APPENDIX

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A-1

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 27, 2021
Decided July 16, 2021

Before

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-2876

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT D. SUTTON,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:01-cr-00032-bbc-3

Barbara B. Crabb,
Judge.

O R D E R

Robert Sutton is serving a 52-year federal sentence for thirteen armed robberies he committed in 1997 and 1998. The sentence includes so-called stacked penalties for three convictions under 18 U.S.C. § 924(c)—one that resulted in a mandatory sentence of five years and two others that resulted in mandatory consecutive sentences of 20 years each. In July 2020 Sutton invoked 18 U.S.C. § 3582(c)(1)(A) and sought a sentencing reduction based not only on the health risks of exposure to COVID-19 within prison, but also on the amendment Congress enacted in the First Step Act of 2018 to limit the circumstances in which multiple sentences for the commission of a firearms offense under § 924(c) can be stacked—imposed to run consecutively to one another. The district court denied Sutton's motion, concluding in part that the discretion in

§ 3582(c)(1)(A) to reduce a sentence upon finding "extraordinary and compelling reasons" does not include the authority to reduce § 924(c) sentences lawfully imposed before the effective date of the First Step Act's anti-stacking amendment. Our recent decision in *United States v. Thacker*, — F.4th — (slip op.) (7th Cir. July 15, 2021), resolved that legal question in the same way as the district court. And as for Sutton's health conditions, the district court appropriately exercised its discretion to deny release on that ground. So we affirm.

I

A

In 1997 Sutton joined a group that then robbed 13 businesses in Madison, Wisconsin over the next year. The crew brandished firearms during most robberies, holding victims at gunpoint and demanding money. A 21-count grand jury indictment filed in 2001 named Sutton in seven of the counts—one for bank robbery by intimidation (18 U.S.C. § 2113(a)), three for Hobbs Act robbery (18 U.S.C. § 1951), and three for using a firearm during several of the robberies (18 U.S.C. § 924(c)). A jury convicted Sutton on all counts, and the district court sentenced him to 52 years' imprisonment. This sentence consisted of concurrent 87-month terms for the robbery counts, plus a mandatory consecutive 5-year term for the first § 924(c) count and two mandatory consecutive 20-year terms for the other § 924(c) counts.

We upheld Sutton's sentence on direct appeal. See *United States v. Sutton*, 337 F.3d 792 (7th Cir. 2003). Sutton has since attempted, without success, to obtain relief from his sentence under 28 U.S.C. § 2255.

In July 2020 Sutton invoked § 3582(c)(1)(A) and requested compassionate release. He provided two separate grounds for relief. Sutton first argued that the 45-year sentence for his three § 924(c) convictions is an extraordinary and compelling reason warranting immediate release because, after Congress amended that provision as part of the First Step Act, his convictions would now carry an aggregate mandatory minimum term of only 15 years. He then argued that his medical conditions (diabetes, high blood pressure, and high cholesterol) put him at increased risk of serious complications from COVID-19.

B

The district court denied Sutton's motion, observing that, to obtain relief, Sutton had to show an "extraordinary and compelling" reason for release under § 3582(c)(1)(A)

and that he did not present a danger to the community under U.S.S.G. § 1B1.13(2). The policy statement in § 1B1.13 states that any reason—other than medical conditions, age, and family circumstances—must be deemed extraordinary and compelling by the Bureau of Prisons but the Bureau here had not made such a finding regarding the First Step Act's amendment to § 924(c).

At the time of its decision, the district court did not have the benefit of our guidance in *United States v. Gunn*, in which we concluded that the policy statement applies only to motions brought by the Bureau of Prisons. See 980 F.3d 1178, 1180 (7th Cir. 2020). While the policy statement may guide a district court's discretion, it does not have binding effect. See *id.*

But the district court's reference to § 1B1.13 is inconsequential because, as part of denying Sutton's motion, the court exercised its discretion independent of the policy statement's instructions. The district court concluded that the change to § 924(c) does not make "extraordinary" the continued enforcement of a legally imposed and still-valid sentence. A contrary conclusion, the district court added, would impermissibly circumvent Congress's choice in the First Step Act to make § 924(c) apply prospectively.

In rejecting Sutton's health-based argument for release, the district court reasoned that release was unnecessary to protect him from COVID-19 because the United States Penitentiary at Allenwood, Pennsylvania, where Sutton is housed, had few cases. The court the underscored that, regardless, it would not release Sutton because it could not conclude that he posed no danger if released.

Sutton now appeals.

II

In the First Step Act of 2018, Congress amended the sentencing scheme prescribed by 18 U.S.C. § 924(c). Specifically, § 403(a) of the enactment limited the circumstances under which the heightened mandatory minimum sentence applies to second or subsequent convictions under § 924(c). That penalty now applies only if the offender's first § 924(c) violation is final at the time of a second or subsequent violation. Congress also made plain in § 403(b) that the amendment "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." By its terms, then, the First Step Act's anti-stacking amendment does not apply retroactively.

The district court got it exactly right when it concluded the change to § 924(c) could not constitute an extraordinary and compelling reason warranting a reduction in Sutton's sentence. We held just that in *Thacker*, slip op. at 12 ("At step one, the prisoner must identify an 'extraordinary and compelling' reason warranting a sentence reduction, but that reason cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c)."). While Sutton's pre-First Step Act sentence may carry significantly longer mandatory minimums than someone convicted of the same crimes today, the district court may not use the discretion conferred by § 3582(c)(1)(A) to reduce a sentence on that basis. As we said in *Thacker*, "[t]he proper analysis of a motion for a discretionary sentencing reduction under § 3582(c)(1)(A) based on 'extraordinary and compelling' reasons proceeds in two steps." *Id.*, slip op. at 12. The district court may consider the change to § 924(c) when weighing any applicable § 3553(a) factors—but only after it first finds an extraordinary and compelling reason warranting a sentencing reduction.

We close by addressing Sutton's challenge to the district court's denial of his compassionate release motion on the basis that his health conditions placed him at high risk of contracting COVID-19 within USP Allenwood. We see no abuse of discretion. See *United States v. Saunders*, 986 F.3d 1076, 1078 (7th Cir. 2021) ("We review a district court's denial of compassionate release for abuse of discretion.").

While acknowledging Sutton's serious medical conditions and the pandemic, the district court appropriately exercised its broad discretion to deny release. "[C]ourts are not compelled to release every prisoner with extraordinary and compelling health concerns." *Id*. Once it finds an extraordinary or compelling reason for release, the district court must still weigh any applicable § 3553(a) sentencing factors to determine if release is appropriate. See 18 U.S.C. § 3582(c)(1)(A). The district court found that the Bureau of Prisons had implemented protections at the Allenwood facility to reduce the risk of infection. These protections resulted in USP Allenwood recording only two active cases at the time of the court's decision. More fatal to Sutton's appeal, however, is that the district concluded that Sutton continued to pose danger to the community if released, since he was a member of a crew responsible for a string of armed robberies.

For these reasons, we AFFIRM.

A-2

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT SUTTON,

Defendant.

OPINION AND ORDER

01-cr-32-bbc

- -

Defendant Robert Sutton was charged in 2001 with a variety of crimes, three of which involved charges under 18 U.S.C. § 924(c) and carried penalties that increased with the number of crimes. He was found guilty and sentenced to 52 years of incarceration. He now moves under the First Step Act for compassionate release and resentencing, asking the court to reduce his present sentence to the approximately 18½ years he has already served. Dkt. ##339 and 353. He contends that there are extraordinary and compelling reasons for such a reduction.

The government opposes defendant's motion on the ground that the court does not have the authority to make the reduction he is seeking. I agree. Although defendant's sentence is unusually long, I am not persuaded that defendant has shown an extraordinary and compelling reason for compassionate release under the circumstances of his case or that the court has the authority to reduce his sentence. Accordingly, his motion will be denied.

The following facts are drawn from the administrative record (AR).

BACKGROUND

Defendant was convicted in March 2002 of seven crimes, in connection with three bank robberies: three counts of violating 18 U.S.C. § 1951 (robbery under the Hobbs Act); three counts of violating 18 U.S.C. § 924(c) (use of a firearm in connection with a crime of violence); and one count of violating 18 U.S.C. § 2113(a) (bank robbery by intimidation). On the three robbery counts, defendant's total sentence was 87 months, as was his sentence on the one count of bank robbery by intimidation. All four sentences were imposed to run concurrently.

At the time defendant was sentenced, § 924(c) required a five-year term of imprisonment on the first count of conviction, with each subsequent count of conviction to be followed by a consecutive term of 20 years of imprisonment. Thus, for the three "use of firearm" charges, defendant's sentence was five years on count 13, to run consecutively to the sentences imposed on the four previous counts; on count 15, the sentence was imposed to run consecutively to the sentence imposed on count 13; and on count 17, the sentence was to run consecutively to the sentence imposed on count 15. Defendant's total sentence was 52 years and three months.

In 2018, Congress enacted the First Step Act of 2018, making a number of changes in the law applicable to federal crimes. As relevant to defendant's case, Congress amended 18 U.S.C. § 924(c), which applied to crimes involving the use of a firearm in connection

with a crime of violence. 18 U.S.C. § 924(c). The harsh consecutive sentences that had been required before the Act took effect would not apply unless the offender had been previously convicted of a violation of § 924(c); in that event, the sentence would be 25 years for each violation of the statute.

To date, defendant has served 18½ years and has a release date of November 22, 2046. If he were to be sentenced today for the crimes he committed in 2001, his sentence could have been decades lower. However, defendant was sentenced in 2002, well before the First Step Act was enacted in 2018. The Act makes it clear that Congress did not intend the changes the Act made to § 924(c) to be retroactive: "[Section 924(c)] and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." First Step Act § 403(b). See also Dorsey v. United States, 567 U.S. 260, 272 (2012) (citing 1 U.S.C. § 109) (general federal savings statute provides that new criminal statute shall not change penalties "incurred" under old one "unless the repealing Act shall so expressly provide").

OPINION

Defendant is seeking compassionate release from confinement under a provision of the First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i), which allows the court to reduce or terminate a defendant's sentence when "extraordinary and compelling reasons warrant such a reduction." The Sentencing Commission has set out the reasons for such a change in a

sentence. They include terminal illness, age, family circumstances and the defendant's medical conditions. However, even a defendant who falls into this category will not qualify for compassionate release unless the commission finds 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). In addition, the court is required to consider the factors set forth in 18 U.S.C. § 3553(a), such as the nature and circumstances of the offense and the history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, whether the sentence will afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant and provide defendant needed educational and vocational training, medical care or other correctional treatment.

Before the Act's passage, it was up to the Director of the Bureau of Prisons to file such a petition for early release, but few such petitions were filed. Now, prisoners may file such motions directly to the court if they believe they can establish the existence of "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivision (A) through (C)," § 1B1.13 (Reduction in Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(a)). The reasons described in the three subdivisions all relate to the age, medical condition and family circumstances of the inmate. Under subdivision (D) of § 1B1.13, which relates to "Other Reasons," a prisoner may be able to establish grounds for early release if he has reasons for early release that are not only "extraordinary and compelling," but are found to be so by the Director of the Bureau of Prisons. § 1B1.13, Commentary; Application Notes, 1(D).

Finally, a court cannot hear a defendant's motion unless the defendant has filed a request for such relief from the warden and the request has been denied or it has not been responded to by the warden within in 30 days. In this case, defendant asked for release and the warden denied it within 30 days. (Alternatively, the Director of the Bureau of Prisons may move for such relief on defendant's behalf, but that was not necessary in this case.)

Defendant asserts two separate grounds for relief. The first is that he qualifies for compassionate release because he is suffering from three serious physical conditions—specifically, Type II diabetes, hypertension and hyperlipidemia—that are aggravating risk factors for COVID-19 complications and death. The government does not deny that defendant's diabetes is a serious medical condition, but does not consider either it or defendant's other medical conditions to be an extraordinary and compelling reason for compassionate release in the circumstances in which defendant is housed.

The Allenwood prison reports that only one inmate and one correctional staff member have tested positive for COVID-19 out of a population of 605. www.bop.gov/coronavirus visited Sept. 18, 2002. The government maintains that the steps that have been taken at the prison have reduced the possibility of inmates and staff contracting COVID-19. According to the Bureau of Prisons, these steps include the use of face masks, the screening of staff, newly-admitted inmates and contractors and isolating symptomatic inmates. www.bop.gov. In addition, I cannot conclude that defendant would pose no danger to the community if released. The presentence report shows that defendant was a member of a group responsible for a string of armed robberies, during which both real and fake handguns

were present, brandished and sometimes pointed directly at victims. Accordingly, I am not persuaded that defendant has shown extraordinary and compelling reasons for granting him compassionate release.

For his second ground, defendant relies on subdivision (D) of § 1B1.13, arguing that there are extraordinary and compelling reasons for early release in his case because Congress's passage of the First Step Act "emphasized the imperative of reducing unnecessary incarceration and avoiding unduly punitive sentences that do not serve the ends of justice." Dft.'s Br., dkt. #353, at 8. As discussed above, Congress did not make retroactive the changes in the First Step Act relating to stacked sentences in § 924, retroactive, and expressly stated that the Act applied to offenses committed before the Act took effect only in cases in which the sentence had not been imposed before the Act became law. First Step Act, § 403(b). Because defendant's sentence was imposed before the First Step Act was enacted, he is not entitled to the benefit of the 2018 changes in the statute.

Defendant acknowledges that Congress made no provision in the First Step Act for retroactivity of previously imposed sentences, but contends that "Congress simply did not intend for the [§] 924(c)(1) change to be made *universally* retroactive; the lack of retroactivity 'simply establishes that a defendant sentenced before the [First Step Act took effect] is not *automatically* entitled to resentencing; it does not mean that the court should not consider the effect of a radically changed sentence for purposes of applying § 3582(c)(1)(A).'" Dft.'s Br., dkt. #353, at 10-11 (emphasis in original) (quoting United States v. O'Bryan, 2020 WL 869475, a *1 (D. Kan. Feb. 21, 2020) (emphasis in original)).

See also United States v. Brown, 2020 WL 349289, at *3 (E.D. Wis. Aug. 7, 2020) (reducing previously imposed mandatory and consecutive sentence on ground that First Step Act allows district courts to consider defendant's motion for compassionate release as to those individuals who would not be subject to sentence stacking if they had been sentenced after First Step Act took effect).

A number of courts have adopted this reasoning, agreeing that the First Step Act's significant reduction in the § 924(c) penalties may be considered an "extraordinary and compelling reason" under § 1B1.13(D) for a reduction in a sentence imposed before the First Step Act was enacted. See, e.g., United States v. Young, 2020 WL 1047815, at *7-9 (M.D. Tenn. Mar. 3, 2020); United States v. Maumau, 2020 WL 806121, at *5-7 (D. Utah Feb. 18, 2020); United States v. Urkevitch, 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019). Other courts have taken the opposite view, concluding that, even if they view the sentences imposed under the previous version of § 924(c) as unduly punitive, they lack the power to revise such a sentence once it has been imposed. The only exceptions are for sentences whose terms have subsequently been lowered by the Sentencing Commission. See, e.g., United States v. Ebbers, 2020 WL 913999 (S.D.N.Y. Jan. 8, 2020); United States v. Willingham, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019; United States v. Lynn, 2019 WL 3805349, at *30-4 (S.D. Ala. Aug. 13, 2019).

Even after amendment by the First Step Act, 18 U.S.C. § 3582(c)(1)(A) requires that a sentence reduction must be consistent with applicable policy statements issued by the Sentencing Commission. Dillon v. United States, 560 U.S. 817, 827-30 (2010) (confirming

that district courts must abide by commission's policy statements when reducing term of imprisonment under § 3582(c)(2)). Currently, the policy statement in § 1B1.13 includes subdivision D's requirement the "extraordinary circumstances" are to be determined by the Bureau of Prisons. Thus, until Congress changes the requirement to adhere to the policy statement, or the Sentencing Commission changes the policy statement itself, subdivision D requires a finding of extraordinary circumstances by the BOP.

Although a good case can be made for the proposition that unduly punitive sentences do not serve the ends of justice, I am not persuaded that it is within the court's authority to take it upon itself to reduce sentences with which it disagrees. Difficult as it may be to accept the fact that when Congress adjusted the sentences applicable to violations of 18 U.S.C. § 924(c)(1), it chose not to adjust any such sentences that had been imposed before the Act went into effect, and a lower court cannot ignore or disregard that choice. Only Congress has the authority to change the meaning and the scope of a statute, either on its own or acting through the Sentencing Commission.

ORDER

IT IS ORDERED that defendant Robert Sutton's motion for compassionate release, dkt. ##339 and 353, are DENIED.

Entered this 21st day of September, 2020.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge

United States District Court

Western District Of Wisconsin

UNITED STATES OF AMERICA

V.

ROBERT D. SUTTON

JUDGMENT IN A CRIMINAL CASE
(for offenses committed on or after November 1, 1987)

Case Number: 01-CR-32-C-03

Defendant's Attorney: GREGORY DUTCH

The Defendant, Robert D. Sutton, was found guilty on counts 1, 12, 13, 14, 15, 16, and 17 of the indictment.

ACCORDINGLY, the court has adjudicated defendant guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1951 and § 2	Robbery (Hobbs Act), Class C felonies	August 20, 1997	1 and 14
18 U.S.C. § 1951	Robbery (Hobbs Act), a Class C felony	August 2, 1997	12
18 U.S.C. § 924(c) and § 2	Use of Firearm in Connection with a Crime of Violence; a Class D felony	August 21, 1997	13
18 U.S.C. § 924(c) and § 2	Use of Firearm in Connection with a Crime of Violence; a Class C felony	August 14, 1997	15
18 U.S.C. § 924(c) and § 2	Use of Firearm in Connection with a Crime of Violence; a Class C felony	August 20, 1997	17
18 U.S.C. § 2113(a) and § 2	Bank Robbery by Intimidation, a Class C felony	August 20, 1997	16

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER 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.

Defendant's Date of Birth: [redacted]1968

Defendant's USM No.: 04908-090

Defendant's Residence Address: Unknown

Defendant's Mailing Address: Fox Lake Correctional Institution
W10237 Lake Emily Road
P.O. Box 147
Fox Lake, WI 53933-0147

March 6, 2002
Date of Imposition of Judgment

Barbara B. Crabb
Barbara B. Crabb
District Judge

March 13, 2002
Date Signed:

IMPRISONMENT

As to counts 1, 12, 14 and 16 of the indictment, it is ordered that defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 87 months on each count, with the terms to run concurrently with each other. This sentence is at the bottom of the guideline range.

As to count 13 of the indictment, it is ordered that defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of five years, with the term to be served consecutively to counts 1, 12, 14 and 16.

As to counts 15 and 17, it is ordered that defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 20 years on each count. The term of imprisonment imposed on count 17 is to be served consecutively to the term imposed on count 15, which term is to be served consecutively to the terms imposed on counts 1, 12, 13, 14 and 16.

The total sentence of imprisonment is 52 years and 3 months.

The conduct involved in this prosecution is unrelated to the conduct for which defendant is currently serving a sentence of imprisonment in state custody. Pursuant to § 5G1.3(c), it is ordered that this federal sentence is to be served consecutively to the term of imprisonment imposed on defendant in Milwaukee County Circuit Court Case No.98CF3086.

The Court makes the following recommendations to the Bureau of Prisons: None.

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 Marshal

SUPERVISED RELEASE

The terms of confinement are to be followed by a three-year term of supervised release on each count, with each term to be served concurrently with each other.

Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm or destructive device while on supervised release.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page).

Defendant shall also comply with the following special conditions:

1. Register with local law enforcement agencies and the state attorney general, as directed by the supervising probation officer;

2. Allow searches by the supervising probation officer of any residence or property under defendant's control where there is reason to believe defendant is in possession of illegal narcotics, stolen materials, firearms or other contraband and permit confiscation of any contraband materials; and

3. Abstain from excessive use of alcohol and from any use of illegal drugs and from association with drug users and sellers and participate in substance abuse treatment and testing as directed by the supervising probation officer.

STANDARD CONDITIONS OF SUPERVISION

1) Defendant shall not leave the judicial district without the permission of the court or probation officer;

2) Defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) Defendant shall support his or her dependents and meet other family responsibilities;

5) Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) Defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

7) Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
1	$100.00	$0.00	$0.00
12	$100.00	$0.00	$500.00
13	$100.00	$0.00	$0.00
14	$100.00	$0.00	$2,082.00
15	$100.00	$0.00	$0.00
16	$100.00	$0.00	$49,120.00
17	$100.00	$0.00	$0.00
Total	$700.00	$0.00	$51,702.00

As to counts 1, 12, 13, 14, 15, 16 and 17 of the indictment, it is adjudged that defendant is to pay a $100 criminal assessment penalty on each count, for a total of $700, to the Clerk of Court, Western District of Wisconsin, immediately following sentencing.

Defendant has neither the means nor earning capacity to pay a fine under § 5E1.2(e) without impairing his ability to pay restitution.

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

NAME OF PAYEE		TOTAL AMOUNT OF LOSS	AMOUNT OF RESTITUTION ORDERED	PRIORITY ORDER OF PAYMENT
Big Mikes Super Subs		$ 500.00	$ 500.00	1
Kohl's Grcoery Sotre		$ 2,082.00	$ 2,082.00	2
Great Midwest Bank		$ 49,120.00	$ 49,120.00	3
	Totals:	$ 51,702.00	$ 51,702.00	

As to count 12, defendant is ordered to pay restitution in the amount of $500 to Big Mikes Super Subs (Appendix C). Defendant's restitution obligation is joint and several with James Fleming. As to counts 14 and 16, defendant is to pay restitution in the amount of $2,082 to Kohl's Grocery Store and $49,120 to Great Midwest Bank (Appendix D). Defendant's restitution obligation on counts 14 and 16 is joint and several with James Fleming, Michael Brown and Angela Cramer.

Restitution in the total amount of $51,702 is due immediately and payable to the Clerk of Court for the Western District of Wisconsin for disbursement to the victims listed in Appendices C and D. The victims are to receive restitution disbursements in $50 increments in the order they are listed. No interest is to accrue on the unpaid portions of the restitution or criminal assessment obligations.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

(1) assessment;
(2) restitution;
(3) fine principal;
(4) cost of prosecution;
(5) interest;
(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Appendix C
01-CR-32-C-02 and 03
James Fleming and Robert Sutton

Name	Address	Amount
Big Mikes Super Subs	Attn: Vickie Gallagher 3009 Perry Madison, WI 53713	500.00
	Total:	***$500.00***

Appendix D
01-CR-32-C-01, 02, and 03
Michael Brown, James Fleming, and Robert Sutton
01-CR-35-C-01 –Angela Cramer

Name	Address	Amount
Kohls Grocery Store	Attn: Jeffrey Brzezinski 11100 West Burleigh Milwaukee, WI 53222	$ 2,082.00
Great Midwest Bank	2902 Dryden Drive, Madison, Wisconsin, 53704	49,120.00 ($75 joint and several with Angela Cramer)
	Total:	***$51,202.00***

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of monetary penalties shall be due during the period of imprisonment.

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-2943

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROSS THACKER,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 2:03-cr-20004-MMM-2 — **Michael M. Mihm**, *Judge*.

ARGUED MAY 13, 2021 — DECIDED JULY 15, 2021

Before SYKES, *Chief Judge*, and SCUDDER and KIRSCH, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Ross Thacker is serving a 33-year federal sentence for a series of armed robberies he committed in 2002. The sentence included so-called stacked penalties—imposed to run consecutively to one another—for two convictions under 18 U.S.C. § 924(c) for using and carrying a firearm during two of the robberies. The first § 924(c) conviction resulted in a mandatory minimum sentence of 7 years, and the

second added a mandatory consecutive sentence of at least 25 years. In September 2020 Thacker invoked 18 U.S.C. § 3582(c)(1)(A) and sought to reduce his sentence based not only on the health risks of exposure to COVID-19 within prison, but also on the amendment Congress enacted in the First Step Act of 2018 to limit the circumstances in which multiple sentences for violations of § 924(c) can be stacked. The district court denied Thacker's motion, concluding in part that the discretion in § 3582(c)(1)(A) to reduce a sentence upon finding "extraordinary and compelling reasons" does not include the authority to reduce § 924(c) sentences lawfully imposed before the effective date of the First Step Act's anti-stacking amendment.

Federal courts across the country have—and continue to—weigh in on this question, sometimes reaching different conclusions. We now weigh in too—and agree with the district court. Given Congress's express decision to make the First Step Act's change to § 924(c) apply only prospectively, we hold that the amendment, whether considered alone or in connection with other facts and circumstances, cannot constitute an "extraordinary and compelling" reason to authorize a sentencing reduction. So we affirm.

I

A

Ross Thacker and a friend committed several armed robberies in and around Champaign, Illinois in 2002. Federal charges followed and two jury trials resulted in Thacker being convicted of two violations of 18 U.S.C. § 1951 (commercial robbery) and two accompanying violations of 18 U.S.C.

§ 924(c) for using and carrying a firearm in furtherance of a crime of violence.

The district court sentenced Thacker to 33 years and 4 months' imprisonment and 5 years of supervised release. Seven of those 33 years came from the sentence imposed for Thacker's first § 924(c) violation. See 18 U.S.C. § 924(c)(1)(A)(ii) (2002). A consecutive 25 years followed for the second violation of § 924(c). See *id.* § 924(c)(1)(C)(i) (2002). Those sentences reflected the mandatory minimum and consecutive terms of imprisonment Congress prescribed for violations of § 924(c) at the time of Thacker's sentencing. In short, the district court had no choice but to sentence Thacker to at least 7 years for the first § 924(c) violation and then to at least 25 consecutive years for the second. We affirmed Thacker's convictions on direct appeal. See *United States v. Thacker*, 206 F. App'x 580 (7th Cir. 2006).

B

In August 2020, after exhausting his remedies within the Bureau of Prisons, Thacker filed a *pro se* motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Upon reviewing Thacker's motion, the district court appointed counsel to represent him. Thacker's counsel then submitted an amended motion. The amended motion pointed to the significance of the First Step Act's change to § 924(c)'s penalty structure and added health-related considerations amid the COVID-19 pandemic. Thacker explained that he suffered from Type-2 diabetes and hypertension and faced an increased risk of exposure to and complications from COVID-19 within the federal correctional institution in Gilmer County, West Virginia, where he is serving his sentence.

The First Step Act of 2018 effected significant changes to aspects of federal criminal sentencing. See Pub. L. No. 115-391, 132 Stat. 5194. For one, federal prisoners acquired the right under 18 U.S.C. § 3582(c)(1)(A) to request a reduction in their sentences. No longer do they have to persuade and depend on the Bureau of Prisons to bring the motion on their behalf, which rarely happened before the First Step Act. For another, Congress amended the penalties mandated by certain statutes, including § 924(c).

Before the Act, a second or subsequent conviction under § 924(c) mandated the imposition of a minimum sentence of 25 years to run consecutive to all other sentences, including any sentence imposed (even in the same case) for a first conviction under § 924(c). See 18 U.S.C. § 924(c)(1)(C)(i) (2002). The First Step Act changed that. An enhanced sentence for a second or subsequent conviction under § 924(c) now applies only when the first § 924(c) conviction arises from a separate case and becomes final before the second conviction. See § 403, 132 Stat. at 5221–22.

Had Ross Thacker been sentenced after the First Step Act became law, he would have faced a 14-year mandatory minimum—7 years for each of his two § 924(c) convictions for brandishing a firearm during an armed robbery. Instead, Thacker faced a 32-year sentence for his two § 924(c) convictions. That 18-year difference understandably means all the world to Thacker.

The district court denied Thacker's motion for two primary reasons. First, the district court found that COVID-19 was well controlled within FCI Gilmer and otherwise that Thacker's health conditions were being managed with medication. In short, the district court concluded that Thacker's

health conditions did not amount to an extraordinary and compelling reason for early release.

Second, and as for the First Step Act's amendment to § 924(c), the district court observed that the amendment, by its terms, applied only prospectively and therefore that the sentencing disparity highlighted by Thacker could not serve as an extraordinary and compelling reason warranting a sentencing reduction.

In denying Thacker's motion, the district court lacked the benefit of our recent decision in *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020). As a result, the district court made the mistake of resting a part of its reasoning on the Sentencing Commission's policy statement defining what may constitute an extraordinary and compelling reason for purposes of a discretionary compassionate release sentencing reduction under § 3582(c)(1)(A)(i). In *Gunn*, we concluded that while the policy statement could serve as a guide to district courts, it was binding only on compassionate release motions made by the Director of the Bureau of Prisons. See *id.* at 1179.

But that mistake is of no moment on appeal because the district court also expressly addressed Thacker's argument on the merits, and observed that Congress, in § 403(b) of the First Step Act, expressly made the anti-stacking amendment effective only prospectively. Congress's choice, the district court concluded, meant that the sentencing disparity resulting from the amendment to § 924(c) could not constitute an extraordinary and compelling reason for a discretionary sentencing reduction and early release under § 3582(c)(1)(A).

Reasoning in the alternative, the district court also underscored that, even if the First Step Act's amendment to § 924(c)

were retroactive, the court would not exercise its discretion to grant Thacker early release. On this front, the district court applied the factors in 18 U.S.C. § 3553(a) and found that Thacker, in light of his offense conduct and criminal history, continued to present a danger to the community.

Thacker now appeals.

II

Congress made plain in § 403(b) of the First Step Act that the amendment to 18 U.S.C. § 924(c) "shall apply to any offense that was committed before the date of the enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." By its terms, then, the First Step Act's anti-stacking amendment applies prospectively.

There is no way to read that choice as anything other than deliberate, for Congress charted a different course in other provisions of the First Step Act. Consider, for example, § 404, in which Congress permitted defendants who were sentenced before the Fair Sentencing Act of 2010 to benefit from that law's sentencing reform—including the elimination of mandatory minimum sentences for simple possession and the increased threshold quantity of crack cocaine necessary to trigger mandatory penalties. Congress made those changes retroactive. These distinctions matter, and they are ones reserved for Congress to make. Interpreting § 403 to apply retroactively would unwind and disregard Congress's clear direction that the amendment apply prospectively. The district court was right to see Thacker's motion, at least in part, as an attempted end-run around Congress's decision in the First Step Act to give only prospective effect to its amendment of § 924(c)'s sentencing scheme.

The compassionate release statute, § 3582(c)(1)(A), affords district courts discretion to reduce a term of imprisonment upon finding, among other requirements, "extraordinary and compelling reasons to warrant such a reduction." If a district court finds such reasons exist, it then must weigh any of the applicable sentencing factors in 18 U.S.C. § 3553(a) in determining whether to reduce a sentence. See 18 U.S.C. § 3582(c)(1)(A). Many a federal prisoner has invoked the extraordinary and compelling reasons provision as part of seeking a sentencing reduction, often citing extraordinary health circumstances involving terminal illness. See *Gunn*, 980 F.3d at 1179. We recently explained that, until the Sentencing Commission updates its policy statement to reflect prisoner-initiated compassionate release motions, district courts have broad discretion to determine what else may constitute "extraordinary and compelling reasons" warranting a sentence reduction. See *id.* at 1180–81.

But the discretionary authority conferred by § 3582(c)(1)(A) only goes so far. It cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively. To conclude otherwise would allow a federal prisoner to invoke the more general § 3582(c) to upend the clear and precise limitation Congress imposed on the effective date of the First Step Act's amendment to § 924(c). See *United States v. Jarvis*, 999 F.3d 442, 2021 WL 2253235, at *2 (6th Cir. June 3, 2021). Put another way, there is nothing "extraordinary" about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute. See *United States v. Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring) ("Indeed,

the imposition of a sentence that was not only permissible but statutorily required at the time is neither an extraordinary nor a compelling reason to now reduce that same sentence.").

We harbor broader concerns with allowing § 3582(c)(1)(A) to serve as the authority for relief from mandatory minimum sentences prescribed by Congress. We see nothing preventing the next inmate serving a mandatory minimum sentence under some other federal statute from requesting a sentencing reduction in the name of compassionate release on the basis that the prescribed sentence is too long, rests on a misguided view of the purposes of sentencing, reflects an outdated legislative choice by Congress, and the like. Rationales along those lines cannot supply an extraordinary and compelling reason to reduce a lawful sentence whose term Congress enacted, and the President signed, into law. Any other conclusion offends principles of separation of powers.

In making this observation, we are not saying that extraordinary and compelling individual circumstances, such as a terminal illness, cannot in particular cases supply the basis for a discretionary sentencing reduction of a mandatory minimum sentence. See *Gunn*, 980 F.3d at 1179. But we are saying that the discretion conferred by § 3582(c)(1)(A) does not include authority to reduce a mandatory minimum sentence on the basis that the length of the sentence itself constitutes an extraordinary and compelling circumstance warranting a sentencing reduction.

And so too do we worry that a contrary conclusion about the scope of the discretion conferred by § 3582(c)(1)(A) would allow the compassionate release statute to operate in a way that creates tension with the principal path and conditions Congress established for federal prisoners to challenge their

sentences. That path is embodied in the specific statutory scheme authorizing post-conviction relief in 28 U.S.C. § 2255 and accompanying provisions. See *Hrobowski v. United States*, 904 F.3d 566, 567–68 (7th Cir. 2018).

We previously affirmed Thacker's convictions on direct appeal. And Thacker already unsuccessfully attacked his sentence under § 2255, so he would need express authorization to bring a second or successive request for post-conviction relief. See 28 U.S.C. § 2244(a). But he cannot do so, at least not on the basis of the First Step Act's amendment to § 924(c). Congress permits a second or successive § 2255 motion only if it contains "newly discovered evidence" or relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(1)–(2); see *Hrobowski*, 904 F.3d at 568. We have already twice rejected Thacker's attempts at a successive § 2255 appeal. See *Thacker v. United States*, No. 16-3530 (7th Cir. October 6, 2016); *Thacker v. United States*, No. 16-1191 (7th Cir. March 2, 2016). He presents no new evidence nor has the Supreme Court made any such ruling with respect to the § 924(c) stacking provision. To the contrary, the Supreme Court has found no constitutional infirmity with the prior § 924(c) stacked sentencing scheme. See *Deal v. United States*, 508 U.S. 129, 136–37 (1993) (involving a challenge that § 924(c)(1) is facially ambiguous).

In the end, our conclusion is limited. We hold only that the discretionary sentencing reduction authority conferred by § 3582(c)(1)(A) does not permit—without a district court finding some independent "extraordinary or compelling" reason—the reduction of sentences lawfully imposed before the effective date of the First Step Act's amendment to § 924(c). Nothing about our holding precludes district courts, upon

exercising the discretion conferred by § 3582(c)(1)(A) and determining that a sentence reduction is warranted, from considering the First Step Act's amendment to § 924(c) in determining the length of the warranted reduction. In fact, as other courts have persuasively explained, this may be the more effective way to get at the § 924(c) sentencing disparity. See *Jarvis*, 999 F.3d 442, 2021 WL 2253235, at *3.

III

In closing, we observe that we are not the only court to deal with this issue. In fact, it has come up across the country, and courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release.

The Fourth Circuit, on the one hand, takes the view that the sentencing disparity resulting from the anti-stacking amendment to § 924(c) may constitute an extraordinary and compelling reason for release. See *United States v. McCoy*, 981 F.3d 271, 285–87 (4th Cir. 2020).

On the other hand, a panel of the Sixth Circuit more recently took the opposite view. See *Jarvis*, 999 F.3d 442, 2021 WL 2253235, at *3. This followed from a previous decision of the Sixth Circuit concluding that another nonretroactive change to sentencing law in the First Step Act could not, by itself, constitute an extraordinary and compelling reason for release. See *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021). To a lesser extent and with little elaboration, the Eighth Circuit seems to be on this side of the ledger too. See *United States v. Loggins*, 966 F.3d 891, 892–93 (8th Cir. 2020) (observing that the district court did not misstate the law in finding

"that a non-retroactive change in law did not support a finding of extraordinary or compelling reasons for release").

The Tenth Circuit has adopted a middle ground, determining that the sentencing disparity resulting from a nonretroactive change to sentencing law in the First Step Act may serve in combination with other rationales as an extraordinary and compelling reason for early release. See *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021); see also *Maumau*, 993 F.3d at 837. Another panel of the Sixth Circuit, in a decision issued before *Jarvis*, echoed this same approach for the change to § 924(c). See *United States v. Owens*, 996 F.3d 755, 764 (6th Cir. 2021).

Our own court is familiar with this debate too. We heard *United States v. Black*, — F.3d —, 2021 WL 2283876 (7th Cir. June 4, 2021), Thacker's appeal, and a third case, *United States v. Sutton*, No. 20-2876 (7th Cir. argued Apr. 27, 2021), earlier this year. All three appeals implicated, to one degree or another, the First Step Act's amendment to § 924(c) and its relation to a request for a compassionate release sentencing reduction under § 3582(c)(1)(A). But whether the change to § 924(c) could constitute an extraordinary and compelling reason for release was squarely presented in only this appeal and *Sutton*. *Black*, by contrast, principally concerned whether the district court in that case should have weighed the change to § 924(c) when applying the § 3553(a) factors after the prisoner identified serious medical concerns as an independent extraordinary and compelling reason for release.

In vacating the district court's denial of compassionate release in *Black*, we cited with favor the views of both the Fourth and Tenth Circuits, while also observing that Congress's changes to the statutory sentencing scheme in § 924(c) might

factor into a district court's individualized determination of whether the § 3553(a) sentencing factors weighed in favor of Eural Black's early release. See *Black*, — F.3d —, 2021 WL 2283876, at *3. We then remanded the case with instructions allowing the district court to consider the change to § 924(c) as part of deciding Black's request for a sentencing reduction. *Black*'s broad language and express reliance on the Fourth Circuit's decision in *McCoy* left the opinion open to the observation that we had concluded Congress's recent amendment to § 924(c) can itself constitute an extraordinary and compelling reason justifying early release under § 3582(c)(1)(A). See *id.* at *5 n.3 (Kirsch, J., dissenting) (advancing this precise point).

We take the opportunity here to answer squarely and definitively whether the change to § 924(c) can constitute an extraordinary and compelling reason for a sentencing reduction. It cannot.

The proper analysis when evaluating a motion for a discretionary sentencing reduction under § 3582(c)(1)(A) based on "extraordinary and compelling" reasons proceeds in two steps. At step one, the prisoner must identify an "extraordinary and compelling" reason warranting a sentence reduction, but that reason cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c). Upon a finding that the prisoner has supplied such a reason, the second step of the analysis requires the district court, in exercising the discretion conferred by the compassionate release statute, to consider any applicable sentencing factors in § 3553(a) as part of determining what sentencing reduction to award the prisoner.

Before issuing this opinion, we circulated it to the full court under Circuit Rule 40(e). No judge in active service

requested to hear this case *en banc*.[*] Accordingly, the legal framework articulated in this opinion reflects the law of the Circuit.

For these reasons, we AFFIRM the district court's denial of Thacker's compassionate release motion.

[*] Circuit Judge Jackson-Akiwumi did not participate in the consideration or decision of this case.

18 USC 3582: Imposition of a sentence of imprisonment
Text contains those laws in effect on October 7, 2021

From Title 18-CRIMES AND CRIMINAL PROCEDURE
PART II-CRIMINAL PROCEDURE
CHAPTER 227-SENTENCES
SUBCHAPTER D-IMPRISONMENT
Jump To:

§3582. Imposition of a sentence of imprisonment

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

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

(1) modified pursuant to the provisions of subsection (c);
(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

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

(c) Modification of an Imposed Term of Imprisonment.-The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

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

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

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

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

(d) Notification Requirements.-

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

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

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

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Added Pub. L. 98–473, title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1998 ; amended Pub. L. 100–690, title VII, §7107, Nov. 18, 1988, 102 Stat. 4418 ; Pub. L. 101–647, title XXXV, §3588, Nov. 29, 1990, 104 Stat. 4930 ; Pub. L. 103–322, title VII, §70002, Sept. 13, 1994, 108 Stat. 1984 ; Pub. L. 104–294, title VI, §604(b)(3), Oct. 11, 1996, 110 Stat. 3506 ; Pub. L. 107–273, div. B, title III, §3006, Nov. 2, 2002, 116 Stat. 1806 ; Pub. L. 115–391, title VI, §603(b), Dec. 21, 2018, 132 Stat. 5239 .)

Editorial Notes

References in Text

The Federal Rules of Criminal Procedure, referred to in subsec. (b)(2), are set out in the Appendix to this title.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (e), is Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1236 , as amended, which is classified principally to chapter 13 (§801 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

Amendments

2018-Subsec. (c)(1)(A). Pub. L. 115–391, §603(b)(1), in introductory provisions, inserted "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," after "Bureau of Prisons,".

Subsecs. (d), (e). Pub. L. 115–391, §603(b)(2), (3), added subsec. (d) and redesignated former subsec. (d) as (e).

2002-Subsec. (c)(1)(A). Pub. L. 107–273 inserted "(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 "may reduce the term of imprisonment" in introductory provisions.

1996-Subsec. (c)(1)(A)(i). Pub. L. 104–294 inserted "or" after semicolon at end.

1994-Subsec. (c)(1)(A). Pub. L. 103–322, inserted a dash after "if it finds that", designated "extraordinary and compelling reasons warrant such a reduction" as cl. (i), inserted a semicolon at end of cl. (i), realigned margins accordingly, and added cl. (ii) before concluding provisions.

1990-Subsec. (b)(2). Pub. L. 101–647 inserted "of the Federal Rules of Criminal Procedure" after "rule 35".

1988-Subsec. (c)(2). Pub. L. 100–690 substituted "994(o)" for "994(n)".

Statutory Notes and Related Subsidiaries

Effective Date of 1996 Amendment

Amendment by Pub. L. 104–294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104–294, set out as a note under section 13 of this title.

Effective Date

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.