APPENDIX

A-1

859 Fed.Appx. 500 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Thomas JOHNSON, Defendant-Appellant.

No. 20-13169
|
Non-Argument Calendar
|
(June 14, 2021)

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:08-cr-20190-JEM-1

Attorneys and Law Firms

Aileen Cannon, Lisa A. Hirsch, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, Scott Dion, U.S. Attorney's Office, Miami, FL, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee

Brenda Greenberg Bryn, Jan Christopher Smith, II, Federal Public Defender's Office, Fort Lauderdale, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant

Thomas Johnson, Pro Se

Before WILLIAM PRYOR, Chief Judge, NEWSOM and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Thomas Johnson appeals the partial denial of his motion for a sentence reduction based on the First Step Act of 2018. Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. Two years after the President commuted ***501** Johnson's sentence of imprisonment from 360 months to 240 months, Johnson moved, without success, for a further reduction of his sentence of imprisonment and his term of supervised release. On appeal, we vacated the denial of relief because it was unclear whether the district court understood that it could reduce Johnson's sentence below his revised advisory guideline range and remanded for further proceedings. *United States v. Jones*, 962 F.3d 1290, 1293, 1296, 1305 (11th Cir. 2020). On remand, the district court granted Johnson's request to reduce his term of supervised release from eight years to six years, but it declined to reduce Johnson's sentence of imprisonment, 18 U.S.C. § 3553. We affirm.

We review the denial of a motion to reduce a sentence based on the First Step Act for abuse of discretion. *Jones*, 962 F.3d at 1296. "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *United States v. Khan*, 794 F.3d 1288, 1293 (11th Cir. 2015) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004)). Because abuse of discretion is a deferential standard of review, the district court has a range of choice that we will not disturb even though we might have made a different decision. *United States v. Riley*, 995 F.3d 1272, 1278 (11th Cir. 2021).

The district court did not abuse its discretion. It understood that it had the authority under the First Step Act to reduce Johnson's sentence of imprisonment and chose to do so in part. Johnson argues that the district court should have considered the statutory sentencing factors, but the record shows that it did so.

As in *United States v. Potts*, 997 F.3d 1142, 1145 (11th Cir. 2021), the district court decided that the sentencing factors did not support a reduction of Johnson's sentence of imprisonment. The district court reasonably determined that "the facts of [Johnson's] case [did] not merit a revised sentence below ... 240 months" in the light of the "amount of crack cocaine [he] was convicted of possessing," "the danger drug trafficking brings to the community," and his status as a career offender for accumulating 17 convictions in 12 years that included numerous controlled substance offenses. *See* 18 U.S.C. § 3553(a). Even so, the district court decided "that Johnson's conduct while imprisoned justifie[d] reducing his term of supervised release from eight years to six." Johnson argues that the district court should have given more weight to his rehabilitation and positive prison record, but "[t]he weight given to any specific § 3553(a) factor is left to the district court's discretion," *United States v. Fox*, 926 F.3d 1275, 1282 (11th Cir. 2019). We cannot say that the district court abused

its discretion in reducing only Johnson's term of supervised release and leaving undisturbed his sentence of imprisonment.

AFFIRMED.

All Citations

859 Fed.Appx. 500 (Mem)

End of Document

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 08-20190-CR-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS JOHNSON,

Defendant.
_____/

MOTION FOR ORDER ON MANDATE VACATING JULY 10, 2019 ORDER, AND IMPOSING REDUCED SENTENCE UNDER SECTION 404 OF THE FIRST STEP ACT

Defendant, Thomas Johnson, through undersigned counsel, respectfully requests that the Court enter an order on the mandate issued July 15, 2020, vacating its prior order denying his request for a sentence reduction under Section 404 of the First Step Act, and – in light of the Eleventh Circuit's clarification of this Court's broad discretion under Section 404(b) to impose a reduced sentence – reducing his term of imprisonment from 240 to 180 months, and his term of supervised release from 8 to 6 years, after consideration of all the relevant factors in 18 U.S.C. § 3553(a). As grounds for that request, he states:

1. The Eleventh Circuit's decision. On June 16, 2020, the Eleventh Circuit vacated this Court's July 10, 2019 order denying Mr. Johnson a reduction of his sentence under Section 404 of the First Step Act. *United States v. Jones, et al.*, ___ F.3d ___, 2020 WL 3248113, at *12 (11th Cir. June, 16, 2020).

The decision addressed four separate defendants' claims for relief under the Act and clarified a number of issues under Section 404 as a matter of first impression. The Eleventh Circuit held that where, as here, a defendant has been convicted by a jury of possessing with intent to distribute 5 or more grams of crack under § 841(b)(1)(B), he is eligible for a sentencing reduction under Section 404(a) because the statutory penalties for this offense were reduced by Section 2 of the Fair Sentencing Act ("FSA"). Such a defendant now faces the reduced minimum and maximum penalties in § 841(b)(1)(C). *Id.* at *10. Accordingly, the Eleventh Circuit confirmed (DE 122) that this Court correctly found Mr. Johnson eligible for a reduction under Section 404(a) because his new statutory range of imprisonment under § 841(b)(1)(C) is "zero to 30 years of imprisonment instead of 10 years to life imprisonment." *Id.*

Nonetheless, the Eleventh Circuit held, to the extent this Court might have believed it had "no authority" under Section 404(b) to further reduce Mr. Johnson's sentence because his commuted sentence was already below the revised guideline range, it erred. This Court most definitely "had the authority" to further reduce Mr. Johnson's sentence below the revised guideline range. *Id.* However, the Eleventh Circuit was not "sure that the district court understood its authority" under Section 404(b) to further reduce Mr. Johnson's sentence because of the "ambiguous phrase [in the order] that the First Step act 'affords no further relief.'" That language left the appellate court "unsure of the grounds for the ruling." *Id.* at *11.

Adding to the confusion was the fact that "the government erroneously argued in the district court that Johnson was ineligible for a reduction because his sentence was already below the revised guideline range." *Id.* While the district court might have "understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what it believed to be sufficient relief," the Eleventh Circuit stated, "[i[f the district court ruled that it could not grant Johnson's motion, that ruling would be erroneous because neither the First Step Act nor section 3582(c)(1)(B) barred the district court from reducing Johnson's sentence below the guideline range." *Id.*

2. The relevant factors to be considered in the discretionary determination under Section 404(b). Since the Eleventh Circuit could not "tell which of [the above] readings" of the July 10, 2019 order was correct, it vacated the order and remanded to allow the Court to revisit Mr. Johnson's request for a reduction, *id.* at *11, in light of the guidance provided in the decision. The Eleventh Circuit identified the factors this Court should consider in determining whether to grant Mr. Johnson's motion.

The Eleventh Circuit held that in determining "whether to exercise its discretion to reduce an eligible movant's sentence under section 404(b)," "the actual quantity of crack cocaine involved in a violation" is a "key factor." *Id.* at *8. However, the district court should "consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a)." *Id.* at *11 (citing *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020)). *See Allen*, *id.* at 356-58 (holding that the district court

reversibly erred in believing its authority under Section 404 was limited to considering the defendant at the time he committed the "covered offense," and that "any good behavior that occurred after the covered offense is immaterial;" clarifying that the district court indeed had authority under Section 404 to reduce a clearly-eligible defendant's term of imprisonment below his Guideline range based on post-sentencing conduct and other § 3553(a) factors).

Here, all of the relevant factors for consideration under Section 404(b) weigh in favor of granting Mr. Johnson a further reduction in both his term of imprisonment and term of supervised release.[1]

3. Small quantity of crack. By any measure – comparison to all crack cases prosecuted nationwide, crack cases in the district, or simply the four crack cases considered in *Jones* – Mr. Johnson's "actual quantity of crack' (10.4 grams) was extremely small. Notably, defendant Allen in *Jones*, who the Eleventh Circuit confirmed was also eligible for a reduction, was responsible for selling 420-784 grams of crack per week. *Id.* at *11. While undoubtedly, some district courts have exercised their discretion to deny reductions to defendants whose actual offenses involved huge quantities of crack that far exceed the heightened 280 grams threshold for the top statutory penalties under the Fair Sentencing Act, undersigned counsel is unaware of any case involving as small a quantity of crack as this one where no further

[1] The government, in *Allen*, did not oppose the defendant's request for a lower term of supervised release, and the district court reduced his term of supervised release to the reduced statutory minimum, *id.* at 356, as Mr. Johnson requests here.

reduction to an eligible defendant has been granted. *Cf.* *United States v. Shepard*, Case No. 06-00482-cr-SCJ-RGV, DE 207:3 & DE 212 (N.D. Ga. Mar. 20, 2020) (Jones, J.) (additional reduction granted to Career Offender whose actual conduct involved 9.93 grams of crack); *United States v. Stilling*, No. 8:08-cr-230-T-24SPF, DE112:2-3 (M.D. Fla. March 15, 2019) (Bucklew, J.) (additional reduction granted to Career Offender whose actual conduct involved 12.6 grams of crack).

3. The need to avoid unwarranted disparities with similarly-situated defendants. Comparisons to other cases involving similar "actual conduct" are a necessary consideration for the Court under Section 404(b) because, as the government has rightly conceded before all of the courts of appeals at this point, in exercising its discretion under Section 404(b) a district court must consider the § 3553(a) factors. Here, the comparatively small amount of crack involved in Mr. Johnson's case is directly relevant to multiple § 3553(a) factors:

- the "nature and circumstances of the offense," § 3553(a)(1);
- the need for the sentence imposed to "reflect the seriousness of the offense" and "provide just punishment," § 3553(a)(2)(A);

  and

- "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6).

In endeavoring to avoid unwarranted disparities with similarly-situated defendants, the Court should also consider that courts have routinely granted reductions below the revised Career Offender range to defendants whose original

sentences were already at or below the revised Career Offender range either because the court varied at the original sentencing,[2] or they received a commutation of their original sentence from the President. Although there are many comparable cases in the latter category where courts have granted a further reduction of an already-commuted Career Offender sentence over the government's objection, the Court should consider in particular two grants in this Circuit:

- *United States v. Walke*r, Case No. 07-60283-cr-COHN, DE 58 (S.D.Fla. Feb. 24, 2020) (further reducing commuted sentence of 188 months imprisonment which was the bottom of post-FSA revised Career Offender range, to "time served" which was approximately 146 months imprisonment; reasoning that the defendant deserved the same percentage reduction from the bottom of his revised guideline range that he had received through the commutation because "there was no reason to frustrate the goals" of the court's "co-equal branches and deny Walker two benefits that are rightfully his: an Executive Grant of Clemency and a reduced sentence under the First Step Act");

  and

- *United States v. Stilling*, No. 8:08-cr-230-T-24SPF, DE112:2-3 (M.D. Fla. March 15, 2019) (Bucklew, J.) (further reducing commuted sentence of 168 months imprisonment, a term well below the post-FSA revised Career Offender range, to 140 months, and also reducing 8 year supervised release term to 6 years, based on "the amount of drugs involved in Defendant's offense, 12.6 grams of cocaine base, and Defendant's good conduct while incarcerated.").[3]

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[2] *See, e.g., United States v. King*, 2019 WL 3752934 (W.D. Va. Aug. 8, 2019) (defendant originally faced 360-life Career Offender range, but was granted a variance to 180 months; even though that term was below revised Career Offender range of 262-327 months post-FSA, the court further reduced the sentence to time served; defendant had served 136 months).

[3] *See also United States v. Cook*, No. 05-258, DE173 & DE179 (E.D. Mo. 2019) (after commutation of term of imprisonment from 240 to 200 months, which was below revised Career Offender range, further reducing sentence to 180 months

For the reasons stated by Judge Bucklew in *Stilling* – both a comparatively small quantity of crack, and excellent conduct while in prison – the Court should reduce Mr. Johnson's sentence to 180 months imprisonment and 6 years supervised release here.

4. Exemplary post-sentencing rehabilitation. In *Pepper v. United States*, 462 U.S. 476 (2011), the Supreme Court rightly recognized that in resentencing a defendant, his post-sentencing conduct is not only relevant to a complete evaluation of his "history and characteristics," § 3553(a)(1), but also the need for the sentence imposed to serve the purposes of sentencing Congress set forth in § 3553(a)(2)(B), (C), and (D): namely, affording adequate deterrence, protecting the public against further crimes of the defendant, and providing opportunities for rehabilitation. *Id.* at 448-93 (citing with approval *United States v. McMannus*, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy, J. concurring) ("In assessing ... deterrence, protection of the public, and

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imprisonment; also reducing supervised release from 8 to 6 years); *United States v. Barber*, 2019 WL 3771754 (W.D. Va. Aug. 9, 2019) (after commutation of sentence from mandatory life to 240 months, which was below the Career Offender range of 360-life, further reducing sentence to time served when defendant had been incarcerated for approximately 176 months); *United States v. Garrett*, 2019 WL 2603531 (S.D. In. June 25, 2019) (after commutation of defendant's sentence from mandatory life to 360 months, which was below the 360-life Career Offender range since the 360 months included a consecutive 60-month sentence for a § 924(c) offense, further reducing total sentence to 216 months); *United States v. Biggs*, 2019 WL 2120226 (N. D. Ill. May 15, 2019) (after commutation of term of imprisonment from 360 to 262 months, which was below the 360-months life range under the FSA, further reducing sentence to 180 months which was a time served sentence). The government, notably, has not appealed ***any*** of these reductions.

rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C0 & (D), there would seem to be no better evidence than a defendant's post-incarceration conduct.").

Here, not only has Mr. Johnson maintained a perfect disciplinary record for over 12 straight years in prison, which – in and of itself – is remarkable, differentiating him from many defendants who have received First Step Act reductions in this Circuit and nationwide – but indeed, he has made every effort to improve himself from the moment he entered the BOP. He earned his GED; completed the drug education requirement; took a course in anger management; and engaged in vocational training (custodial maintenance and carpentry). And recently, he has become a participant in UNICOR, and through that work has begun giving back to his community already.

Notably, Mr. Johnson was originally designated to FCI Miami which allowed him the comfort of being close to his family in the Miami area. However, after Hurricane Michael devastated FCI Marianna in 2018, he volunteered to be transferred there so that he could help rebuild the prison. He has been working there in this capacity through UNICOR for almost a year now. He was accepted into UNICOR and allowed to do so, because he has never engaged in any violent act in his life, has a perfect BOP disciplinary record, and has been designated by the BOP for "minimum" and "out custody."

In circumstances such as these, where a defendant has demonstrated his rehabilitation through his post-sentencing conduct, that conduct is "clearly relevant to the selection of an appropriate sentence" because: it "provides the most up-to-date

picture" of the defendant; "[a] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing,'" *id.* at 492-93 (citing *United States v. Bryson*, 229 F.3d 425, 426 (2nd Cir. 2000)); and post-sentencing rehabilitation "sheds light on the likelihood that [a defendant] will engage in future criminal conduct, a central factor that district courts must assess when imposing sentence." *Pepper*, 562 U.S. at 492. Indeed, in the Supreme Court's estimation, "exemplary postsentencing conduct" is "***the most accurate indicator*** of '[the defendant's] present purposes and tendencies.'" As such, it "will 'suggest the period of restraint and the kind of discipline that ought to be imposed on him.," and "***bears directly*** on the District Court's overarching duty to 'impose a sentence sufficient, but not greater than necessary,' to serve the purposes of sentencing. § 3553(a)." 562 U.S. at 492-93 (emphasis added)(citation omitted).

Not only in *Stilling*, but in *Biggs* and *Garrett* as well (*see supra* n.3), courts have applied *Pepper*'s guidance in granting defendants – like Mr. Johnson – with already-commuted sentences further reductions under Section 404(b) based on demonstrated post-sentencing rehabilitation. And indeed, in another well-known case in this district Judge Rosenberg rightly applied *Pepper*'s guidance in exercising her discretion under Section 404(b) of the First Step Act to reduce the defendant's life sentence to time served based upon his demonstrated rehabilitation. *See* Judge Robin Rosenberg, *Prison for Life. He Turned Himself Around. So I Freed Him*, N.Y. Times, (July 18, 2019) (noting that "[t]he true marker of a person's character is what he does when he thinks no one is watching," and the defendant's' "unwavering dedication to

improve himself over the last two decades, despite his circumstances" had convinced the court "that his hope on his own future wasn't misplaced.")

Mr. Johnson has likewise shown his character through his perfect conduct, unwavering dedication to improve himself, and dedication to the prison community – all the while maintaining a strong bond with his wife and children throughout his incarceration. The Court can now see the effect that 12 years of incarceration has had upon him. He is a changed man. The Court can trust that reducing his term of imprisonment at this time to 180 months,[4] followed by 6 years supervised release, would be "sufficient but not greater than necessary" to comply with all of the purposes of sentencing set forth in § 3553(a)(2).

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BY: /s/***Jan C. Smith II***
Jan C. Smith II
Assistant Federal Public Defender
Florida Bar No.: 0117341

[4] Assuming all available gain time, the undersigned believes Mr. Johnson would be required to serve slightly more than 12 years, 9 months imprisonment on an 180 month sentence. As of this writing Mr. Johnson has been incarcerated for almost 12 years and 4 months. Therefore, a reduction of his term of imprisonment to 180 months would not be a "time served" sentence, but should result in his immediate release to a halfway house. Notably, Mr. Johnson's loving family has stood by him for all of these years and will be there to help him make a smooth transition in every way. As he will describe in a letter he has mailed directly to the Court, his wife works for the United Parcel Service, and has already arranged for him to begin a job with UPS upon his release. Moreover, the Defendant has also secured an apprenticeship to gain his CDL and crane operator's license as indicated in an attached letter from Mr. Tarrell Wallace.

One E. Broward Boulevard, Suite 1100
Fort Lauderdale, FL 33301-1842
(954) 640-7123
jan_smith@fd.org

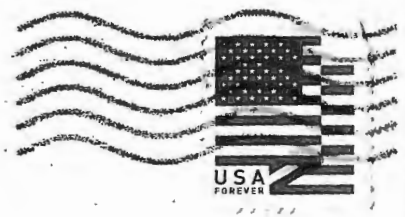
CERTIFICATE OF SERVICE

I HEREBY certify that on July 15, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jan C. Smith II
Jan C. Smith II

NAME: Thomas Johnson
REG. NO. 81063-004
QUARTERS: Cherokee-A
FEDERAL PRISON CAMP
P.O. BOX 7006
MARIANNA, FL 32447-7006

PENSACOLA FL 325
23 JUN 2020 PM 1 1



Legal Mail

RECEIVED JUN 30 2020

Attorney- Brenda G. Bryn
one E. Broward Blvd, suite 1100
Ft. Lauderdale, FL
33301-1865

33301-184275

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 01457723

Dept. of Justice / Federal Bureau of Prisons

Team Date: 04-02-2020

Plan is for inmate: JOHNSON, THOMAS 81063-004

Facility:	MNA MARIANNA FCI	Proj. Rel. Date:	12-11-2024
Name:	JOHNSON, THOMAS	Proj. Rel. Mthd:	GCT REL
Register No.:	81063-004	DNA Status:	EST02003 / 06-24-2010
Age:	39		
Date of Birth:	12-17-1980		

Detainers

Detaining Agency	Remarks

NO DETAINER

Current Work Assignments

Facl	Assignment	Description	Start
MNA	RECYCLE	RECYCLE UNICOR	12-02-2019

Current Education Information

Facl	Assignment	Description	Start
MNA	ESL HAS	ENGLISH PROFICIENT	03-10-2009
MNA	GED EARNED	GED EARNED IN BOP	04-20-2010

Education Courses

SubFacl	Action	Description	Start	Stop
MNA SCP	C	RPP1-AIDS&STD/INFECTIOUS DISEA	09-26-2019	09-26-2019
MIA SCP	C	CMP JUMP	03-07-2018	03-28-2018
MIA SCP	C	CALISTHENICS	03-07-2018	04-03-2018
MIA	C	CUSTODIAL MAINTENANCE	01-14-2015	05-26-2015
EST	C	RES.CARPENTRY2 12:30-2 (PG#6)	03-24-2014	09-30-2014
MIA	C	AIDS AWARENESS	07-29-2014	07-29-2014
EST	C	INFECTIOUS DISEASE PREVT(HN#1)	04-10-2014	04-10-2014
EST	C	RES.CARPENTRY1 8-10:30AM(PG#6)	07-10-2012	09-17-2012
EST	C	INFECTIOUS DISEASE PREVT(HN#1)	07-26-2012	07-26-2012
EST	C	HEALTH FAIR-QUARTERLY (HN#1)	09-20-2011	09-20-2011
EST	C	NCCER CORE CONST.8-9 (PG#6)	09-01-2010	03-07-2011
EST	C	GED MILLIGAN 9-10:30 M-F(PG#6)	08-14-2009	04-20-2010
EST	C	ANGER MANAGEMENT (HN#1/PG#6)	09-17-2009	10-22-2009
EST	C	COMM DRIVERS LICENSE (EM#2)	06-08-2009	07-13-2009
EST	C	INFECTIOUS DISEASE PREVT(HN#1)	04-09-2009	04-09-2009

Discipline History (Last 6 months)

Hearing Date	Prohibited Acts

*** NO INCIDENT REPORTS FOUND IN LAST 6 MONTHS ***

Current Care Assignments

Assignment	Description	Start
CARE1	HEALTHY OR SIMPLE CHRONIC CARE	07-10-2012
CARE1-MH	CARE1-MENTAL HEALTH	07-31-2010

Current Medical Duty Status Assignments

Assignment	Description	Start
REG DUTY	NO MEDICAL RESTR--REGULAR DUTY	04-15-2014
YES F/S	CLEARED FOR FOOD SERVICE	04-15-2014

Current Drug Assignments

Assignment	Description	Start
DAP FAIL W	RESIDENT DRUG TRMT FAIL-WITHDR	08-07-2018
ED COMP	DRUG EDUCATION COMPLETE	05-27-2010
INELIGIBLE	18 USC 3621 RELEASE INELIGIBLE	05-16-2017
NR DIS	NRES DRUG TMT/DISCONTINUED	03-22-2017

FRP Details

MNAF1 606.00 * MALE CUSTODY CLASSIFICATION FORM * 03-26-2020
PAGE 001 OF 001 14:24:41

(A) IDENTIFYING DATA

REG NO..: 81063-004 FORM DATE: 08-28-2019 ORG: DSC
NAME....: JOHNSON, THOMAS

MGTV: PGM PAR
PUB SFTY: NONE MVED: 08-28-2020

(B) BASE SCORING

DETAINER: (0) NONE SEVERITY.....: (3) MODERATE
MOS REL.: 68 CRIM HIST SCORE: (08) 12 POINTS
ESCAPES.: (0) NONE VIOLENCE.....: (0) NONE
VOL SURR: (0) N/A AGE CATEGORY...: (2) 36 THROUGH 54
EDUC LEV: (0) VERFD HS DEGREE/GED DRUG/ALC ABUSE.: (0) NEVER/>5 YEARS

(C) CUSTODY SCORING

TIME SERVED.....: (4) 26-75% PROG PARTICIPAT: (2) GOOD
LIVING SKILLS...: (2) GOOD TYPE DISCIP RPT: (5) NONE
FREQ DISCIP RPT.: (3) NONE FAMILY/COMMUN..: (4) GOOD

--- LEVEL AND CUSTODY SUMMARY ---

BASE	CUST VARIANCE	SEC TOTAL	SCORED LEV	MGMT SEC LEVEL	CUSTODY	CONSIDER
+13	+20 -4	+9	MINIMUM	N/A	OUT	DECREASE

G0005 TRANSACTION SUCCESSFULLY COMPLETED - CONTINUE PROCESSING IF DESIRED

OPERATING ENGINEER, LOCAL 487

INTERNATIONAL UNION OF OPERATION ENGINEERS AFL-CIO

Tarrell Wallace
Registered number #2546652

June 24, 2020

Dear, Judge Jose E. Martinez

I come to you on behalf of Mr. Thomas Johnson. I Tarrell Wallace a Steward in the Local Union of Operating Engineers, I would like to consider this apprenticeship program for Mr. Johnson and put in a letter of recommendation for him, I have been a member of the International Union of Operation Engineers since February 25th, 2005. I would like if granted the opportunity to work with Mr. Johnson on getting his CDLs so he can become a productive citizen. If you have any questions, contact me at (954) 325-2274.

Sincerely

Tarrell Wallace

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:08-cr-20190-MARTINEZ

THOMAS JOHNSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

UNITED STATES OF AMERICA'S RESPONSE IN OPPOSITION TO JOHNSON'S MOTION TO REDUCE SENTENCE UNDER § 404 OF THE FIRST STEP ACT AND MOTION FOR COMPASSIONATE RELEASE UNDER 18 U.S.C. § 3582

The United States of America, by and through the undersigned Assistant United States Attorney, hereby responds in opposition to movant Thomas Johnson's ("Johnson") Motion to Reduce Sentence under § 404 of the First Step Act (the "§ 404 Motion") (CRDE 129) and his Motion for Compassionate Release and Reduction of Sentence pursuant to 18 U.S.C. § 3582 (the "Compassionate Release Motion") (CRDE 127).[1] The government opposes the Compassionate Release Motion, as Johnson does not present extraordinary and compelling reasons and because the § 3553(a) factors weigh against granting such relief.[2] Although Johnson is eligible to be

[1] The government will refer to documents in the underlying criminal case as "CRDE," followed by the appropriate docket entry number and the corresponding page number assigned by the electronic docketing system.

[2] Given that Johnson filed the Compassionate Release Motion while represented by counsel, this Court may ignore that filing and deny it on this basis. *See United States v. LaChance*, 817 F.2d 1491, 1498 (11th Cir. 1987) ("It is the law of this circuit that the right to counsel and the right to proceed *pro se* exist in the alternative and the decision to permit a defendant to proceed in a hybrid fashion rests in the sound discretion of the trial court."). However, given that the government is

considered for relief, the government opposes the § 404 Motion based on the § 3553(a) factors and because a further reduction would not be in the spirit of what Congress intended in enacting the First Step Act.

I. Course Of Proceedings In The Underlying Criminal Case

On November 27, 2007, a Miami-Dade police officer stopped at a last known address of a wanted person (PSI ¶ 4).[3] Although he was unable to locate the wanted person, the police officer was approached by an individual who informed him that narcotics trafficking was occurring at a nearby apartment complex (*id*.). After driving by that apartment complex, the officer observed Johnson conducting three separate drug transactions (*id*. ¶¶ 4–5). On one occasion, the officer noticed that Johnson received $10 in exchange for a small plastic bag (*id*. ¶ 5). The police officer then called for a "take down," which resulted in other officers converging on the scene and attempting to apprehend Johnson (*id*. ¶ 6). Johnson fled but was eventually taken into custody in the apartment he was using for his drug transactions (*id*.). A search incident to arrest revealed a firearm in Johnson's waistband, as well as numerous crack cocaine rocks and powder cocaine in the kitchen of the apartment where he had fled (*id*.). The net weight of the crack cocaine found was 10.4 grams and the powder cocaine weighed 8.8 grams (*id*. ¶¶ 7, 12).

On March 6, 2008, a federal grand jury in the Southern District of Florida returned a four-count indictment charging Johnson with possession of a firearm and ammunition by a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) ("Count 1"); possession with

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also responding to Johnson's § 404 Motion, and in the interest of justice, the Court should consider the Compassionate Release Motion on the merits.

[3] The presentence investigation report (the "PSI") became available for disclosure on August 21, 2008.

intent to distribute five grams or more of a mixture and substance containing a detectable amount of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) ("Count 2"); possession with intent to distribute a mixture and substance containing a detectable amount of cocaine powder, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) ("Count 3"); and using or carrying a firearm during and in relation to a drug trafficking crime (specifically Counts 2 and 3, both violations of 21 U.S.C. § 841(a)(1)), in violation of 18 U.S.C. § 924(c)(1)(A) ("Count 4") (CRDE 1:1–3). Johnson pleaded "not guilty" and proceeded to trial (CRDE 10). Before trial, the government filed a notice pursuant 21 U.S.C. § 851(a) stating its intention to seek an enhanced penalty against Johnson based upon certain prior convictions (CRDE 44). Following a three-day jury trial, Johnson was found guilty of Counts 1, 2, 3 as charged in the indictment, and not guilty of Count 4 (CRDE 67).

The only objections to the PSI that remained unresolved at sentencing had to do with the factual basis underlying the jury's verdict (CRDE 86:2–3). So as not to disturb the jury's findings, the district court overruled Johnson's objections (*id*. at 3). As to sentencing, the government requested that Johnson be sentenced within the guideline range (*id*.). Whereas defense counsel requested that he be sentenced to the mandatory minimum, which in this case was 15 years (*id*. at 3–4). In support of a mandatory minimum sentence, defense counsel noted that Johnson, despite his extensive criminal history, had only ever been incarcerated for a total of 779 days (*id*. at 4). And so, defense counsel argued, among other things, that the 15-year mandatory minimum already presented a substantial jump from his previous terms of imprisonment, and would be a sufficient, but not greater than necessary, sentence pursuant to § 3553 (*id*. at 5–8). Johnson himself then addressed the Court and, although he acknowledged his culpability as to his prior offenses, he

claimed innocence as to the charges that the jury found proven beyond a reasonable doubt (*id*. at 8–10). In response, the government noted that the career offender provision, which applied in this case, only requires two prior convictions, but Johnson had five qualifying prior convictions (*id*. at 10–11).

The Court then observed that if Johnson had been sentenced to a substantial sentence for his prior state convictions, and thereby learned his lesson, he may not be in the present situation facing a lengthy term of incarceration (*id*. at 12–14). Having considered the arguments of the parties, the PSI, and the statutory factors, the district court sentenced Johnson at the low end of the advisory guideline range (*id*. at 16).[4] Specifically, the Court sentenced Johnson to 360 months of imprisonment as to Counts 1, 2, and 3, all to be served concurrently (*id*.). A total of eight years of supervised release was imposed as well as a $300 special assessment (*id*. at 16–17). Johnson thereafter filed a notice of appeal (CRDE 76).

On November 6, 2009, the Eleventh Circuit filed a non-published opinion affirming Johnson's convictions and sentence (CRDE 91:5). Thereafter, the Supreme Court denied Johnson's petition for a writ of *certiorari* (CRDE 93). Over the years, Johnson has filed several post-conviction motions. On December 6, 2010, Johnson filed a motion for a reduction of sentence, seeking relief pursuant to the Fair Sentencing Act of 2010 (CRDE 94), which the district court denied (CRDE 97). Next, Johnson filed a motion to vacate sentence under 28 U.S.C. § 2255,

[4] Because Johnson was career offender and the statutory maximum penalty for the instant offense was life, his total offense level was 37 (PSI ¶ 18). And although his 12 criminal history points would normally have resulted in a criminal history category V, given that he was a career offender, the criminal history category automatically became VI (*id*. ¶ 33). According to the PSI, based on a total offense level of 37 and a criminal history category of VI, the guideline imprisonment range was 360 months to life (*id*. ¶ 62).

alleging several claims of ineffective assistance of counsel (CRDE 98), which the district court denied (CRDE 100). And in June 2016, Johnson filed yet another § 2255 motion (CRDE 101), which the district court directed be transferred to the Court of Appeals, so that Johnson would be able to request authorization to file a successive 2255 (CRDE 102). Following the Eleventh Circuit's denial of the request to file a successive 2255 and the magistrate judge's report and recommendation as to Johnson's Rule 60(b) motion, the district court denied Johnson's motion (CRDE 106). On January 25, 2017, pursuant to a presidential commutation, Johnson's term of incarceration was amended to 240 months (CRDE 105). Still more, Johnson filed three additional motions to reduce sentence, one on January 8, 2019 (CRDE 107), another on January 29, 2019 (CRDE 109), and a third on March 14, 2019 (CRDE 112). The district court denied all three (CRDE 122). Johnson appealed the district court's denial (CRDE 123). Then, last month, the Eleventh Circuit vacated the district court's order and remanded for further proceedings (CRDE 128:36). *See United States v. Jones*, 962 F.3d 1290, 1305 (11th Cir. 2020). Johnson filed the Compassionate Release Motion on July 6, 2020 (CRDE 127). And he filed the § 404 Motion on July 15, 2020 (CRDE 129).

II. The Government's Response To Johnson's § 404 Motion

a. The § 404 Motion

The § 404 Motion first describes the Eleventh Circuit's decision which vacated this Court's order denying Johnson's original § 404 motion (CRDE 129:1–4). Johnson then argues that this Court should grant him relief for three primary reasons. First, he cites to the "[s]mall quantity of crack" involved in this case, specifically 10.4 grams (*id*. at 4–5). Second, in claiming that the § 3553(a) factors weigh in his favor, he specifically cites to the "small amount of crack" involved

in his case and he references the "need to avoid unwarranted disparities with similarly-situated defendants," while citing to district court cases (*id*. at 5–7). Third, Johnson argues that his "[e]xemplary post-sentencing rehabilitation" justifies a further reduction of his sentence (*id*. at 7–10). In support of this third point, he claims a "perfect disciplinary record for over 12 straight years in prison" and his "effort[s] to improve himself," like earning a GED, completing a drug rehabilitation program, taking a course in anger management, and being involved in vocational training (*id*. at 8). Johnson also cites to a more recent experience where he volunteered to be transferred to his current location in order to be able to help that facility rebuild after it had been damaged by a hurricane (*id*.). He says that he was only allowed to help in the rebuilding because "he has never engaged in any violent act in his life," because of his disciplinary record, and by being "designated by the BOP for 'minimum' and 'out custody'" (*id*.). Lastly, Johnson argues that "his character through his perfect conduct, unwavering dedication to improve himself, and dedication to the prison community—all the while maintaining a strong bond" with his family—support his request to reduce his term of imprisonment to 180 months and his term of supervised release to six years (*id*. at 9–10).[5]

b. Legal Standard And Analysis

The Eleventh Circuit remanded this case for further proceedings following its decision to

[5] Defense counsel believes that, should this Court grant the § 404 Motion, Johnson would be due to be immediately released to a halfway house (CRDE 129:10 n.4). Defense counsel also suggests that Johnson would have a job available to him upon release and that he has secured an apprenticeship (*id*.). Defense counsel also describes the filing docketed at CRDE 127 as a letter written by Johnson and sent directly to the district court (*id*.). Because the content of the letter reads as though Johnson is also seeking compassionate release due to the COVID-19 pandemic, and because the letter was docketed as a motion, the government also responds to that "letter" as a separate motion.

vacate this Court's order (docketed at CRDE 122), denying Johnson's motions to reduce sentence (CRDE 128:36). *See Jones*, 962 F.3d at 1305. As the Eleventh Circuit recounted in its opinion, "[t]he First Step Act permits a district 'court that imposed a sentence for a covered offense' to 'impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed.' First Step Act § 404(b). It defines 'covered offense' as 'a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010.' *Id.* § 404(a)." *Id*. at 1297. Further, "[t]he Act makes clear that the relief in subsection (b) is discretionary: 'Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.'" *Id*. at 1298. And "[s]ection two of the Fair Sentencing Act, the only section applicable in these appeals, modified the statutory penalties for crack-cocaine offenses that have as an element the quantity of crack cocaine provided in subsections 841(b)(1)(A)(iii) and (B)(iii). It did so by increasing the quantity of crack cocaine necessary to trigger those penalty provisions." *Id*.

Johnson is eligible to be considered for a sentencing reduction because his conviction for possession with intent to distribute five grams or more of crack cocaine (Count 2) is a "covered offense," given that the Fair Sentencing Act modified the statutory penalties for that offense.[6] At

[6] The Court's discretionary authority to reduce Johnson's sentence is limited to Count 2 because no other count of conviction is a "covered offense." In other words, Johnson's 240-month sentence (as reduced by presidential commutation) for Counts 1 and 3 may not be disturbed under § 404 of the First Step Act because those convictions are not for "covered offenses." *See United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) ("[I]n ruling on a defendant's First Step Act motion, the district court (1) is permitted to reduce a defendant's sentence only on a 'covered offense' and only 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense, and (2) is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3, to reduce the defendant's sentence on the

sentencing, and prior to the Fair Sentencing Act's enactment, the statutory penalty range for Count 2 was 10 years to life imprisonment (and at least eight years of supervised release) because of Johnson's prior convictions as noted in the § 851 notice. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (2006). And after the Fair Sentencing Act, the statutory range for that offense (Count 2) changed to zero to 30 years of imprisonment and a supervised release term of at least six years. *See id.* § 841(b)(1)(C) (2010); *Jones*, 962 F.3d at 1303 ("Because of Johnson's four prior felony drug convictions, the statutory penalty for his offense was 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2006). After the Fair Sentencing Act, the statutory range for that same offense changed to zero to 30 years of imprisonment. *See id.* § 841(b)(1)(C) (2012).").[7] Johnson is eligible to be considered for a sentence reduction because he was: (1) sentenced prior to the Fair Sentencing Act's enactment; (2) convicted pursuant to the drug-quantity element of § 841(b)(1)(B); (3) and was not already serving the lowest available sentence under § 841(b)(1)(C). *See Jones*, 962 F.3d at 1298, 1301, 1303. This Court, however, should exercise its discretion and deny his § 404 Motion for two primary reasons. *See Jones*, 962 F.3d at 1302 ("These determinations of whether a movant is eligible for relief and whether to grant the movant relief are separate.").

First, while a presidential commutation certainly does not preclude relief, it is a factor for

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covered offense based on changes in the law beyond those mandated by sections 2 and 3, or to change the defendant's sentences on counts that are not 'covered offenses.' *See* First Step Act § 404(b); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019). In short, the First Step Act does not authorize the district court to conduct a plenary or *de novo* resentencing. *See Hegwood*, 934 F.3d at 418.").

[7] Relevant here, § 2 of the Fair Sentencing Act increased the threshold drug quantity of crack cocaine from 5 grams to 28 grams for § 841(b)(1)(B)(iii)'s 10-year mandatory minimum and life statutory maximum enhanced penalties. And as noted *supra*, 10.4 grams of crack cocaine were attributed to Johnson in the district court proceedings (PSI ¶¶ 7, 12) (CRDE 122:10).

this Court to consider in deciding whether to grant Johnson's § 404 Motion. Johnson's new, post-Fair Sentencing Act total offense level is 34, pursuant to the career offender guidelines, because the statutory maximum of his Count 2 conviction is now 30 years. *See* USSG § 4B1.1(b). The offense level of 34 and the criminal history category of VI result in a new Sentencing Guidelines range of 262 to 327 months. Given that Johnson's presidentially-commuted sentence of 240 months is already below the low-end of the new Guidelines range, this Court should exercise its discretion to deny him further relief. In other words, the Court should consider exercising its discretion to deny the § 404 Motion here because it would not be in keeping with sentencing Johnson "as if" the Fair Sentencing Act were in effect at the time he committed the crack cocaine offense, which is what the First Step Act calls for. *See Denson*, 963 F.3d at 1089 ("[I]n ruling on a defendant's First Step Act motion, the district court (1) is permitted to reduce a defendant's sentence only on a 'covered offense' *and only 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense* . . . In short, the First Step Act does not authorize the district court to conduct a plenary or *de novo* resentencing. *See Hegwood*, 934 F.3d at 418.") (emphasis added). Johnson's already reduced sentence is one factor that the Court should consider, the other factor (the § 3553(a) analysis) is discussed in more detail below in section IV.

III. The Government's Response To Johnson's Compassionate Release Motion

a. The Bureau Of Prisons' Response To The COVID-19 Pandemic

As this Court is well aware, COVID-19 is an extremely dangerous illness that has caused many deaths in the United States in a short period of time and that has resulted in massive disruption to our society and economy. In response to the pandemic, the Bureau of Prisons ("BOP") has taken significant measures to protect the health of the inmates in its charge.

The BOP has explained that "maintaining safety and security of [the BOP's] institutions is [the BOP's] highest priority." BOP, Updates to BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), available at https://www.bop.gov/resources/news/20200319_covid19_update.jsp.

Indeed, the BOP has had a Pandemic Influenza Plan in place since 2012. BOP Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012), available at https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That protocol is lengthy and detailed, establishing a six-phase framework requiring BOP facilities to begin preparations when there is first a "[s]uspected human outbreak overseas." *Id*. at i. The plan addresses social distancing, hygienic and cleaning protocols, and the quarantining and treatment of symptomatic inmates.

Consistent with that plan, the BOP began planning for potential coronavirus transmissions in January. At that time, the agency established a working group to develop policies in consultation with subject matter experts at the Centers for Disease Control ("CDC"), including by reviewing guidance from the World Health Organization. On March 13, 2020, the BOP began to modify its operations, in accordance with its Coronavirus (COVID-19) Action Plan ("Action Plan"), to minimize the risk of COVID-19 transmission into and inside its facilities. Since that time, as events require, the BOP has repeatedly revised the Action Plan to address the crisis.

Beginning on May 18, 2020, the BOP implemented Phase Seven of the Action Plan, which currently governs operations. The current modified operations plan requires that all inmates in every BOP institution be secured in their assigned cells/quarters for a period of at least 14 days, in order to stop any spread of the disease. Only limited group gathering is afforded, with attention to social distancing to the extent possible, to facilitate commissary, laundry, showers, telephone, and

computer access. Further, the BOP has severely limited the movement of inmates and detainees among its facilities. Though there will be exceptions for medical treatment and similar exigencies, this step will limit transmissions of the disease. Likewise, all official staff travel has been cancelled, as has most staff training. All staff and inmates have been and will continue to be issued face masks and strongly encouraged to wear an appropriate face covering when in public areas when social distancing cannot be achieved.

Every newly admitted inmate is screened for COVID-19 exposure risk factors and symptoms. Asymptomatic inmates with risk of exposure are placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. In addition, in areas with sustained community transmission, all facility staff are screened for symptoms.

Social and legal visits were stopped as of March 13th, and remain suspended until at least July 31, 2020, to limit the number of people entering the facility and interacting with inmates. In order to ensure that familial relationships are maintained throughout this disruption, the BOP has increased detainees' telephone allowance to 500 minutes per month. Tours of facilities are also suspended. Legal visits will be permitted on a case-by-case basis after the attorney has been screened for infection in accordance with the screening protocols for prison staff. Further details and updates of the BOP's modified operations are available to the public on the BOP's website at a regularly updated resource page: www.bop.gov/coronavirus/index.jsp.

In addition, in an effort to relieve the strain on BOP facilities and assist inmates who are most vulnerable to the disease and pose the least threat to the community, the BOP is exercising

greater authority to designate inmates for home confinement. On March 26, 2020, the Attorney General directed the Director of the BOP, upon considering the totality of the circumstances concerning each inmate, to prioritize the use of statutory authority to place prisoners in home confinement. That authority includes the ability to place an inmate in home confinement during the last six months or 10% of a sentence, whichever is shorter, *see* 18 U.S.C. § 3624(c)(2), and to move to home confinement those elderly and terminally ill inmates specified in 34 U.S.C. § 60541(g). Congress has also acted to enhance the BOP's flexibility to respond to the pandemic. Under the Coronavirus Aid, Relief, and Economic Security Act, enacted on March 27, 2020, the BOP may "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement" if the Attorney General finds that emergency conditions will materially affect the functioning of the BOP. Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516. On April 3, 2020, the Attorney General gave the Director of the BOP the authority to exercise this discretion, beginning at the facilities that thus far have seen the greatest incidence of coronavirus transmission. *See* Federal Bureau of Prisons, *COVID-19 Home Confinement Information*, at https://www.bop.gov/coronavirus/. Taken together, all of these measures are designed to sharply mitigate the risks of COVID-19 transmission in a BOP institution. The BOP has pledged to continue monitoring the pandemic and to adjust its practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders.

Unfortunately and inevitably, some inmates have become ill, and more likely will in the weeks ahead. But the BOP must consider its concern for the health of its inmates and staff alongside other critical considerations. For example, notwithstanding the current pandemic crisis,

the BOP must carry out its charge to incarcerate sentenced criminals to protect the public. It must consider the effect of a mass release on the safety and health of both the inmate population and the citizenry. It must marshal its resources to care for inmates in the most efficient and beneficial manner possible. It must assess release plans, which are essential to ensure that a defendant has a safe place to live and access to health care in these difficult times. And it must consider myriad other factors, including the availability of both transportation for inmates (at a time when interstate transportation services often used by released inmates are providing reduced service), and supervision of inmates once released (at a time when the Probation Office has necessarily cut back on home visits and supervision).

b. The Compassionate Release Motion[8]

In his Compassionate Release Motion, Johnson argues that he is deserving of relief because he is a "non-violent offender with no violence in [his] background" and presents no "threat to [the] community or anyone else" (CRDE 127:1). He claims, for example, that "taking classes" and earning a "high school diploma" are evidence of his rehabilitation (*id*.). He demonstrates an interest

[8] Noticeably absent from the Compassionate Release Motion is any claim regarding administrative exhaustion, as required by statute. The BOP has no record of any administrative request submitted for consideration by Johnson. Given that there is no indication that Johnson has exhausted "all" of his administrative remedies as required by statute, the Compassionate Release Motion is not properly before this Court. However, because Johnson's request is plainly without merit, this Court should deny the Compassionate Release Motion on the merits, with prejudice. *See* U.S.C. § 3582(c)(1)(A) ("[t]he court may not modify a term of imprisonment once it has been imposed except that . . . 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.") (emphasis added). What is more, according to the BOP, because Johnson has a medium risk PATTERN score, he does not qualify for home confinement.

in contributing to the community and being present and a good father to his children; he also expresses an interest in using his experience in a positive way to help others (*id*.). Johnson cites his work skills, like carpentry, and mentions his transfer to Marianna, Florida to help rebuild a prison that was damaged by a hurricane (*id*.). Johnson further states that the rebuilding of that prison represents a positive impact on BOP staff employment (*id*.). He also claims to have a job available to him upon release (*id*.). And in closing, in a single sentence, Johnson mentions the COVID-19 pandemic and its impact on crowded prisons (*id*.).

c. Legal Standard And Analysis

i. Johnson Should Be Denied Compassionate Release Because He Does Not Present Extraordinary Or Compelling Reasons.

The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act on December 21, 2018, provides in pertinent part:

> (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 . . .

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

As under prior law, in assessing the merits of a defendant's motion for compassionate release under § 3582(c)(1)(A), the court's ultimate decision must be "consistent with applicable policy statements issued by the Sentencing Commission." Further, 28 U.S.C. § 994(t) provides: "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." Accordingly, the relevant policy statement of the Commission is binding on the court. *See Dillon v. United States*, 560 U.S. 817, 826 (2010) (where 18 U.S.C. § 3582(c)(2) permits a sentencing reduction based on a retroactive guideline amendment, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," the Commission's pertinent policy statements are binding on the court).[9]

The Sentencing Guidelines Policy Statement appears at § 1B1.13, and provides that the court may grant release if "extraordinary and compelling circumstances" exist, "after considering

[9] Prior to the passage of the First Step Act, while the Commission Policy Statement was binding on the court's consideration of a motion under § 3582(c)(1)(A), such a motion could only be presented by the BOP. The First Step Act added authority for an inmate himself to file a motion seeking relief, after exhausting administrative remedies, or after the passage of 30 days after presenting a request to the warden, whichever is earlier. Under the law, the inmate does not have a right to a hearing. Rule 43(b)(4) of the Federal Rules of Criminal Procedure states that a defendant need not be present where "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." *See Dillon*, 560 U.S. at 827–28 (observing that, under Rule 43(b)(4), a defendant need not be present at a proceeding under § 3582(c)(2)).

the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable," and the court determines that "[t]he 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 application note 1 to the Policy Statement, the Commission identifies the "extraordinary and compelling reasons" that may justify compassionate release. The note provides as follows:

> 1. **Extraordinary and Compelling Reasons.**--Provided the defendant meets the requirements of subdivision (2) [regarding absence of danger to the community], extraordinary and compelling reasons exist under any of the circumstances set forth below:
>
> (A) **Medical Condition of the Defendant.**--
>
> (i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> (ii) The defendant is—
>
> (I) suffering from a serious physical or medical condition,
>
> (II) suffering from a serious functional or cognitive impairment, or
>
> (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
>
> (B) **Age of the Defendant.**--The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (C) **Family Circumstances.**--

> (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
>
> (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
>
> (D) **Other Reasons.**--As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

USSG § 1B1.13. And application note 3, citing 28 U.S.C. § 994(t), provides that "rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason" for applying § 3582(c)(1)(A). *Id*. This Court should accordingly find that the addition of a claim of rehabilitation by Johnson does not by itself provide a basis for relief.

As noted above, the Sentencing Commission recognizes two circumstances related to health as possibly sufficient. First, the Commission describes an inmate "suffering from a terminal illness." Second, the Commission identifies a circumstance in which an inmate is "suffering from a serious physical or medical condition[;] suffering from a serious functional or cognitive impairment[;] or experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover."

For its part, the BOP promulgated Program Statement 5050.50, amended effective January 17, 2019, to set forth its evaluation criteria.[10] The BOP Program Statement is similar with respect to these circumstances to the Sentencing Commission's, although it is more extensive. Pertinent here, the BOP's Program Statement defines a "debilitated medical condition" as one where the

[10] *See* https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

inmate is "[c]ompletely disabled, meaning the inmate cannot carry on any self-care and is totally confined to a bed or chair; or [c]apable of only limited self-care and is confined to a bed or chair more than 50% of waking hours." As to circumstances involving "debilitated medical conditions," a reduction in sentence may be considered for inmates "who have an incurable, progressive illness or who have suffered a debilitating injury from which they will not recover." The Program Statement also notes that a reduction in sentence may be considered for inmates "who have been diagnosed with a terminal, incurable disease and whose life expectancy is eighteen (18) months or less."[11]

"[A] compassionate release due to a medical condition is an extraordinary and rare event." *White v. United States*, 378 F. Supp. 3d 784, 787 (W.D. Mo. May 9, 2019). The defendant has the burden to show circumstances meeting the test for compassionate release. *See United States v. Hamilton*, 715 F.3d 328, 341 (11th Cir. 2013) (the defendant has the burden of proving that he is entitled to a sentence reduction). As the terminology in the statute makes clear, compassionate release is "rare" and "extraordinary." *United States v. Willis*, 382 F. Supp. 3d 1185, 1188 (D.N.M. 2019) (citations omitted).

Johnson does not specify a category for relief in the Compassionate Release Motion, other than a single general reference to COVID-19 and its impact on inmates,[12] nor does he cite to any

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[11] In order for this Court to consider granting Johnson relief, he must first qualify under either the Sentencing Commission or the BOP's Program Statement. *See United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3805349, at *4–5 (S.D. Ala. Aug. 12, 2019).

[12] *See United States v. Eberhart*, No. 13-cr-00313-PJH-1, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) ("General concerns about possible exposure to COVID-19 do not meet the criteria for extraordinary and compelling reasons for a reduction in sentence set forth in the Sentencing Commission's policy statement on compassionate release, U.S.S.G. § 1B1.13.").

medical conditions (CRDE 127:1). Nor do his medical records of the last two years reveal any current conditions that would warrant the extraordinary relief he now seeks. Other than eye discomfort and marijuana dependency, there do not appear to be any other current health issues.[13]

As stated above, Johnson does not invoke a specific category upon which he seeks compassionate release. Instead, he generally references the COVID-19 pandemic (CRDE 127:1). Although he has the burden of proof, Johnson presents nothing to rebut the sensible conclusion that he does not qualify for compassionate release. Moreover, denial of compassionate release in this matter is consistent with the emerging case law following passage of the First Step Act. *See Cannon v. United States*, No. CR 11-048-CG-M, 2019 WL 5580233, at *1–4 (S.D. Ala. Oct. 29, 2019) (the 71-year-old defendant suffers from significant back and stomach issues, as well as high blood pressure, diabetes, skin irritation, loss of hearing, and various other complications, but relief is denied: "To the extent that Cannon is seeking compassionate release based on his age, he has additionally failed to meet his burden of showing that he meets the criteria of the guidelines. While he is over the age of sixty-five and arguably suffers from medical conditions due to the aging process, Cannon has not shown that those condition are so serious or that he is deteriorating so as to justify compassionate release . . . There is no indication that these conditions have escalated [from the time he was sentenced] to the point that they have caused a serious deterioration in his physical or mental health."); *United States v. Gutierrez*, No. CR 05-0217 RB, 2019 WL 2422601, at *4 (D.N.M. June 10, 2019) (court puts "great weight" on BOP's decision to deny relief); *see also United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3082202, at *2–3 (S.D. Ala. July 15,

[13] The medical records also indicate that Johnson has previously complained of chest pain, shortness of breath, and a sinus infection. Those issues either did not manifest during a medical encounter or appear to have since been resolved.

2019) (compassionate release, sought on the basis of a variety of health ailments, is denied, as none affect the inmate's ability to function in a correctional environment).[14]

IV. The § 3553(a) Factors Cut Against Granting Johnson Relief On The § 404 Motion And The Compassionate Release Motion

As to the Compassionate Release Motion, Johnson should not be granted compassionate release because he has not proffered "extraordinary and compelling reasons." As to the § 404 Motion, although Johnson is eligible to be considered for discretionary relief, his request for a sentence reduction should be denied as discussed in more detail *supra*. In this case, the § 3553(a) factors provide further grounds for this Court to exercise its discretion to deny both motions.

The § 3553(a) factors do not weigh in favor of Johnson's release. First, his claims of "non-violence" (CRDEs 127:1; 129:8) is contradicted by his convictions in the instant case, which include the possession of a firearm by a previously convicted felon. Further, by the time Johnson was 27-years-old, he had already amassed an extensive criminal record. At sentencing, the government observed that Johnson had five prior convictions that qualified him for the career offender enhancement (CRDE 86:11). The recurrence of Johnson's drug trafficking, the span and extent of his criminal history, as well as the nature and circumstances of his instant offenses, make further reduction of this Court's original sentence unjustified. At sentencing, in 2008, the Court previously considered the § 3553(a) factors as well as Johnson's conduct, observing that the "record is horrible. It is repetitive. It is like the rules don't apply to him" (CRDE 86:13). In

[14] Matters in which compassionate release motions have been granted presented much more compelling circumstances. *See, e.g., United States v. Johns*, No. CR 91-392-TUC-CKJ, 2019 WL 2646663, at *2–4 (D. Ariz. June 27, 2019) (defendant is 81 years old with multiple serious medical conditions, including "severe heart disease" and a stroke, from which he is not likely to recover, and, after serving 23 years, has a substantially diminished ability to provide self-care within the BOP).

sentencing Johnson to 360 months of imprisonment, the district court noted that "the main purpose, the main benefit of it is that he isn't going to be on the street until he's almost 60 years old. I think that is the main benefit of the thing, and maybe when he comes out he'll not only be older, but wiser, and become a productive member of society" (*id.* at 15). Though Johnson will now certainly be released well before his 60th birthday, he should not now also be released from prison before his 40th.

His convictions in this case were for drug possession with intent to distribute and possession of a firearm (CRDE 1:1–3). The combination of drug trafficking and firearms is a dangerous mix that strongly cuts against early release. In sum, the applicable § 3553(a) factors—such as the nature and circumstances of the offense, the history and characteristics of the offender, the need to ensure adequate punishment, deterrence, and community protection—do not support Johnson's release, and his claims of rehabilitation are not enough to counter that conclusion. His release would minimize the severity of the offense of conviction and undermine the safety of the community. Further reducing his sentence below that which would apply under the Sentencing Guidelines to a defendant convicted today of the same amount of crack cocaine would create an unwarranted disparity with similarly-situated defendants. Given that he was convicted of and sentenced for drug trafficking and possession of a firearm, and for all of the above reasons, a further reduction is not warranted for any ground Johnson raises.

V. COVID-19 And The Compassionate Release Motion

In his Compassionate Release Motion, Johnson cites to the COVID-19 pandemic as justification for his release.[15] However, the mere existence of the pandemic, which poses a general

[15] The CDC cautions that older adults and/or those with serious underlying medical

threat to every non-immune person in the country, cannot alone provide a basis for a sentence reduction; to put it another way, Johnson's condition has not changed as a result of COVID-19 (and certainly, the analysis of the § 3553 factors or the danger posed by Johnson's release have not changed).[16]

As of July 29, 2020, there is just one confirmed inmate case of the virus and just seven confirmed staff cases (with one staff member recovery) of the virus at Marianna FCI. Moreover, Marianna FCI, where Johnson is housed, has isolation units, separate recovery areas, and other means to isolate individuals, should that become necessary. Additionally, the BOP has instituted numerous measures to mitigate transmission, including a suspension of legal and social visits as well as the implementation of enhanced staff screening and social distancing. The following is a link to the Bureau of Prison COVID-19 Action Plan: https://www.bop.gov/resources/news/20200313_covid-19.jsp. As such, Marianna FCI has the capacity to address cases of COVID-19. In sum, the fact that a new virus exists is not grounds to release Johnson or any of the other thousands of incarcerated persons in the United States. Johnson has failed to meet his burden and show that this Court should grant him relief based upon the COVID-19 virus or for any other reason.[17]

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conditions may be at higher risk of severe illness due to COVID-19. Johnson does not fall under either of these categories. First, given that Johnson is only 39-years-old, he clearly does not fall under the high-risk category due to age. Second, Johnson does not allege any serious underlying medical condition in his Compassionate Release Motion.

[16] Further, because Johnson does not provide this Court with a release plan, other than vague statements about his desire to live with his family and that he has a job available to him upon release, it is impossible to consider whether he would be more or less susceptible to contracting the virus if released.

[17] Given the sensitive nature of the documents, the government is sending a motion to the

VI. Conclusion

For the forgoing reasons, Johnson is not eligible for relief and this Court should therefore deny both the § 404 Motion and the Compassionate Release Motion with prejudice.

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district court seeking authorization to file the medical records from July 2018 to July 2019 and medical records from July 2019 to July 2020 under seal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the **29th** day of **July 2020**, the undersigned electronically filed the foregoing document and its attachment with the Clerk of the Court using CM/ECF.

s/ Armando R. Méndez
ARMANDO R. MÉNDEZ
Assistant United States Attorney

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 MIAFH          *          INMATE DISCIPLINE DATA          *     07-09-2020
PAGE 001 OF 001 *     CHRONOLOGICAL DISCIPLINARY RECORD    *     09:11:37

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UDC HEARING DATE/TIME: 06-09-2016 0940
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APPEAL CASE NUMBER(S): 866724
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        LP COMM    / 30 DAYS / CS
        COMP:    LAW:    LOSS OF COMM. FOR DAYS AS OF 06-09-2016



G0005       TRANSACTION SUCCESSFULLY COMPLETED - CONTINUE PROCESSING IF DESIRED
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A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 08-20190-CR-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS JOHNSON,

Defendant.
_____/

REPLY TO GOVERNMENT'S RESPONSE TO MOTION FOR REDUCED SENTENCE UNDER SECTION 404 OF THE FIRST STEP ACT

Defendant, Thomas Johnson, through undersigned counsel, respectfully replies to the government's response (DE 135) to his motion for reduced sentence under Section 404(b) of the First Step Act (DE 129), as follows:

1. **The only motion before the Court at this time is Mr. Johnson's motion for reduction of sentence pursuant to Section 404 of the First Step Act, which the Eleventh Circuit remanded for further consideration under Section 404(b).**

The government devotes the bulk of DE135 to opposing a separate "Motion for Compassionate Release" which Mr. Johnson has ***not*** filed and therefore, such motion does not exist. Contrary to the government's mischaracterization of DE 127, that letter by Mr. Johnson to the Court – even by a liberal construction – did not expressly or implicitly seek the separate remedy of compassionate release authorized in 18 U.S.C. § 3582(c)(1)(A).

In his letter, Mr. Johnson simply offered support for his previously-filed, and now-remanded motion for reduction of his sentence pursuant to Section 404 of the First Step Act. The most pertinent facts in the letter for purposes of Section 404(b) are those attesting to his post-sentence rehabilitation by earning his diploma, taking many life-enriching classes, working with (and bettering himself through) UNICOR, and planning for a job with UPS upon leaving prison. Notably, these very facts were detailed by undersigned counsel in the motion for order on remand, as they directly support reducing Mr. Johnson's sentence to 180 months imprisonment and 6 years supervised release at this time. (DE 129).

To be clear, pages 9-19 and 21-22 of the government's response address a separate statutory vehicle for release that Mr. Johnson has *not* invoked. In those portions of DE135, the government has vigorously rebutted straw man arguments on non-issues under Section 404 such as administrative exhaustion of remedies for purposes of § 3582(c)(1)(A), and the type of medical conditions that would be considered "extraordinary and compelling" grounds for release under that different provision.

As there is no reason for such a lengthy discussion of irrelevant non-issues, these portions of the response are merely an effort to distract from the fact that the government has no well-founded basis – consistent with 18 U.S.C. § 3553(a) – to oppose reduction in Mr. Johnson's term of imprisonment and supervised release under Section 404(b) at this time.

2. The government provides no legally-cognizable reason consistent with 18 U.S.C. § 3553(a) for why the Court should not further reduce both Mr. Johnson's term of imprisonment and term of supervised release on Count 2 as Mr. Johnson has requested; its claim that "a further reduction would not be in the spirit of what Congress intended" is unfounded.

The government concedes that as per *United States v. Jones et al.*, 962 F.3d 1290 (11th Cir. 2020), the Court has the authority to further reduce Mr. Johnson's term of imprisonment to 180 months imprisonment, and his supervised release to the new statutory minimum of 6 years on Count 2, because he is "not already serving the lowest available sentence under § 841(b)(1)(C)." DE 135: 8 (citing *Jones*, 962 F.3d at 1298, 1301, 1303). However, it asks the Court to exercise its discretion not to grant either reduction "for two primary reasons." DE 135:8. Both are baseless.

(A) The government's "spirit of the enactment" argument is unfounded. While conceding – contrary to its prior position – that a presidential commutation "does not preclude further relief," the government argues that because Mr. Johnson's commuted sentence is already below the low end of the Guideline range under the Fair Sentencing Act, it "would not be in the spirit of what Congress intended in enacting the First Step Act" to further reduce Mr. Johnson's sentence, because that "would not be in keeping with sentencing Johnson 'as if' the Fair Sentencing Act were in effect at the time he committed the crack cocaine offense." DE 135:2, 9. The government is wrong for a host of reasons.

As a threshold matter, the Eleventh Circuit rejected this precise reading of the Act in remanding Mr. Johnson's case for reconsideration. It explained that the "'as if"

requirement in § 404(b) imposed only two limits on the Court's discretion," *id.* at 1303, and neither precludes a further reduction in either the term of imprisonment or supervised release here. Indeed, the Eleventh Circuit remanded the case because it could not be sure the Court understood its authority to further reduce Mr. Johnson's already-commuted sentence. *Id.* at 1305.

Notably, when Congress wrote the First Step Act in 2018, it was well-aware that President Obama had just commuted the sentences of 1,715 drug offenders,[1] many "of whom were users or dealers of crack."[2] The government would have this Court believe that while Congress drafted sweeping legislation benefitting crack offenders, it intended – without saying a word – to preclude any benefit to this large, well-publicized swath of them. Had Congress intended to deny further relief to any defendant with a commuted sentence already below the revised guideline range, it could easily have said so. That it did not is significant. And notably, the government cannot point to a sentence in the legislative history that might support its "spirit of the enactment" argument. The argument is unfounded and should be rejected.

The most telling proof that the government has invented this "spirit of the enactment" argument from thin air, is the fact that the government cannot confront or distinguish – and instead feels compelled to ignore – *every* case Mr. Johnson cited

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[1] Gregory Korte, *Obama Grants 330 More Commutations, Bringing Total to a Record 1,715*, USA Today (Jan. 19, 2017), https://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/.

[2] Eli Hager, *Obama Commutes the Sentences of 61 Federal Prisoners*, The Marshall Project (Mar. 30, 2016), https://www.themarshallproject.org/2016/03/30/obama-commutes-the-sentences-of-61-federal-prisoners-many-with-crack-convictions.

in DE 129: 6, n. 3 in which courts in this district, circuit, and throughout the country have granted a further reduction to an eligible defendant with a prior commutation: namely,

- *United States v. Walker*, Case No. 07-60283-cr-COHN, DE 58 (S.D.Fla. Feb. 24, 2020) (Cohn, J.);
- *United States v. Stilling*, No. 8:08-cr-230-T-24SPF, DE112:2-3 (M.D. Fla. March 15, 2019) (Bucklew, J.)
- *United States v. Cook*, No. 06-258 (E.D. Mo. 2019);
- *United States v. Barber*, 2019 WL 3771754 (W.D. Va. Aug. 9, 2019);
- *United States v. Garrett*, 2019 WL 2603531 (S.D. Ind. June 25, 2019); and
- *United States v. Biggs*, 2019 WL 2120226 (N.D. Ill. May 15, 2019).

The movants in every one of these cases had prior drug convictions that made them Career Offenders just like Mr. Johnson. And nonetheless, in every instance, these courts granted a further reduction of a commuted term that was at or already below the revised Career Offender range because of the defendant's demonstrated rehabilitation. The Court should do so here as well.

(B) <u>The government's claim that the § 3553(a) factors weigh against a reduction is unfounded; in so arguing, the government ignores every relevant § 3553(a) factor</u>. Although the reduced sentences accorded the similarly-situated defendants in *Walker*, *Stilling*, *Cook*, *Barber*, *Garrett*, and *Biggs* must be

taken into account due to Congress' mandate in 18 U.S.C. § 3553(a)(6) to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct," the government improperly ignores this § 3553(a) factor entirely, as well as every other § 3553(a) factor warranting leniency here. Given the Eleventh Circuit's characterization of "[t]he actual quantity of crack cocaine involved in a violation" as "***a key factor for a sentence modification***," *Jones*, 962 F.3d at 1301 (emphasis added), and the fact that no court in the country has denied a reduction to a defendant whose offense conduct involved as little crack as here, the government improperly tries to minimize the significance of the extremely small quantity of crack involved in Mr. Johnson's offense.

It points out that he was also convicted of possession of a firearm by a convicted felon. But in suggesting that the addition of the § 922(g) count here is a sound reason to deny any further relief to Mr. Johnson, the government ignores that in several of the commutation cases cited above – *Biggs*, *Cook*, and *Garrett* – the defendant also had a firearm, the government similarly argued "danger to the community," and the courts nonetheless further reduced these defendants' sentences. *See, e.g., Biggs*, 2019 WL 2120226, at **3-4 (reducing sentence to time served where defendant had served the 180 minimum mandatory on his § 922(g)/ACCA count, even though he had illegally possessed ***multiple*** firearms; noting with significance that "the record does not suggest that he wielded or discharged them," and he had been a model inmate); *United States v. Cook*, Case No. 05-cr-258-CDP, DE 173 & DE 179 (E.D. Mo. 2019) (reducing 200-month sentence on both crack and §922(g) counts to 180 months

imprisonment, notwithstanding government's argument that "***defendant's poor conduct***" in prison demonstrated "disrespect for the law and continued danger" to the community); *cf. Garrett*, 2019 WL 2603531, at **1, 4 (reducing sentence even though the defendant was in possession of a ***loaded firearm*** at the time of arrest, and convicted of a § 924(c) count for possessing the firearm ***in furtherance*** of a drug trafficking crime; reasoning that "the crimes he committed did not involve violence," and the defendant "has shown both that he is capable of rehabilitation and the he is dedicated to doing so");

Here, unlike *Garrett*, the gun Mr. Johnson possessed was not loaded. He was not convicted of a § 924(c) offense, because there was no evidence that the gun was possessed to "further" a drug crime in any way. Like *Biggs*, he was convicted merely for possessing a gun as a felon; he did not brandish it, or even mention it during his crack deal. Contrary to the government's mistaken suggestion, his crack offense was in no sense "violent." And indeed, as the PSI shows, he has not been involved in any violent act in his life.

Like the defendants in both *Biggs* and *Garrett*, Mr. Johnson has shown himself at every step of the way through his lengthy incarceration to be a "model prisoner." Unlike the defendant in *Cook*, he has not had even one disciplinary infraction – ever. The government ignores his exemplary record of conduct in prison for the last 12 years, because it cannot dispute that he is a changed person. But while the government tries to ignore this irrefutable fact and governing law, namely, *Pepper v. United States*, 462 U.S. 476 (2011) where the Supreme Court rightly recognized that

post-sentencing conduct is the best evidence possible of the need for a sentence to deter, protect, and further rehabilitate a defendant, *see id.* at 489-93, the Court cannot ignore these considerations; Congress mandates their consideration.

In other circuits, notably, the government has candidly conceded that that it is reversible error under Section 404(b), for a district court ***not*** to consider how a defendant's post-sentencing conduct impacts the above-mentioned § 3553(a) considerations. Specifically, in *United States v. Allen*, 956 F.3d 355 (6th Cir. 2020), a decision cited with approval in *Jones*, 962 F.3d at 1304, the government conceded and the Sixth Circuit agreed that the district court reversibly erred in considering the defendant only at the time he committed the covered offense – treating his subsequent good behavior as "immaterial." *Allen*, 956 F.3d at 356-67. That the same U.S. government would take a directly contrary position to its position in *Allen* here, without citing any supportive authority, and indeed contrary to all authority, is inconsistent with its duty of candor to this Court.

As Judge Rosenberg rightly acknowledged in her op-ed explaining why she reduced Clarence Pott's life sentence to time served (which the government has not addressed), "[t]he true marker of a person's character is what he does when he thinks no one is watching." (DE 129:9). Mr. Johnson has demonstrated his character by his exemplary conduct for the last 12 years in prison. For much of that time, Congress provided him no vehicle for relief from that harsh sentence; because he qualified as a Career Offender, he was denied relief from otherwise applicable retroactive guideline amendments.

Unlike a compassionate release movant, Mr. Johnson does not seek a time served sentence or outright release at this time. Rather, he seeks a reduction in his sentence to 180 months imprisonment, which will allow him to transition back to society in a halfway house, where he will continue to be supervised. With the BOP designating him for "out" custody (which allows his work to rebuild the prison at Marianna), and without a single disciplinary infraction in over 12 years – the government's "danger to the community" argument is not based on current fact. Baseless assertions about "danger to the community" should not tip the balance of the § 3553(a) factors against a well-warranted further reduction in Mr. Johnson's term of imprisonment and supervised release.

On the latter point, the government casually ignores that it conceded in *Allen* and in many other cases where as here a defendant has a record of exemplary institutional conduct, that the Court should reduce the movant's term of supervised release down to the new statutory minimum. Plainly, the 6-year minimum under § 841(b)(1)(C) would have been imposed had Mr. Johnson been sentenced after the Fair Sentencing Act revised the applicable statutory penalties. Therefore, to sentence Mr. Johnson "as if" Section 2 of the FSA were in effect should warrant a 6 year term at this time, given his 12 years in jail with perfect conduct. There is no conceivable reason for maintaining the greater-than-minimum term of supervision Congress made clear in the FSA is sufficient for Mr. Johnson's very small quantity crack offense.

It should also be noted that the United States Sentencing Commission's new study examines exactly this issue: how much does the length of the punishment correlate with the goals of deterrence and protection of the public? This recent study revealed that "[t]here was **no statistically significant difference in the recidivism rates of offenders released early pursuant to retroactive application of the drugs minus two amendment and a comparable group of offenders who served their full sentences**." https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf (emphasis added). This was the same finding the Commission had made with respect to the 2-level reduction in crack cocaine offenses:

> Second, the Commission relied on its recidivism study of the Crack Minus Two Amendment to predict that modest reductions in drug trafficking penalties such as those provided by the Drugs Minus Two Amendment would not increase recidivism and jeopardize public safety…. The Commission noted that it had compared the recidivism rates of offenders who were released early as a result of retroactive application of the Crack Minus Two Amendment with a control group of offenders who had served their full terms of imprisonment and detected no statistically significant difference in the rates of recidivism for the two groups after two years, and again after five years….

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf. (internal citations omitted). In sum, the data revealed to the Sentencing Commission that the shorter sentences resulting from the two-level decreases in the Guidelines continued to show

no difference in rates of recidivism compared to those who served longer sentences. There is no question, as revealed by his actions while incarcerated, that Mr. Johnson is as different a now as one could be from the person who was arrested and charged in this case.

3. <u>The Court indisputably has the authority under Section 404(b) to also reduce the concurrent sentences imposed on Counts 1 (the ACCA count) and 3 (the cocaine powder count) because these counts were grouped under the Guidelines for sentencing; the government's claim that the Court's discretionary authority under Section 404(b) is "limited to Count 2 because no other count of conviction is a 'covered offense'" is unfounded</u>.

The government baselessly asserts in a footnote that the concurrent 210 months sentences on Counts 1 and 3 cannot be disturbed under § 404(b) of the First Step Act because those convictions are not for "covered offenses." DE 135:7 n. 6. If that assertion were correct, the Eleventh Circuit would have remanded for the court to engage in a futile inquiry that would not impact Mr. Johnson in any way. Not only does that make zero sense; it is simply *not* the law.

Notably, the courts in *Cook* and *Biggs* ruled to the contrary in the *precise* circumstances here. In *Biggs*, the court reasoned that:

> Although only one of Biggs's two convictions qualifies as a covered offense, the court "imposed a sentence for a covered offense" when it entered a single sentencing judgment. Moreover, when "imposing a reduced sentence as if ... the Fair Sentencing Act ... were in effect," the court effectively resentences the defendant under the Fair Sentencing Act. ... As with any sentencing, the court considers multiple counts together; indeed, the guidelines require the court to use a combined offense level for all counts. U.S.S.G. § 3D1.1(a)(3). Because the potential reduced penalties for covered offenses could influence the

> range of recommended penalties for non-covered offenses, "impos[ing] a reduced sentence as if ... the Fair Sentencing Act ... were in effect" entails resentencing on all counts.

2019 WL 2120226 at *3 (noting with significance that the court in *Cook* had reduced a sentence for a covered crack offense, and non-covered firearm offense; reducing Biggs's sentence on both the crack and ACCA count to the 180 month minimum on his ACCA count).

Other district courts have ruled similarly – likewise reducing concurrent sentences imposed pursuant to the grouping rules of the Guidelines on both a covered crack count, and non-covered firearm or cocaine powder count. *See, e.g., United States v. Mitchell*, 2019 WL 2647571, at *1, 7-9 (D.D.C. June 27, 2019) (granting First Step Act reduction to "time served" on all concurrent counts – a covered count involving 14.5 grams of crack, as well as a non-covered § 922(g) firearm count as here – after a presidential commutation of the aggregate sentence on all counts; following *Biggs*, but finding Mitchell's case even stronger because he had incurred ***no disciplinary infractions*** in 14 years); *United States v. Hughes*, 2019 WL 4621973, at **5-7 (W.D. Mich. Sept. 24, 2019) (imposing reduced concurrent sentences equating to "time served" on crack, powder, and § 922(g) counts).

While many district courts have now held that the language of § 404(b) or the "sentencing package" doctrine – or both – permit a court to resentence on non-covered as well as covered counts where the crack count demonstrably drove the aggregate

sentence imposed on the non-covered counts,[3] as of this writing only one court of appeals – the Seventh Circuit in *United States v. Hudson*, ___ F.3d ___, 2020 WL4198333 (7th Cir. July 22, 2020) – has specifically considered the issue in the exact scenario presented here. Indeed, in *Hudson* the Seventh Circuit squarely held

[3] *See United States v. Clarke*, Case No. 92-cr-4013-WS-CAS-7, 2019 WL 7499892, at *1-2 (N.D. Fla. Oct. 24, 2019) (Stafford, J.) (government ***conceded*** that *if* defendant were eligible for a sentence reduction on the crack offenses, the court had the authority to reduce his concurrent life sentences on a non-covered count for malicious destruction of property; after finding that the defendant was indeed eligible for a reduction on the crack counts, agreeing with the reasoning in *Biggs* that "where – as here – a defendant's crack offenses drove the entire sentencing package, a district court has the authority under the First Step Act to reduce sentences on all counts" including his crack offenses; reducing life sentence on all counts to time served); *United States v. Hill*, ___ F. Supp. 3d ___, 2020 WL 891009 at *4, (D. Md. Feb. 24, 2020) (applying sentencing package doctrine to counts grouped under the Guidelines at sentencing; holding: "when a district court reconsiders a sentence for one count, it can reconsider sentences for other counts;" citing cases); *United States v. Jones*, 2019 WL 6907304, at *8 (D. Conn. Dec. 19, 2019) ("The RICO, RICO Conspiracy, and heroin violations . . . were all addressed together, with the crack cocaine violation, as part of a single sentencing package, and these offenses are inextricably related. The Court, therefore, has the authority to reduce Mr. Jones' entire sentence under the First Step Act;" citing *United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999) (Sotomayor, J.)); *United States v. Washington*, 2019 WL 4750575, at *3 (C.D. Ill. Sept. 30, 2019) (when enacting § 404(b), Congress gave courts the authority to reduce "aggregate" sentences involving both covered and non-covered offenses); *United States v. Anderson*, No. 0:04-353 (CMC), 2019 WL 4440088, at *4 n. 2 (D. S.C. Sept. 17, 2019) (recognizing that where a defendant is eligible for a reduction on a covered offense, and "the court originally fashioned a sentence as a whole for both counts," the court "has the authority and discretion to unbundle the sentence and impose a reduced sentence on both [covered and non-covered] counts"); *United States v. Medina*, No. 3:05-CR-58 (SRU), 2019 WL 3769598, *6 (D. Conn. July 17, 2019) (Underhill, C.J.) ("Limiting resentencing to only the covered offense not only minimizes the benefit of the First Step Act, it also conflicts with the Sentencing Guidelines and weakens a sentencing court's authority. . . . Medina should get the full benefit of the First Step Act's remedial purpose."), *motion for reconsideration denied*, 2019 WL 3766392 (D. Conn. Aug. 9, 2019) (Underhill, C.J.); *United States v. Foreman*, 2019 WL 3050670, at *2 n.3, 7 (W.D. Mich. July 12, 2019) (imposing reduced sentence on both crack and powder counts).

that a district court most definitely has the authority under the plain language of Section 404(b) to reduce a defendant's sentence on a grouped, non-covered, concurrently-sentenced § 922(g)/ACCA count. According to the Seventh Circuit, the district court "faltered" in finding that the First Step Act did not permit it to reduce Hudson's concurrent sentence on his ACCA count, because it erroneously "collaps[ed] the eligibility and discretionary inquires" under Section 404. *Id.* at *3. It explained:

> Here, Hudson was eligible for a sentence reduction under the First Step Act because the "statutory penalties for [his] crack-cocaine offenses had been modified by the Fair Sentencing Act. His eligibility "to have a court consider whether to reduce the previously imposed term of imprisonment," covers the firearm offense, because that offense was grouped with Hudson's covered offenses for sentencing, and the resulting aggregate sentence included Hudson's sentences for both the firearm and covered offenses. ...
>
> This conclusion aligns with the text of the First Step Act, which says: a court that "imposed a sentence for a covered offense" may "impose a reduced sentence as if" the Fair Sentencing Act "were in effect at the time the covered offense was committed. § 404(b). That language does not bar a court from reducing a non-covered offense. The district court agreed that Hudson's crack offenses were covered offenses; and the text of the First Step Act requires no more for a court to consider whether it should exercise its discretion to reduce a single, aggregate sentence that includes covered and non-covered offenses.
>
> Excluding non-covered offenses from the ambit of First Step Act consideration would, in effect, impose an extra-textual limitation on the Act's applicability. In Section 404(c) the Act sets forth two express limitations on its applicability. ... If Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language. It did not. And "we decline to expand the limitations crafted by Congress."
>
> In addition, a court's consideration of the term of imprisonment for a non-covered offense comports with the manner in which sentences are imposed. Sentences for covered offenses are not imposed in a vacuum, hermetically sealed off from sentences imposed for non-covered offenses. Multiple terms of imprisonment are treated under federal law as a

> single, aggregate term of imprisonment, 18 U.S.C. § 3584(c), and we've recognized "a criminal sentence is a package composed of several parts." Indeed, the Guidelines *require* a court to group similar offenses, U.S.S.G. § 3D1.2, and to assign a combined offense level for all counts. Sometimes, as Hudson's case demonstrates, a reduced statutory maximum for one count grouped with other offenses directly reduces penalties for other courts. Here, the Fair Sentencing Act's reduction of the statutory maximum penalty affixed to Hudson's higher-volume crack offense drastically reduces – by 100 months – the Guidelines range attached to Hudson's firearm offense.
>
> In sum, a court is not limited under the text of the First Step Act to reducing a sentence solely for a covered offense. Instead, a defendant's conviction for a covered offense is a threshold requirement of *eligibility* for resentencing on an aggregate penalty. Once past that threshold, a court may consider a defendant's request for a reduced sentence, including for non-covered offenses that are grouped with covered offenses to produce the aggregate sentence.

Id. at **3-4 (footnote and internal citations omitted).

Contrary to the government's misleading suggestion in footnote 6, there was ***no*** similar question before the court regarding reducing an aggregate sentence on grouped non-covered counts in either *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019) or *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020). Both cases are inapposite for these and other reasons.

In *Hegwood*, the defendant sought a resentencing *de novo* on grounds that he no longer qualified as a Career Offender under current law. But Mr. Johnson, unlike the defendant in *Hegwood*, has ***not*** so argued. He has not sought resentencing on any ground unrelated to the statutory changes in Section 2 of the Fair Sentencing Act. He concedes that he remains a Career Offender today. He merely seeks a reduced sentence on the ACCA and powder cocaine counts grouped with his crack count, since it was the enhanced statutory penalties on the crack count that drove the Career

Offender range for all counts. To sentence Mr. Johnson "as if" the Fair Sentencing Act applied, requires recalculation of the Guideline range for all counts, and imposing the same sentence on Counts 1, 2, and 3 just as before. If the Count 2 sentence is reduced to 180 months (for the reasons, and based on the analogous authorities discussed *supra*), the concurrent sentences on Counts 1 and 3 should be reduced as well.

Denson is inapposite for different reasons. The only question before the panel in *Denson* was whether the district court was required to hold a hearing with the defendant present when ruling on his motion for a reduced sentence under Section 404 of the First Step Act. *See* 963 at 1082. Given that narrow issue, the gratuitous language added at the end of the decision, and cited by the government, is plainly *dicta*. And as former Chief Judge Carnes has reiterated many times, "regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case;" "all statements that go beyond the facts of the case ... are dicta. And dicta is not binding on anyone for any purpose." *Edwards v. Prime, Inc.*,602 F.3d 1276, 1298 (11th Cir. 2010); *United States v. Birge*, 830 F.3d 1229, 1232 (11th Cir. 2016) (emphasizing *Edwards*' distinction between dicta and holding, and declaring subsequent panel was not bound by a previous panel's dicta).

Nor should that dicta have any persuasive value here because the Court had no occasion in *Denson* to consider a case anything like Mr. Johnson's. The district court in *Denson* was not asked to reduce a concurrent sentence on a non-covered count grouped with and driven by the crack count because the defendant there received no

such sentence. The defendant did have a § 922(g) count, but unlike Mr. Johnson he did not qualify as an Armed Career Criminal. As such, his sentence on the § 922(g) count was capped at the 120 month statutory maximum under § 924(a). There was no single "aggregate" Guideline sentence imposed on all counts in *Denson* driven by the crack count, as is the case here. Accordingly, the defendant in *Denson only* sought to reduce his sentence on his crack count, and asked for an in-person hearing to present evidence in support of that reduction.

The *Denson* panel's dicta is neither binding or persuasive in these materially-distinct circumstances. Notably, in addressing a case involving circumstances analogous to those here – post *Denson* – Judge Middlebrooks squarely rejected the precise objection the government has raised here that the court could not reduce a sentence on a § 922(g)/ACCA count because it is not a "covered offense." *See United States v. Farrington*, Case No. 06-cr-20765, DE 101:8-14 (S.D. Fla. July 27, 2020) (agreeing with the defendant that the sentencing package doctrine provided the Court with discretion to revisit his overall sentence, and reduce his concurrent 300 month terms on crack and § 922(g)/ACCA counts to 180 months imprisonment – which the court did).

As support for his ruling, Judge Middlebrooks cited longstanding Eleventh Circuit "sentencing package" precedents like *United States v. Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014), and *United States v. Martinez*, 606 F.3d 1303, 1304 (11th Cir. 2010). He also found the Seventh Circuit's on-point decision in *Hudson* persuasive in rejecting the government's position.

For the reasons stated by Judge Middlebrooks in *Farrington*, and in the many other on-point, cogently-reasoned decisions discussed above, the Court should reduce Mr. Johnson's sentence on his crack, powder, and ACCA counts, to the 180 month minimum term here, followed by 6 years supervised release which is the new statutory minimum. Such a sentence would be "sufficient but not greater than necessary to comply with all of the purposes of sentencing" identified by Congress in § 3553(a)(2) at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on August 4, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for

those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jan C. Smith II
Jan C. Smith II

A-5

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 08-20190-CR-MARTINEZ

UNITED STATES OF AMERICA,

vs.

THOMAS JOHNSON,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR REDUCED SENTENCE PURSUANT TO FIRST STEP ACT

Before the Court is Defendant Thomas Johnson's Motion on Order on Mandate Vacating July 10, 2019 Order, and Imposing Reduced Sentence Under Section 404 of the First Step Act. [ECF No. 129]. The United States filed an opposition [ECF No. 135], and Johnson filed a reply [ECF No. 140]. After careful consideration, the Court **grants in part** the motion only as to Johnson's term of supervised release.

The Eleventh Circuit Court of Appeals succinctly summarized the facts and procedural history as follows:

> In 2008, a grand jury charged Johnson with possession with intent to distribute five grams or more of crack cocaine, 21 U.S.C. § 841(a)(1), (b)(1)(B) (2006), possession with intent to distribute a detectable amount of powder cocaine, *id.* § 841(a)(1), (b)(1)(C), possession of a firearm and ammunition as a convicted felon, 18 U.S.C. §§ 922(g)(1), 924(e), and knowingly using and carrying a firearm in furtherance of drug-trafficking felonies, *id.* § 924(c)(1)(A). Before trial, the government filed notice of its intent to rely on Johnson's four prior felony drug convictions to seek higher statutory penalties. *See* 21 U.S.C. § 851(a). A jury convicted Johnson of each count other than the count for using a firearm in furtherance of drug-trafficking felonies, and the jury found that his crack-cocaine offense involved five or more grams of crack cocaine.
>
> At sentencing, Johnson's crack-cocaine count carried a statutory range of 10 years to life imprisonment because of the enhancement

> for his prior felony drug convictions. *See id.* § 841(b)(1)(B)(iii) (2006). Those prior convictions also meant the statutory range for his powder-cocaine count was zero to 30 years of imprisonment. *See id.* § 841(b)(1)(C). His felon-in-possession count carried a statutory range of 15 years to life imprisonment. *See* 18 U.S.C. § 924(e)(1). As a career offender under the Guidelines, his guideline range was 360 months to life imprisonment based on a total offense level of 37 and a criminal history category of VI. *See* U.S.S.G. § 4B1.1(a), (b) (2007). The district court imposed three concurrent 360-month terms of imprisonment, followed by an eight-year term of supervised release. After Johnson filed several unsuccessful challenges to his convictions and sentence, the President commuted his sentence to a term of 240 months of imprisonment in 2017.
>
> In 2019, Johnson filed a motion for a reduced sentence under the First Step Act in which he stressed the ways in which he has improved while in prison. The district court denied his motion. It rejected arguments by the government that Johnson was ineligible for a reduction because he was sentenced as a career offender and received a commutation, and it concluded that his statutory penalties would have been lower under the Fair Sentencing Act. But it ruled that "the First Step Act affords no further relief to" Johnson because he "is already serving a sentence below the bottom of the guideline range."

United States v. Jones, 962 F.3d 1290, 1295–96 (11th Cir. 2020).

The Eleventh Circuit reversed this Court's order because its phrasing—that "the First Step Act affords no further relief"—made it unclear whether this Court "understood its authority to reduce Johnson's sentence below the revised guideline range." As the Eleventh Circuit explained:

> The ambiguous phrase that the First Step Act "affords no further relief" leaves us unsure of the grounds for the ruling. The government erroneously argued in the district court that Johnson was ineligible for a reduction because his sentence was already below the revised guideline range. If the district court ruled that it could not grant Johnson's motion, that ruling would be erroneous because neither the First Step Act nor section 3582(c)(1)(B) barred the district court from reducing Johnson's sentence below the revised guideline range. It is also possible that the district court correctly understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what it believed to be sufficient relief. We cannot tell which of these

> readings is correct, so we vacate the order and remand for further proceedings.

Id. at 1305.

The second interpretation is the correct one: this Court "understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what [this Court] believed to be sufficient relief." *Id.* Both parties agree that thanks to his commutation, Johnson is now serving a sentence below his revised guideline: 240 months, even though his guideline is 262 to 327 months. The Court understood that Johnson was eligible for a further reduction, but the Court nonetheless declined to exercise its discretion in this particular case.

As the Eleventh Circuit recognizes, district courts are not required to reduce a sentence under the First Step Act and "have wide latitude to determine whether and how to exercise their discretion in this context." *Id.* at 1304. Considering the relevant § 3553(a) factors, and Johnson's arguments regarding them, including his conduct while in prison, the Court would have found that a revised sentence at the bottom range of the revised guideline would have been appropriate: 262 months. Johnson, however, is already serving a lower sentence of 240 months. Thus, the Court declines to reduce his sentence further.

To be clear, the Court is not holding that Johnson's commutation makes him ineligible for a reduction under the First Step Act. He is eligible, as this Court already found. What the Court is saying is that the facts of this case do not merit a revised sentence below the 240 months that Johnson is already serving. Although the Court recognizes and commends Johnson's rehabilitative

efforts and positive disciplinary history, those accomplishments do not warrant a further reduction in his sentence—and certainly not the 180 months Johnson seeks, which is almost seven years below the revised minimum. Moreover, the relatively small amount of crack cocaine Johnson was convicted of possessing was not insignificant, and it does not detract from the danger drug trafficking brings to the community or wash away Johnson's extensive criminal past, which are important considerations for this Court.

That being said, the Court does find that Johnson's conduct while imprisoned justifies reducing his term of supervised release from eight years to six. This reduction would be in line the new revised guideline, as well. Thus, the Court grants the motion in that respect only.

In conclusion, after careful consideration of the parties' arguments and the record in this action, it is

ORDERED AND ADJUDGED that

1. Defendant's Motion on Order on Mandate Vacating July 10, 2019 Order, and Imposing Reduced Sentence Under Section 404 of the First Step Act [ECF No. 129] is **GRANTED IN PART AND DENIED IN PART**.

2. Defendant's term of imprisonment is left intact. Defendant's term of supervised release is reduced from eight years to six years.

3. The letter requesting a reduction in sentence [ECF No. 127] is **DENIED AS MOOT.** Defense counsel concedes that the letter was erroneously filed as a motion.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of August 2020.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All Counsel of Record
Thomas Johnson, *pro se*