No. _____

IN THE

Supreme Court of the United States

JAMES A. HALD, WALTER B. SANDS, AND CONNIE EDWARDS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A)(i), a district court may reduce a term of imprisonment "after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable," but only "if it finds that . . . extraordinary and compelling reasons warrant such a reduction." As initially codified, only the Bureau of Prisons could move to modify a federal prisoner's sentence, but it rarely did so. In response, in December 2018, Congress amended the statute to permit federal prisoners to file their own motions. This amendment has resulted in significant litigation, but the lower courts have split multiple ways over the statute's meaning. At present, this Court has yet to interpret the statute. The question presented is:

> Whether, under 18 U.S.C. § 3582(c)(1)(A)(i), a district court must first determine whether "extraordinary and compelling reasons warrant such a reduction" as a threshold eligibility inquiry, as multiple Circuits have held, or whether a district court can deny a motion for a reduced sentence without resolving this issue at all, but instead by finding that the applicable sentencing factors in 18 U.S.C. § 3553(a) do not warrant a reduced sentence, as the Tenth Circuit held below.

RELATED PROCEEDINGS

United States v. Hald, Case No. 6:11-cr-10227-EFM-1 (D. Kan. Sept. 16, 2020)

United States v. Hald, Case No. 20-3195 (10th Cir. Aug. 6, 2021)

United States v. Sands, Case No. 2:06-cr-20044-JAR-3 (D. Kan. Oct. 29, 2020)

United States v. Sands, Case No. 20-3228 (10th Cir. Aug. 6, 2021)

United States v. Edwards, Case No. 2:12-cr-20015-DDC-1 (D. Kan. Sept. 29, 2020)

United States v. Edwards, Case No. 20-3209 (10th Cir. Oct. 4, 2021)

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JOINT PETITION FOR WRIT OF CERTIORARI

James Hald, Walter Sands, and Connie Edwards respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published opinion in Mr. Hald's and Mr. Sands' appeals is available at 8 F.4th 932, and is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix F. The district court's unpublished order denying Mr. Hald's motion for a reduced sentence is available at 2020 WL 5548826, and is included as Appendix B. The district court's unpublished order denying Mr. Sands' motion for a reduced sentence is available at 2020 WL 6343303, and is included as Appendix C.

The Tenth Circuit's unpublished order in Ms. Edwards' appeal is available at 2021 WL 4520048, and is included as Appendix D. The district court's unpublished order denying Ms. Edwards' motion for a reduced sentence is available at 2020 WL 5802080, and is included as Appendix E.

JURISDICTION

The district courts had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed the denial of Mr. Hald's and Mr. Sands' motions on August 6, 2021, and denied their joint petition for rehearing en banc on September 20, 2021. The Tenth Circuit affirmed the denial of Ms. Edwards' motion on October 4, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3582 (full text included as Appendix F)

STATEMENT OF THE CASE

The lower courts are split over § 3582(c)(1)(A)(i)'s statutory design. Some courts of appeals have held that, under the statute's sequential-step test, district courts must first determine, as a threshold eligibility inquiry, whether "extraordinary and compelling reasons warrant [] a reduction." *See*, *e.g.*, *United States v. Ugbah*, 4 F.4th 595, 597 (7th Cir. 2021); *United States v. Saccoccia*, 10 F.4th 1 (1st Cir. 2021). Other courts of appeals (including the Tenth Circuit below) disagree and have held that the statute does not include a sequential-step test, and, thus, that district courts may deny motions for reduced sentences solely under the § 3553(a) factors. Pet. App. 3a; *United States v. Tinker*, 14 F.4th 1234, 1237 (11th Cir. 2021). Review is necessary to resolve this conflict over the statute's plain meaning.

On the merits, the Tenth Circuit's decision is at direct odds with the statute's text. By its plain terms, the "extraordinary and compelling reasons" inquiry is a threshold eligibility inquiry. 18 U.S.C. § 3582(c)(1)(A) (authorizing a reduction only "if" extraordinary and compelling reasons exist); Webster's Third New International Dictionary 1124 (2002) ("if" means "in the event that," "so long as," or "on condition that"); Oxford English Dictionary (2d ed. 1989) (defining "if" as "[i]ntroducing a clause of condition or supposition"; "[o]n condition that") (accessed online). If such reasons for a reduced sentence exist, the question then becomes "what sentencing reduction to award the prisoner." *United States v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021). The § 3553(a) factors are not a threshold inquiry to relief, but are simply factors

courts must consider "after" finding that "extraordinary and compelling reasons warrant [] a reduction." 18 U.S.C. § 3582(c)(1)(A). Thus, it naturally follows that the extraordinary-and-compelling-reasons inquiry must precede any consideration of the § 3553(a) factors. This Court's decision in *Koons v. United States* confirms the point. 138 S.Ct. 1783 (2018) (interpreting a similar neighboring provision to include a threshold-eligibility determination). As does this Court's decision in *Dillon v. United States*. 560 U.S. 817 (2010) (interpreting the same neighboring provision to include a sequential-step test).

Resolution of this Circuit split is critically important for at least four reasons. First, Congress just amended § 3582(c)(1)(A)(i) to permit defendant-filed motions. The statute is literally available to every federal prisoner (and there are over 150,000 such prisoners), and thousands of federal prisoners have already sought relief under this newly available remedial statute. It is thus critical that this Court provide a definitive interpretation of this widely available and widely used statute at the outset. Second, and relatedly, this frequently-used statute should not have different meanings in different jurisdictions (as it currently does). Third, because the Tenth Circuit's atextual approach does not provide clear guidance to district courts, it creates even more disparities, both across and within the various judicial districts. And fourth, the Tenth Circuit's interpretation encourages district courts to deny motions without ever addressing § 3582(c)(1)(A)(i)'s key threshold inquiry: whether "extraordinary and compelling reasons warrant [] a reduction." Congress expected district courts to answer that question, not avoid it by reciting the § 3553(a) factors used to impose the sentence in the first instance.

This joint petition is an excellent vehicle to resolve the conflict over this extremely important question. This Court should grant this petition.

A. Statutory Background

Section 3582 – entitled "Imposition of a sentence of imprisonment" – includes multiple subsections. 18 U.S.C. § 3582(a)-(e).[1] The first subsection provides that a sentencing court, when imposing a term of imprisonment, "shall consider the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(a). This provision is consistent with § 3553 itself, which also instructs that sentencing courts "shall consider" the § 3553(a) factors "in imposing a sentence." 18 U.S.C. § 3553(a). The second subsection makes clear that "a judgment of conviction that includes [a sentence to imprisonment] constitutes a final judgment," despite the fact that a sentencing court could later modify the term of imprisonment under certain circumstances. 18 U.S.C. § 3582(b).

One of these enumerated circumstances is found within § 3582's third subsection. 18 U.S.C. § 3582(b)(1). Section 3582(c) generally provides that a "court may not modify a term of imprisonment once is has been imposed," but then includes two overarching exceptions to this general rule. The first overarching exception, found within 18 U.S.C. § 3582(c)(**1**), authorizes reduced sentences in three circumstances. Section 3582(c)(**1**)(**A**)(**i**) permits a district court to reduce a sentence "if it finds that . . . extraordinary and compelling reasons warrant such a reduction" (the provision

[1] The last two subsections are not relevant here (they deal with relief for federal prisoners with terminal illnesses, 18 U.S.C. § 3582(d), and associational restrictions for those convicted of drug or racketeering offenses, 18 U.S.C. § 3582(e)). We do not discuss them further.

directly at issue here). Section 3582(c)(**1**)(**A**)(**ii**) permits reductions for qualifying elderly defendants who were sentenced under 18 U.S.C. § 3559(c). And § 3582(c)(**1**)(**B**) permits a district court to modify a term of imprisonment if "expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." The second overarching exception, found within 18 U.S.C. § 3582(c)(**2**), generally permits a district court to reduce a term of imprisonment based on a retroactive change to the defendant's guidelines range.

To drill down on § 3582(c)(**1**)(**A**), Congress enacted the provision as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1998-1999 (1984). In its original form, any motion for a reduced sentence "had to be made by the BOP Director." *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020). The BOP had "exclusive power over all avenues of" relief. *Id.* An inmate could not file his own motion, nor could he seek judicial review of the BOP's refusal to file a motion on the inmate's behalf. *See United States v. Ruffin*, 978 F.3d 1000, 1003 (6th Cir. 2020); *Rodriguez-Aguirre v. Hudgins*, 739 Fed. Appx. 489, 491 (10th Cir. 2018) (unpublished).

Over the years, the "BOP used [its release] power sparingly, to say the least." *Brooke*r, 976 F.3d at 231. In 2013, the Office of the Inspector General issued a report highly critical of the BOP's implementation of its statutory authority.[2] The Inspector General concluded that "[t]he BOP does not properly manage the compassionate

[2] Department of Justice, Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program 11 (Apr. 2013) (hereinafter "The 2013 Report"), available at: https://oig.justice.gov/reports/2013/e1306.pdf.

release program, resulting in inmates who may be eligible candidates for release not being considered." The 2013 Report at 11. The Inspector General found that the BOP failed to provide adequate guidance to staff regarding medical and non-medical criteria for relief, lacked timeliness standards for reviewing requests, did not adequately inform prisoners about the program, and had no system to track requests or ensure that decisions were consistent with BOP policy or with § 3582(c)(1)(A). *Id.*

In response, in 2018, Congress amended § 3582(c)(1)(A) to, *inter alia*, permit defendants to file their own motions. First Step Act, Pub. L. 115-391, 132 Stat. 5194, § 603 (2018) (entitled "Increasing the Use and Transparency of Compassionate Release"). "Congress clearly did not view this – a break with over 30 years of procedure – as a minor or inconsequential change. Congresspersons called it 'expand[ing],' 'expedit[ing],' and 'improving' compassionate release." *Brooker*, 976 F.3d at 235. In its current form, § 3582(c)(1)(A) provides that, "in any case":

> (A) **the court**, upon motion of the Director of the Bureau of Prisons, or **upon motion of the defendant** after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, **may reduce the term of imprisonment** (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), **after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that**—
>
> > (i) **extraordinary and compelling reasons warrant such a reduction**; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the

> offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
>
> > **and** that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A)(i) (emphasis added).

Congress used similar sequential language within § 3582(c)(2). In that provision, Congress authorized a reduced sentence if certain prerequisites were met:

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

18 U.S.C. § 3582(c)(2) (emphasis added).

This Court has not yet interpreted § 3582(c)(**1**). But in *Dillon*, this Court held that § 3582(c)(**2**) "establishes a two-step inquiry. A court **must first determine** that a reduction is consistent with § 1B1.10 **before it may consider** whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a)." 560 U.S. at 826 (emphasis added). Then, in *Koons*, this Court further made clear that § 3582(c)(2) includes a threshold eligibility inquiry – whether the defendant's guidelines range was based on a subsequently-lowered retroactive guideline – that must be addressed before anything else. 138 S.Ct. at 1790.

Whether a similar threshold-eligibility sequential-step inquiry applies to § 3582(c)(1)(A) is at the heart of this joint petition.

B. Proceedings Below

1. In 2012, James Hald pleaded guilty to a drug conspiracy and was sentenced to a 210-month term of imprisonment. Pet. App. 7a, 32a. In July 2020, Mr. Hald moved for a reduced sentence under § 3582(c)(1)(A)(i). *Id.* Mr. Hald argued that his preexisting health conditions (obesity, hypertension, and Hepatitis C), in conjunction with the COVID-19 pandemic and his incarceration, qualified as extraordinary and compelling reasons for a reduced sentence. Pet. App. 7a, 35a.

The district court denied the motion. Pet. App. 8a, 32a-37a. The district court noted that Mr. Hald's health conditions "may present an extraordinary and compelling reason," Pet. App. 35a, but did not definitively resolve the issue, Pet. App. 14a, 24a. Rather, the district court "move[d] on to consider the § 3553(a) factors," Pet. App. 35a, and determined that, in light of those factors (specifically, Mr. Hald's offense conduct and criminal history), Mr. Hald failed to "demonstrate an extraordinary and compelling reason warranting [a] sentence reduction." App. 8a, 35a-37a.

2. In 2007, a jury found Walter Sands guilty of drug-and-gun-related offenses, and the district court imposed a 420-month term of imprisonment. Pet. App. 11a, 38a. The district court later reduced the sentence under § 3582(c)(2) to 384 months' imprisonment. Pet. App. 12a, 39a. In July 2020, Mr. Sands moved for a reduced sentence under § 3582(c)(1)(A)(i). Pet. App. 12a, 39a. Mr. Sands, like Mr. Hald, argued that his preexisting health conditions (obesity, diabetes, asthma, hypertension, and

sleep apnea) in conjunction with the COVID-19 pandemic and his incarceration, established extraordinary and compelling reasons for a reduced sentence. Pet. App. 12a, 39a, 42a.

The district court denied the motion. Pet. App. 12a. The district court noted the government's concession that Mr. Sands established extraordinary and compelling reasons, Pet. App. 42a-43a, but did not definitively resolve the issue, Pet. App. 14a, 24a. Rather, the district court (like it did in Mr. Hald's case) "move[d] on to consider the § 3553(a) factors," Pet. App. 43a, and determined that, in light of those factors (specifically, Mr. Sands' offense conduct and criminal history, as well as the need to deter and punish), Mr. Sands failed to "demonstrate an extraordinary and compelling reason warranting [a] sentence reduction." Pet. App. 45a.

3. In 2012, Connie Edwards pleaded guilty to a drug conspiracy, and the district court imposed a 300-month term of imprisonment. Pet. App. 50a-51a. In 2020, Ms. Edwards moved for a reduced sentence under § 3582(c)(1)(A)(i). Pet. App. 50a. Ms. Edwards (like Mr. Hald and Mr. Sands) argued that her preexisting health conditions (cancer, chronic kidney disease, chronic obstructive pulmonary disease, obesity, Type 2 diabetes, hypertension, and her age (68 years old)) in conjunction with the COVID-19 pandemic and her incarceration, established extraordinary and compelling reasons for a reduced sentence. Pet. App. 47a, 51a.

The district court denied the motion. Pet. App. 56a-59a. Although the district court determined that "Ms. Edwards has not established that 'extraordinary and compelling reasons' warrant compassionate release," Pet. App. 56a, it did so "by skipping ahead" to the § 3553(a) factors, Pet. App. 48-49a. Pet. App. 56a-59a (relying

on Mr. Edwards' offense conduct and history and characteristics, the need to punish and deter, and the advisory guidelines range (of life)). The district court ultimately concluded that, although Ms. Edwards' "significant health problems" "favor[ed] her request," "the pertinent sentencing factors in 18 U.S.C. § 3553(a) do not favor the reduction Ms. Edwards's motion seeks." Pet. App. 59a.

4a. All three petitioners appealed. They each explained that § 3582(c)(1)(A)(i)'s plain text requires a three-step sequential test, with step one – whether extraordinary and compelling reasons warrant a sentence reduction – as a threshold eligibility inquiry. Pet. App. 13a-14a, 17a-18a, 48a. Petitioners explained that this reading of the statute was obvious in light of this Court's decision in *Dillon*, as *Dillon* held that a neighboring subsection with similar language – 18 U.S.C. § 3582(c)(2) – required an analogous sequential-step test. Pet. App. 17a-18a, 20a. This reading was also obvious in light of *United States v. C.D.*, 848 F.3d 1286, 1289-1290 (10th Cir. 2017), as *C.D.* further held that § 3582(c)(2) required a threshold-eligibility determination that had to be answered before considering any applicable policy statement or the § 3553(a) factors. *See* Pet. App. 16a. n.7. Because the district courts skipped over § 3582(c)(1)(A)'s threshold eligibility inquiry, and denied relief solely under the § 3553(a) factors, the petitioners asked the Tenth Circuit to vacate the district courts' orders and remand for a proper analysis. *See* Pet. App. 13a-14a, 48a.

b. While the appeals were pending, the Tenth Circuit published its decision in *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021). Consistent with petitioners' plain-text interpretation of § 3582(c)(1)(A), *McGee* interpreted the statute to require a "three-step test." *Id.* at 1043. "At step one . . . a district court must find whether

extraordinary and compelling reasons warrant a sentence reduction." *Id.* at 1042 (alterations omitted). "At step two . . . a district court must find whether such reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* (alterations omitted). "At step three . . . § 3582(c)(1)(A) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by steps one and two is warranted in whole or in part under the particular circumstances of the case.'" *Id.* (alterations omitted). *McGee* made clear that the first two steps "authorize[]" a district court to reduce a sentence. *Id.* In contrast, at the third step, a district court considers the § 3553(a) factors only if the reduction is "authorized by steps one and two," and only to determine whether (and to what extent) to reduce the sentence. *Id.*

But immediately after setting forth this three-step test, *McGee* noted in dicta "that district courts may **deny** compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others." *Id.* at 1043 (emphasis added); Pet. App. 15a (noting that this sentence was dicta). Ultimately, *McGee* was not about the statute's sequence, however, but instead about whether district courts can consider intervening statutory changes when determining whether a defendant had established extraordinary and compelling reasons to warrant a reduced sentence under step one (the Tenth Circuit held that it could). 992 F.3d at 1047. *McGee* also held that the second step was inapplicable to defendant-filed motions because the Sentencing Commission has not yet amended the "applicable policy statement" since § 3582(c)(1)(A)'s amendment in 2018. *Id.* at 1050. Because the district court in that case "misunderstood the extent of its

authority at both steps one and two of § 3582(c)(1)(A)'s statutory test," the Tenth Circuit vacated the denial of the defendant's motion and remanded "so that it may consider McGee's motion anew." *Id.* at 1051.

c. Following *McGee*, the Tenth Circuit affirmed the denial of Mr. Hald's and Mr. Sands' motions in a published opinion. Pet. App. 31a.[3] In doing so, the Tenth Circuit did not rely on § 3582(c)(1)(A)'s plain text. The Tenth Circuit barely mentioned the text (and did not address petitioners' textual arguments surrounding Congress's use of the words "if" and "after" within § 3582(c)(1)(A)). *See* Pet. App. 15a-24a. Instead, although admitting that the statement in *McGee* was dicta, the Tenth Circuit, quoting that statement, held "that district courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others." Pet. App. 14a-15a.

The Tenth Circuit provided two reasons to adopt this dicta as binding precedent. Pet. App. 15a-24a. First, the Tenth Circuit cited the structure of § 3582(c)(1)(A), noting that the statute "mentions step three [the § 3553(a) factors] first," and so "the natural meaning could well be that the court is to first determine whether relief would be authorized by that step and then consider whether the other two steps are satisfied." Pet. App. 15a. But "most importantly," the Tenth Circuit declared, "there [was] no reason to mandate any particular order for the three steps." Pet. App. 16a. "If the most convenient way for the district court to dispose of a motion for

[3] The Tenth Circuit affirmed the denial of a third prisoner's motion as well (Monterial Wesley). Pet. App. 1a. Because we did not represent Mr. Wesley on appeal, we have not petitioned for a writ of certiorari on his behalf. Moreover, Mr. Wesley did not raise the question presented in this joint petition.

compassionate release is to reject it for failure to satisfy one of the steps, we see no benefit in requiring it to make the useless gesture of determining whether one of the other steps is satisfied." Pet. App. 16a-17a.

The Tenth Circuit was unpersuaded that this Court's decision in *Dillon* supported a contrary interpretation. Pet. App. 17a-24a. The Tenth Circuit implied that this Court's sequential-step language in *Dillon* was dicta. Pet. App. 20a. Citing decisions interpreting constitutional provisions, not statutes, it surmised that it was "not at all unusual for an appellate court, including the Supreme Court, to conceptualize a decision as proceeding in a certain order (step 1, step 2, etc.), yet permit the ultimate decisionmaker—ordinarily the trial court—to proceed in a different order if more convenient and efficient." Pet. App. 20a-23a. And it saw "no justification for requiring a specific order of analysis" under § 3582(c)(1)(A) even if *Dillon* required such an analysis under § 3582(c)(2). Pet. App. 23a. The Tenth Circuit further distinguished *C.D.* because *C.D.* held that § 3582(c)(2)'s threshold-eligibility requirement was jurisdictional, but here, the extraordinary-and-compelling-reasons inquiry is not jurisdictional. Pet. App. 16 n.7. In doing so, however, the Tenth Circuit conceded that *C.D.*'s jurisdictional holding was likely incorrect under this Court's recent jurisdictional precedent. Pet. App. 16 n.7.

5. Mr. Hald and Mr. Sands petitioned for rehearing en banc because the Tenth Circuit's decision conflicted with decisions from other courts of appeals. The Tenth Circuit ordered the government to respond, but it then denied the petition in a one-page unpublished order. Pet. App. 61a.

6. After the petition for rehearing en banc was denied, a different Tenth Circuit panel affirmed the denial of Ms. Edwards' motion. Pet. App. 46a-49a. The panel held that "[u]nder *Hald*, the [district] court did not err by skipping ahead to [the § 3553(a)] factors." Pet. App. 48a-49a.

This timely joint petition follows.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition to resolve a conflict in the Circuits over whether Congress has provided for a sequential threshold-eligibility determination under § 3582(c)(1)(A). Review is especially important because the Tenth Circuit's decision – holding that Congress has not provided for such a test – is contradicted by the text and structure of the statute, as well as this Court's decisions in *Koons* and *Dillon*. Moreover, review is essential because of the question's importance. Aside from the need to resolve an entrenched conflict, the question involves the interpretation of a new remedial statute that is widely available to all federal prisoners. It is imperative that the statute be interpreted uniformly and in a manner that provides meaningful guidance to the lower courts. The Tenth Circuit's test does neither of these things. The Tenth Circuit's test also undermines the entire point of § 3582(c)(1)(A)(i) – to determine whether a federal prisoner has established extraordinary and compelling reasons that warrant a reduction – because it does not require district courts to answer that threshold eligibility question. This petition is an excellent vehicle to resolve the Circuit split. This Court should grant this petition.

I. Review is necessary to resolve a conflict in the Circuits.

There is an established conflict over whether § 3582(c)(1)(A)(i)'s plain text requires

a sequential threshold-eligibility determination to resolve motions for reduced sentences.

1a. Two courts of appeals – the **Tenth Circuit** and the **Eleventh Circuit** – have held that § 3582(c)(1)(A)(i) does not establish a sequential test at all. Pet App. 15a (the statute "does not mandate a particular ordering of the three steps")[4]; *United States v. Tinker*, 14 F.4th 1234, 1237 (11th Cir. 2021) ("nothing on the face of 18 U.S.C. § 3582(c)(1)(A) requires a court to conduct the compassionate-release analysis in any particular order."). In those Circuits, district courts "may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking *and do not need to address the others*." Pet. App. 14a (emphasis in original); *Tinker*, 14 F.4th at 1240 (noting "a district court's ability . . . to assess one necessary condition while skipping over another"). Because these Courts have held that § 3582(c)(1)(A)(i) does not mandate a particular sequence, they've held that the existence of extraordinary and compelling reasons is not a threshold eligibility determination under the statute. Pet. App. 14a, 17a; *Tinker*, 14 F.4th at 1240. Rather, a district court is free to "skip[]" the "extraordinary and compelling reasons" inquiry entirely. Pet. App. 14a, 48a; *Tinker*, 14 F.4th at 1238.

b. Two courts of appeals – the **Second Circuit** and the **Ninth Circuit** – agree with the Tenth and Eleventh Circuits that § 3582(c)(1)(A)(i) does not require district courts to apply a sequential threshold-eligibility test when *denying* motions. *United*

[4] The decision below modifies the Tenth Circuit's earlier decision in *McGee*, which appeared to adopt a sequential-step test when a district court grants (but not denies) a motion. *See* 992 F.3d at 1043. The decision below makes clear that a sequential-step test is never necessary. Pet. App. 15a.

States v. Keller, 2 F.4th 1278, 1284 (9th Cir. 2021) (rejecting the defendant's argument that "motions brought under § 3582(c)(1)(A)(i) require courts to perform a sequential step-by-step analysis"); *United States v. Holmes*, 858 Fed. Appx. 429, 430 (2d Cir. 2021) (same); *see also United States v. Giddens*, __ Fed. Appx. __, 2021 WL 5267993, at *2 (2d Cir. Nov. 12, 2021) ("nothing in section 3582(c) required the district court to draw an express and definitive conclusion on [whether extraordinary and compelling reasons existed] before considering whether the section 3553(a) factors nevertheless rendered a sentence reduction unwarranted").

But the Ninth Circuit has held that a threshold-eligibility sequential-step test is required before a district court *grants* a motion. *Keller*, 2 F.4th at 1284 ("although a district court must perform this sequential inquiry before it grants compassionate release, a district court that properly denies compassionate release need not evaluate each step"). The Second Circuit appears to agree with the Ninth Circuit on this point. *See*, *e.g.*, *United States v. Jones*, 17 F.4th 371 (2d Cir. 2021) ("extraordinary and compelling reasons are necessary—but not sufficient—for a defendant to obtain relief"). Neither court, however, has explained how the statute's text supports different tests based on whether a district court intends to grant or deny relief.

2. In conflict with the Tenth and Eleventh Circuits (and in partial conflict with the Second and Ninth Circuits), five courts of appeals – the **First Circuit**, **Third Circuit**, **Fourth Circuit**, **Sixth Circuit**, and **Seventh Circuit** – have all held that § 3582(c)(1)(A)(i)'s plain text requires district courts to employ a threshold-eligibility sequential-step test when resolving motions. *United States v. Saccoccia*, 10 F.4th 1, 4 (1st Cir. 2021) ("First, the courts must find [] that the defendant has presented an

'extraordinary and compelling reason' warranting a sentence reduction . . . . Then, the court must consider any applicable § 3553(a) factors") (citing *Dillon*); *United States v. Jones*, 980 F.3d 1098, 1106-1108 (6th Cir. 2020) (same) (citing *Dillon*); *United States v. Andrews*, 12 F.4th 255, 258, 262 (3d Cir. 2021) (same); *United States v. Haynes*, 856 Fed. Appx. 405, 407 (3d Cir. 2021) (same); *United States v. High*, 997 F.3d 181, 186 (4th Cir. 2021) (same); *United States v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021) (same).

As the Third Circuit has explained: "[t]he conditional statement is clear: The court first determines whether a defendant is eligible for relief by considering whether 'extraordinary and compelling reasons warrant' relief. If the court finds such reasons, it then considers the § 3553(a) factors to determine whether to grant the relief." *Haynes*, 856 Fed. Appx. at 407. "[I]it is best to proceed in that order, which reflects the statutory structure." *United States v. Ugbah*, 4 F.4th 595, 597 (7th Cir. 2021).

The Ninth and Tenth Circuits have both indicated that the Sixth Circuit agrees with its test. Pet. App. 14a; *Keller*, 2 F.4th at 1284. But that's untrue. In the Sixth Circuit, in order to "skip" the threshold-eligibility inquiry, a district court must, at a minimum, assume the existence of extraordinary and compelling reasons. *Jones*, 980 F.3d at 1108 (the district court "assumed for the sake of argument that extraordinary and compelling reasons existed . . . and then proceeded to weigh several § 3553(a) factors"); *Ruffin*, 978 F.3d at 1006 (denying the motion because the defendant "did not identify extraordinary and compelling reasons"); *United States v. Navarro*, 986 F.3d 668, 670 (6th Cir. 2021) (affirming in a form order under the § 3553(a) factors);

United States v. McGuire, 822 Fed. Appx. 479, 480 (6th Cir. 2020) (unpublished) (the use of a form order, like the one in *Navarro*, "assume[s] that the district court determined that [defendant] had demonstrated extraordinary and compelling reasons making him eligible for compassionate release").

Unlike in the Second, Ninth, Tenth, and Eleventh Circuits, a district court in the Sixth Circuit cannot simply deny a motion under the § 3553(a) factors. "The exception in § 3582(c)(1)(A)(i) is not an open-ended invitation to simply relitigate and reweigh the § 3553(a) factors based on facts that existed at sentencing. 'Congress did not write the statute that way.'" *United States v. Hunter*, 12 F.4th 555, 569 (6th Cir. 2021). Rather, "the statute contains three distinct requirements," *id.*, and those requirements must be addressed in "sequence," "i.e., a district court must make the two requisite 'find[ings] before weighing the applicable § 3553(a) factors," *Jones*, 980 F.3d at 1107.

This Circuit split is in need of resolution.[5] Section 3582(c)(1)(A)(i) should not have different meanings in different jurisdictions. As with any statute, it should have one uniform meaning throughout the United States. At present, it does not. And there is no plausible reason to think that the courts of appeals will resolve this conflict on their own. The conflict is significant. It would take multiple Circuits to switch sides to eliminate it. We already know that the Tenth Circuit has no intent of switching sides. Pet. App. 61a. There is no reason to think that any of the other Circuits would

[5] Even if we're wrong about what side of the split the Sixth Circuit falls, there is still an identical entrenched conflict that is in need of resolution. Moreover, as far as we can tell, the Fifth, Eighth, and DC Circuits have not yet definitively ruled on this issue. But when they do, their decisions will just deepen what is already an entrenched conflict.

either (let alone 4 or 5 other Circuits). The conflict will persist until this Court resolves it. Review is necessary.

II. The Tenth Circuit erred.

Review is also necessary because the Tenth Circuit's decision has no support in the statute's text. The statute's text plainly includes a threshold-eligibility sequential-step test.[6] This is obvious from Congress's use of the phrase "if [the district court] finds that" to introduce two prerequisites to relief: that "extraordinary and compelling reasons warrant [] a reduction"; and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i). By using the word "if," Congress plainly introduced conditions precedent to relief. *See* Black's Law Dictionary (11th ed. 2019) (defining "condition precedent" as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises," and including numerous examples using "if" to signal a condition precedent). This follows naturally from the plain meaning of the word "if." Webster's Third New International Dictionary 1124 (2002) ("if" means "in the event that," "so long as," or "on condition that"); Oxford English Dictionary (2d ed. 1989) (defining "if" as "[i]ntroducing a clause of condition or supposition"; "[o]n condition that") (accessed online).

Thus, under the statute's text, a district court must first determine "if" "extraordinary and compelling reasons warrant such a reduction," and then "if" any "such reduction is consistent with applicable policy statements issued by the

[6] Section 3582(c)(1)(A) also includes a preliminary exhaustion requirement, but this petition has nothing to do with that requirement, so we do not discuss it.

Sentencing Commission" (if such an applicable policy statement exists), before it moves on to consider anything else. *See*, *e.g.*, *Thacker*, 4 F.4th at 576; *Andrews*, 12 F.4th at 258; *Saccoccia*, 10 F.4th at 4; *Jones*, 980 F.3d at 1106-1108. If either of these conditions precedent are not met, the motion must be denied. *See*, *e.g.*, *Ugbah*, 4 F.4th at 598. If these conditions precedent are met, however, "a defendant becomes *eligible* for relief," *High*, 997 F.3d at 186 (emphasis in original), and the district court "may reduce the term of imprisonment," 18 U.S.C. § 3582(c)(1)(A).

Only at this point, "after" a defendant has met the conditions precedent to relief, does a district court conduct the third step: "considering the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(1)(A). This also follows from the statute's text, which places this phrase – "after considering the factors set forth in section 3553(a) to the extent that they are applicable" – immediately before the conditional language ("if it finds that"), but immediately after the phrase "may reduce the term of imprisonment." As the majority of courts of appeals have held, the statute's text makes plain that the § 3553(a) factors are not a condition precedent to relief, but rather factors district courts must consider "after" finding that a defendant is eligible for a reduced sentence. *Thacker*, 4 F.4th at 576; *Andrews*, 12 F.4th at 258; *Saccoccia*, 10 F.4th at 4; *Jones*, 980 F.3d at 1106-1108; *High*, 997 F.3d at 186. The Seventh Circuit has summed it up best:

> "Upon a finding that the prisoner has supplied [an extraordinary and compelling reason], . . . the analysis requires the district court, in exercising the discretion conferred by the compassionate release statute, to consider any applicable sentencing factors in § 3553(a) as part of determining what sentencing reduction to award the prisoner."

Thacker, 4 F.4th at 576.

The Tenth Circuit did not address any of these textual points below. *See* Pet. App. 14a-24a. Rather, the Tenth Circuit surmised that, because § 3582(c)(1)(A) "mentions step three first, the natural meaning could well be that the court is to first determine whether relief would be authorized by that step and then consider whether the other two steps are satisfied." Pet. App. 15a. That is not an argument the government made below (the government made no textual arguments at all below), and so that suggestion was not briefed by the parties. The suggestion is untenable for three reasons.

First, the suggestion ignores the conditional language used by Congress, as just explained. It is irrelevant where Congress puts conditional language within a statute; the language is still conditional. Second, this suggestion ignores the fact that Congress included two avenues to relief within § 3582(c)(1)(A) – subsection (i) and subsection (ii). Because Congress included two avenues to relief, the most natural place to put a § 3553(a)-consideration requirement was within § 3582(c)(1)(A) so that this requirement would apply to both subsections. 18 U.S.C. § 3582(c)(1)(A)(i)-(ii). And third, as explained below, this suggestion is incompatible with this Court's decisions in *Dillon* and *Koons*, which interpret analogous conditional language within § 3582(c)(2) to require a threshold-eligibility sequential-step test.

The Eleventh Circuit's attempt to defend its test is equally unpersuasive. The Eleventh Circuit provided this sentence as an "analogy" to support its position: "Rose can give Joe a cookie, after Joe walks the dog, if he does the dishes, and takes out the trash." *Tinker*, 14 F.4th at 1237. According to the Eleventh Circuit, this sentence has

"the same syntax as § 3582(c)(1)(A)," and "[i]t's clear to the average speaker of American English that, before Rose can give Joe a cookie, Joe must walk the dog, do the dishes, and take out the trash. But the order in which Joe completes those tasks is immaterial." *Id.*

The problem with this analogy is that the Eleventh Circuit's sentence does not have "the same syntax" as § 3582(c)(1)(A). Section 3582(c)(1)(A) requires district courts to "consider[]" the § 3553(a) factors when determining the extent, if any, of a reduction under § 3582(c)(1)(A)(i) or (ii). That is not the same thing as requiring Joe to "walk[] the dog." 14 F.4th at 1237. The phrase "after Joe walks the dog" is not similar to the phrase "after considering the [§ 3553(a)] factors to the extent that they are applicable." If the Eleventh Circuit's phrase were – "after considering whether Joe walked the dog" – then it would have "the same syntax," and it would disprove the Eleventh Circuit's approach. Then, as long as Joe "does the dishes, and takes out the trash," 14 F.4th at 1237, he's eligible for a cookie. It's just that, after Joe has done those things, Rose has the discretion to give him the cookie after considering whether Joe also walked the dog. Maybe Rose still gives him the cookie even if he did not walk the dog; maybe she only gives him half of a cookie even if he walked the dog; maybe she doesn't give him a cookie at all even though he walked the dog because he walked the dog in a giant mud puddle and made a huge mess. That decision is discretionary. Joe's cookie-quest doesn't support a no-sequential-step test under § 3582(c)(1)(A).

For two additional reasons, the statute's structure further undermines the Tenth (and Eleventh) Circuit's position. First, the Tenth Circuit's position is even more untenable with respect to subsection (c)(1)(A)(ii). That provision only applies to

prisoners who are "at least 70 years of age" and have "served at least 30 years in prison" under a sentence "imposed under section 3559(c)." § 3582(c)(1)(A)(ii). Yet, under the Tenth Circuit's approach, a district court could deny relief under the §3553(a) factors to, for instance, a 50-year-old defendant not sentenced under § 3559(c) who has served two years in prison. That cannot possibly be what Congress intended. That defendant is *ineligible* for a reduced sentence under § 3582(c)(1)(A)(ii). The district court should not "consider the § 3553(a) factors at all." *See Ugbah*, 4 F.4th at 598.

Second, Congress structured § 3582(c)(2) similarly, including a threshold-eligibility requirement (a retroactively reduced guidelines range), and using analogous conditional language ("if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"), preceded by the phrase "after considering the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). In *Dillon*, this Court held that § 3582(c)(2) "establishes a two-step inquiry. A court **must first determine** that a reduction is consistent with § 1B1.10 **before it may consider** whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a)." 560 U.S. at 826 (emphasis added).

Following *Dillon*, every court of appeals (including the Tenth Circuit) has held that § 3582(c)(2) requires the sequential-step test this Court announced in *Dillon*. *See*, *e.g.*, *United States v. Vaughn*, 806 F.3d 640, 643 (1st Cir. 2015); *United States v. Christie*, 736 F.3d 191, 194 (2d Cir. 2013); *United States v. Rodriguez*, 855 F.3d 526, 529 (3d Cir. 2017); *United States v. Martin*, 916 F.3d 389, 395 (4th Cir. 2019); *United*

States v. Lopez, 989 F.3d 327, 332 (5th Cir. 2021); *United States v. Thompson*, 714 F.3d 946, 948 (6th Cir. 2013); *United States v. Phelps*, 823 F.3d 1084, 1087 (7th Cir. 2016); *United States v. Darden*, 910 F.3d 1064, 1066 (8th Cir. 2018); *United States v. Hernandez-Martinez*, 933 F.3d 1126, 1130 (9th Cir. 2019); *C.D.*, 848 F.3d at 1289-1290; *United States v. Caraballo-Martinez*, 866 F.3d 1233, 1247 (11th Cir. 2017); *United States v. Wyche*, 741 F.3d 1284, 1292 (D.C. Cir. 2014). When analyzing § 3582(c)(1)(A), multiple courts of appeals have recognized "[s]ections 3582(c)(1)'s and (c)(2)'s parallel language and structure." *Jones*, 980 F.3d at 1107; *United States v. Long*, 997 F.3d 342, 351 (D.C. Cir. 2021) ("[t]he structure of Section 3582(c)(2) closely parallels that of [] Section 3582(c)(1)(A)"); *Saccoccia*, 10 F.4th at 4 (referring to § 3582(c)(2) as "a provision adjacent to section 3582(c)(1), employing similar language"); *United States v. Kibble*, 992 F.3d 326, 329 (4th Cir. 2021) ("we see no reason to adopt different standards for these parallel provisions").

The Tenth Circuit dismissed *Dillon* as irrelevant, Pet. App. 17a-24a, implying that the relevant language from *Dillon* was unpersuasive dicta, Pet. App. 20a-23a. According to the Tenth Circuit, whether this portion of *Dillon* binds lower courts is left for "further clarification by" this Court. Pet. App. 23a. But no court of appeals has ever considered that language dicta. Rather, as just shown, every court of appeals (including the Tenth Circuit) has adopted *Dillon*'s sequential-step test as binding precedent.

The Tenth Circuit also discounted *Dillon*'s test because it is "not at all unusual for an appellate court, including the Supreme Court, to conceptualize a decision as proceeding in a certain order (step 1, step 2, etc.), yet permit the ultimate

decisionmaker—ordinarily the trial court—to proceed in a different order if more convenient and efficient." Pet. App. 20a. But in support, the Tenth Circuit cited decisions interpreting *constitutional* provisions, not *statutes*. Pet. App. 20a-22a. That is an all-together different thing. The First Amendment's prohibition against any "law abridging the freedom of speech" obviously does not set forth a sequential order to resolve disputes over commercial speech. *See* Pet. App. 21a. Nor does the Sixth Amendment's right to counsel set forth a sequential order to resolve disputes over an attorney's effectiveness. *See* Pet. App. 20a. But the same is not true for statutes. Congress often passes sequential statutory schemes. *See*, *e.g.*, *Guam v. United States*, 141 S.Ct. 1608, 1613 (2021) (noting the "sequence" of the statute at issue there)).

Moreover, this Court made clear in *Koons*, 138 S.Ct. at 1790, that § 3582(c)(2) includes a "threshold" eligibility requirement: whether the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o)," 18 U.S.C. § 3582(c)(2). This threshold eligibility requirement precedes not just any consideration of the § 3553(a) factors, but also whether a reduction is consistent with any applicable policy statement. *Id.* (holding that the policy statement "cannot make a defendant eligible when § 3582(c)(2) makes him ineligible").

The Tenth Circuit did not address *Koons* below, but it did address its earlier decision in *C.D.*, Pet. App. 16 n.7, which, the year before *Koons*, held, as *Koons* would later hold, that § 3582(c)(2) includes a threshold eligibility requirement. 848 F.3d at 1289-1290. The Tenth Circuit dismissed *C.D.* because it considered the threshold-eligibility requirement a jurisdictional one, and a "court has no authority to address

a nonjurisdictional merits issue if it lacks jurisdiction." Pet. App. 16a. n.7. But the Tenth Circuit acknowledged "the apparent tension between [C.D.'s jurisdictional holding] and recent Supreme Court law." Pet. App. n.7. Indeed, consistent with decisions from other courts of appeals, *Koons* expressly refers to § 3582(c)(2)'s retroactive-guidelines-range requirement as a "threshold" eligibility requirement without even a hint that this requirement is jurisdictional. 138 S.Ct. at 1790; *see also United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013) (threshold-eligibility requirement not jurisdictional); *United States v. Taylor*, 778 F.3d 667 (7th Cir. 2015) (same).

Section 3582(c)(1)(A) should be interpreted similarly to § 3582(c)(2) to require an analogous threshold-eligibility sequential-step test. *See*, *e.g.*, *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009) ("Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations."). Under both provisions, a district court must first determine whether a defendant is eligible for relief in the first instance: under § 3582(c)(1)(A)(i) if the district court finds that "extraordinary and compelling reasons warrant [] a reduction," and under § 3582(c)(2) if the district court finds that the defendant's guidelines range "has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)." *See Koons*, 138 S.Ct. at 1790. Under both provisions, Congress has set forth a sequential-step test for district courts to use to resolve these motions. *See Dillon*, 560 U.S. at 826.

Contrary to the Tenth Circuit's position below, we do not need to surmise whether "there is a reason why a court acting under § 3582(c)(2) must first address whether

the defendant's guidelines range has been changed by a postsentencing amendment." Pet. App. 23a. We know the answer: because Congress has said it must. *Dillon*, 560 U.S. at 826; *Koons*, 138 S.Ct. at 1790. Likewise, here, a district court must first determine whether "extraordinary and compelling reasons warrant such a reduction" because that's what § 3582(c)(1)(A)'s plain text requires courts to do. The "justification for requiring a specific order of analysis" under § 3582(c)(1)(A), Pet. App. 23a, is the statute's text. The Tenth Circuit doesn't get to amend the statute simply because it disagrees with it. *Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020) (judges cannot "add to, remodel, update, or detract from" the statute's text, as that "would risk amending statutes outside the legislative process reserved for the people's representatives").

Indeed, there is a very good reason why Congress wrote § 3582(c)(1)(A) the way that it did. Congress amended § 3582(c)(1)(A) to ensure that district courts can reduce sentences for those who demonstrate extraordinary and compelling reasons for such reductions. *See Brooker*, 976 F.3d at 235. The district court's "task [is] not to assess the correctness of the original sentence it imposed. Rather, its task [is] to determine whether the § 3553(a) factors counsel[] against a sentence reduction in light of the new, extraordinary circumstances identified." *Kibble*, 992 F.3d at 334 (Gregory, C.J., concurring). "The exception in § 3582(c)(1)(A)(i) is not an open-ended invitation to simply relitigate and reweigh the § 3553(a) factors based on facts that existed at sentencing." *Hunter*, 12 F.4th at 569. Perhaps that is the "most convenient way for the district court to dispose of a motion," Pet. App. 15a-16a, but "'Congress did not write the statute that way,'" *Hunter*, 12 F.4th at 569. And § 3582(c)(1)(A) was not

amended to give district courts convenient ways to deny relief. It should not be interpreted with that goal in mind.

Finally, statutory context also severely undermines the Tenth Circuit's decision. In § 3582(a), Congress referenced § 3553(a) as well, requiring that district courts, "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable." *See also* 18 U.S.C. § 3553(a) (instructing that sentencing courts "shall consider" the § 3553(a) factors "in imposing a sentence"). This provision makes clear that the § 3553(a) factors are relevant at the sentencing stage of the proceedings. Those factors guide a district court's discretion in determining "whether to impose a term of imprisonment" and "the length of [any such] term." 18 U.S.C. § 3582(a). They do not guide a district court's discretion in determining whether "extraordinary and compelling reasons warrant [] a [sentence] reduction," 18 U.S.C. § 3582(c)(1)(A)(i), or whether an elderly defendant sentenced under § 3559(c) is eligible for a sentence reduction, 18 U.S.C. § 3582(c)(1)(A)(ii). Only if a defendant satisfies those conditions "may" a district court "reduce a term of imprisonment." 18 U.S.C. § 3582(c)(1)(A). And it is only at that point, "after" the threshold eligibility determination is made, that a district court considers any applicable § 3553(a) factors in order to determine "whether to impose a term of imprisonment" and "the length of [any such] term." 18 U.S.C. § 3582(a).

The Second and Ninth Circuits' hybrid approach – adopting a threshold-eligibility sequential-step test to grant, but not deny, motions, *Keller*, 2 F.4th at 1284; *Holmes*, 858 Fed. Appx. at 430 – also lacks any support in the text. There is nothing within

the statute that requires a district court to proceed one way, but not the other, based solely on whether the district court intends to grant or deny relief. Indeed, under the Second and Ninth Circuits' approach, in order to know which analysis to employ (a threshold-eligibility sequential-step test or something different), a district would first have to decide whether to grant or deny the motion. But that type of ends-justifies-the-means decisional process puts the cart before the horse. The purpose of a legal test is to guide a district court's decision-making authority. It makes no sense to adopt a reading of § 3582(c)(1)(A)(i) that requires a district court to make the ultimate decision first in order to determine what legal test to employ.

This Court has rejected such illogical reasoning in other contexts. *See*, *e.g.*, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S.Ct. 883, 892 (2018) ("those inquiries put the proverbial cart before the horse. Before a court can determine whether a transfer was made by or to or for the benefit of a covered entity, the court must first identify the relevant transfer to test in that inquiry."); *Florida v. Georgia*, 138 S.Ct. 2502, 2516 (2018) ("To require 'clear and convincing evidence' about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse."); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 551 (1994) ("By treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on 'meritorious' FELA claims, the Third Circuit put the cart before the horse: The common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the 'merit' of a FELA claim of this type cannot be ascertained without reference to the common law."). For this reason, and

the others just discussed, this Court should grant this petition.

III. The resolution of this issue is critically important to the federal criminal justice system.

Review is also necessary because of the importance of the question presented. This is so for at least four reasons.

First, Congress just recently amended § 3582(c)(1)(A) to permit defendants to file their own motions for relief. First Step Act, § 603, 132 Stat. 5194, 5238. This new remedy is available to every federal prisoner, and there are currently over 150,000 federal prisoners.[7] Over 20,000 federal prisoners have already sought relief under this newly available remedial statute (and over 3,600 prisoners have obtained relief).[8] A statute that is so widely available and so widely used must have a uniform interpretation. As it stands now, it does not. This Court should thus use this petition to interpret this statute for the first time in order to bring uniformity to this important and expansive area of the law. *See*, e.*g.*, Sup. Ct. R. 10(a) (authorizing review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *Dawson v. Steager*, 139 S.Ct. 698, 703 (2019) ("Because cases in this field have yielded inconsistent results, much as this one has, we granted certiorari to afford additional guidance.").

Importantly, § 3582(c)(1)(A)(i)'s meaning is currently unsettled. This Court has

[7] https://www.bop.gov/about/statistics/population_statistics.jsp.

[8] USSC Compassionate Release Data Report (Sept. 2021) at 4, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf (hereinafter "USSC Report")

not yet interpreted the meaning of the statute. Thus, the question presented is not "that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. Houston*, 137 S.Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). It is that the law in this area is entirely unsettled and in need of resolution. *See*, *e.g.*, *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 346 (1944) (granting certiorari to review "unsettled" questions "important to the administration of" a statutory scheme). In light of the wide sweep of the statute, and the extensive Circuit split, this question will continue to recur until this Court resolves it. *See*, *e.g.*, *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959) ("Since the question is important and recurring we granted certiorari.").

Second, in light of this pervasive conflict, § 3582(c)(1)(A)(i) has a different meaning based solely on geography. Prisoners sentenced in one jurisdiction must play by different rules than prisoners sentenced in other jurisdictions. And district courts in one jurisdiction are subject to different rules than district courts in other jurisdictions. Such "geographical happenstance" has no place in the proper interpretation of a statute. *See*, *e.g.*, *Rogers Cty. Bd. of Tax Roll Corr. v. Video Gaming Techs.*, 141 S.Ct. 24, 25 (2020) (Thomas, J., dissenting from the denial of cert.).

Indeed, considering that federal prisoners are housed throughout the United States without any real regard as to the jurisdiction of conviction, 18 U.S.C. § 3621(b), and considering that many federal prisoners must file pro se motions in this context[9],

[9] See, e.g., Casey Tolan, *Compassionate release became a life-or-death lottery for thousands of federal inmates during the pandemic*, available at: https://www.cnn.com/2021/09/30/us/covid-prison-inmates-

there is obvious risk of confusion in terms of pro se prisoners and their ability to seek relief under a proper understanding of the law. A prisoner housed in a federal prison in Chicago, but who was convicted in Denver (for instance), may reasonably seek relief under a threshold-eligibility sequential-step test, not realizing that such a test does not apply in the federal district court in Denver. And regardless, prisoners housed in the same prison (but with convictions from different jurisdictions) should not be subject to differing interpretations of § 3582(c)(1)(A)(i) simply because of geography.

Third, the Tenth Circuit's non-sequential-step test does not provide meaningful guidance to lower courts. On the one hand, a district court in the Tenth Circuit is instructed that it need not consider whether a defendant has established extraordinary and compelling reasons for a reduced sentence in order to deny a motion. Pet. App. 16a-17a. This is a "useless gesture" in some cases. Pet. App. 17a. On the other hand, a district court in the Tenth Circuit is instructed that it must still consider the alleged extraordinary and compelling reasons under the § 3553(a) factors. Pet. App. 23a-24a. This mashed-up test not only has no textual support, but provides little guidance to the lower courts on how to comply with the law. And by permitting district courts to skip the first step, there is a serious risk that courts will never meaningfully address what it means to establish "extraordinary and compelling reasons" for a reduced sentence. In contrast, a threshold-eligibility sequential-step test would provide clear guidance to the lower courts on precisely how

compassionate-release-invs/index.html (explaining that some jurisdictions do not appoint counsel for prisoners in this context).

to apply this statute, and it would ensure meaningful development of the contours of the "extraordinary and compelling" threshold inquiry.

Statutes should not be interpreted in ways that "prove exceedingly difficult to apply," *Stokeling v. United States*, 139 S.Ct. 544, 554 (2019), or "complicate the factfinder's review." *Life Techs. Corp. v. Promega Corp.*, 137 S.Ct. 734, 741 (2017). Rather, a statute's construction should "hew[] most closely to the text of the statute and provide[] an administrable construction." *Id.* The Tenth Circuit's approach does not do that.

And this lack of clear guidance undoubtedly attributes to the "wide disparities" that currently exist under this statute. *See* Tolan, *supra*, p. 29 n.9. "[W]hether defendants get released early during the pandemic has had almost as much to do with which courts are hearing their motion as it does with the facts of their cases." *Id.* At present, there is "a national patchwork of jarringly different approval rates between federal courts." *Id.* This should come as no surprise considering that the lower courts are divided over what test district courts should apply when ruling on such motions. "'You need a national standard"; "without one, 'it creates a vacuum and it creates uncertainty, and most importantly it creates disparity.'" *Id.* (quoting United States District Judge Charles Breyer). By resolving the question presented, this Court could (and should) take one crucial step toward defining that much-needed national standard.

Finally, the question presented is exceedingly important because the Tenth Circuit's interpretation of § 3582(c)(1)(A)(i) encourages district courts to deny motions without ever addressing § 3582(c)(1)(A)(i)'s key inquiry: whether "extraordinary and

compelling reasons warrant [] a reduction." *See* Pet. App. 16a-17a. This critical question is nothing more than a "useless gesture" in the Tenth Circuit. Pet. App. 17a. That cannot be the law. Congress expected district courts to answer that question, not avoid it by reciting the § 3553(a) factors used to impose the sentence in the first instance. *See*, *e.g.*, *Hunter*, 12 F.4th at 569; *Thacker*, 4 F.4th at 576. The whole point of the statute is to reduce sentences for those with extraordinary and compelling reasons for such reductions. The threshold eligibility question must be answered in every case, not rendered "useless" by an appellate court. Review is necessary.

IV. This petition is an ideal vehicle to resolve the question presented.

For two reasons, this petition presents an ideal opportunity for this Court to answer the question presented.

1. The question arises on direct review from a lower federal court of appeals. The petitioners properly preserved the question presented below, and the Tenth Circuit affirmed under de novo review. The unanimous, summary denial of en banc rehearing, after receiving a response from the government, makes clear that the Tenth Circuit will not overrule its precedent on this point. Thus, there are no procedural hurdles to overcome for this Court to resolve the conflict on this issue and address the merits of this critically important question.

2. This is also an excellent vehicle because the petitioners can establish extraordinary and compelling reasons for reduced sentences. Each petitioner suffers from serious medical conditions that put their lives at risk while incarcerated during the COVID-19 pandemic. Indeed, the government conceded below that both Mr. Sands and Ms. Edwards can satisfy this first step. Pet. App. 42a-43a, 56a. And absent

some significant countervailing reason, a federal prisoner who establishes that "extraordinary and compelling reasons warrant [] a reduction" should receive a reduced sentence.

The Tenth Circuit missed the point of this below, claiming that we somehow "fail[ed] to explain how a finding of extraordinary and compelling reasons would factor into the § 3553(a) analysis." Pet. App. 17a. That was untrue. We explained below the practical difficulties with an order-less interpretation of the statute: when a district court fails to determine whether extraordinary and compelling reasons independently exist for a reduced sentence, the district court "impermissibly devalue[s]" the reasons why the defendant filed the motion. Sands Br. 23. Those reasons "are not just one factor among many; they are *the* factor that permits the reduction." *Id.* (emphasis in original).

> The district court's approach [and now the Tenth Circuit's approach] sets aside the precise grounds that actually authorize a motion for a reduction under § 3582(c)(1)(A). If all the court must do is consider the § 3553(a) factors, § 3582(c)(1)(A) is completely meaningless. At the initial sentencing, 18 U.S.C. § 3553(a) already mandates that the court "impose a sentence sufficient, but not greater than necessary" to comply with the sentencing factors. The key question in a motion under § 3582(c)(1)(A) is whether there are extraordinary and compelling reasons which now alter the balance and warrant a reduction.

Hald Br. 23. When a district court finds that extraordinary and compelling reasons warrant a reduced sentence, it is up to the district court to explain how the § 3553(a) factors counterbalance those reasons, "especially considering that the current sentence is one the district court found sufficient, but not greater than necessary, at a time when extraordinary and compelling reasons did not warrant a lower sentence."

Id. 24.

The petitioners can satisfy the first step. That fact makes this an excellent vehicle to resolve this conflict.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES A. HALD,

Defendant - Appellant.

No. 20-3195

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTERIAL WESLEY,

Defendant - Appellant.

No. 20-3208

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WALTER B. SANDS,

Defendant - Appellant.

No. 20-3228

Appeals from the United States District Court
for the District of Kansas
(D.C. No. 6:11-CR-10227-EFM-1)
(D.C. No. 2:07-CR-20168-JWL-2)
(D.C. No. 2:06-CR-20044-JAR-3)

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Monterial Wesley, pro se.

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, with him on the briefs), Kansas Federal Public Defender's Officer, Topeka, Kansas, for Defendant - Appellant Walter B. Sands.

James A. Brown, Assistant United States Attorney (Stephen R. McAllister, United States Attorney, and Jared S. Maag, Assistant United States Attorney, with him on the briefs, and Duston J. Slinkard, Acting United States Attorney, District of Kansas, on the memorandum briefs), District of Kansas, Topeka, Kansas, for Appellee United States of America.

Before **HARTZ**, **HOLMES**, and **EID**, Circuit Judges.

HARTZ, Circuit Judge.

James A. Hald, Monterial Wesley, and Walter B. Sands (Defendants) appeal the denials of their district-court motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A).[1] They are among the many prisoners who have sought to be released from prison confinement during the COVID-19 pandemic. Each claimed that his underlying health conditions and mounting infections at his correctional

[1] Although these cases were not consolidated, we deal with them jointly in this opinion because of the similarity of the issues presented.

facility satisfied the statute's "extraordinary and compelling reasons" requirement for early release.[2] 18 U.S.C. § 3582(c)(1)(A). But before granting a sentence reduction the district court must also consider whether the factors set forth in 18 U.S.C. § 3553(a) support the reduction. *See* 18 U.S.C. § 3582(c)(1)(A). And each of the Defendants was denied relief by the United States District Court for the District of Kansas based on the court's discretionary analysis of the § 3553(a) factors.

The principal issue on appeal is whether, as argued by Hald and Sands, a district court is permitted to deny relief based on its assessment of the § 3553(a) factors without first making a determination on the existence of "extraordinary and compelling reasons." We reject the argument, holding that district courts are free to deny relief on the basis of any one of § 3582(c)(1)(A)'s requirements without considering the others. We also reject the other arguments raised by Sands and Wesley.[3] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm denial of all three motions for compassionate release.

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[2] As of oral argument in May 2021, all three men had either been vaccinated or been offered the opportunity to be vaccinated against COVID-19. Although we do not consider this development in resolving their appeals, there is certainly room for doubt that Defendants' present circumstances would support a finding of "extraordinary and compelling reasons." *See United States v. Baeza-Vargas*, -- F. Supp. 3d --, 2021 WL 1250349, at *3–4 (D. Ariz. April 5, 2021) (collecting district-court cases representing a "growing consensus" that either receiving or refusing COVID-19 vaccination "weighs against a finding of extraordinary and compelling circumstances" for purposes of § 3582(c)(1)(A)).

[3] Wesley's notice of appeal refers only to the district court's denial of his motion for reconsideration of the denial of his motion for release. But since his notice of appeal would have also been timely with respect to the court's initial order denying his motion for compassionate release, we construe Wesley's pro se notice of appeal as

I. STATUTORY FRAMEWORK

"Federal courts are forbidden, as a general matter, to modify a term of imprisonment once it has been imposed; but the rule of finality is subject to a few narrow exceptions." *Freeman v. United States*, 564 U.S. 522, 526 (2011) (citation and internal quotation marks omitted). One such exception is codified at 18 U.S.C. § 3582(c)(1)(A). From its enactment in 1984 until 2018, § 3582(c)(1)(A) allowed only the Director of the Bureau of Prisons (BOP) to move for a reduction in a defendant's sentence, making the defendant "wholly dependent upon the Director of the BOP [to do] so on his or her behalf." *United States v. McGee*, 992 F.3d 1035, 1041 (10th Cir. 2021). This arrangement resulted in infrequent and perhaps uneven application of § 3582(c)(1)(A)—between 1984 and 2013 the Director of the BOP used the process to release an average of only 24 inmates per year. *See id*.

In 2018 Congress enacted the First Step Act. Relevant here, § 603(b) of the Act, entitled "INCREASING THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE," amended § 3582(c)(1)(A) to allow defendants to

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encompassing both the original denial of his motion under § 3582(c)(1)(A) and the denial of his motion for reconsideration. *Cf. Artes-Roy v. City of Aspen*, 31 F.3d 959, 961 n.5 (10th Cir. 1994) ("[A]n appeal from the denial of a Rule 59 motion will be sufficient to permit consideration of the merits of the [judgment], if the appeal is otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced." (internal quotation marks omitted)). (The proposed amendments to Fed. R. App. P. 3, which would become effective later this year, further appear to support our treatment of Wesley's notice of appeal. *See* https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments.)

seek relief under the statute on their own, rather than depending on the Director of the BOP. *See id* at 1042. The provision now reads, in relevant part, as follows:

> [T]he 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—
>
> . . . extraordinary and compelling reasons warrant such a reduction . . .
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

We recently held that the plain language of the statute creates a "three-step test." *McGee*, 992 F.3d at 1043; *see United States v. Maumau*, 993 F.3d 821, 831 (10th Cir. 2021). "At step one . . . a district court must find whether extraordinary and compelling reasons warrant a sentence reduction." *McGee*, 992 F.3d at 1042 (brackets and internal quotation marks omitted). "At step two . . . a district court must find whether such reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id*. (brackets, emphasis, and internal quotation marks omitted). "At step three . . . § 3582(c)(1)(A) instructs a court to consider any applicable [18 U.S.C.] § 3553(a) factors and determine whether, in its discretion, the reduction authorized by steps one and two is warranted in whole or in part under the particular circumstances of the case." *Id.* (original brackets and

internal quotation marks omitted); *see Maumau*, 993 F.3d at 831 (same). We declared (although Hald and Sands contend that our statement was nonbinding dictum) that "'district courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others.'" *McGee*, 992 F.3d at 1043 (quoting *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021)); *Maumau*, 993 F.3d at 831 n.4 (same). To *grant* a motion for compassionate release, however, the district court "must of course address all three steps." *McGee*, 992 F.3d at 1043 (internal quotation marks omitted).[4]

[4] In *McGee* and *Maumau* we also clarified two matters that are not directly relevant to this appeal. First, we held that "district courts, in applying the first part of § 3582(c)(1)(A)'s statutory test, have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" *McGee*, 992 F.3d at 1045, rejecting the government's suggestion that the Sentencing Commission, rather than the courts, should "define what types of circumstances constitute extraordinary and compelling reasons," *id.* at 1043 (internal quotation marks omitted); *see Maumau*, 993 F.3d at 832. The design of Congress in amending § 3582(c)(1)(A) was not to create an open season for resentencing (after all, the title of the amendment speaks in terms of "Compassionate" release, *see* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 § 603(b)); but our opinions in *McGee* and *Maumau* suggest that the district court has substantial discretion. Second, we held that the relevant Sentencing Commission policy statement, USSG § 1B1.13, "is applicable only to motions for sentence reductions filed by the Director of the BOP, and not to motions filed directly by defendants." *McGee*, 992 F.3d at 1050; *Maumau*, 993 F.3d at 836–37. Thus, until the additional voting members required for a quorum are appointed to the Sentencing Commission and the Commission is able to "comply with its statutory duty of promulgating a post-First Step Act policy statement regarding the appropriate use of the sentence reduction provisions of § 3582(c)(1)(A)(i)," the district court's discretion is not restricted by any Sentencing Commission policy statements, *McGee*, 992 F.3d at 1050, although it would hardly be an abuse of discretion for a district court to look to the present policy statement for guidance.

II. PROCEEDINGS BELOW

A. Hald

In October 2011 Hald was indicted in Kansas federal court on one count of conspiracy to distribute 50 grams or more of methamphetamine and three substantive counts of possession with intent to distribute methamphetamine (100.5 grams, 86.1 grams, and 543.4 grams). After rejecting an initial plea agreement under which Hald would have served 180 months' imprisonment, the district court approved in March 2012 an agreement under which he would plead guilty to the conspiracy count and be sentenced to 210 months' imprisonment, with the remaining counts being dismissed.

In July 2020, a little less than halfway through his sentence, Hald filed a motion under § 3582(c)(1)(A) asking the district court to reduce his sentence to time served, although imposing home confinement for five years as a condition of supervised release and adding five years to his five-year term of supervised release. The motion claimed that "extraordinary and compelling reasons warrant[ed] immediate reduction of his sentence." Hald R., Vol. 1 at 52. He argued that his preexisting health conditions—obesity, hypertension, and Hepatitis C—put him at high risk of serious illness or death should he become infected with COVID-19 and that the close quarters at his correctional facility, FMC Fort Worth, had led to a high prevalence of the disease.[5]

[5] Hald's motion appears to suggest that he had already been infected by COVID-19 at the time, *see* Hald R., Vol. 1 at 58, though he later represented in supplemental appellate briefing that he "ha[d] never tested positive for COVID-19," Hald Supp. Aplt. Br. at 1. Given the ambiguity produced by these apparently conflicting

The government opposed Hald's motion, arguing that his "medical conditions . . . when considered collectively [did not] establish extraordinary and compelling circumstances," Hald R., Vol. 1 at 102, and that even if they did, consideration of the § 3553(a) factors would still warrant denial of the motion.

The district court denied Hald's motion. *See United States v. Hald*, No. 11-10227-01-EFM, 2020 WL 5548826, at *3 (D. Kan. Sept. 16, 2020). Although it found "that [his] medical conditions, in tandem with the COVID-19 pandemic, may present an extraordinary and compelling reason" for early release, *id.* at *2, the court decided that no sentence reduction was warranted, *id*. at *2–3. On consideration of the § 3553(a) factors, it noted the serious nature of Hald's offense, the violent circumstances surrounding the offense, and his lengthy criminal history, concluding "that the 210-month sentence originally imposed remains sufficient, but not greater than necessary, to meet the sentencing factors in § 3553(a) and punish the offense involved." *Id.* at *3.

B. Wesley

In 2008 Wesley was indicted in Kansas federal court on 13 counts arising out of a conspiracy to distribute cocaine and cocaine base (crack). Among the charges was one count of using a firearm "during and in relation to . . . [a] drug trafficking

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statements and the government's failure to raise this point, we need not linger on it. We merely note that, like access to vaccination, prior infection and recovery from COVID-19 would presumably weigh against a finding of extraordinary and compelling reasons. *See United States v. Neal*, No. CR 11-28, 2020 WL 4334792, at *1 (E.D. La. July 28, 2020) (collecting district-court cases).

crime," in violation of 18 U.S.C. § 924(c). After Wesley pleaded guilty (without the benefit of a plea agreement) to the conspiracy count and three counts of using a telephone to facilitate the conspiracy, he went to trial on the nine remaining counts and was ultimately convicted on just two of them, both being charges of attempted possession with intent to distribute cocaine. At sentencing, "the district court found that Mr. Wesley was accountable for 150 kilograms of cocaine, had possessed a firearm, and did not qualify for an adjustment for acceptance of responsibility," resulting in a guideline range of 324 to 405 months. *United States v. Wesley*, 423 F. App'x 838, 839 (10th Cir. 2011) (unpublished) (*Wesley I*). In October 2009 Wesley was sentenced to 30 years' imprisonment, to be followed by five years' supervised release. We affirmed the sentence on direct appeal. *See id.* at 841.

In May 2020, about one-third through his sentence, Wesley filed a motion under § 3582(c)(1)(A) to reduce his sentence to time served while imposing home confinement as a condition of supervised release. Wesley argued that his preexisting health conditions—epileptic seizures, hyperlipidemia (high cholesterol), and "respiratory infections related to juvenile asthma"—put him at "imminent risk" of serious disease or death should he contract COVID-19, and that those risk factors, coupled with the prevalence of the virus at his correctional facility, FCI Forrest City Low, constituted extraordinary and compelling reasons warranting his release. Wesley R., Vol. 1 at 41. The government opposed Wesley's motion, arguing that he had failed to present extraordinary and compelling reasons, and even if he had, consideration of the § 3553(a) factors would still require denial. The government

also pointed out that BOP records indicated that his asthma could not have been serious because it was not being treated by medication or inhaler. Wesley failed to address the asthma issue at all in his reply brief, relying solely on his epileptic seizures and hyperlipidemia.

The district court denied Wesley's motion, finding that he "ha[d] simply not shown that he bears an increased risk of serious medical harm," and thus could not show that "extraordinary and compelling reasons warrant his release from prison." *United States v. Wesley*, No. 07-20168-02-JWL, 2020 WL 3868901, at *3 (D. Kan. July 9, 2020) (*Wesley II*). The court noted that the record did not support a finding that any of Wesley's medical conditions "place[d] him at an elevated risk of harm from the virus." *Id.* at *2. It found that "Wesley's cholesterol is managed with daily medication and there is no evidence that this condition is debilitating in any way," and that he had not reported a seizure in over a year and had "refused to take the [anti-seizure] medication prescribed to him." *Id.* at *2–3. The court further observed that high cholesterol was not "among the conditions cited by the Centers for Disease Control as involving some increased risk of complications from Covid-19 infection," *id.* at *2, and neither were seizure disorders, *see id.* at *3. Given Wesley's failure to address his juvenile asthma or related respiratory conditions in his reply brief, the court understood that he was no longer seeking relief on that basis. *See id.* at *1 n.2.

In July 2020, Wesley moved for reconsideration, asserting, among other things, that the district court had overlooked or otherwise failed to consider information relevant to his various medical conditions. For instance, he claimed to

have newly discovered evidence reflecting that he had suffered seizures as recently as June 2020 and evidence substantiating his claimed respiratory conditions. Wesley also submitted a two-page affidavit from a medical doctor offering opinions on his conditions and their effect on his risk of death or severe illness were he to contract COVID-19. The district court denied the motion for reconsideration. *See United States v. Wesley*, No. 07-20168-02-JWL, 2020 WL 5848897, at *3 (D. Kan. Oct. 1, 2020) (*Wesley III*). First, it said that even if it were to "assume for purposes of the motion that Mr. Wesley's seizure disorder 'may' increase his risk of severe illness," that still would not be sufficient to establish extraordinary and compelling reasons because the outbreak at FCI Forrest City Low "appears to now be contained and controlled." *Id.* at *2. Second, it said that even if Wesley's medical conditions did constitute an extraordinary and compelling reason, compassionate release would still be inappropriate based on application of the § 3553(a) factors. *See id.* at *3. The court pointed to the "significant quantity" of drugs (more than 150 kilograms of cocaine) attributed to Wesley as well as the "inherent violence associated with the related firearms offense." *Id.*

C. Sands

In September 2006 Sands was indicted in Kansas federal court on five counts arising from firearms violations and a conspiracy to distribute methamphetamine. He was convicted by a jury on all counts and in September 2008 was sentenced to 420 months' imprisonment, to be followed by 10 years' supervised release. We upheld the convictions and sentence on direct appeal. *See United States v. Sands*, 329 F.

App'x 794, 796, 800–02 (10th Cir. 2009) (unpublished) (*Sands I*). The district court later reduced Sands's sentence from 420 to 384 months based on a retroactive amendment to the drug-quantity guideline. *See* USSG § 2D1.1.

In July 2020 Sands filed a pro se motion seeking compassionate release under § 3582(c)(1)(A). The Federal Public Defender for the District of Kansas took on the representation and filed a supplemental brief on his behalf, seeking a reduction of his sentence to time served with five years' home confinement as a condition of supervised release. Sands argued that his preexisting health conditions—including obesity, diabetes, asthma, hypertension, and sleep apnea—put him at high risk of serious disease or death should he contract COVID-19, and that those risk factors, coupled with an outbreak of the virus at his correctional facility, FCI Edgefield, constituted extraordinary and compelling reasons warranting his release. In opposition to the motion the government conceded that his medical conditions "establish[ed] extraordinary and compelling reasons allowing for consideration of compassionate release," but argued that application of the § 3553(a) factors nevertheless required denial. Sands R., Vol. 1 at 97.

The district court denied the motion. *See United States v. Sands*, No. 06-20044-03-JAR, 2020 WL 6343303, at *4 (D. Kan. Oct. 29, 2020) (*Sands II*). In light of the government's concession on the issue of extraordinary and compelling reasons, the court turned to the § 3553(a) factors and concluded that "the 384-month sentence remains sufficient, but not greater than necessary, to meet the sentencing factors in § 3553(a) and punish the offense involved." *Id.* at *3–4. The court noted the

seriousness of the offense (nearly two kilograms of methamphetamine were attributed to Sands), Sands's criminal history, and the need to "provide adequate deterrence [and] appropriate punishment." *Id*.

III. DISCUSSION

We first address the arguments advanced by Hald and Sands and explain why they do not warrant reversal. We then address the issues raised by Wesley, again affirming the denial of relief.

A. Hald's and Sands's Motions

Hald and Sands both argue that the district court misinterpreted § 3582(c)(1)(A) by not considering the three prerequisites for relief in the proper order of step 1, step 2, and step 3, as we have labeled them in our precedents. For the reader's convenience, we requote the pertinent provisions of the section, inserting bracketed numerals to identify the three steps:

> [T]he court, . . . upon motion of the defendant, . . . may reduce the term of imprisonment . . . , [3] after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> [1] extraordinary and compelling reasons warrant such a reduction . . .
>
> and [2] that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

Hald and Sands contend that the statutory provision requires an inflexible, mandatory sequencing of the analysis of the three prerequisites, and that by bypassing what they call the *threshold* inquiry on the existence of extraordinary and compelling reasons,

the district court in both cases committed reversible error. Our review of this legal issue is de novo. *See McGee*, 992 F.3d at 1041.

We reject this argument of Hald and Sands. Even assuming that their characterization of the district-court orders is correct and that both proceeded to consider the § 3553(a) factors (step three) before resolving, or at least assuming, the existence of extraordinary and compelling reasons (step one), there was no error. We addressed this precise issue in both *McGee* and *Maumau*. In *McGee* we stated that "district courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking *and do not need to address the others*." *Id.* at 1043 (emphasis added) (internal quotation marks omitted)*; see Maumau*, 993 F.3d at 831 n.4 (same).

Hald and Sands offer two principal responses to this language.[6] First, they suggest that what *McGee* and *Maumau really* meant to say is that a district court may *assume* the existence of "extraordinary and compelling reasons" before continuing on to the § 3553(a) factors. But that is not what we said. Nor has that been said by the Sixth Circuit, whose opinions we discussed at length and followed in our two precedents. In particular, in *United States v. Ruffin*, 978 F.3d 1000 (6th Cir. 2020), the district court had denied the defendant's § 3582(c)(1)(A) motion after finding that he had failed to satisfy *any* of the three requirements. *See id.* at 1002–03. Affirming,

[6] Although *McGee* and *Maumau* were filed after the close of briefing in these cases, Hald and Sands both addressed their effect at oral argument and in multiple letters submitted under Federal Rule of Appellate Procedure 28(j).

the Sixth Circuit neither decided *nor assumed* the existence of extraordinary and compelling reasons, explaining that "we may affirm the denial of relief based on the third discretionary rationale alone." *Id.* at 1006.

Second, Hald and Sands argue that the language in *McGee* and *Maumau* allowing courts to deny § 3582(c)(1)(A) motions at any of the three steps without addressing the others is nonbinding dicta. They have a point. Although we have no doubt that the statements in those opinions were carefully considered by the panels (and are therefore entitled to our respect), it is true that the sequence of the three steps was "not necessarily involved nor essential to determination" of the issues in either *McGee* or *Maumau*. *United States v. Barela*, 797 F.3d 1186, 1190 (10th Cir. 2015). We therefore must consider the statements as dicta. *See id*.

In any event, we agree with the statements. The language of § 3582(c)(1)(A) certainly requires that relief be granted only if all three prerequisites are satisfied, but it does not mandate a particular ordering of the three steps (much less the ordering Hald and Sands urge). Since it mentions step three first, the natural meaning could well be that the court is to first determine whether relief would be authorized by that step and then consider whether the other two steps are satisfied. We think it persuasive, if not binding, that our well-considered reading of the statutory language in *McGee* declared that the three steps could be considered in any order. *See* 992 F.3d at 1044.

Moreover, and most importantly, there is no reason to mandate any particular order for the three steps.[7] If the most convenient way for the district court to dispose

[7] One reason to mandate that a particular issue be the first to be considered is that the issue is a jurisdictional one. The court has no authority to address a nonjurisdictional merits issue if it lacks jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). But no party has argued in these appeals that step one is jurisdictional. And in recent years the Supreme Court has been increasingly firm in limiting what statutory provisions should be considered jurisdictional. As the Court wrote in *Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 153 (2013), "To ward off profligate use of the term 'jurisdiction,' we have adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional. *Arbaugh* [*v. Y & H Corp.*, 546 U.S. 500, 516 (2006)]. We inquire whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.' *Id.*, at 515–516." *Accord Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848–50 (2019). Against this backdrop and in the absence of contrary controlling precedent, we decline to read a jurisdictional element into § 3582(c)(1)(A)'s "extraordinary and compelling reasons" requirement when the statute itself provides no indication (much less a "clear statement") to that effect. We acknowledge that this circuit has reached the opposite conclusion with respect to a neighboring statutory provision, holding that § 3582(c)(2)'s requirement that the defendant "show he was sentenced based on a guideline range the Sentencing Commission lowered subsequent to defendant's sentencing" *is* a jurisdictional requirement that must be addressed first by the district court. *United States v. C.D.*, 848 F.3d 1286, 1289–90 (10th Cir. 2017), *following United States v. White*, 765 F.3d 1240, 1244, 1245 n.3 (10th Cir. 2014), *following United States v. Blackwell*, 81 F.3d 945, 947 (10th Cir. 1996); *see also United States v. Green*, 405 F.3d 1180, 1184 (10th Cir. 2005) (suggesting in dictum that each paragraph of § 3582(c) has a jurisdictional grant). *But see United States v. Taylor*, 778 F.3d 667, 670 (7th Cir. 2015) ("clarify[ing] that district courts have subject-matter jurisdiction over—that is, the power to adjudicate—a § 3582(c)(2) motion even when authority to *grant* a motion is absent because the statutory criteria are not met"). But no precedent of this court has extended that holding to § 3582(c)(1)(A), and we decline to do so now, particularly in light of the apparent tension between that precedent and recent Supreme Court law. *See C.D.*, 848 F.3d at 1289 n.2 (stating that whether § 3582(c)(2) contains a jurisdictional element "is certainly debatable" in light of *Auburn Regional* and other recent Supreme Court cases); *United States v. Shkambi*, 993 F.3d 388, 389–90 (5th Cir. 2021) (district court "plainly had jurisdiction over [defendant's] § 3582[(c)(1)(A)] motion" even though defendant had failed to demonstrate extraordinary and compelling reasons; "[the defendant] properly filed [his § 3582(c)(1)(A) motion] in a court that had the power to grant it.

of a motion for compassionate release is to reject it for failure to satisfy one of the steps, we see no benefit in requiring it to make the useless gesture of determining whether one of the other steps is satisfied. Hald and Sands suggest that the existence of "extraordinary and compelling reasons" (step one) must be resolved first because that determination somehow informs the district court's § 3553(a) analysis at step three. We are not persuaded. They fail to explain how a finding of extraordinary and compelling reasons would factor into the § 3553(a) analysis. To be sure, the various facts that would support a finding of such reasons are relevant to the § 3553(a) analysis. But to the extent that they influence that analysis, it is irrelevant whether those facts meet the test of "extraordinary and compelling reasons." Certainly, nothing in § 3553 itself requires a court to consider whether there are extraordinary and compelling reasons when it is determining the proper sentence to be imposed under § 3553(a). And the massive body of case law directing how courts are to conduct their § 3553(a) analysis imposes no such requirement.

Hald and Sands rely on *Dillon v. United States*, 560 U.S. 817 (2010), in support of their argument that step one must first be considered, but we think that they read too much into that opinion. In that case the Supreme Court addressed the application of § 3582(c)(1)(a)'s neighboring paragraph, § 3582(c)(2), which permits a district court to reduce the sentence of a defendant if a guideline on which the

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. . . The district court got to the end and found [his] motion meritless. But that does not mean the district court suddenly lost the jurisdiction it previously exercised; it just means that [his] motion failed on the merits.").

defendant's original sentence was based had been amended so that the defendant's sentencing guideline range would now be lower.[8] There was no issue in that case about whether the district court had addressed issues in the proper order. The Court was considering something altogether different. Dillon's sentencing-guideline range had been reduced by postsentencing amendments to the guidelines. He argued that § 3582(c)(2) therefore entitled him to a resentencing hearing at which the guidelines would be only advisory because the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), had held that the Sixth Amendment prohibited the imposition of mandatory guidelines on sentencing courts. *See Dillon*, 560 U.S. at 819 (*Booker* "rendered the Guidelines advisory to remedy the Sixth Amendment problems associated with a mandatory sentencing regime."). That is, he contended, *Booker* always conferred on sentencing courts the authority to vary from what would be required under the guidelines.

The Supreme Court rejected the contention, holding that the procedure to reduce a sentence under § 3582(c)(2) is not a resentencing procedure and is not

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[8] Section 3582(c)(2) provides:

> The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

governed by *Booker*. *See id.* at 825–26, 828. In *Booker* the Court held that the mandatory-guideline regime violated the Sixth Amendment because the maximum sentence to which the defendant could be subjected depended on fact findings made by a judge under a preponderance-of-the-evidence standard, rather than on findings made by a jury beyond a reasonable doubt. *See Dillon*, 560 U.S. at 820. But the proceedings at issue in *Dillon* arose only after imposition of a final sentence consistent with *Booker* and were solely to permit a reduction from the original sentence. A reduced sentence could be imposed only if there had been a relevant postsentencing amendment to the guidelines. In the Court's words: "Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 826. The Court described the statutory scheme as follows: "A court *must first* determine that a reduction is consistent with § 1B1.10 before it may consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a)." *Id.* (emphasis added). "[P]roceedings under [§ 3582(c)(2)]" thus have a significantly more "limited scope and purpose" than original sentencing proceedings and "do not implicate the interests identified in *Booker*." *Id.* at 828; *see id.* ("[P]roceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt. Taking the original sentence as given, any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment[.]").

Hald and Sands fasten on *Dillon*'s description of the procedure under § 3582(c)(2), arguing not only that its "must first" language mandates a particular order of operations under that statute, but that we should require that same order of analysis in cases under § 3582(c)(1)(A) as well. As previously noted, however, the Court in *Dillon* was not resolving whether the district court had improperly taken matters out of order. It was conceptualizing proceedings under § 3582(c)(2) to distinguish them from original sentencing proceedings. The important conceptual distinction was that relief was permissible under the provision only if a final sentence had previously been imposed and there had been a relevant postsentencing amendment to the guidelines.

It is not at all unusual for an appellate court, including the Supreme Court, to conceptualize a decision as proceeding in a certain order (step 1, step 2, etc.), yet permit the ultimate decisionmaker—ordinarily the trial court—to proceed in a different order if more convenient and efficient. A few examples will suffice.

First, in *Smith v. Robbins*, 528 U.S. 259 (2000), the Court stated that to establish an ineffective-assistance-of-counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), "Respondent *must first* show that his counsel was objectively unreasonable in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. *If* [*Respondent*] *succeeds* in such a showing, he then has the burden of demonstrating prejudice." *Id.* at 285 (emphasis added) (citation omitted). But in *Strickland* itself the Court made it clear that courts need not follow the rigid order of

operations suggested by the language in *Robbins*. *See Strickland*, 466 U.S. at 697 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Robbins*, 528 U.S at 286 n.14 (noting this flexibility).

Similarly, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) stated that, in commercial-speech cases, "[*a*]*t the outset, we must* determine whether the expression is protected by the First Amendment." *Id.* at 566 (emphasis added). Yet in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court found it unnecessary to resolve that question. *See id.* at 425 ("The Government argues first that gambling implicates no constitutionally protected right . . . . The Court of Appeals did not address this issue and neither do we, for the statutes are not unconstitutional [even] under the standards of *Central Hudson* applied by the courts below."). And although the Court has said that a "public employee's speech is entitled to *Pickering* [*v. Bd. of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968)] balancing *only when* the employee speaks as a citizen upon matters of public concern," *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (emphasis added) (internal quotation marks omitted), which is a "threshold inquiry," *id.* at 82, it bypassed that inquiry altogether in *Waters v. Churchill*, 511 U.S. 661 (1994), *see id.* at 680 ("Even if [the fired employee's] criticism . . . was speech on a matter of public concern—

something we need not decide—the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." (emphasis added)).

To be sure, there are some contexts in which the order of operations *is* important, and courts err by disregarding that order. But when the Supreme Court has insisted on a particular order, it has explained why the order is important. For instance, under the since-rescinded rule of *Saucier v. Katz*, 533 U.S. 194 (2001), *abrogated in pertinent part by Pearson v. Callahan*, 555 U.S. 223 (2009), courts ruling on qualified immunity were required to decide the existence of a constitutional violation before proceeding to consider whether, if a right had indeed been violated, that right was clearly established. *See id*. at 201. The Court expressed concern that if qualified immunity were regularly resolved on the clearly-established prong, the development of constitutional law would suffer. *See id.* (explaining that by first addressing the existence of a constitutional violation, courts facilitate "the law's elaboration from case to case" and that "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful"). Likewise, in an initial sentencing proceeding, "a district court should begin . . . by correctly calculating the applicable Guidelines range" before proceeding to consider the § 3553(a) factors and the parties' arguments for any departure. *Gall v. United States*, 552 U.S. 38, 49 (2007); *see United States v. Maynard*, 984 F.3d 948, 956 (10th Cir. 2020). Calculation of the guidelines range at the outset is essential to inform the sentencing

judge of what a typical sentence is for similar offenses and similar defendants. *See Gall*, 522 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) ("The Guidelines are the framework for sentencing and anchor the district court's discretion. Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence." (citations, ellipsis, and internal quotation marks omitted)); 18 U.S.C. § 3553(a)(6) (sentencing court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

Perhaps there is a reason why a court acting under § 3582(c)(2) must first address whether the defendant's guideline range has been changed by a postsentencing amendment. (After all, the court needs to calculate the guideline sentencing range before analyzing the effect of the § 3553(a) factors.) We will leave that to further clarification by the Supreme Court. But even if there is justification for requiring a specific order of analysis under that statutory provision, we see no justification for requiring that the district court proceed under § 3582(c)(1)(A) in the manner demanded by Hald and Sands.

One last comment on this issue. We emphasize that we are not saying that a court can deny compassionate-release relief on the ground that release is not appropriate under § 3553(a) if the court has not considered the facts allegedly

establishing extraordinary and compelling reasons for release. As we have stated above, those facts are relevant to the § 3553(a) analysis. But Hald and Sands have not argued this type of error, and the records in the two cases do not support such a claim. *See Hald*, 2020 WL 5548826, at *3 ("At this point, Defendant has served approximately half of his sentence as he has served 104 months. Reducing his sentence by half, *even during the ongoing COVID-19 pandemic*, does not further sentencing objectives. The Court remains convinced that 210 months is an appropriate sentence." (emphasis added)); *Sands II*, 2020 WL 6343303, at *4 ("At this time, Defendant has only served approximately half of his sentence and is not expected to be released until 2033. *Although Defendant has underlying conditions increasing his risk of serious complications should he contract COVID-19*, the reduction of Defendant's sentence in such a significant manner would not afford adequate deterrence or punishment." (emphasis added)).

We therefore conclude that the district courts committed no legal error in resolving the motions by Hald and Sands by first addressing the § 3553(a) factors. Because Hald does not argue that the district court abused its discretion in how it weighed the § 3553(a) factors, we affirm its denial of his motion.[9]

[9] As Hald appears to acknowledge, the district court cannot have erred in "fail[ing] to conduct the second step of the § 3582(c)(1)(A) analysis," Hald Aplt. Br. at 24, when we have held that there is no applicable policy statement, *see McGee*, 992 F.3d at 1050.

Before we can affirm the district court's denial of Sands's motion, however, we must also address some other issues he has raised with respect to the court's order. First, Sands argues that the district court erred by failing to mention his "asthma as a severe medical condition," by "misstat[ing] the number of counts of conviction," and by "cit[ing] [his] offense level as 38, without acknowledging that [it] was retroactively reduced to 36." Sands Aplt. Br. at 24 (citation omitted). Second, he claims that the district court erred when it mistakenly referred to the first § 3553(a) factor as the "nature and circumstances of the offense and the history and characteristics of the *offense*," *Sands II*, 2020 WL 6343303, at *3 (emphasis added), rather than "the nature and circumstances of the offense and the history and characteristics of the *defendant*," 18 U.S.C. § 3553(a)(1) (emphasis added). Third, he contends that the district court "ignored" and "never accurately acknowledged" his arguments for mitigation, including reclassification of his drug-possession conviction, postsentencing rehabilitation, and letters submitted by family and friends. Sands Aplt. Br. at 25. Finally, he argues that the district court erred by failing to "seriously consider" that his request for compassionate release included placement on home confinement as a condition of his current five-year term of supervised release and the revision of his term of supervised release to add an additional five years thereafter. *Id.*; *see* Sands R., Vol. 1 at 70–71.

We are not persuaded. This court is not in the business of grading the papers of our very busy colleagues on the trial bench. Any reasonable reading of the district court's opinion would conclude that it properly performed its job in assessing

Sands's arguments. Regarding Sands's first set of alleged errors, there would have been little point in the district court's mentioning Sands's asthma since it had accepted his contention that his "underlying conditions increase[ed] his risk of serious complications should he contract COVID-19." *Sands II*, 2020 WL 6343303, at *4. Whether Sands's very serious drug and firearms offenses were prosecuted in five counts or six counts is so obviously inconsequential that the court's miscount of the numbers (although its opinion listed the five counts of conviction) is no more reflective of the thoroughness of the court's deliberations than a misspelling. Sands has waived any argument based on the district court's failure to mention the retroactive reduction of his offense level by not making any effort to explain how that failure affected the court's decision, particularly when the court's opinion twice mentioned the later reduction in his sentence. And the district court's misquote of the final word of § 3553(a)(1)—substituting "offense" for "defendant"—after correctly quoting the language earlier in its opinion undoubtedly is a simple typographical error.

Nor has Sands established that the district court erred by failing to mention some of his mitigation arguments or by failing to adequately consider his suggestion of supervised release on the condition of home confinement. To be sure, when imposing the original sentence, the district court must provide a statement of reasons. *See* 18 U.S.C. § 3553(c). But as we noted in *United States v. Chavez-Meza*, 854 F.3d 655, 658 (10th Cir. 2017), *aff'd* 138 S. Ct. 1959 (2018), the provision at issue in that case, § 3582(c)(2)—which is identical to § 3582(c)(1) in this respect—contains no

such requirement. And since at initial sentencing we ordinarily do not require "specific discussion of Section 3553(a) factors . . . for sentences falling within the ranges suggested by the Guidelines," *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1202 (10th Cir. 2007), it would seem to follow that nothing more detailed is required to justify imposing or maintaining under either paragraph of § 3582(c) a sentence within the recommended range of the applicable guidelines, *see Chavez-Meza*, 854 F.3d at 659 (addressing § 3582(c)(2)). In any event, "[a]t bottom, the sentencing judge need only set forth enough to satisfy the appellate court that [s]he has considered the parties' arguments and has a reasoned basis for exercising [her] own legal decisionmaking authority." *Chavez-Meza*, 138 S. Ct. at 1964 (internal quotation marks omitted). And that is certainly the case here. We think that the points raised by Sands in mitigation are hardly such "substantial contentions" as to demand a written explanation by the court. *United States v. Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006). The court's failure to mention these matters in its opinion can be easily explained by their being "typical" and therefore already incorporated into the Sentencing Commission's reasoning (adopted by the sentencing court) of what the usual sentencing range should be. *Chavez-Meza*, 138 S. Ct. at 1964 (internal quotation marks omitted). Sands does not explain why the contents of the letters from family and friends provide convincing reasons for reducing his sentence (certainly not by half); the only evidence he mentions of postsentencing rehabilitation is that he served "as a UNICOR maintenance worker, and had completed a number of BOP programs (including a drug education program)," Aplt.

Br. at 9; and he has failed to explain the relevance of the fact that § 401(a) of the First Step Act of 2018, Pub. L. 115–391, 132 Stat. 5194, 5220–21 (which does not apply to persons previously sentenced, *see id.* § 401(c), 132 Stat. 5221) would reduce the minimum sentence that could be imposed, especially when his guidelines range and sentence (384 months after the 2015 reduction in his sentence) were significantly above the previous statutory minimum of 300 months. As for Sands's suggestion of home confinement, his contention is only that the sentencing judge failed to "seriously consider" the suggestion, *id.* at 25, which amounts to nothing more than a complaint that the judge did not agree with him.

Having disposed of Sands's remaining arguments, we affirm the district court's order denying his request for compassionate release under § 3582(c)(1)(A).

B. Wesley's Motion

Proceeding pro se, Wesley raises several arguments in his appeal from the district court's denial of his request for compassionate release and denial of his motion for reconsideration.[10] First, he contends that "[t]he district court abused its discretion in determining that [he] had not demonstrated extraordinary and compelling circumstances to support compassionate release." Wesley Aplt. Br. at 3a. But the district court ultimately did not rely on that determination. In denying Wesley's motion for reconsideration, the district court stated that "even if the court

[10] Because Wesley is a pro se litigant, we construe his appellate "pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys." *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007).

found that Mr. Wesley had established extraordinary and compelling reasons for release, the court would nonetheless deny the motion based on the § 3553(a) factors." *Wesley III*, 2020 WL 5848897, at *2. As stated above, if a district court properly denies compassionate release because of the § 3553(a) factors, it is irrelevant how the court viewed whether the defendant had demonstrated extraordinary and compelling circumstances.

Next, Wesley argues that the district court abused its discretion in its consideration of the § 3553(a) factors, both by failing to adequately explain its reasoning and by incorrectly weighing the individual factors. But, for the reasons stated above in rejecting Sands's similar argument, we see no merit to the adequate-explanation argument. *See Chavez-Meza*, 138 S. Ct. at 1964; *Chavez-Meza*, 854 F.3d at 658–59; *Lopez-Flores*, 444 F.3d at 1222. The district court listed the six potentially applicable § 3553(a) factors[11] before concluding that they required denial of Wesley's motion. *See Wesley III*, 2020 WL 5848897, at *2. We have no reason to doubt that the district court in fact considered those factors, and nothing more was required. And the district court was not required to consider, as Wesley argues, that the applicable Sentencing Commission policy statement, USSG § 1B1.13, supports compassionate release because he does not pose "a danger to the safety of any other

[11] The seventh factor, "the need to provide restitution to any victims of the offense," 18 U.S.C. § 3553(a)(7), is inapplicable to Wesley.

person or to the community." This court has held that § 1B1.13 is inapplicable to § 3582(c)(1)(A) motions filed directly by defendants. *See McGee*, 992 F.3d at 1050.

We also reject Wesley's claim that the district court abused its discretion in analyzing any of the individual § 3553(a) factors. Because the weighing of the § 3553(a) factors is committed to the discretion of the district court, we cannot reverse "unless we have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Chavez-Meza*, 854 F.3d at 659 (internal quotation marks omitted). Since the court had determined that Wesley was "accountable for more than 150 kilograms of cocaine" and had possessed a firearm, *Wesley III*, 2020 WL 5848897, at *3, we see no error in the court's decision that the seriousness of the offense and the need to provide adequate deterrence weighed against compassionate release and see no reason why these factors should necessarily be outweighed by Wesley's relatively minor preexisting criminal history or his unspecified efforts at rehabilitation while in prison.

Finally, we reject Wesley's argument that the denial of relief for him created an "unwarranted sentenc[ing] disparit[y] among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(c)(6), because of grants of compassionate release to defendants Jeffrey Plank, Kenneth Rayford, and James Riccardi by the same judge who denied release to him. *See United States v. Plank*, No. 17-20026-JWL, 2020 WL 3618858, at *1 (D. Kan. July 2, 2020); *United States v. Rayford*, No. 09-20143-01-JWL, 2020 WL 4335013, at *1 (D. Kan. July 28, 2020);

United States v. Riccardi, No. 02-20060-JWL, 2020 WL 4260636, at *1 (D. Kan. July 24, 2020). A comparison of the orders granting relief to Plank and denying relief to Wesley show that the court considered Wesley's criminal activity to be much more serious than Plank's. And both Rayford and Riccardi had already served a much greater percentage of their sentences than Wesley had. *Compare Rayford*, 2020 WL 4335013, at *1 (projected 15 months remaining on 168-month sentence) *and Riccardi*, 2020 WL 4260636, at *1 (projected 13 months remaining on 262-month sentence) *with Wesley III*, 2020 WL 5848897, at *1 (projected 160 months remaining on 360-month sentence). We are not left with "a definite and firm conviction that the [district] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Chavez-Meza*, 854 F.3d at 659 (internal quotation marks omitted). If anything, the judge's grant of compassionate release in three other cases increases our confidence that he has given careful attention to the specific facts in each case. Accordingly, we affirm.

IV. CONCLUSION

We **AFFIRM** the denials by the district courts of Hald's motion for early release, Sands's motion for early release, and Wesley's motions for early release and for reconsideration. We **GRANT** Wesley's motion to proceed *in forma pauperis*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* vs. JAMES A. HALD, *Defendant.*	Case No. 11-10227-01-EFM

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant's Motion to Reduce Sentence (Doc. 63). He seeks early release from prison due to having underlying health conditions that make him susceptible to contracting COVID-19. The government opposes Defendant's motion. For the reasons stated in more detail below, the Court denies Defendant's motion.

I. Factual and Procedural Background

On March 26, 2012, Defendant pleaded guilty to Conspiracy to Distribute and Possess with the Intent to Distribute 50 grams or more of Methamphetamine, in violation of 21 U.S.C. § 846. On that same date, Defendant was sentenced to 210 months imprisonment. Defendant is 53 years old, and he is currently incarcerated at Fort Worth FMC. There have been 587 positive cases, and

12 inmates have died in the facility in which Defendant is housed.[1] Currently, there are 23 active inmate cases and 9 active staff cases. Defendant's projected release date is October 9, 2026.

On July 7, 2020, Defendant filed an emergency motion seeking to reduce his sentence due to the risk of contracting COVID-19 in prison.[2] He states that he suffers from a combination of medical ailments that make him more susceptible to serious complications from COVID-19. Defendant also contends that the situation at FMC Fort Worth is dire. The government opposes the motion.

II. Legal Standard

The First Step Act amended the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), to allow a defendant to file his own motion for release.[3] It allows defendants to seek early release from prison provided certain conditions are met. First, "a criminal defendant may file a motion for compassionate release only if: '(1) he has exhausted all administrative rights to appeal the [Bureau of Prisons' ("BOP")] failure to bring a motion on his behalf, or (2) 30 days have passed since the warden of his facility received his request for the BOP to file a motion on his behalf.' "[4] The administrative exhaustion requirement is jurisdictional and cannot be waived.[5]

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[1] Federal Bureau of Prisons, *COVID-19 Coronavirus: COVID-19 Cases*, https://www.bop.gov/coronavirus/ (last visited September 14, 2020).

[2] The Federal Public Defender filed a motion on behalf of Defendant.

[3] *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[4] *United States v. Boyles*, 2020 WL 1819887, at *2 (D. Kan. 2020) (citing *United States v. Alam*, 2020 WL 1703881, at *2 (E.D. Mich. 2020)); *see also* 18 U.S.C. § 3582(c)(1)(A).

[5] *See United States v. Johnson*, 766 F. App'x 648, 650 (10th Cir. 2019) (holding that without an express statutory authorization, a court lacks jurisdiction to modify a sentence); *United States v. Read-Forbes*, --- F. Supp. 3d ---, 2020 WL 1888856, at *3–4 (D. Kan. 2020) (examining the text, context, and historical treatment of § 3582(c)'s subsections to determine that the exhaustion requirement is jurisdictional); *Boyles*, 2020 WL 1819887, at *2 (determining that exhaustion of administrative remedies is a prerequisite for the court's jurisdiction); *cf. United States v. Younger*, 2020 WL 3429490, at *3 (D. Kan. 2020) (reasoning that the Sixth Circuit's approach articulated in *United*

Next, if a defendant satisfies the exhaustion requirement, the Court may reduce the defendant's sentence, after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent they are applicable, if the Court determines: (1) "extraordinary and compelling reasons warrant such a reduction;" or (2) "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) . . . and a determination has been made by the Director of the [BOP] that the defendant is not a danger to the safety of any other person or the community."[6] Finally, the Court must ensure that any reduction in Defendant's sentence under this statute is "consistent with applicable policy statements issued by the Sentencing Commission."[7]

III. Analysis

Defendant seeks early release based on underlying health conditions and the risk of contracting serious complications from COVID-19 in prison. The government asserts that Defendant is not an appropriate candidate for early release.

A. Exhaustion

Defendant has satisfied the exhaustion requirement described in § 3582(c). He requested compassionate release from the Warden at FMC Fort Worth on June 2, 2020. Confirmation of that request was received the same day. As of July 7, 2020, Defendant had not received a response

States v. Alam, 960 F.3d 831 (6th Cir. 2020), is "highly persuasive," and concluding that § 3582(c)(1)(A)'s exhaustion requirement is a claims-processing rule).

[6] 18 U.S.C. § 3582(c)(1)(A)(i)-(ii).

[7] *Id.*; *see also Dillon v. United States*, 560 U.S. 817, 819 (2010) (holding that the Sentencing Commission's policy statement regarding 18 U.S.C. § 3582(c)(2) remains mandatory in the wake of *United States v. Booker*, 543 U.S. 220 (2005)).

from the Warden. Thus, because more than 30 days have passed since Defendant's request, the Court has jurisdiction to decide his motion.

B. Extraordinary and Compelling Reasons

Having determined that Defendant exhausted his administrative remedies, the Court next considers whether Defendant's underlying medical conditions of hypertension, Hepatitis C, and obesity, coupled with the outbreak of COVID-19 in FMC Fort Worth, constitutes an extraordinary and compelling reason warranting a sentence reduction under § 3582(c)(1)(A). Obesity is listed by the Centers for Disease Control and Prevention ("CDC") as one condition that is at increased risk for severe illness from COVID-19.[8] Hypertension is listed as a condition that may cause increased risk.[9] While Hepatitis C is not listed, Defendant has at least two underlying conditions that increase his risk of serious complications should he contract COVID-19. Thus, the Court finds that these medical conditions, in tandem with the COVID-19 pandemic, may present an extraordinary and compelling reason. Accordingly, the Court will move on to consider the § 3553(a) factors.

C. Section 3553(a) Factors

The Court must consider the sentencing factors enumerated in 18 U.S.C. § 3553(a) "to the extent that they are applicable" when determining whether a sentence reduction is appropriate.[10] Some of the § 3553(a) factors include the nature and circumstances of the offense; the need for the

[8] CDC, *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited September 14, 2020).

[9] *Id.*

[10] 18 U.S.C. § 3582(c)(1) (stating that the court should consider the factors set forth in § 3553(a) when determining the length of imprisonment).

sentence imposed to reflect the seriousness of the offense, afford adequate deterrence, and protect the public from future crimes by the defendant; and the need to avoid unwarranted sentence disparities.[11]

Defendant pleaded guilty to the serious offense of conspiracy to distribute and possess with the intent to distribute 50 grams or more of methamphetamine. The sentencing guideline range, based on Defendant's criminal history and offense level, was 360 months to life. This Court rejected the parties' Rule 11(c)(1)(C) plea agreement of 180 months, which was only half of the recommended sentence guideline, and instead sentenced Defendant to 210 months.

At this point, Defendant has served approximately half of his sentence as he has served 104 months. Reducing his sentence by half, even during the ongoing COVID-19 pandemic, does not further sentencing objectives. The Court remains convinced that 210 months is an appropriate sentence.

Contrary to Defendant's contention that his offense was non-violent, the overall circumstances surrounding it were not. The Sedgwick County Sheriff's Department conducted an investigation into Defendant's criminal conduct for approximately ten months in 2011. During that time, Defendant was found to be in the possession of drugs, and arrested, multiple times. In the course of one arrest, Defendant engaged the police in a car chase, crashed his vehicle, and then continued to try and evade capture. Defendant was also in possession of brass knuckles during another arrest.

Defendant's criminal history spans twenty-five years. In addition, Defendant committed the offense, for which he was sentenced in this Court, while he was on parole for the offenses of

[11] 18 U.S.C. § 3553(a).

criminal threat and driving while license suspended. Indeed, Defendant's guideline range was 360 months to life.

The Court recognizes that Defendant appears to have performed well in prison. He reduced his custody level to low, completed education courses and drug programs, and recently obtained a letter from the Health Services Administrator at FMC Fort Worth who gave recognition to Defendant's help during the COVID-19 pandemic recovery process at that facility. Defendant is to be commended for these positive efforts and changes. Reducing Defendant's sentence, however, to time served would not reflect the seriousness of Defendant's criminal conduct or his criminal history. Nor would it provide adequate deterrence or appropriate punishment. The Court finds that the 210-month sentence originally imposed remains sufficient, but not greater than necessary, to meet the sentencing factors in § 3553(a) and punish the offense involved. Accordingly, the Court finds that Defendant does not demonstrate an extraordinary and compelling reason warranting sentence reduction and an early release from prison.

IT IS THEREFORE ORDERED that Defendant's Motion to Reduce Sentence (Doc. 63) is **DENIED.**

IT IS SO ORDERED.

Dated this 16th day of September, 2020.

Eric F Melgren

ERIC F. MELGREN
UNITED STAES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **WALTER B. SANDS,** **Defendant.**	**Case No. 06-20044-03-JAR**

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Walter B. Sands Motion for Compassionate Release (Doc. 247). For the reasons provided below, Defendant's motion is denied.

I. Background

On February 16, 2007, Defendant was convicted by jury of : (1) conspiracy to possess with intent to distribute at least fifty grams of methamphetamine; (2) possession with intent to distribute or distribution of at least five grams of methamphetamine; (3) possession with the intent to distribute at least fifty grams of methamphetamine; (4) use of a firearm in furtherance of a drug trafficking crime; and (5) being a felon in possession of a firearm.[1] On September 24, 2008, Defendant was sentenced to 420 months imprisonment, a ten-year term of supervised release, and a $100 special assessment.[2]

[1] Doc. 123.

[2] Doc. 183.

The Tenth Circuit dismissed Defendant's appeal and affirmed his convictions and sentence.[3] Defendant filed a postconviction petition under 28 U.S.C. § 2255, which was denied.[4] The Tenth Circuit denied Defendant a certificate of appealability and dismissed the § 2255 appeal.[5] Defendant's sentence was reduced on February 10, 2015, from 420 months to 384 months imprisonment.[6]

Defendant is currently incarcerated at Edgefield FCI. The Bureau of Prisons ("BOP") reports 102 inmates at that facility have tested positive for COVID-19, 837 inmates have been tested, and one inmate has died.[7] There is one active inmate case, sixteen active staff cases, and six tests remain pending.[8] Defendant is 48 years old, and his projected release date is July 25, 2033.

On July 20, 2020, Defendant filed a motion requesting compassionate release due to his underlying medical conditions of obesity, diabetes, hypertension, and sleep apnea and the risk of severe complications or death should he contract COVID-19 while in prison. He requests that his sentence be reduced to time served. He then requests that as a condition of supervised release, he be placed on home confinement for five years, and have an additional five years added to his ten-year term of supervised release. Defendant is represented by counsel.

II. Legal Standards

[3] Doc. 205.

[4] Docs. 214, 235.

[5] Doc. 243.

[6] Doc. 246.

[7] Federal Bureau of Prisons, *COVID-19 Coronavirus: COVID-19 Cases*, https://www.bop.gov/coronavirus (last accessed October 23, 2020).

[8] *Id.*

"[I]t is well-settled that '[a] district court is authorized to modify a [d]efendant's sentence only in specified instances where Congress has expressly granted the court jurisdiction to do so.'"[9] Section 3582(c) permits a court to modify a term of imprisonment for compassionate release only if certain exceptions apply. Until recently, these exceptions required the BOP to move on a defendant's behalf. In 2018, however, the First Step Act modified the compassionate release statute, permitting a defendant to bring his own motion for relief.[10] But a defendant may bring a motion for compassionate release from custody only if he "has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on [his] 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. . . ."[11] Unless a defendant meets this exhaustion requirement, the court lacks jurisdiction to modify the sentence or grant relief.[12]

Where a defendant has satisfied the exhaustion requirement, a court may reduce the defendant's proposed sentence, after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent they are applicable, if the court determines: (1) "extraordinary and compelling reasons warrant such a reduction"; or (2) "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) . . . and a determination

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[9] *United States v. White*, 765 F.3d 1240, 1244 (10th Cir. 2014) (quoting *United States v. Blackwell,* 81 F.3d 945, 947 (10th Cir. 1996)).

[10] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[11] 18 U.S.C. § 3582(c)(1)(A).

[12] *United States v. Johnson*, 766 F. App'x 648, 650 (10th Cir. 2019) (holding that without an express statutory authorization, a court lacks jurisdiction to modify a sentence); *see also United States v. Walker*, No. 13-10051-EFM, 2020 WL 2101369, at *2 (D. Kan. May 1, 2020) ("The administrative exhaustion requirement is jurisdictional and cannot be waived."); *see also United States v. Read-Forbes*, 454 F. Supp. 3d 1113, 1116–17 (D. Kan. Apr. 16, 2020) (analyzing the text, context, and historical treatment of § 3582(c)'s subsections to determine the exhaustion requirement is jurisdictional). *Cf. United States v. Younger*, No. 16-40012-DDC, 2020 WL 3429490, at *3 (D. Kan. June 23, 2020) (reasoning that, absent direct guidance from the Tenth Circuit, the Sixth Circuit's approach articulated in *United States v. Alam*, 960 F.3d 831 (6th Cir. 2020), is "highly persuasive," and concluding that § 3582(c)(1)(A)'s exhaustion requirement is a claims-processing rule).

has been made by the Director of the [BOP] that the defendant is not a danger to the safety of any other person or the community."[13] In addition, a court must ensure that any reduction in a defendant's sentence under this statute is "consistent with applicable policy statements issued by the Sentencing Commission."[14]

The Sentencing Commission's policy statement pertaining to sentence reductions under 18 U.S.C. § 3582(c)(1)(A) is found at U.S.S.G. § 1B1.13. The comments to § 1B1.13 contemplate four categories of extraordinary, compelling circumstances: (1) the defendant is suffering from a terminal illness, i.e., a serious, advanced illness with an end-of-life trajectory; (2) the defendant is suffering from a serious physical or medical condition, serious functional or cognitive impairment, or 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 the defendant is not expected to recover; (3) the defendant is at least 65 years old, is experiencing a serious deterioration in physical or mental health because of the aging process, and has served at least ten years or seventy-five percent of the term of imprisonment, whichever is less; and (4) the defendant needs to serve as a caregiver for a minor child, spouse, or registered partner.[15] A defendant requesting compassionate release bears the burden of establishing that compassionate release is warranted under the statute.[16]

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[13] 18 U.S.C. § 3582(c)(1)(A).

[14] *Id.*; *see also Dillon v. United States*, 560 U.S. 817, 819 (2010) (holding the Sentencing Commission policy statement regarding 18 U.S.C. § 3582(c)(2) remains mandatory in the wake of *United States v. Booker*, 543 U.S. 220 (2005)).

[15] U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1 (U.S. Sentencing Comm'n 2018).

[16] *See United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016) (finding that defendant bears the burden of demonstrating entitlement to relief under § 3582(c)(2)); *United States v. Bright*, No. 14-10098-JTM, 2020 WL 473323, at *1 (D. Kan. Jan. 29, 2020) (noting that the "extraordinary and compelling" standard imposes a heavy burden on an inmate seeking compassionate release under § 3582(c)(1)(A)).

III. Discussion

A. Exhaustion

Defendant has satisfied the exhaustion requirement described in § 3582(c). Defendant sent a letter to the Warden on June 10, 2020 requesting compassionate release. As of July 20, 2020, the date Defendant filed his motion in this Court, more than 30 days had passed. In addition, the government does not dispute that Defendant has satisfied the applicable exhaustion requirement. Thus, because more than thirty days have passed since Defendant filed his request with the Warden, this Court has jurisdiction to decide Defendant's motion.

B. Extraordinary and Compelling Reasons

Having determined that Defendant has properly exhausted administrative remedies, the Court must next determine whether extraordinary and compelling reasons warrant reducing Defendant's sentence to time served. Congress permitted 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."[17] The Sentencing Commission, in its commentary to U.S.S.G. § 1B1.13, has enumerated four categories of circumstances which may constitute extraordinary relief.[18]

Here, Defendant asserts that his circumstances constitute extraordinary, compelling reasons to reduce his sentence. He contends that his underlying health conditions of obesity, diabetes, hypertension, and sleep apnea, and the outbreak of COVID-19 in prison, makes him more susceptible to serious illness or death should he contract COVID-19. The government concedes that per Department of Justice ("DOJ") policy and Centers for Disease Control and

[17] 28 U.S.C. § 994(t).

[18] U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1 (U.S. Sentencing Comm'n 2018).

Prevention ("CDC") guidance, Defendant's medical conditions, in the context of the COVID-19 pandemic, constitute an extraordinary and compelling reason. The government contends, however, that when balanced with the § 3553(a) factors, Defendant fails to demonstrate a situation so severe that release is warranted. Accordingly, the Court will move on to consider the § 3553(a) factors.

C. Section 3553(a) Factors

The Court next considers whether Defendant's reduction would comply with the sentencing factors enumerated in 18 U.S.C. § 3553(a). That statutes requires courts to "impose a sentence sufficient, but not greater than necessary" in consideration of the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .;
> (5) any pertinent policy statement . . . issued by the Sentencing Commission . . .;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.[19]

While the Court takes all seven § 3553 factors into account, those most pertinent to Defendant's case are the nature and circumstances of the offense and the history and characteristics of the offense, the need for the sentence imposed to reflect the seriousness of the

[19] 18 U.S.C. § 3553(a).

offense, and the need to provide adequate deterrence. In consideration of these factors, the Court concludes that releasing Defendant now would not leave him with a sentence that is "sufficient, but not greater than necessary."

Defendant was convicted by jury of six serious offenses including conspiracy to possess with intent to distribute at least fifty grams of methamphetamine, possession with the intent to distribute at least fifty grams of methamphetamine, the use of a firearm in furtherance of a drug trafficking crime, and being a felon in possession of a firearm.

After an investigation into distribution of methamphetamine in the Kansas City area, law enforcement became aware that Defendant was involved in this distribution ring. Defendant provided methamphetamine to a co-defendant who then sold the methamphetamine. The next day, Defendant was stopped in a vehicle, while driving with a suspended license and an active warrant for his arrest. Law enforcement found a loaded handgun under the front seat of the vehicle. A subsequent search of Defendant's residence revealed methamphetamine and marijuana. Based on Defendant's later statements, Defendant was ultimately attributed with 1,975 grams of methamphetamine.

At the time of sentencing, Defendant had a total offense level of thirty-eight and a criminal history category of VI. The sentencing Court noted Defendant's extensive criminal history, negative performance while on probation and parole, prior gang involvement, and involvement in the crimes for which he was being sentenced. The Court considered numerous sentencing factors when sentencing Defendant to 420 months' imprisonment.[20]

Defendant notes the great disparity between his sentence and the sentences received by his two co-Defendants. His co-Defendants, however, both pleaded guilty to one offense. In

[20] This sentence was later reduced to 384 months.

contrast, Defendant proceeded to trial and was convicted on six counts. Thus, a sentence disparity is to be expected. At this time, Defendant has only served approximately half of his sentence and is not expected to be released until 2033. Although Defendant has underlying conditions increasing his risk of serious complications should he contract COVID-19, the reduction of Defendant's sentence in such a significant manner would not afford adequate deterrence or punishment.

Reducing Defendant's sentence to time served would not reflect the seriousness of Defendant's criminal conduct. Nor would it provide adequate deterrence or appropriate punishment. The Court finds that the 384-month sentence remains sufficient, but not greater than necessary, to meet the sentencing factors in § 3553(a) and punish the offense involved. Accordingly, the Court finds that Defendant does not demonstrate an extraordinary and compelling reason warranting sentence reduction and an early release from prison.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion for Compassionate Release (Doc. 247) is **DENIED**.

IT IS SO ORDERED.

Dated: October 29, 2020

s/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

October 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CONNIE EDWARDS,

Defendant - Appellant.

No. 20-3209
(D.C. No. 2:12-CR-20015-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH, MORITZ**, and **EID**, Circuit Judges.

This case concerns the risks from COVID-19 for prisoners with serious illnesses. Ms. Connie Edwards is one of these prisoners, fearing the spread of COVID-19 while she is serving a 300-month prison term for drug crimes. *See* 21 U.S.C. § 841(a), (b)(1)(C).

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* Oral argument would not materially help us in deciding the appeal, so we have decided the appeal based on the briefs and the record on appeal. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value under Fed. R. App. P. 32.1(a) and 10th Cir. R. 32.1(A).

During her life, Ms. Edwards has endured many of the illnesses that heighten the risks from COVID-19: cancer, chronic kidney disease, chronic obstructive pulmonary disease, hypertension, obesity, and Type 2 diabetes mellitus. The risks appeared particularly grave to Ms. Edwards because of her age (68 years old). So she moved for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), as amended by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. The district court denied her motion.

This statute directs the district court to consider whether

- "extraordinary and compelling reasons warrant" a sentencing reduction,
- a reduction would be "consistent with applicable policy statements issued by the Sentencing Commission," and
- a sentence reduction is warranted under the sentencing factors in 18 U.S.C. § 3553(a).

18 U.S.C. § 3582(c)(1)(A).

In support, Ms. Edwards pointed not only to her chronic illnesses but also to her age (68), her lack of a criminal record, her work tutoring other prisoners, and her plans to live with her sister upon release.

The district court denied the motion, concluding that the § 3553(a) factors weighed against a sentence reduction. The court acknowledged that Ms. Edwards's serious illnesses supported early release. But the court concluded that this factor was dwarfed by the seriousness of Ms.

Edwards's offense and her failure to serve even 32% of her sentence. R. at 216–17.

On appeal, Ms. Edwards argues that the district court erred by failing to consider the first step of the § 3582(c)(1)(A) inquiry: "whether extraordinary and compelling reasons warrant [a sentencing reduction]." 18 U.S.C. § 3582(c)(1)(A). We recently rejected this argument in *United States v. Hald*, explaining that "there is no reason to mandate any particular order for the three steps." *United States v. Hald*, 8 F.4th 932, 942 (10th Cir. 2021). There the defendants argued that the court should have considered the existence of extraordinary and compelling reasons before going to the § 3553(a) factors. We disagreed: "If the most convenient way for the district court to dispose of a motion for compassionate release is to reject it for failure to satisfy one of the steps, we see no benefit in requiring it to make the useless gesture of determining whether one of the other steps is satisfied." *Id.* at 942–43.

The district court need not address all three steps when denying a § 3582(c)(1)(A) motion. But the court must still consider all of the relevant facts. *Id.* at 937. The district court did so here, fully considering the facts that Ms. Edwards had characterized as extraordinary and compelling—her chronic illnesses and the risks created by COVID-19. But the court reasonably found that other § 3553(a) factors outweighed the grounds urged by Ms. Edwards. Under *Hald*, the court did not err by skipping ahead

to these factors. We thus affirm the denial of Ms. Edwards's motion for a reduction of sentence.

Entered for the Court

Robert E. Bacharach
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONNIE EDWARDS (01),

Defendant.

Case No. 12-20015-01-DDC

MEMORANDUM AND ORDER

This matter comes before the court on pro se[1] prisoner Connie Edwards's Motion for Compassionate Release (Doc. 470). Ms. Edwards seeks compassionate release because of the COVID-19 pandemic. *Id.* at 1. The government has filed a Response (Doc. 475) and the Federal Public Defender's Office has filed a Reply for Ms. Edwards (Doc. 481). For reasons explained below, the court denies Ms. Edwards's motion.

I. Background

In October 2012, a grand jury returned a 23-count Third Superseding Indictment against Ms. Edwards and others. Doc. 159. Count 1 charged Ms. Edwards with conspiring to distribute and possession with intent to distribute oxycodone, hydrocodone, methadone, morphine, and methamphetamine, with death and serious bodily injury resulting from the use of the substances. *Id.* at 2. This charge, if proved beyond a reasonable doubt, would violate 21 U.S.C.

[1] Ms. Edwards filed her Motion pro se. But, she is represented by counsel in this case, and her counsel filed the Reply. The court construes the pro se filing liberally and holds it to a less stringent standard than formal pleadings drafted by lawyers. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). But the court does not assume the role of advocate for a pro se litigant. *Id.* And, the court does not apply that pro se standard to the professionally prepared Reply.

§§ 841(a)(1), 841(b)(1)(C), 846, and 18 U.S.C. § 2. *Id.* In November 2012, Ms. Edwards entered a plea agreement with the government. Docs. 206 & 207. She pleaded guilty to Count 1 of the Third Superseding Indictment. Doc. 207 at 1–2. The Presentence Investigation Report ("PSR") calculated a total offense level of 43—the highest offense level recognized by the Sentencing Guidelines—and a criminal history category of I, producing a Guidelines sentence of life imprisonment. Doc. 253 at 24 (PSR ¶ 122). In March 2013, the court sentenced Ms. Edwards to 300 months' imprisonment followed by five years of supervised release. Doc. 267 at 2–3 (Judgment).

Ms. Edwards asserts she currently is incarcerated at Carswell Federal Medical Center. Doc. 470 at 1. She reports that she suffers from numerous chronic health problems—cancer, chronic kidney disease, chronic obstructive pulmonary disease (COPD), obesity, and Type 2 diabetes mellitus—among others. *Id.* at 2–4; Doc. 481 at 3. Indeed, the government has supplied more than 400 pages of records documenting Ms. Edwards's medical history. Doc. 478 (sealed medical records). Ms. Edwards asserts her health conditions place her at serious risk should she contract COVID-19. Doc. 470 at 5–6. Ms. Edwards's current facility has about a 40% positivity rate for COVID-19, according to the government's Response. Doc. 475 at 7. She also contends she has served almost eight years of her 25 year sentence. Doc. 481 at 17 n.44.

II. Legal Standard

Binding authority from our Circuit establishes that "'[a] district court is authorized to modify a [d]efendant's sentence only in specified instances where Congress has expressly granted the court jurisdiction to do so.'" *United States v. White*, 765 F.3d 1240, 1244 (10th Cir. 2014) (quoting *United States v. Blackwell*, 81 F.3d 945, 947 (10th Cir. 1996)). Title 18 U.S.C. § 3582(c)—commonly called the compassionate release statute—permits a court to modify a

term of imprisonment but only if certain exceptions apply. For many years, these exceptions only permitted the Bureau of Prisons ("BOP") to bring a motion under the compassionate release statute. But in 2018, the First Step Act modified the compassionate release statute and authorized a defendant to file her own motion for relief. First Step Act of 2018, Pub. L. No. 115-391, § A 603(b)(1), 132 Stat. 5194, 5239 (2018). This amendment authorized an inmate to make such a motion, but only after she "has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on [her] 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 . . . ." 18 U.S.C. § 3582(c)(1)(A).

Ms. Edwards asserts that she asked her warden for compassionate release on April 8, 2020. Doc. 470 at 6. The government asserts that BOP records show that the warden denied her request on May 26, 2020. Doc. 475 at 4; *see also* Doc. 481-1 (warden's denial of compassionate release request). The government never explicitly discloses its position whether Ms. Edwards has exhausted her administrative remedies. *See* Doc. 475 at 3–4. Instead, the government's brief addresses the merits of Ms. Edwards's motion. *Id.* at 5–10. Since the government never raises a failure-to-exhaust defense, the government appears to concede that Ms. Edwards has exhausted her administrative remedies.

In *United States v. Alam*, 960 F.3d 831 (6th Cir. 2020), the Sixth Circuit treated § 3582(c)(1)(A)'s exhaustion requirement as a claim-processing rule, not a jurisdictional bar. *Id.* at 832–34. Although claim-processing rules don't implicate the court's subject matter jurisdiction, the court must enforce them when properly invoked. *Id.* at 833. But, if not invoked, claim-processing rules are subject to waiver and forfeiture. *Id.* at 834; *see also United States v. Spaulding*, 802 F.3d 1110, 1130–34 (10th Cir. 2015) (Gorsuch, J., dissenting) (explaining why

"§ 3582(c) doesn't strip the district court of any of its preexisting post-judgment jurisdiction and is instead and again a claim-processing rule").

The Tenth Circuit hasn't decided yet whether § 3582(c)(1)(A)'s exhaustion requirement is jurisdictional. So, the court must predict how our Circuit would decide the question. The court finds the Sixth Circuit's decision highly persuasive and the court predicts the Tenth Circuit would adopt its reasoning. Consistent with *Alam*, the court treats § 3582(c)(1)(A)'s exhaustion requirement as a claim-processing rule.

Because Ms. Edwards waited more than 30 days after requesting compassionate release to file a motion in federal court, she has satisfied the exhaustion requirement of § 3582(c)(1)(A). And, even if she hasn't, the government has waived any objections to the exhaustion requirement by not reserving it. So, the court now turns to the substance of Ms. Edwards's motion.

III. Discussion

A. The court exercises its discretion when deciding whether "extraordinary and compelling reasons" exist.

Section 3582(c)(1)(A) authorizes district courts to reduce a term of imprisonment if, "after considering the factors set forth in Section 3553(a) to the extent that they are applicable," the court finds that (i) "extraordinary and compelling reasons warrant such a reduction" and (ii) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

The Sentencing Commission's applicable policy statement is found in U.S.S.G. § 1B1.13. *United States v. Beck*, 425 F. Supp. 3d 573, 578 (M.D.N.C. 2019). As pertinent here, this policy statement provides that the court may reduce a term of imprisonment, after considering the § 3553(a) factors, if (1) "[e]xtraordinary and compelling reasons warrant the reduction," (2)

"[t]he defendant is not a danger to the safety of any other person or the community," and (3) "[t]he reduction is consistent with this policy statement." U.S.S.G. § 1B1.13.

Application Note 1 to § 1B1.13 provides that extraordinary and compelling reasons exist "under any of the [four] circumstances set forth below" in (A) through (D). *Id.* § 1B1.13 application notes 1. Subdivision (A) of Note 1 provides that the medical condition of a prisoner may qualify her for compassionate release, if (i) she is suffering from a terminal illness, or (ii) she is suffering from a serious physical or medical condition that "substantially diminishes" her ability to provide self-care within the prison and she is not expected to recover. *Id.* § 1B1.13 application notes 1(A). Subdivision (B) applies where "[t]he 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 . . . her term of imprisonment, whichever is less." *Id.* § 1B1.13 application notes 1(B). Subdivision (C) applies to family circumstances not invoked here. Subdivision (D) supplies a catchall provision: it applies when "[a]s determined by the Director of the [BOP], 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)." *Id.* § 1B1.13 application notes 1(D).

Ms. Edwards plainly does not qualify under two of the four subdivisions in Note 1. Although she is over 65 years old and suffering a deterioration in health, she has not served the lesser of 10 years or 75% of her sentence (Subdivision (B)). And nothing suggests that the "family circumstances" addressed in Subdivision (C) apply. She also does not qualify under either of the two prongs described in Subdivision (A). Although Ms. Edwards has a number of chronic health conditions, nothing suggests she "is suffering from a terminal illness" with "an end of life trajectory"—prong (i)—or, as prong (ii) requires, that she has contracted a "serious

physical or medical condition" that "substantially diminishes" her ability "to provide self-care within the environment of a correctional facility" and she "is not expected to recover from" the condition.[2] § 1B1.13 application notes 1(A).

This leaves Subdivision (D). The guidance for this subsection advises that § 1B1.13 applies when "[a]s determined by the Director of the [BOP], 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)" of application note 1.[3] *Id.* § 1B1.13 application notes 1(D).

A few courts have ruled that only the BOP may invoke the catchall provision of subdivision (D). *United States v. Jackson* summarized the reasoning of one such decision:

> Congress gave the Sentencing Commission the mandate to decide what constitutes an extraordinary and compelling reason; the [First Step Act] did not expand the criteria for finding such a reason, but merely allowed defendants to file motions; there can be no relief under this statute without consistency with the policy statement; and the policy statement does not presently provide for a court determination of other reasons.

United States v. Jackson, No. 08-20150-02-JWL, 2020 WL 2812764, at *3 (D. Kan. May 29, 2020), *reconsidered on other grounds*, 2020 WL 4284312 (citing *United States v. Lynn*, No. 89-0072-WS, 2019 WL 3805349, at *2–4 (S.D. Ala. Aug. 13, 2019)). But an "overwhelming majority of courts" have rejected this approach. *Id.* They instead have "concluded that a court may make the necessary determination that other circumstances warrant relief under this statute."

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[2] Prong (ii) also applies to "serious functional or cognitive impairment" and "deteriorating physical or mental health because of the aging process." § 1B1.13 application notes 1(A)(ii). Ms. Edwards's motion focuses on the risk the COVID-19 virus poses to her life, given her age and health status. Her motion never reports that she has any impairment that independently can satisfy prong (ii).

[3] As explained above, in Section II, § 3582 used to permit the BOP—but not inmates—to file a compassionate release motion. But the First Step Act broadened § 3582(c)(1)(A), so an inmate now can file a motion. *See* First Step Act of 2018, Pub. L. No. 115-391, § A 603(b)(1), 132 Stat. 5194, 5239 (2018). The Sentencing Commission hasn't revised § 1B1.13 of the Guidelines since that amendment and so, the language used in this Guideline provision still requires a motion by the BOP. *United States v. Jackson*, No. 08-20150-02-JWL, 2020 WL 2812764, at *3 (D. Kan. May 29, 2020).

Id. (citations omitted). In other words, "[w]hile the old policy statement provides helpful guidance, it does not constrain the [c]ourt's independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction under § 3582(c)(1)(A)(i)." *Beck*, 425 F. Supp. 3d at 579; *see also Jackson*, 2020 WL 2812764, at *3 (assuming, for purposes of deciding the motion, that court is not limited to circumstances set forth in subdivisions (A) through (C)); *United States v. O'Bryan*, No. 96-10076-03-JTM, 2020 WL 869475, at *2 (D. Kan. Feb. 21, 2020) ("In the wake of the First Step Act, numerous courts have recognized the court can determine whether extraordinary and compelling reasons exist to modify a sentence—and may do so under the 'catch all' provision . . . ."); *United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019) (concluding that the correct interpretation of § 3582(c)(1)(A) is that when a defendant brings a motion for a sentence reduction under the amended provision, the court can determine whether extraordinary and compelling reasons—outside those delineated in subdivisions (A)–(C)—warrant granting relief).

The court joins this prevailing view, concluding that it may decide whether "extraordinary and compelling" reasons warrant compassionate release.

B. Ms. Edwards has not established that "extraordinary and compelling reasons" warrant compassionate release.

Ms. Edwards seeks compassionate release because, she asserts, her "comorbidities place [her] at extremely high risk for dire complications" if she contracts the COVID-19 virus. Doc. 470 at 3. The government asserts that Ms. Edwards's conditions do not qualify her for release. Doc. 475 at 8. The government admits Ms. Edwards suffers from conditions that put her at a high risk should she contract COVID-19. *Id.* at 6–7. And, it recognizes, numerous inmates at her facilty have tested positive for the virus. *Id.* at 7. But, the government contends that Ms. Edwards already is confined at a BOP Medical Center, and that Ms. Edwards's medical records

show that the BOP has provided "extensive care" for her. *Id.* And, the government argues, the other factors the court must consider weigh against release. *Id.* at 8–10.

To be sure, it is regrettable that Ms. Edwards is incarcerated during this pandemic. It is also regrettable that she has serious health problems. But the court isn't convinced that the combination of these circumstances qualifies her for release. The court reaches this conclusion "after considering the factors set forth in [18 U.S.C.] § 3553(a) to the extent that they are applicable"—the rubric § 3582(c)(1)(A) instructs the court to apply. Four of those statutory sentencing factors are particularly germane here. The next four subsections discuss them.

1. Nature and Circumstances of the Offense[4]

In March 2010, the Franklin County, Kansas Drug Enforcement Unit learned from a confidential informant that Ms. Edwards was selling and trading prescription pills. Doc. 253 at 6 (PSR ¶ 20). An investigation revealed that on May 9, 2009, William Thomas Powell had purchased what he thought was methamphetamine from Ms. Edwards at her home in Ottawa, Kansas. *Id.* (PSR ¶ 21). But the substance actually was prescription pills—hydrocodone, methadone, and carisoprodol—that Ms. Edwards's associate had crushed into a powder. *Id.* Later that evening, Ms. Edwards also sold Mr. Powell prescription pills. *Id.* Mr. Powell ingested the pills and injected the substance he thought was methamphetamine. *Id.* He was found dead the next day. *Id.* The coroner and toxicologist attributed his death to "polydrug toxicity." *Id.*

The PSR also details Ms. Edwards's extensive prescription pill conspiracy. *Id.* at 7–13 (PSR ¶¶ 22–58). She received sentencing enhancements because she was an organizer or leader of the criminal activity, obstructed justice, and possessed a firearm. *Id.* at 16–17 (PSR ¶¶ 79, 82,

[4] The facts discussed in parts 1–4 come from the PSR, which Ms. Edwards did not object to in any respect. Doc. 253 at 28 (PSR ¶ 147).

83). To conclude with the obvious, Ms. Edwards committed a serious felony offense that cost a human being his life. The nature and circumstances of the offense do not favor Ms. Edwards's motion.

2. History and Characteristics of the Defendant

Ms. Edwards had only a few theft convictions from many years before her conviction in this case. *Id.* at 18 (PSR ¶¶ 92–94). The PSR calculated a criminal history category of I. *Id.* at 19 (PSR ¶ 95). But, as explained above, she orchestrated a significant drug conspiracy for several years. Ms. Edwards also violated the conditions of her pretrial release by having prohibited contact with a witness and trying to persuade that witness to lie to law enforcement. Doc. 146 at 1 (Order of Detention Pending Trial). Ms. Edwards's track record in this case weighs against her motion.

From a health perspective, Ms. Edwards suffers from cancer, chronic kidney disease, chronic obstructive pulmonary disease, obesity, type 2 diabetes, and hypertension. Doc. 481 at 4–9. The court recognizes her health conditions and the outbreak at her facility place her at risk of complications from COVID-19. Although Ms. Edwards's criminal history weighs against her request, her comorbidities favor her request. This factor is neutral in the analysis.

3. The Need for the Sentence to Reflect the Offense's Seriousness, to Provide Just Punishment, and to Afford Adequate Deterrence to Criminal Conduct

When the court sentenced Ms. Edwards, it adhered to the statutory mandate that it impose a sentence that was "not greater than necessary." 18 U.S.C. § 3553(a). Ms. Edwards received a significant but, in context, appropriate sentence. After she has served not even 32% of her sentence, reducing that sentence by almost 70% would produce a sentence that no longer reflects the gravity of Ms. Edwards's criminal conduct. Likewise, such a reduced sentence no longer

would furnish adequate deterrence to criminal conduct or provide just punishment. These factors weigh against Ms. Edwards's motion.

4. The Sentencing Range Established for the Applicable Category of Offense Committed by the Applicable Category of Defendant

The PSR calculated a Guidelines sentence of life imprisonment. Doc. 253 at 24 (PSR ¶ 122). Reducing Ms. Edwards's sentence to time-served would reduce it to about a 96-month custody sentence, well below the applicable guideline range. A 96-month custody sentence represents 32% of Ms. Edwards's 300-month custody sentence. No new circumstance justifies this disparity.[5]

C. Conclusion

In sum, the pertinent sentencing factors in 18 U.S.C. § 3553(a) do not favor the reduction Ms. Edwards's motion seeks. Indeed, the only thing that favors her request is the fact that, regrettably, she suffers from significant health problems. The court recognizes that her health status—at least in theory—has the potential to increase the severity of the sentence beyond the 300 months already imposed. *United States v. Mel*, No. CR TDC-18-0571, 2020 WL 2041674, at *3 (D. Md. Apr. 28, 2020) ("The fact that Mel has been incarcerated . . . during a serious outbreak of COVID-19 inside the facility sufficiently increased the severity of the sentence beyond what was originally anticipated . . . ."). But this factor has not increased the sentence's severity to the point where an almost 70% reduction in Ms. Edwards's custody sentence is sufficient.

[5] The court is mindful of the other factors identified by § 3553(a). They are not pertinent, however, to the current motion.

The court is not prepared to conclude that Ms. Edwards's health conditions provide sufficient reason for her release under § 3582(c)(1)(A). The court thus denies Ms. Edwards's Motion for Compassionate Release (Doc. 470).

IT IS THEREFORE ORDERED BY THE COURT THAT Ms. Edwards's Motion for Compassionate Release (Doc. 470) is denied.

IT IS SO ORDERED.

Dated this 29th day of September, 2020, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

September 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES A. HALD,

Defendant - Appellant.

No. 20-3195
(D.C. No. 6:11-CR-10227-EFM-1)
(D. Kan.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WALTER B. SANDS,

Defendant - Appellant.

No. 20-3228
(D.C. No. 2:06-CR-20044-JAR-3)
(D. Kan.)

ORDER

Before **HARTZ**, **HOLMES**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter D. Imprisonment (Refs & Annos)

18 U.S.C.A. § 3582

§ 3582. Imposition of a sentence of imprisonment

Effective: December 21, 2018
Currentness

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

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

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

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

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

(1) in any case--

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

Appendix G

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

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

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

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

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

(d) Notification requirements.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

Notes of Decisions (1247)

18 U.S.C.A. § 3582, 18 USCA § 3582
Current through PL 117-57.