

No. 21-6476

IN THE
Supreme Court of the United States

Supreme Court, U.S. FILED OCT 04 2021 OFFICE OF THE CLERK
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AARON MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court and the Eleventh Circuit Court of Appeals violated this Court's decision in Ellis v. United States, 356 U.S. 674, 78 S. Ct. 974, 2 L.Ed.2d 1060 (1958), by denying Petitioner leave to appeal in forma pauperis and classifying his appeal as frivolous, despite the fact that his arguments have merit, as several other circuit courts and the overwhelming majority of district courts agree with petitioner's arguments and conclusions of law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit decision under review is unpublished and is reproduced as Appendix A. The district court's order is also unpublished, but is reproduced as Appendix B.

JURISDICTION

The Eleventh Circuit issued its decision on August 12, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915, in part:

(a)(1) "any court of the United States authorise the ... action or proceeding... or appeal therein, without prepayment of fees or security therefor..."

(e)(2) "The Court may request an attorney to represent any person unable to afford counsel."

INTRODUCTION

The "compassionate release provisions of 18 U.S.C. § 3582(c)(1) allows district courts to reduce the sentence of incarcerated persons in "extraordinary and compelling" circumstances. 18 U.S.C. § 3582(c)(1)(A). For over three decades, § 3582(c)(1)(A) allowed the Bureau of Prisons ("BOP") to file motions for compassionate release. Because the BOP rarely did so, few compassionate release cases ever reached the federal courts. This drought of compassion concluded in 2020 when the forces of law and nature collided.

Enacted with overwhelming bipartisan support, the First Step Act of 2018 ("FSA") sought to make the criminal justice system a bit more just. Section 603(b) was a centerpiece provision. It increased the use and transparency of compassionate release by allowing defendants to file their own motions to district courts by removing the BOP as the gatekeeper.

The FSA's provisions allowing incarcerated persons to file their own § 3582(c)(1)(A) motions coupled with COVID-19's pernicious presence in federal prisons triggered a massive upswing in

imprisoned persons seeking Compassionate release. Petitioner was one of those imprisoned persons. The FSA and COVID-19 completely redefined the Compassionate release landscape. This Court has had little opportunity to examine Compassionate release and technical questions regarding § 3582(c)(1)(A)'s requirements, and its standards of review have long went unanswered. This left district courts to determine their own requirements and standards, which left many imprisoned persons, like Petitioner, to rely on the whims and mood of the district courts.

The district Court denied Petitioner's motion for compassionate release, specifically citing both U.S.S.G. § 1B1.13, as the applicable policy statement, and 18 U.S.C. § 3142(g)'s dangerous factor. The district Court also concluded that the type of offense weighed against release, failed to consider the § 3553(a) sentencing factors anew, failed to consider the need to avoid unwarranted sentencing disparities, and made the clearly erroneous factual findings that Petitioner has a high risk of recidivism and that the community can only be protected by his incarceration. This was a clear abuse of discretion, as the district court applied the

incorrect legal standard, followed improper procedures when it made its determination, and made erroneous factual findings. Therefore, petitioner timely appealed the district court's denial of his motion for compassionate release to the Eleventh Circuit Court of Appeals.

However, both the district court and the Eleventh Circuit Court of Appeals denied petitioner leave to appeal in forma pauperis ("IFP") on his appeal. Both lower courts concluded that petitioner's arguments were frivolous and converted the good-faith test into a requirement of a preliminary showing of a particular degree of merit. Despite the lower courts' rulings, there is a consensus among the district courts and many other circuit courts have interpreted the statutes in petitioner's favor, meaning any appeal of these issues is not frivolous.

If an imprisoned person's geography remains one of the most relevant factors in determining the sentence he receives or the severity of his punishment, that would raise some constitutional questions in a country that guarantees equal protection under the law. This principle should apply to compassionate release motions as well.

Not only has the Eleventh Circuit ruled contrary to the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, but it denied Petitioner the opportunity to argue his claims by not allowing him to proceed IFP on appeal. As Petitioner's action had arguable merit in both law and fact, he should have been granted IFP status, even if he was ultimately unsuccessful. The Eleventh Circuit violated this Court's holding in Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958), and Petitioner should be granted leave to proceed IFP on appeal.

This is an ideal vehicle to intervene. Petitioner fully preserved his abuse of discretion arguments in the district court and on appeal. Both the district court and the Eleventh Circuit denied him IFP on the sole ground that his arguments were frivolous and without merit, despite many other circuits reaching the opposite conclusion. This Court should grant review, correct the Eleventh Circuit, and hold that, when other circuit courts have interpreted a statute in a defendant's favor, a motion for leave to proceed IFP cannot be denied as frivolous.

STATEMENT

A. PROCEEDINGS BELOW

In 2013, a federal grand jury indicted Petitioner on multiple counts relating to transporting child pornography. (Doc. 31). Petitioner pled guilty to one count of transporting three images of child pornography and, despite being a young, first time, non-violent offender, the district court sentenced him to 200-months' imprisonment followed by 20 years of supervised release. (Doc. 141 at 21).

In 2020, Petitioner filed a pro se motion for compassionate release, pursuant to 18 U.S.C. § 3582(c)(1)(A). (Doc. 157). In his motion, he contended that extraordinary and compelling reasons supported his request for release. Specifically, Petitioner noted his pre-existing medical conditions, such as bicuspid aortic valve disease, hypertension, and obesity, which placed him at an increased risk of illness in light of COVID-19. (Id. at 1, 7-8). He further contended that his two years of pretrial services monitoring while on bond, his "Low" recidivism risk level calculated by the BOP, the fact that his sentence has been more laborious than that served by most inmates, his clean disciplinary record while incarcerated, and his rehabilitation, all provided ample evidence that he would not be a danger to society if released. (Id.). He

provided ample documentation that he suffered from those medical conditions and that he had a low risk of recidivism, and he fully exhausted his administrative remedies.

The government opposed Petitioner's motion. It first confirmed he suffered from the medical conditions listed in his motion and agreed that the conditions constituted extraordinary and compelling circumstances for his release.

(Doc. 159). Nevertheless, it argued that Petitioner's offense, his risk of recidivism, and his danger to the community weighed in favor of denying his motion. (Id.).

The district court denied Petitioner's motion for compassionate release. (Doc. 162) (Appendix B). It noted that, although his medical conditions may qualify him for compassionate release under U.S.S.C. § 1B1.13, he remains a danger to the community under the factors set forth in 18 U.S.C. § 3142(g), (Id.). Specifically, it found that his crime warranted a 200-month sentence, and that early release would fail to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public. (Id.).

Petitioner filed a notice of appeal, as well as a motion to proceed IFP on appeal. The district court

denied Petitioner to proceed IFP on appeal, stating that any appeal by him would not be taken in good faith. Petitioner then moved the Eleventh Circuit Court of Appeals for leave to proceed IFP on appeal.

The Eleventh Circuit denied Petitioner's motion for leave to proceed IFP on appeal, stating that there were no nonfrivolous issues on appeal. (Doc. _____) (Appendix A).

B. REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG

This Court's intervention is necessary because the Eleventh Circuit was wrong to deny Petitioner leave to proceed IFP on appeal.

In Roberts v. U.S. Dist. Court, 339 U.S. 844, 845, 70 S.Ct. 954 (1950), this Court held that the denial of IFP status is an appealable order. Petitioner challenges the Eleventh Circuit's conclusion that he can not proceed IFP on appeal because his arguments are frivolous.

As this Court held in Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958),

leave to appeal IFP should be allowed unless petitioner's contentions on the merits were frivolous. The only statutory requirement for the allowance of an indigent's appeal is the applicant's "good faith." 28 U.S.C. § 1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley v. United States*, 354 U.S. 521, 1 L.Ed.2d 1529, 77 S.Ct. 1371 (1957).

The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. R. Crim. P. 39(a), the request of an indigent for leave to appeal in forma pauperis must be allowed.

The Eleventh Circuit Court of Appeals may grant a petitioner leave to proceed IFP if he "show[s] inability to pay or give security for fees and costs." 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3970.1 (4th ed. Apr. 2020 update); See 28 U.S.C. § 1915(a)(1). "When considering a motion filed

pursuant to § 1915(a), "[t]he only determination to be made by the court... is whether the statements in the affidavit satisfy the requirement of poverty." Martinez v. Kristi Kleaners, Inc., 364 F.3d 1305, 1307 (11th Cir. 2004) (per curiam). Petitioner's affidavit of indigency and prison account statement satisfied this requirement, and he established indigency. See 28 U.S.C. § 1915(a).

The IFP Statute does not require a ruling about whether an appeal is frivolous at the outset. See 28 U.S.C. § 1915(e)(2)(B) (stating that "the court shall dismiss the case at any time if the court determines" the appeal is frivolous (emphasis added)). A complaint is frivolous if it "lacks an arguable basis either in law or fact." Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827 (1989); see also Denton v. Hernandez, 504 U.S. 25, 33, 112 S.Ct. 1728 (1992). A complaint is also legally frivolous if it fails to raise an "arguable question of law" or is based on an "indisputable meritless legal theory." Neitzke, 490 U.S. at 372-78. See also Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002).

Even where a "claim is arguable, but

ultimately will be unsuccessful, 'we have stressed that' it must be treated like the claims brought by paying litigants and should survive frivolity review" and be allowed to proceed. *Cofield v. Alabama Pub. Serv. Comm'n.*, 936 F.2d 512, 515 (11th Cir. 1991). Because petitioner sought leave to proceed IFP on his appeal in the Eleventh Circuit, his appeal was subjected to a frivolity determination. See *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983).

Recently, the Eleventh Circuit concluded that the abuse-of-discretion standard of review applies to cases involving the denial of compassionate release under §3582(c)(1)(A). *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021). The district court abuses its discretion if it applies incorrect legal standards, follows improper procedures when making its determination, or makes clearly erroneous factual findings. *United States v. Barrington*, 648 F.3d 1178, 1194 (11th Cir. 2011). In addition, the Eleventh Circuit has granted IFP status to many other petitioners challenging the district court's abuse of discretion for compassionate release motions. See, e.g., *United States v. Jockish*, 2021 U.S. App. LEXIS 11049 (11th Cir. 2021); *United States v. ONeal*, 2021

U.S. App. LEXIS 7633 (11th Cir. 2021); United States v. Aldissi, 2021 U.S. App. LEXIS 8795 (11th Cir. 2021); United States v. McGee, 2021 U.S. App. LEXIS 12269 (11th Cir. 2021); United States v. Kimseing Le, 2021 U.S. App. LEXIS 21497 (11th Cir. 2021). To add insult to injury, Petitioner's abuse of discretion arguments were stronger than the above cited cases and multiple circuit courts agree with his arguments, yet he was denied.

There is a consensus amongst the district courts and other circuit courts have interpreted the statutes in Petitioner's favor, meaning any appeal of these issues is not frivolous. See 28 U.S.C. § 1915(e)(2)(B); § 18 U.S.C. § 3582(c)(1)(A); First Step Act § 603(b); U.S.S.G. § 1B1.13. See also United States v. Pelloquin, Appeal No. 20-12818-DD, 2020 U.S. App. LEXIS 39966 (11th Cir. 2020) (holding that a circuit court has interpreted the statute in the petitioner's favor, so a motion for leave to proceed IFP cannot be denied as frivolous).

To prevail on his appeal in the Eleventh Circuit, Petitioner would have to show how the district court abused its discretion in denying his motion for compassionate release. The arguments below were presented to the

Eleventh Circuit and his appeal involved several legal points arguable on their merits (and therefore not frivolous).

Petitioner should have been granted IFP and his appeal should have proceeded to full briefing, as there was in fact at least one issue of arguable merit on appeal.

**Q. WHETHER UNITED STATES SENTENCING
GUIDELINE § 1B1.13 APPLIES TO
DEFENDANT-BROUGHT MOTIONS FOR
COMPASSIONATE RELEASE UNDER
TITLE 18 U.S.C. § 3582(C)(1)(A)?**

Eight of the nine circuit courts to have considered this question, as well as the overwhelming majority of district courts, have ruled that § 1B1.13 does not apply to compassionate release considerations because it was not revised after Congress made material changes to § 3582(c). See *United States v. Brooker*, 976 F.3d 228, 235-37 (2nd Cir. Sept. 20, 2020); *United States v. Andrews*, 2021 U.S. App. LEXIS 26089 (3rd Cir. Aug. 30, 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. Dec. 2, 2020);

United States v. Shkambi, 993 F.3d 388, 392-93 (5th Cir. Apr. 7, 2021); United States v. Jones, 980 F.3d 1098, 1108-12 (6th Cir. Nov. 20, 2020); United States v. Gunn, 980 F.3d 1178, 1180-81 (7th Cir. Nov. 20, 2020); United States v. Aruda, 993 F.3d 797, 801-802 (9th Cir. Apr. 8, 2021); United States v. Manman, 993 F.3d 821, 834 (10th Cir. Apr. 1, 2021); United States v. Long, 2021 WL 1972245, *8 (D.C. Cir. May 18, 2021).

Thus, the majority view of circuit and district courts is that U.S.S.G. § 1B1.13 is not a Straight jacket, which leaves district courts with the discretion to construe what qualifies as "extraordinary and Compelling reasons" for a reduction in Sentence.

The Eleventh Circuit's holding in United States v. Bryant, 2021 WL 1827158 (11th Cir. May 7, 2021), a split panel decision, is the sole circuit holding to the contrary by concluding that district courts are bound by § 1B1.13. This circuit split is untenable. Geography alone now determines whether offenders are granted compassionate release. The insightful dissent in Bryant

Concluded that: "The problems that arise from the majority's reliance on the outdated policy statement are compounded by the majority's express decision to strike (or ignore) language from the policy statement ... Sadly, this result reinstates the exact problems the First Step Act was intended to remedy: Compassionate release decisions had been left under the control of a government agency that showed no interest in properly administering it." Id.

There is nothing new about district courts deciding sentence reduction motions. In passing § 3582(c), Congress empowered district courts, not the U.S. Parole Commission, as previously, to decide in individual cases if "there is a justification of reducing a term of imprisonment." S. Rep. No. 98-225, at 56 (1983). Put differently, Congress envisioned 18 U.S.C. § 3582(c)(1)(A) to act as a "safety valve" for [the] modification of sentences" and intended for district courts to be able to reduce sentences when justified by various factors and reasons that the U.S. Parole Commission previously had considered in making parole determinations. Id. at 121.

Lawmakers further noted that the foregoing approach would keep "the sentencing power in the judiciary where it belongs" and that § 3582(c)(1)(A) would allow for the "later review of sentences in particularly compelling situations." *Id.* This legislative history demonstrates that Congress, in passing § 3582(c), intended to give district courts an equitable power to employ, on an individual basis, a modification of sentence when "extraordinary and compelling reasons" indicate that the sentence initially imposed on an individual defendant no longer serves legislative objectives.

By its plain language, § 3582(c)(1)(A) is broadly applicable to a defendant who possesses individualized "extraordinary and compelling reasons for a sentence reduction. Although Congress did not define what constitutes an "extraordinary and compelling reason" for a reduction of sentence under the provisions of § 3582(c), the First Step Act amendments intended for the first time to grant to district courts an equitable power to be employed on an individualized basis to correct fundamentally unfair sentences or "to justify a reduction of an unusually long sentence." S. Rep. No. 98-225, pp. 55-56.

District Courts have held such long-standing authority to determine in their discretion what qualifies as "extraordinary and compelling reasons" for a reduction in sentence. This long-standing authority was only hampered by an ineffective gatekeeper until Congress finally amended the Statute to eliminate the Bureau of Prisons from that role.

The Eleventh Circuit's holding in Bryant is not only anathema to fundamental fairness and equal application of the law across the land, but it is inconsistent with the text of § 3582(c) and the undisputed purpose of the First Step Act. The Bryant panel's interpretation also violated the well-established prior precedent rule. The Sentencing Guidelines is governed by the traditional rules of Statutory Construction, U.S. v. Perez, 336 F.3d 1178, 1182 (11th Cir. 2004), including the prohibition against adding words. U.S. v. One 1990 Beechcraft, 619 F.3d 1275, 1278 (11th Cir. 2020). While the Bryant panel incorrectly answered the question of whether U.S.S.G. § 1B1.13 is an "applicable" policy statement for defendant-brought motions for compassionate release, petitioner questions whether district courts can add words to the Guidelines and its Application Notes. Petitioner contends that the discretion

of the district courts to determine what qualifies as "extraordinary and compelling reasons" cannot be bound by U.S.S.C. § 1B1.13. Even though Congress specifically directed the Sentencing Commission "to describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples," words cannot be added to the Guidelines by the courts and the Guidelines are advisory in nature. 28 U.S.C. § 994(t). In United States v. Booker, 543 U.S. 220, 224 (2005), this Court struck the mandatory nature of the Guidelines and made the Guidelines "effectively advisory." Id. at 245.

In addition to the advisory Guidelines, Congress instructed the Sentencing Commission to merely "describe" and give "a list of specific examples" of what should be considered "extraordinary and compelling reasons" for a sentence reduction. § 994(t). Nowhere did Congress instruct the Sentencing Commission to "define" what qualifies as "extraordinary and compelling reasons" and, even if Congress did, the courts cannot add words to U.S.S.C. § 1B1.13 or any other guideline and the Guidelines are advisory in nature. Booker, at 245.

Therefore, because the district court stated that "[t]he applicable policy for § 3582(c)(1)(A) is found in USSC § 1B1.13" and "1B1.13's descriptions of 'extraordinary and compelling reasons' for compassionate release remain relevant, even if the limitation on the identity of the moving party does not," the district court abused its discretion. (Doc. #162 at 8). See *Barrington*, 648 F.3d 1178 (holding that the district court abuses its discretion if it applies incorrect legal standards or follows improper procedures when making its determination). Under *Harris*, 989 F.3d 908, the Eleventh Circuit should have used the abuse-of-discretion standard to review the denial of Petitioner's compassionate release motion. Petitioner's argument was not frivolous and the Eleventh Circuit violated this Court's holding in *Ellis*, 78 S.Ct. 974, when it denied him IFP status on appeal.

b. WHETHER A DEFENDANT'S
DANGEROUSNESS TO THE COMMUNITY
(§ 3142(g)) APPLIES TO MOTIONS
FILED UNDER § 3582(c)(1)(A)(i)?

Section 3582(c)(1)(A) authorizes compassionate release on the basis of either (1) "extraordinary and compelling reasons," or (2) the defendant's age and service of at least 30 years of a sentence, 18 U.S.C. § 3582(c)(1)(A)(i) & (ii). Petitioner requested compassionate release under the first of these provisions, § 3582(c)(1)(A)(i), and the Statute references a defendant's danger to the community under § 3142(g) only in connection with the second, § 3582(c)(1)(A)(ii).

Given that Congress specifically directed the Sentencing Commission merely "to describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples," 28 U.S.C. § 994(+), the Commission's authority to require a separate assessment of a defendant's dangerousness where a compassionate release motion otherwise establishes extraordinary and compelling reasons is not entirely clear.

Moreover, given the specific reference to a dangerousness factor in only the second Statutory

Category of compassionate release authority, See 18 U.S.C. § 3582(c)(1)(A)(ii) (pertaining to defendants who are at least 70 years old and have served at least 30 years in prison), it appears that Congress intentionally decided not to require a specific dangerousness finding for motions invoking extraordinary and compelling reasons for a sentence reduction. See § 3582(c)(1)(A)(i); Cf. Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

A finding of dangerousness under § 3142(g) is not an independent ground to deny a defendant's motion under the newly amended § 3582(c)(1)(A)(i). See United States v. Johnson, 2020 WL 2515856, at *4 (D.D.C. May 16, 2020). Even the Sixth Circuit has held that a district court cannot indicate that a defendant "has failed to demonstrate that he is not a danger to the community" to deny a compassionate

release motion filed by a defendant, United States v. Sherwood, No. 20-4082, ___ F.3d ___ (6th Cir. 2021). Any court that denies a defendant's motion for compassionate release under § 3582(c)(1)(A)(i), because of a finding of dangerousness under § 3142(g), abuses its discretion. A defendant's dangerousness under § 3142(g) is "an impermissible factor" for the district court to rely on and a Court of Appeals "must vacate the order and remand the case for future considerations" if the district court relies on § 3142(g). Id.

While district courts cannot use § 3142(g), considering a defendant's dangerousness is, at the very least, a part of the balancing of factors under 18 U.S.C. § 3553(a). The potential danger that a defendant's release would pose to the community is addressed by the district court's evaluation of "the need for the sentence imposed... to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(c).

Therefore, because the district court stated that it "must evaluate whether [petitioner] is a danger to the safety of others or the community under 18 U.S.C. § 3142(g)" and that his "danger to the community

preclude[5] early release," the district court abused its discretion. (Doc. # 162 at 6). See Barrington, 648 F.3d 1178 (holding that a district court abuses its discretion if it applies incorrect legal standards or follows improper procedures when making its determination). Under Harris, 989 F.3d 908, the Eleventh Circuit should have used the abuse-of-discretion standard to review the denial of Petitioner's compassionate release motion. Petitioner's argument was not frivolous and the Eleventh Circuit violated this Court's holding in Ellis, 78 S.Ct. 974, when it denied him IFP status on appeal.

C. WHETHER PETITIONER HAS A HIGH RISK OF RECIDIVISM?

Congress has entrusted the Sentencing Commission with direct responsibility for fostering and protecting the interests of, among other things, sentencing policy that identifies a defendant's risk of recidivism. Thus, the concerns that sentences reflect a defendant's risk of recidivism fall properly within the province of the Sentencing Commission. In fulfilling its mission to "establish sentence policies and practices for the

Federal criminal justice system," 28 U.S.C. § 991(b)(1), the Commission must ensure that sentencing policies and practices "afford adequate deterrence to criminal conduct... [and] protect the public from future crimes of the defendant," 18 U.S.C. § 3553(a)(2); see 28 U.S.C. § 991(b)(1)(A). These are just different ways to say risk of "recidivism," which is simply "[a]n offender's propensity to continue a pattern of committing crimes, often crimes of the same type," Criminal Law - A Desk Reference (5th Ed. 2021).

To accomplish these tasks, the Commission formulated the Sentencing Guidelines. Within a defendant's Guideline calculation, "[t]he offense level and criminal history category measure different things.... The criminal history category principally estimates the likelihood of recidivism." United States v. Pereira, 465 F.3d 515, 522 (2nd Cir. 2006); United States v. Dadi, 235 F.3d 945, 956 n. 10 (5th Cir. 2000).

Prior to the conviction for which Petitioner is presently incarcerated, he had no other arrests or convictions. This resulted in Petitioner having a total of zero criminal history points during his Guideline calculation at sentencing, as he was a

first-time offender without even a speeding ticket.

Thus, the Sentencing Commission has estimated that Petitioner has a low likelihood of recidivism, as his criminal history category is scored at Zero.

In May of 2019, the Bureau of Justice Statistics issued a report that found that offenders with similar convictions as Petitioner were less likely to be re-arrested than any other type of offender. Overall, based on empirical evidence and statistics, it is a historical fact that offenders, like Petitioner, have one of the lowest re-offense rates.

Even if all general empirical evidence and statistics are disregarded, the Government itself, in the form of the Bureau of Prisons, has independently concluded that Petitioner has a "LOW" risk of recidivism based on his offense, background, personal characteristics, and other factors. On December 21, 2018, the First Step Act was signed into law. Congress instructed the Attorney General to develop a "risk and needs assessment system." See 18 U.S.C. § 3632. In response, the Attorney General, in consultation with the Bureau of Prisons, Administrative Office of the United States Courts, the Office of Probation and Pretrial

Services, the National Institute of Justice, and the National Institute of Corrections, created the Prisoner Assessment Tool Targeting Estimated Risk and Needs (or the PATTERN system). On April 28, 2021, the Bureau of Prisons performed an assessment on Petitioner and assigned him a "Low" Risk Recidivism Level by using the PATTERN system. Thus, the Government, in the form of the Bureau of Prisons, has concluded that Petitioner has a "Low" likelihood of recidivism.

This Court in Pepper v. United States, 562 U.S. 476, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011), also emphasized that a defendant's post sentencing rehabilitation is a critical factor in determining any sentence because it "sheds light on the likelihood that he will engage in future criminal conduct, a central factor that sentencing courts must consider," (Id., at 492) (emphasis added). "In assessing... deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C) & (D), there would seem to be no better evidence than a defendant's post-incarceration conduct." Pepper, at 131 U.S. 491 (citing McMannus, 496 F.3d, at 853 (Melloy, J., concurring)). Petitioner's exemplary post-sentencing conduct, clear disciplinary record,

and programming efforts may be taken as the most accurate indicator of his low risk of recidivism and his rehabilitation. See Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 82 L.Ed. 43 (1937) (holding that "justice generally requires consideration of... the character and propensities of the offender."). Petitioner, as an imprisoned person, can do no more to demonstrate remorse for his transgressions and his subsequent rehabilitation than actively access and participate in educational and rehabilitative programming and to behave in an exemplary manner for as long as possible. Thus, the previous decisions of this Court conclude that Petitioner has a low likelihood of recidivism.

In addition, when a defendant "was on pretrial bail for [several] years while his case was pending in [the district] court, [it] suggest[s] that incarceration is not necessary to protect the public from future crimes" committed by the defendant. United States v. Johnson, 2020 WL 2515856 (D.D.C. May 16, 2020). Petitioner has already shown that he can be placed on court monitoring without committing future crimes by his compliance with all terms and conditions of his

pretrial release during the two-year period his case was pending. Thus, Petitioner's actions during two-years of pretrial monitoring should have allowed the district court to conclude that he has a low likelihood of recidivism.

Therefore, because the district court stated that it has "continuing concerns of recidivism," despite the fact that all evidence demonstrates Petitioner's low risk of recidivism, the district court abused its discretion. (Doc. # 162 at 10). See Barrington, 648 F.3d 1178 (holding that a district court abuses its discretion if it makes clearly erroneous factual findings). Under Harris, 989 F.3d 908, the Eleventh Circuit should have used the abuse-of-discretion standard to review the denial of Petitioner's compassionate release motion. Petitioner's argument was not frivolous and the Eleventh Circuit violated this Court's holding in Ellis, 78 S.Ct. 974, when it denied him IFP Status on appeal.

d. WHETHER THE TYPE OF OFFENSE
COMMITTED WEIGHS AGAINST
GRANTING COMPASSIONATE RELEASE?

The text and logic of § 3582(c)(1) makes plain: a sentence reduction is not inconsistent with the § 3553(a) factors solely because of the defendant's offense of conviction. Section 3582(c)(1) permits a district court to reduce a sentence in "any case"—not just cases with specific offenses. See United States v. Gonzales, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting Webster's Third New International Dictionary 97 (1976)). When a statute provides for relief in "any case," there is no basis for categorically limiting that relief to a certain subset of cases. See Id. See also Ali v. Federal Bureau of Prisons, 552 U.S. 214, 220, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (finding Congress' use of the word "any" was most naturally understood as meaning "whatever kind."); Citizens' Bank of La. v. Parker, 192 U.S. 73, 81, 24 S.Ct. 181, 48 L.Ed. 346 (1904) ("The word any excludes selection or distinction.").

Recognizing the breadth of 18 U.S.C. § 3582(c)(1)'s text not to discount the seriousness of some criminal offenses, but to give effect to the policy choice

that Congress made plain by using the word "any"; when a district court finds that extraordinary and compelling circumstances exist for compassionate release, every offender may be eligible for mercy, regardless of the crime.

The question of whether a defendant should be granted compassionate release must not take place in a vacuum, as each offender is an individual and an appropriate sentence must be tailored to that individual, his crime, and his extraordinary and compelling circumstances. The district court cannot make a "blanket determination based solely on [a defendant's] offense of conviction." See, e.g., United States v. Roney, 833 Fed. Appx. 850, 2020 U.S. App. LEXIS 34890 (2nd Cir. 2020).

"[T]he district court, at one point in its analysis, cited... authority for the proposition that '[c]ourts have been reluctant to grant compassionate release requests to individuals convicted of crimes [similar to the defendant]...' We do not appear to have endorsed any presumption to that effect." United States v. John Doe, 833 Fed. Appx. 366, 2020 U.S. App. LEXIS 34134 (3rd Cir. 2020). If there is no binding legal authority to presume that an offense of conviction weighs against compassionate release,

than the district court's reliance on such a presumption is misplaced and is considered an abuse of discretion.

Therefore, because the district court stated that "the type of offense also weighs against release," it abused its discretion, as neither the Eleventh Circuit nor any other circuit endorsed any presumption to that effect. (Doc. #162 at 10). See Barrington, 648 F.3d 1178 (holding that the district court abuses its discretion if it applies incorrect legal standards or makes clearly erroneous factual findings). Under Harris, 989 F.3d 908, the Eleventh Circuit should have used the abuse-of-discretion standard to review the denial of Petitioner's compassionate release motion. Petitioner's argument was not frivolous and the Eleventh Circuit violated this Court's holding in Ellis, 78 S.Ct. 974, when it denied him IFP status on appeal.

**e. WHETHER THE §3553(a)
FACTORS SHOULD BE CONSIDERED
ANEW WHEN DETERMINING
COMPASSIONATE RELEASE?**

In the context of a compassionate release

motion, once a prisoner meets the statutory threshold of compelling circumstances, the district court is required to consider the § 3553(a) factors anew. "Section 3582(c)(1) necessarily envisions that the § 3553(a) factors may balance differently upon a motion for compassionate release than they did at the initial sentencing," because "an individual requesting compassionate release will, in all cases, be serving a sentence that a district court once held was 'sufficient but not greater than necessary.'" United States v. Kibble, 992 F.3d 326, 335 (4th Cir. 2021) (Gregory, C.J., concurring). The concurrence in Kibble also succinctly recognized that "If a district court's original § 3553(a) analysis could always prove that a sentence reduction would intolerably undermine the § 3553(a) factors, then 18 U.S.C. § 3582(c)(1) would, in effect, be a nullity" (Id.).

For a meaningful § 3553(a) analysis, the district court is required to focus on a defendant as he stands on the day his compassionate release motion is before the district court. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as

an individual and every case as a unique study in [] human failings." Koon v. United States, 518 U.S. 811, 113 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime." Williams v. New York, 337 U.S. 241, 246-247, 69 S.Ct. 107, 93 L.Ed. 1337 (1949).

The district court concluded that Petitioner is a danger to the community and so he cannot be released, relying upon the offense conduct in this case, which occurred from an unspecified date in 2012 through March of 2013. Tellingly, however, the district court failed to properly consider the intervening eight (8) years of exemplary post-arrest conduct and six (6) years of institutional behavior, as well as written staff confirmation of Petitioner's long-term status as a model inmate and his low risk of recidivism.

Petitioner also has maintained a clear disciplinary record throughout his term of confinement. He is a far cry from the young and foolish teenager who inexcusably engaged in the criminal conduct for which he was convicted. Petitioner has dedicated his post-arrest life to doing the only thing he is able to do within the

context of his confinement to atone for his crime - working hard to achieve and maintain an exemplary prison record. See Pepper, 131 S.Ct. 1229 (holding that the sentencing court should consider evidence of the defendant's post-sentencing rehabilitation and that such evidence may support a downward variance). This bears directly on a sentencing court's overarching duty to "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing. § 3553(a).

Therefore, because the district court stated that Petitioner's "sentence reflected the Court's view of the § 3553(a) factors at the time of sentencing, and that view has not changed," the district court abused its discretion. (Doc. # 162 at 9). See Barrington, 648 F.3d 1178 (holding that a district court abuses its discretion if it applies incorrect legal standards or follows improper procedures when making its determination). Under Harris, 989 F.3d 908, the Eleventh Circuit should have used the abuse-of-discretion standard to review the denial of Petitioner's compassionate release motion. Petitioner's argument was not frivolous and the Eleventh Circuit violated this Court's holding in Ellis, 78 S.Ct. 974, when it denied him IFP status on appeal.

F. WHETHER COUNSEL SHOULD HAVE BEEN APPOINTED?

The Counsel appointment provision says: "The Court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). If a federal prisoner is indigent enough to proceed IFP, he should be eligible for appointment of counsel. However, there is no constitutional right to have counsel appointed in most post-conviction proceedings. See United States v. Webb, 565 F.3d 789, 795 (11th Cir. 2009).

While the Eleventh Circuit held that there is no right to appointment counsel in § 3582(c)(2) proceedings, it never addressed whether there is a right to appointment of counsel in § 3582(c)(1) proceedings.

A motion for compassionate release, filed pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), is distinguishable from civil post-conviction proceedings. In the context of a compassionate release motion, once the prisoner meets the statutory threshold of compelling circumstances, district courts must consider the § 3553(a) factors anew, effectively reopening the sentencing proceeding in order to resolve the motion. In other words, unlike

civil post-conviction proceedings, a motion for compassionate release, pursuant to § 3582(c)(1)(A)(i), constitutes an extended sentencing proceeding and is a continuation of the criminal trial, thereby requiring appointment of counsel for indigent prisoners. It is important to note that even the district courts understand this principle, as compassionate release motions are added to the criminal docket sheet and not assigned a new post-conviction case number.

Even if compassionate release motions were construed as civil post-conviction proceedings, a district court can abuse its discretion by not appointing counsel in appropriate circumstances. Equitable concerns, such as the complexity of the issues involved, may make the appointment of counsel appropriate to ensure a just outcome. Webb, at 795 & n.4. In this context, the Eleventh Circuit should have reviewed the denial of Petitioner's motion for appointment of counsel for an abuse of discretion. Id. at 795.

The Eleventh Circuit has long held that it must appoint counsel to a person seeking relief who is financially eligible, if the "interests of justice" so require. Schultz v. Wainwright, 701 F.2d 900

(11th Cir. 1983)(per curiam). Here, the interests of justice required the appointment of counsel. See Id. Issues involving the recently enacted First Step Act are inherently novel. And these issues are sufficiently complex that the Eleventh Circuit had at least two such cases sent to oral argument for resolution. See United States v. Bryant, Appeal No. 19-14267 (11th Cir. May 7, 2021); United States v. William Kinsey, III, Appeal No. 20-11208 (11th Cir. submitted on the briefs March 26, 2021).

The law is also clear that pro se criminal defendant's have a right of access to a law library and legal materials when they do not have an attorney. See Edwards v. United States, 795 F.2d 958, 961 nn. 1 & 3 (11th Cir. 1986). Since March of 2020, Petitioner has had no access to a legal library and his claims contained both complex issues of law and fact. Due to COVID-19, Petitioner's prison has been placed on an emergency lockdown quarantine and inmates are confined to certain areas and restricted certain kinds of activities or liberties (i.e., law library). The "shortcomings in the law library or legal assistance program hindered his efforts to pursue a legal claim." Lewis v. Casey, U.S. 343, 351, 116 S. Ct. 2174, 135 L. Ed.2d 606 (1996). Petitioner

has had to rely on several individuals on the street to send him applicable case law, as he is required to remain with his assigned housing unit and/or cell until the operations of the facility has been restored or resume normal operations, (see Appendix D).

Petitioner more than demonstrated exceptional circumstances to justify the appointment of counsel. Petitioner's case warranted the appointment of counsel in the interest of justice, as it involved nonfrivolous claims with factual and legally complex issues, and Petitioner's ability to research applicable case law was severely hampered. See Johnson v. United States, 352 U.S. 565, 1 L.Ed.2d 593, 77 S.Ct. 529 (1956) (Normally, allowance of an appeal should not be denied until an indigent has adequate representation by counsel).

Therefore, because the district court stated that "it finds that the interests of justice and judicial economy do not warrant appointing [petitioner] counsel," the district court abused its discretion, as there were nonfrivolous issues on appeal and Petitioner had no access to applicable case law. (Doc. # 164 at 1). See Barrington, 648 F.3d 1178. Under Harris, 989 F.3d 908, the Eleventh Circuit should have used the abuse-of-discretion

Standard to review the denial of petitioner's denial of his motion for appointment of counsel. Petitioner's arguments were not frivolous and the Eleventh Circuit violated this Court's holding in Ellis, 78 S.Ct. 974, when it stated that "[t]here are no nonfrivolous issues on appeal," to deny him IFP status. (Doc. # ____) (Appendix A).

II. THE QUESTION PRESENTED WARRANTS REVIEW

The question presented has "significant implications for many federal prisoners. United States v. Birt, 966 F.3d 257 (3rd Cir. 2020). Indeed, it affects whether every indigent can be denied their right to appeal the denial of a motion for abuse of discretion. The Eleventh Circuit cannot classify an appeal as frivolous, despite other circuit courts agreeing with an indigent litigant, to deny a motion for leave to appeal IFP. When another circuit court agrees with a litigant's argument, and there is no ruling to the contrary setting precedent, an appeal cannot be denied as frivolous. Eligibility for a circuit court to review a district court's denial of a motion for compassionate release cannot depend on the happenstance of geography or financial ability.

Finally, the Court should resolve this issue now because many indigent defendants are being denied compassionate release in Florida, Georgia, and Alabama, despite the defendants being at-risk to COVID-19. If the Eleventh Circuit refuses to allow indigent defendants to appeal IFP, many lives could be at risk. Were this Court to agree with Petitioner that his arguments are not frivolous, granting this Petition for a writ of Certiorari would have the practical effect of allowing meaningful review of the district courts denial of compassionate release motions. To avoid unjust results, this Court should resolve this issue promptly and require the Eleventh Circuit to rule on non-frivolous arguments.

CONCLUSION

The petition for a writ of Certiorari should be granted. Were a claim is arguable, it must be treated like the claims brought by paying litigants and should survive frivolity review.

Respectfully Submitted, Aaron Murray
Aaron M. Murray