone had a minor bout of COVID-19 then developed a more severe case weeks later).

X. CONCLUSION

The district court correctly concluded that conditions existed to warrant Kibble's compassionate release. Its ultimate decision not to do so, relying overly on the nature of Kibble's offense and the length of time he had served in prison, was an abuse of discretion. For the reasons stated, this Court should grant certiorari in this case.

Respectfully submitted,

RYAN SCOTT KIBBLE

By Counsel

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER

A handwritten signature in black ink, appearing to read 'J.D. Byrne', is written over a horizontal line.

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

A handwritten signature in black ink, appearing to read 'D.R. Bungard', is written over a horizontal line. The word 'for' is written in italics to the right of the signature.

David R. Bungard
Assistant Federal Public Defender