Appendix

APPENDIX

A-1

2021 WL 4130022
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Kadeem **WILLINGHAM**, Defendant - Appellant.

No. 20-13727
|
Non-Argument Calendar
|
(September 10, 2021)

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cr-60079-JIC-2

Attorneys and Law Firms

U.S. Attorney Service, Scott Dion, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff - Appellee.

Brenda Greenberg Bryn, Margaret Y. Foldes, Daryl Elliott Wilcox, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL, for Defendant - Appellant.

Before JORDAN, GRANT, and BRASHER, Circuit Judges.

Opinion

PER CURIAM:

***1** Kadeem Willingham, a federal prisoner, appeals the district court's denial of his motion for reconsideration of his compassionate release motion under 18 U.S.C. § 3582(c)(1)(A). Willingham argues that he has presented extraordinary and compelling reasons to justify a sentence reduction and that the district court erred in holding that it did not have jurisdiction over his motion. Because he has not presented extraordinary and compelling reasons, we affirm.

I.

Willingham pleaded guilty to two counts of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 942(c)(1)(A)(ii), and the district court sentenced him to 32 years in prison. Willingham eventually filed a *pro se* motion for compassionate release, seeking a reduction in sentence. He argued in part that non-retroactive sentencing changes in the First Step Act created "extraordinary and compelling reasons" for relief under 18 U.S.C. § 3582(c)(1)(A). The district court denied that motion. It reasoned that Congress directed the Sentencing Commission to determine "what should be considered extraordinary and compelling reasons for a sentencing reduction," 28 U.S.C. § 994(t), and that it instructed the Commission to do so in an "applicable policy statement," 18 U.S.C. § 3582(c)(1)(A). That policy statement is found at U.S.S.G. § 1B1.13. *United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021).

Note 1 of that policy statement states that extraordinary and compelling reasons include medical condition, age, or family circumstances of the defendant. Under Subsection 1(D), a reduction might also be based on "other reasons" determined by the Director of the Bureau of Prisons. Because post-sentencing developments in law are not an extraordinary and compelling reason under Section 1B1.13 or under the BOP's program statement, the district court concluded that a reduction would be "inconsistent with the Sentencing Commission's policy statements," and it thus lacked jurisdiction to grant the motion. Willingham then filed a counseled motion for reconsideration, which the district court denied. Willingham now appeals.

II.

We review a district court's denial of a motion for reconsideration for abuse of discretion. *United States v. Llewlyn*, 879 F.3d 1291, 1294 (11th Cir. 2018). But we "review *de novo* both determinations about a defendant's eligibility for a Section 3582(c) sentence reduction and questions of statutory interpretation." *Bryant*, 996 F.3d at 1251. If an asserted error is non-constitutional, then we also review it for harmlessness. *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009). That means that the defendant cannot prevail if "viewing the proceedings in their entirety, a court determines that the error did not affect the sentence, or had but very slight effect." *United States v. Mathenia*, 409 F.3d 1289, 1292 (11th Cir. 2005) (cleaned up). In other words, "if one can say with fair assurance that the sentence was not substantially swayed by the error, the sentence is due to be affirmed even though there was error." *Id.* (cleaned up).

III.

***2** Willingham makes three arguments on appeal. First, he argues that the district court erroneously concluded that it lacked jurisdiction to reduce his sentence. Second, he argues that Section 1B1.13 did not limit the district court's authority to reduce his sentence. Third, he argues that the combination of factors he argued before the district court amounted to extraordinary and compelling reasons to reduce his sentence. We review each of these arguments in turn.

First, Willingham argues that the district court erred in concluding that it lacked "jurisdiction" to reduce his sentence under Section 3582(c)(1)(A). He asserts that any limitations in that statute are instead non-jurisdictional in nature. It is true that the text of Section 3582(c)(1)(A) does not contain any jurisdictional restrictions and that the district court did have jurisdiction over Willingham's Section 3582(c)(1)(A) motion. But the district court's references elsewhere to "authority" show that its denial was based on its lack of statutory authority to reduce Willingham's sentence, not a lack of jurisdiction. So although the court's reference to "jurisdiction" was inaccurate, that error was harmless because the district court did lack statutory authority to reduce Willingham's sentence.

Second, Willingham disagrees with the conclusion that the district court lacked statutory authority under Section 3582(c)(1)(A) to reduce his sentence. He argues that Section 1B1.13 is not controlling in his case. This Court's decision in *Bryant* forecloses that argument. *Bryant*, 996 F.3d at 1252. There, we held that "the commonsense reading of 'applicable policy statements' includes U.S.S.G. § 1B1.13, no matter who files the motion." *Id.* We also concluded that "Application Note 1(D) is not at odds with the amended Section 3582(c)(1)(A)." *Id.* at 1263. We are bound by that precedent. *See United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012).

Willingham's counseled reply brief also attacks the validity of Section 1B1.13 on various other grounds. But none of those arguments were raised in Willingham's initial brief, and, except in limited circumstances that do not apply here, *see United States v. Durham*, 795 F.3d 1329, 1331 (11th Cir. 2015), we have "repeatedly ... refused to consider issues raised for the first time in an appellant's reply brief," *United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004). We therefore refuse to consider the arguments raised in Willingham's reply brief.

Third, Willingham asserts in his reply brief that the combination of factors he argued before the district court, which are based on his view of the initial sentencing factors under 28 U.S.C.§ 3553(a), rise to the level of extraordinary and compelling reasons for compassionate release under Section 1B1.13. The district court correctly held that such routine sentencing arguments, unrelated to medical conditions, family circumstances, or advanced age, do not satisfy the policy statement's eligibility criteria. Moreover, this argument was not raised in Willingham's counseled initial brief. *See Levy*, 379 F.3d at 1244.

The district court correctly concluded that Willingham had not presented an extraordinary and compelling reason and that it thus lacked authority to grant him relief under 18 U.S.C. § 3582(c)(1)(A).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 4130022

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60079-CR-COHN/SELTZER(s)
18 U.S.C. § 1951(a)
18 U.S.C. § 924(c)(1)(A)(ii)
18 U.S.C. § 924(d)(1)
18 U.S.C. § 981(a)(1)(C)

UNITED STATES OF AMERICA

vs.

KADEEM WILLINGHAM and
DONELL BARKES,

Defendants.
_____/

SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT 1
Conspiracy to Commit Hobbs Act Robberies
(18 U.S.C. § 1951(a))

From on or about March 25, 2015, to on or about March 27, 2015, in Miami-Dade and Broward Counties, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly and willfully combine, conspire, confederate, and agree with Tyrone Coley and others known and unknown to the Grand Jury to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendant and his co-conspirators did plan to take United States currency and other property from persons employed by businesses and companies operating in interstate

commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons; all in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 2
Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about March 25, 2015, in Broward County, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly and unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "robbery" and "commerce" are defined in Title 18, United States Code, Section 1951(b)(l) and (b)(3), in that the defendant and Tyrone Coley did take United States currency from the person and in the presence of a person employed by Aaron's, Incorporated, located at 1100 West Sunrise Boulevard, Fort Lauderdale, Florida 33311, a business and company operating in interstate and foreign commerce, against the will of that person, by means of actual and threatened force, violence, and fear of injury to that person, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 3
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about March 25, 2015, in Broward County, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 2 of this Superseding Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 4
Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about March 27, 2015, in Broward County, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly and unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "robbery" and "commerce" are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendant and Tyrone Coley did take United States currency from the person and in the presence of a person employed by Aaron's, Incorporated, located at 840 South State Road 7, Hollywood, Florida 33023, a business and company operating in interstate and foreign commerce, against the will of that person, by means of actual and threatened force, violence, and fear of injury to that person, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 5
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about March 27, 2015, in Broward County, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 4 of this Superseding Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 6
Conspiracy to Commit Hobbs Act Robberies
(18 U.S.C. § 1951(a))

On or about April 6, 2015, in Miami-Dade and Broward Counties, in the Southern District of Florida, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

did knowingly and willfully combine, conspire, confederate, and agree with each other and other persons known and unknown to the Grand Jury to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendants and their co-conspirators did plan to take United States currency and other property from persons employed by businesses and companies operating in interstate commerce, against the will of those persons, by means of actual and threatened force, violence,

and fear of injury to said persons; all in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 7
Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about April 6, 2015, in Broward County, in the Southern District of Florida, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

did knowingly and unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "robbery" and "commerce" are defined in Title 18, United States Code, Section 1951(b)(l) and (b)(3), in that the defendants did take United States currency from persons and in the presence of persons employed by AT&T, Incorporated, located at 15731 Pines Boulevard, Pembroke Pines, Florida 33026, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to those persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 8
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about April 6, 2015, in Broward County, in the Southern District of Florida, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the

defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 7 of this Superseding Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 9
Attempted Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about April 6, 2015, in Broward County, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly and unlawfully attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "robbery" and "commerce" are defined in Title 18, United States Code, Section 1951(b)(l) and (b)(3), in that the defendant did attempt to take United States currency from the person and in the presence of persons employed by Carole's Furniture, located at 1097 East Commercial Boulevard, Oakland Park, Florida 33334, a business and company operating in interstate and foreign commerce, against the will of that person, by means of actual and threatened force, violence, and fear of injury to that person, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 10
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about April 6, 2015, in Broward County, in the Southern District of Florida, the defendant,

KADEEM WILLINGHAM,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 9 of this Superseding Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 11
Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about April 6, 2015, in Broward County, in the Southern District of Florida, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

did knowingly and unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms "robbery" and "commerce" are defined in Title 18, United States Code, Section 1951(b)(l) and (b)(3), in that the defendants did take United States currency from the person and in the presence of a person employed by Oreck Holdings LLC, located at 2428 North Federal Highway, Fort Lauderdale, Florida 33305, a business and company operating in interstate and foreign commerce, against the will of that person, by means of actual and threatened force, violence, and fear of injury to that person, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 12
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about April 6, 2015, in Broward County, in the Southern District of Florida, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendants may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 11 of this Superseding Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

FORFEITURE ALLEGATIONS

1. The allegations of this Superseding Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of property, in which one or more of the defendants has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 1951(a) as alleged in Counts 1, 2, and 4 of this Superseding Indictment, the defendant,

KADEEM WILLINGHAM,

shall forfeit to the United States of America, any property, real or personal, which constitutes or is derived from proceeds traceable to such violation.

3. Upon conviction of a violation of Title 18, United States Code, Section 1951(a) as alleged in Counts 6, 7, and 11 of this Superseding Indictment, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

shall forfeit to the United States of America, any property, real or personal, which constitutes or is derived from proceeds traceable to such violation.

4. Upon conviction of any violation of Title 18, United States Code, Section 924(c) as alleged in Counts 3, 5, 8, 10 and 12 of this Superseding Indictment, the defendants,

KADEEM WILLINGHAM and
DONELL BARKES,

shall forfeit to the United States of America, any firearm or ammunition involved in or used in any violation.

5. The property subject to forfeiture includes but is not limited to:

a. $5,000 with respect to Count 1; and

b. $3,000 with respect to Count 6.

All pursuant to Title 18, United States Code, Sections 981(a)(l)(C) and 924(d), and the procedures set forth at Title 21, United States Code, Section 853 as made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON

WIFREDO A. FERRER
UNITED STATES ATTORNEY

DANIEL CERVANTES
ASSISTANT UNITED STATES ATTORNEY

IGNACIO J. VAZQUEZ, JR.
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

KADEEM WILLINGHAM and DONELL BARKES,

Defendants.
_____/

CASE NO. 15-60079-CR-COHN(s)

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

___ Miami ___ Key West
_X_ FTL ___ WPB ___ FTP

New Defendant(s) Yes x No ___
Number of New Defendants 1
Total number of counts 12

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect _____

4. This case will take 15 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	____	Petty	____
II	6 to 10 days	____	Minor	____
III	11 to 20 days	x	Misdem.	____
IV	21 to 60 days	____	Felony	X
V	61 days and over	____		

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) Yes
If yes:
Magistrate Case No. 15-mj-06188-Hunt (as to Barkes)
Related Miscellaneous numbers:
Defendant(s) in federal custody as of April 17, 2015 (as to Willingham), and May 7, 2015 (as to Barkes)
Defendant(s) in state custody as of
Rule 20 from the District of
Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes ____ No X

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes ____ No X

IGNACIO J. VAZQUEZ, JR.
ASSISTANT UNITED STATES ATTORNEY
FLA BAR NO. 16275

*Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **KADEEM WILLINGHAM**

Case No: **15-60079-CR-COHN(s)**

Counts #: 1 and 6

Hobbs Act Robbery Conspiracy

Title 18, United States Code, Section 1951(a)

***Max. Penalty:** 20 Years' Imprisonment

Counts #: 2, 4, 7 and 11

Hobbs Act Robbery

Title 18, United States Code, Section 1951(a)

***Max. Penalty:** 20 Years' Imprisonment

Count #: 9

Attempted Hobbs Act Robbery

Title 18, United States Code, Section 1951(a)

***Max. Penalty:** 20 Years' Imprisonment

Counts #: 3, 5, 8, 10 and 12

Brandishing A Firearm In Furtherance Of A Crime Of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: **DONELL BARKES**

Case No: **15-60079-CR-COHN(s)**

Counts #: 6

Hobbs Act Robbery Conspiracy

Title 18, United States Code, Section 1951(a)

***Max. Penalty:** 20 Years' Imprisonment

Counts #: 7 and 11

Hobbs Act Robbery

Title 18, United States Code, Section 1951(a)

***Max. Penalty:** 20 Years' Imprisonment

Counts #: 8 and 12

Brandishing A Firearm In Furtherance Of A Crime Of Violence

Title 18, United States Code, Section 924(c)(1)(A)(ii)

***Max. Penalty:** Life Imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 15-60079-Cr-COHN

UNITED STATES OF AMERICA,
Plaintiff,
-v-
KADEEM WILLINGHAM,
Defendant.

Fort Lauderdale, Florida
September 25, 2015
9:55 a.m.

Pages 1-10

TRANSCRIPT OF SENTENCING PROCEEDINGS

BEFORE THE HONORABLE JAMES I. COHN

U.S. DISTRICT JUDGE

APPEARANCES:

For the Government: MATTHEW LANGLEY
Assistant U.S. Attorney
99 Northeast 4th Street
Miami, Florida 33132-2111

For the Defendant: THE TONY MOSS FIRM, L.L.C.
BY: REGINALD ANTHONY MOSS, JR., ESQ.
8108 Biscayne Boulevard - PH-701
Miami, Florida 33138

REPORTED BY: WILLIAM G. ROMANISHIN, RMR, FCRR, CRR
(305) 523-5558
Official Court Reporter
400 North Miami Avenue
Miami, Florida 33128

STENOGRAPHICALLY RECORDED COMPUTER-AIDED TRANSCRIPT

♀

(Call to order of the Court)

THE COURT: Okay. The matter before the Court is the United States versus Kadeem Willingham. This is case number 15-60079-Cr.

Mr. Willingham is present. He's represented by Reginald Tony Moss. The Government is represented by Assistant United States Attorney Ignacio Vazquez. I assume that's who's here.

MR. LANGLEY: That is not. I'm AUSA Matthew Langley and I'm covering for Daniel Cervantes and AUSA Ignacio Vazquez.

THE COURT: All right. I'm sorry, Mr. Langley. I just assumed, because I knew what Mr. Cervantes looked like but I don't think I've ever met Mr. Vazquez.

MR. LANGLEY: You know, in Miami we're interchangeable, Judge.

THE COURT: Well, welcome.

MR. LANGLEY: Thank you, sir.

THE COURT: On July 15 of this year, Mr. Willingham entered a plea of guilty to Counts 3 of 8 of a 12-count superseding indictment. Both Counts 3 and 8 charged brandishing a firearm in a crime of violence in violation of 18, United States Code, 924(c)(1)(A)(ii).

Upon acceptance of Mr. Willingham's plea, the Court adjudged him guilty of Counts 3 and 8, ordered a presentence

investigation report and deferred sentencing till today's date.

Have counsel for the respective parties received a copy of the presentence report? Mr. Langley.

MR. LANGLEY: The Government has.

THE COURT: Mr. Moss.

MR. MOSS: We have, Your Honor.

THE COURT: Mr. Willingham, have you received and reviewed the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Are there any objections to the guidelines computations?

MR. MOSS: None from the defense.

MR. LANGLEY: None from the Government, Your Honor.

THE COURT: Are there any objections that require a ruling by the Court?

MR. MOSS: None from the defense.

MR. LANGLEY: None from the Government.

THE COURT: All right. The Court makes the following findings with respect to the advisory guidelines. The total offense level would not be applicable. The criminal history category not applicable. There are statutory requirements as to both Counts 3 and 8.

The statutory requirement as to Count 3 is a minimum of seven years up to a maximum of life; as to Count 8, a

minimum of 23 years to a maximum of life to be served consecutively. Probation would not apply. Supervised release guidelines not applicable. Fine not applicable. Restitution is $5,346; and, of course, there's a mandatory special assessment of $100 as to each of Counts 3 and 8.

Does the Government have a recommendation?

MR. LANGLEY: The Government recommends what is suggested by Probation.

THE COURT: Okay. Mr. Moss, is there something you would like to add?

MR. MOSS: Well, obviously, the Court's discretion is very limited in this situation. So I think the issues that I raised in my sentencing memorandum yesterday would adequately address our response to the PSI.

THE COURT: Which the Court did read docket entry 82.

Mr. Willingham, is there something you would like to say, sir?

THE DEFENDANT: Yes, sir. Sir, my whole life I've dealt with heartbreaks and sorrowful situations for as long as I can remember. I've been on a roller coaster of disappointing and stressful times since I was a kid with everything I've been through in my youth. Being here is a result of me being around the wrong people and allowing them to influence me to do things that I regret.

Upon my release I plan to relocate and start my life

over elsewhere, and I have no desire or hopes to associate myself with the people I once did nor to involve myself with anyone or anything that may incriminate me ever again.

I want to apologize to the state, the federal system, the victims and anyone who had to take time out of their personal lives to deal with this. And I want to also thank Mr. Moss and all that he has done to defend me and all his efforts to do what he could.

Your Honor, I realize I made a mistake and I now realize the severity of my actions. And I don't feel I need a lifetime of punishment in prison. I'm no threat to society nor to anyone. I also realize my actions not only caused me to suffer but also my family who has been supporting me and a young lady who's been by my side, which I plan to marry.

I just want to apologize to everyone once again.

THE COURT: Well, I think that you have a very positive attitude. You know, you can't change the past.

THE DEFENDANT: Yes, sir.

THE COURT: But you can shape the future, and I think it starts with your attitude; and I'm very pleased to see that you view what has happened as a learning experience. You're going to learn from it and try to improve yourself as you go forward.

I think every day that you're incarcerated, if you wake up in the morning and you say I'm going to do something

that will make me a better person, whether it's reading a chapter in a book or doing a hundred pushups, just something positive, I think when you are released -- and ultimately you will be released from prison -- when that day comes, I think you will be a better person.

But, you know, everybody has good days and bad days. But you need to maintain that positive attitude because that will go a long way in shaping your future. So I'm very pleased to see that.

I'm going to impose a sentence which is the lowest sentence I can impose that the law allows. Congress sets minimum-mandatory sentences for certain types of offenses, and judges are precluded from going any lower than that unless at some point in time you provide substantial assistance and the Government recognizes that substantial assistance and in this instance, if you do, moves for a Rule 35. But that's between you and the Government. Certainly, if such a motion is filed at some point in time, it's something certainly I will consider.

So the Court has considered the statements of all parties, the presentence report as well as the factors contained in 18, United States Code, Section 3553(a). The Court finds that Mr. Willingham is financially unable to pay a fine. However, restitution is mandatory.

It is the judgment of this Court that the defendant,

Kadeem Willingham, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for 384 months. A term of imprisonment of 84 months is imposed as to Count 3, and a term of imprisonment of 300 months is imposed as to Count 8, those to be served consecutively.

It is further ordered that the defendant shall pay restitution in the amount of $5,346. Restitution is owed jointly with codefendant Tyrone Coley.

During the period of incarceration payments shall be made as follows. If the defendant earns wages in a Federal Prison Industries job, then he must pay 50 percent of those wages earned toward the financial obligations imposed by this judgment.

If the defendant does not work in a Federal Prison Industries job, then he must pay a minimum of $25 per quarter.

Upon release from incarceration the defendant shall pay restitution at the rate of ten percent of his monthly gross earnings until such time as the Court may alter that payment schedule in the interest of justice. The U.S. Bureau of Prisons, the U.S. Probation Office and the U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay.

These payments do not preclude the Government from using any other anticipated or unexpected financial gains,

assets or income of the defendant in order to satisfy the restitution obligations.

The restitution shall be made payable to the Clerk of Court, United States Courts, and forwarded to the U.S. Clerk's Office, Attention: Financial Section, in Miami. The restitution will be then forwarded by the Clerk of the Court to Aaron's, Incorporated, in Fort Lauderdale, in the amount of $2,214, and AT&T located in Miami in the amount of $3,132.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of five years as to each of Counts 3 and 8 to be served concurrently. Within 72 hours of release from custody the defendant shall report in person to the probation office in the district where released.

While on supervised release the defendant shall not commit any crimes; shall be prohibited from possessing a firearm or other dangerous devices; shall not possess a controlled substance; shall cooperate in the collection of DNA and shall comply with the standard conditions of supervised release, including the following special conditions: Mental health treatment; substance abuse treatment; financial disclosure requirement; employment requirement; and permissible search, all as noted in Part G of the presentence report.

Additionally, the Court will recommend to the Bureau of Prisons that Mr. Willingham be enrolled in the 500-hour

drug abuse treatment program.

It is further ordered that the defendant shall pay immediately to the United States a special assessment of $100 as to each of Counts 3 and 8, for a total of $200.

The total sentence is 384 months' imprisonment, $5,346 in restitution, five years' supervised release, and a $200 assessment.

Now that sentence has been imposed, does the defendant or his counsel object to the Court's finding of fact or to the manner in which sentence was pronounced?

MR. MOSS: No objection, Judge.

But we would point out that at this point Mr. Willingham is unable to pay the special assessment. He's been incarcerated since roughly April of this year and has no other assets by which to pay a special assessment at this time.

THE COURT: Let me advise you, Mr. Willingham, you do have the right to appeal the sentence imposed. Any notice of appeal must be filed within 14 days after entry of judgment. If you're unable to pay for the costs of an appeal, you may apply for leave to appeal in forma pauperis.

Any motions by the Government?

MR. LANGLEY: The Government seeks to dismiss the remaining counts as to the indictment.

THE COURT: That motion is hereby granted. All

remaining counts are hereby dismissed.

Gentlemen, thank you very much.

Any requests for recommendation as to location?

MR. MOSS: We'll request a recommendation that he be placed as close as possible to South Florida.

THE COURT: Okay. The Court will recommend a facility located within the Southern District of Florida.

Thank you, gentlemen.

MR. LANGLEY: Thank you, Your Honor.

THE COURT: You're welcome.

* * * * * * * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A-4

United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

KADEEM WILLINGHAM

JUDGMENT IN A CRIMINAL CASE

Case Number - 0:15CR60079-COHN-2

USM Number: 06069-104

Counsel For Defendant: Reginald Moss
Counsel For The United States: Daniel Cervantes
Court Reporter: William Romanishin

The defendant pleaded guilty to Counts 3 and 8 of the Superseding Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	3/25/2015	3
18 U.S.C. § 924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	4/6/2015	8

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

All remaining Counts are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
9/25/2015

JAMES I. COHN
United States District Judge

September 25, 2015

DEFENDANT: KADEEM WILLINGHAM
CASE NUMBER: 0:15CR60079-COHN-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **84 MONTHS AS TO COUNT 3**
300 MONTHS AS TO COUNT 8 TO RUN CONSECUTIVE TO COUNT 3
TOTAL SENTENCE 384 MONTHS

The Court makes the following recommendations to the Bureau of Prisons:

THE COURT RECOMMENDS THAT THE DEFENDANT BE ALLOWED TO PARTICIPATE IN THE 500 HOUR DRUG TREATMENT PROGRAM.
THE COURT RECOMMENDS THAT THE DEFENDANT BE DESIGNATED TO A FACILITY IN THE SOUTHERN DISTRICT OF FLORIDA.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: KADEEM WILLINGHAM
CASE NUMBER: 0:15CR60079-COHN-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 YEARS AS TO COUNTS 3 AND 8 TO RUN CONCURRENTLY WITH EACH OTHER**.

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

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KADEEM WILLINGHAM
CASE NUMBER: 0:15CR60079-COHN-2

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search - The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: KADEEM WILLINGHAM
CASE NUMBER: 0:15CR60079-COHN-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$200.00	$	$5346.00

Restitution with Imprisonment -
It is further ordered that the defendant shall pay restitution joint and several with co-defendants in the amount of $5346.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.
Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KADEEM WILLINGHAM
CASE NUMBER: 0:15CR60079-COHN-2

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$200.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers , Total Amount, Joint and Several Amount, and corresponding payee.

THE DEFENDANT SHALL RESTITUTION JOINT AND SEVERAL WITH CO-DEFENDANTS IN THE AMOUNT $5346.00.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution,(7) penalties, and (8) costs, including cost of prosecution and court costs.

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	Case NO. 15-60079-CR-Colt/N
V.	
VS.	Motion to Reduce Sentence Pursuant to 18 U.S.C. §3582 (c)(1)(A)(i)
KADEEM WILLINGHAM, Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)

Defendant, Kadeem Willingham, Pro Se respectfully moves this court for an order reducing his Sentence to time Served based on the extraordinary and compelling reason's discussed below, pursuant to the amended 18 U.S.C. §3582(c)(1)(A)(i).

The Defendant brings this motion without formal training in legal drafting in that of a Skilled attorney, and accordingly ask for a "liberal" Construing of this pleading as a matter of law. See Haines V. Kerner, 404 U.S. 519, 520 (1972).

Introduction

Willingham was sentenced in September of 2015 to a 384-month term of imprisonment (32 years). Willingham's sentence is the result of two counts of conviction under 18 U.S.C. §924(c), each of which carried a consecutive, mandatory sentence. In handing down the sentence, Judge Cohn's hands were tied and he could not do anything to mitigate the draconian effect of the Consecutive Sentences on the §924(c) counts.

Mr. Willingham fully acknowledges the bad decisions he has made and is deeply remorseful for his conduct in his past. In the 5 years he has already served he has committed himself to being a better person, in hope's that he doesn't have to wait decades for an opportunity to bring good to this world with his life. His conduct in prison is a testament to his rehabilitation and determination to turn his life around.

On April 24, 2020 Willingham submitted a written request to the Warden of FCI Coleman asking that he/she move this court for a reduction of Sentence under 18 U.S.C. § 3582(c)(1)(A)(i). The request was acknowledged by the warden's office on April 24, 2020 and Willingham was informed that the office would not be filing a motion on his behalf just four days later, on April 29, 2020.

Now, thanks to the amendments to § 3582 (c)(1)(A) that were enacted as part of the First Step Act, Willingham can come directly to the court to request a reduction of his Sentence.

FACTUAL BACKGROUND

On April 16, 2015 a Grand Jury in the Southern District of Florida returned an indictment charging Mr. Willingham and co-defendant Tyrone Coley with Hobbs Act robbery, in Violation of 18 U.S.C. §1951(a), and carrying and brandishing a firearm during an Hobbs Act robbery, in Violation of 18 U.S.C. §924(c). In this indictment, Mr. Willingham and Mr. Coley were charged in counts one and two while Mr. Coley was charged singularly in counts three, four, five and six.

On June 4, 2015 a superseding indictment was returned charging Mr. Willingham with two counts of conspiracy to committ Hobbs Act robbery, in Violation of 18 U.S.C. §1951(a); four counts of Hobbs Act robbery in Violation of 18 U.S.C. §1951(a); One count of attempted Hobbs Act robbery, in Violation of 18 U.S.C. §1951(a); and five counts of carrying and brandishing a fire arm in furtherance of Hobbs Act robberies, in Violation of §924(c)(1)(A)(ii). A co-defendant, Donell Barkes, was charged with Mr. Willingham in one of the conspiracy counts, two of the robbery counts, and two of the brandishing counts.

the "stacked" §924(c) counts.

Willingham has tried unsuccessfully to obtain relief from this unreasonable sentence. He now asks the court to exercise the Power conferred by the First Step Act to reduce his Sentence.

DISCUSSION

This Court has the authority to reduce Willingham's Sentence based on the extraordinary and compelling circumstances presented here. First, it has the jurisdiction to hear this motion because more than 30 days have passed since the Warden received Willingham's request, and the Director of the BOP has not filed a motion with this Court. Second, the changes to 18 U.S.C. §3582(c)(1)(A)(i) made by the First Step Act have finally Vested Courts with the authority to decide When extraordinary and compelling circumstances Warrant a Sentence reduction. Such circumstances clearly exist in this case. Third, the factors a Court must consider in determining an appropriate Sentence all weigh Strongly in favor of a Substantially lower Sentence for Willingham.

A. The Court Has the Authority to Reduce Willingham's Sentence Based On "Extraordinary and Compelling Reasons"

The Compassionate Release statue was first enacted as part of the Comprehensive Crime Control Act of 1984. It provided that

(See Attachment A for reduction in Sentence Application Date)

A district Court could not modify a final term of imprisonment except in four situations, one of which was the existence of "extraordinary and compelling reasons" warranting the reduction, as determined by the Sentencing Court. But although the courts had the final decision-making authority over whether a Sentence would be reduced, the Statue imposed a gatekeeper — that authority could be invoked only upon a motion by the Director of the BOP. Without such a motion, sentencing courts were powerless to reduce a prisoner's sentence, even if the Court concluded that extraordinary and compelling reasons warranted the reduction. 18 U.S.C. § 3582(c)(1)(A)(i); See also PL 98-473 (HJRes 648), PL 98-473, 98 stat 1837 (Oct. 12, 1984).

That changed when Congress enacted the First Step Act, which amended § 3582(c)(1)(A). See P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). Under the amended Statue, a court can now reduce a Sentence for "extraordinary and compelling reasons" in two circumstances. (i) If the Director of the BOP files a motion requesting such relief; (ii) "Upon motion of the defendant," if the defendant has fully exhausted all administrative remedies to appeal the BOP's failure to bring a motion, or if 30 days has lapsed "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). See also United States v. Cantu, No. 1:05-CR-458-1, 2019

WL 2498923, at *3 (S.D. Tex. June 17, 2019) ("[U]nder the newly amended § 3582(c)(1)(A) [the defendant] has standing to bring this motion because more than 30 days elapsed between his reduction-in-sentence request to the Warden and a response."); United States v. Cantu-Rivera, No. CR H-89-204, 2019 WL 2578272, at *1 (S.D. Tex. June 24, 2019) (defendant's "petition ... meets the requirement of a lapse of 30 days from the receipt by the Warden of the defendant's facility ... The court therefore has the authority to address the motion of the defendant."). As noted above, Willingham submitted his request to the Warden on April 24, 2020. As of the date of this filing, more than 30 days after Willingham submitted his request, the BOP has not filed a motion with this Court on Willingham's behalf. Accordingly, Willingham is entitled to bring his motion directly to the Court pursuant to 18 U.S.C. § 3582(c)(1)(A), and this Court is vested with the jurisdiction to rule on the requested relief.

B. The Relief Requested Here is Consistent with the Text of the Statute and the Sentencing Commission's Policy Statement

1. Congress Did Not Limit "Extraordinary and Compelling Reasons" to a Specific, Enumerated Set of Circumstances

Congress did not define what would constitute an "extraordinary and compelling reason" warranting a reduction of a sentence under § 3582(c). Indeed, the legislative history confirms that it intended to grant federal sentencing courts broad discretion to make those determinations on a case-by-case basis, and to reduce fundamentally unfair sentences where such reasons exist.

Congress's initial goal in passing the Comprehensive Crime Control Act was to abolish federal parole and create a "completely restructured guidelines sentencing system." S. Rep. No. 98-225, at 52, 53 n. 74 (1983). But with the elimination of parole as a corrective measure in cases where early release is warranted, Congress recognized the need for an alternative review process. It therefore allowed for judicial reduction of certain sentences under § 3582(c):

> The committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55-56 (emphasis added). Put differently, rather than having the Parole Commission review every

federal sentence, Congress decided to let sentencing courts decide, in a far narrower band of cases presenting extraordinary and compelling circumstances, that "there is a justification for reducing a term of imprisonment." Id. at 56.

The situations listed in § 3582(c) were thus intended to serve as "safety valves for modification of sentences," enabling sentence reductions when justified by factors that previously could have been addressed through the (now abolished) parole system. Id. at 121. This approach was intended to keep "the sentencing power in the judiciary where it belongs," rather than with a federal parole board, and permitted "later review of sentences in particularly compelling situations." Id. (emphasis added). Notably, Congress imposed no limitations on courts' authority to make such determinations, declining to define what constitutes "extraordinary and compelling reasons" or to otherwise constrain judges' discretion. The mandate was simple: If extraordinary and compelling circumstances were present, they would "justify a reduction of an unusually long sentence." S. Rep No. 98-225, at 55-56 (1983).

Unfortunately, the establishment of the BOP as a gate keeper effectively eliminated the safety valve. The BOP, which is part of the Department of Justice, hardly ever opened the gate.[5]

[5] See, e.g., The Answer is No: Too Little Compassionate Release in US Federal Prisons, Human Rights Watch, 2 (Nov. 2012),

https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf stating that between 1992 and 2012, the average annual number of prisoners who received compassionate release following a motion by the BOP was less than two dozen).

To address this reality, Congress, through the First Step Act, now allows direct access to the Sentencing Court once an inmate's request to the BOP has been exhausted.

2. The U.S. Sentencing Commission Has Not Limited "Extraordinary and Compelling Reasons" for Compassionate Release to Medical, Age-Related, or Family Circumstances

When enacting § 3582(c), Congress delegated the responsibility for expounding upon what constitutes "extraordinary and compelling reasons" to the U.S. Sentencing Commission (the "Commission"). See 28 U.S.C. § 994(t) ("The Commission ... shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."); see also 28 U.S.C. § 994(a)(2) (the Commission shall promulgate general policy statements regarding "the sentence modification provisions set forth in section [] ... 3582(c) of title 18"). The resulting policy statement by the Commission sets forth the following factual considerations: (i) the medical condition of the defendant (including terminal illness and other

Serious conditions and impairments); (ii) the age of the defendant (for those 65 and older with serious deterioration related to aging who have completed at least 10 years or 75 percent of the term of imprisonment); (iii) the family circumstances of the defendant (where a child's caregiver or spouse dies or becomes incapacitated without an alternative caregiver); and (iv) "other reasons" as determined by the BOP. U.S.S.G. §1B1.13, Application Note 1(A). The fourth category specifically includes "an extraordinary and compelling reason other than, or in combination with," the first three. Id. Additionally, the commentary makes clear that the extraordinary and compelling reasons "need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment." U.S.S.G. §1B1.13, Application Note 2. In other words, even if an "extraordinary and compelling reason reasonably could have been known or anticipated by the Sentencing Court, [the fact] does not preclude consideration for a [Sentence] reduction." Id.

As the above language makes clear, extraordinary and compelling reasons for a sentence reduction may exist even when an inmate is not elderly, ill, or facing dire, caregiver-related family circumstances. And though the policy statement — which has not been amended since the passage of the First Step Act — vests the Director of the BOP with the authority to determine when such "other reasons" might warrant a reduction in a particular case, that language is now irreconcilable

With the revised statue, which permits a defendant to bring a § 3582 motion to the Court without any response from the BOP or even if the BOP expressly decides that no reasons warrant a reduction of Sentence. Accordingly, that aspect of the commentary is not binding on the Courts because it is inconsistent with the amended text of § 3582 — and the undisputed purpose of the First Step Act — which, "[l]ike other Sentencing Statues . . . trumps the Guidelines." Dorsey V. United States, 567 U.S. 260, 266 (2012). Congress has finally removed the BOP's blessing as a prerequisite to relief under § 3582(c). That law trumps § 1B1.13's requirement of a BOP motion and divests the BOP of its previous authority to determine whether extraordinary and compelling reasons Warrant a Sentence Reduction in a particular case. See also United States V. Da Cai Chen, 127 F.3d 286, 291 (2d Cir. 1997)(Commentary that relates to a statute, or to a guideline that mirrors a Statute (as here), is not entitled to deference); United States V. Piernanzi, 23 F.3d 670, 683 (2d Cir. 1994).

Indeed, at least three district Courts have observed since the passage of the First Step Act that § 1B1.13 "has not yet been updated to reflect that defendants (and not just the BOP) may move for compassionate release." United States V. McGraw, No. 2:02-cr-00018(LJM)(CMM),

2019 WL 2059488, at *2 (S.D. Ind. May 9, 2019), and "[b]ecause the current version of the Guideline Policy Statement conflicts with the First Step Act, the newly-enacted statutory provision must be given effect." Cantu-Rivera, 2019 WL 2578272, at *2 n.1. See also Cantu, 2019 WL 2498923, at *4 ("Given the changes to the statute, the policy-statement provision that was previously applicable to 18 U.S.C. § 3582 (c)(1)(A) no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the appropriate use of the sentence-modification provisions under § 3582.").

The Court's authority to reduce Willingham's sentence is not only consistent with the statute, but also with the language in the policy statement, which makes clear that "[t]he court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction)" and encouraging the filing of a motion for compassionate release where a defendant "meets any of the circumstances set forth in [the] Application Note." As mentioned above, in amending the language of 18 U.S.C. § 3582(c)(1)(A), Congress finally empowered courts to make this critical determination, even in the face of a BOP determination that a defendant's case is not extraordinary or compelling.

Thus, just a few months ago, a district Court in Texas held as follows:

[T]he correct interpretation of § 3582(c)(1)(A) — based on the text, statute history and structure, and consideration of Congress's ability to override any of the Commission's policy statements 'at any time' [...] — is that when a defendant brings a motion for sentence reduction under the amended provision, the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. N.1(A)-(C) warrant granting relief.

Cantu, 2019 WL 2498923 at *5. This Court therefore may make an independent assessment of Willingham's case in considering whether extraordinary and compelling reasons warrant the reduction of his sentence.[6]

---

[6] See also United States v. Urrutia, No. 8:03CR37, 2019 WL 6037391, at *3 (D. Neb. Nov. 14, 2019) ("This Court infers that the Commission would apply the same criteria, including the catch-all provision of Application Note 1(D), in the wake of the First Step Act's amendment to § 3582(c)(1)(A), and that this Court may use Application Note 1(D) as a basis for finding extraordinary and compelling reasons to reduce a sentence."); Cantu, 2019 WL 2498923, at *4 ("Given the changes to the statute, the policy-statement provision that was previously applicable to 18 U.S.C. § 3582(c)(1)(A) no longer fits with the statute and thus does not comply with the

Congressional mandate that the policy statement must provide guidance on the appropriate use of Sentence-modification provisions under §3582.D; Cantu-Rivera, 2019 WL 2578272, at *2n.1 (finding authority to determine that defendant was entitled to relief under the catch-all provision in the commentary to §1B1.13 because the "current policy statement predates the enactment of the First Step Act and is not likely to be amended within the foreseeable future due to lack of a sufficient number of serving members of the Sentencing Commission."); United States v. Beck, No. 1:13-CR-186-6, 2019 WL 2716505, at *6 (M.D. N.C. June 28, 2019) ("While the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment of whether 'extraordinary and compelling reasons' warrant a Sentence reduction under 18 3582(c)(1)(A)(i).")

3. Extraordinary and Compelling Circumstances Warrant a Reduction in Willingham's Sentence

The practice of "Stacking" enhanced §924(c) Charges in a first offense was Condemned for years,

the first such conviction is obtained. From now on, those staggering sentences will be permissible only after a truly "subsequent" conviction. Notably, the fact that this amendment was titled a "Clarification of Section 924(c)" makes clear that 924(c) was never intended by Congress to result in sentences like the one at issue here. In addition, a motion for relief under 18 U.S.C. § 3582(c)(1)(A)(i) requires a court to consider other factors that may warrant relief, including the history and characteristics of the defendant, the defendant's rehabilitation, the sentencing disparities with his co-defendants, and other factors bearing on the person Willingham is today. See U.S.S.G. § 1B1.13 (requiring consideration of, inter alia, the factors set forth in 18 U.S.C. § 3553(a); See also Cantu-Rivera, 2019 WL 2572272, at *2 (the court considered rehabilitation and the "unwarranted [sentencing] disparities among defendants" in determining resentencing was appropriate). As set forth below, these factors further establish the sort of "extraordinary and compelling reasons" that warrant a reduction of Willingham's 32-year sentence.

C. The Relevant Factors Weigh Strongly in Favor of a Sentence Reduction

In deciding Willingham's request for a

Sentence Reduction, the Court must determine whether, after considering the factors set forth in 18 U.S.C. § 3553(a), a lower sentence would be appropriate, in addition to making a finding that Willingham is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g). U.S.S.G. § 1B1.13(2).

1. The Relevant § 3553(a) Factors Weigh Strongly in Favor of Relief

Many of the § 3553(a) factors weigh strongly in favor of relief in Willingham's case. As an initial matter, there have been several changes in Sentencing Policies and the law that would lead to a much lower sentence if Willingham were before the Court today. Since Willingham's Sentencing, in enacting the First Step Act, Congress made it clear that it never meant for defendants like Willingham to receive the enhanced Sentences for "Second or Successive" § 924(c) convictions that were charged in the initial case. If he were Sentenced today it would be a Substantial difference in the term Willingham is serving, being that he would only have 7 years for one § 924(c) Conviction. Since a prior or "Subsequent"

§924(c) conviction was never present, Willingham could never fall under the "Stacking" Provision of the §924(c) Statute.

Willingham has dedicated himself to his education and rehabilitation, personifying the objectives of §3553(a)(2) that "incarceration" provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." This factor weighs heavily in support of granting relief. See Cantu-Rivera, 2019 WL 2578272, at *2 (recognizing the "extraordinary degree of rehabilitation" Mr. Cantu-Rivera accomplished and caring for other inmates as factors justifying the reduction in his sentence). Willingham has accepted responsibility for his actions and is deeply remorseful for the decisions he made in his past. But he has used the time he has spent in prison to turn his life around, and his continued incarceration does not serve any legitimate Sentencing goal at this point. There is no doubt that the time Willingham has already served is more than sufficient

his criminal activity — which ocurred over 5 years ago — he played a non violent role, never harming anyone in the commission of any of his crimes. Willingham had no prior criminal history, and, since his arrest and incarceration, Willingham has been a model inmate with only one non-violent rule violation on his disciplinary record. Willingham's rehabilition is evidenced by the evolution of his character while in prison and his accomplishments. He has maintained an optimistic and positive outlook on life, and has demonstrated a determination to turn his life around. He has participated in FCI Estill's Fatherhood Program, helping bridge the gap between young and older inmates, and also helping older inmates understand the mind sight of their fatherless children, having gone through the same thing himself. Received training in How to Start and Run a Corporation. Completed A House Keeping Apprenticeship, and also received training in Trading Stocks and Bonds, and completed the non-Residential drug program.

Finally, the fact that Willingham will be an asset to the community and not a danger is evident by his conduct while incarcerated and his future plans to eagerly contribute to Society upon his release.

D. Willingham Is Deserving of Mercy

With the passage of the First Step Act, Congress emphasized the imperative of "reducing unnecessary incarceration and avoiding unduly punitive sentences that do not serve the ends of justice." United States v. Simons, No. 07-CR-00874, 2019 WL 1760840, at *3 (E.D.N.Y. Apr. 22, 2019).

This court should also consider the troubling demographic differences in the application of § 924(c)'s mandatory minimum penalties. In its 2004 report entitled Fifteen Years of Guidelines Sentencing, the Sentencing Commission wrote that Black defendants had been disproportionately subjected to § 924(c) "stacking" for decades. Specifically, they accounted for 48% of offenders who qualified for a charge under § 924(c), but they represented 56% of those actually charged under the statute, and 64% of those convicted under it.[13] The Sentencing Commission's October 2011 Report to Congress: Mandatory Minimum penalties in the Federal Criminal Justice System report found that

---

[13] The report can be found at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

Black offenders still constitute the majority of offenders - 55.7% - who are subjected to § 924(c)'s mandatory minimum penalties at sentencing.[14] Black offenders are also convicted of multiple 924(c) counts of greater proportions - 61% - than other ethnicities.[15]

If released, Willingham will live with his older god brother at his home in Indiana. He has maintained a close relationship with him, and his god brother is more than willing to support him and help him rebuild in his life.

Willingham feels significant remorse for the crimes he committed. He understands that he made poor decisions, and going to prison for his crimes has given him time to reflect. This has ultimately matured him and made him a better man.

[14] The report can be found at http://www.ussc.gov/research/congressional-reports/2011-report-Congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[15] Id. at 363

CONCLUSION

Congress never intended to permit, let alone to mandate, the excessive punishment Willingham received in this case. It has now given the Court the power to grant Willingham relief from that sentence. Willingham respectfully requests that the Court take this opportunity to grant a reduction in his sentence based on extraordinary and compelling reasons, and to reduce his sentence to time served.

Respectfully Submitted,

Rodeem Willingham

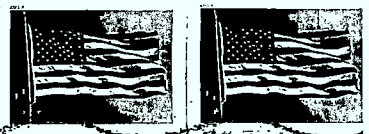
Rodeem Willingham
Reg. No.
F.C.C. Coleman Medium
P.O. Box 1032
Coleman, Florida 33521

Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been sent via the United States Postal Service on this 26th day of May, 2020, to the following party:

Daniel Cervantes, AUSA
99 NE 4th Street Miami, FL 33132

9-104
ty



Legal Mail

Tampa/St Pete FL 336
26 MAY 2020

UNITED STATES DISTRICT COURT

Southern District of Florida

Ft. Lauderdale Division

RECEIVED JUN 0 2 2020

One East Broward Boulevard Su

Fl

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-cr-60079-COHN

UNITED STATES OF AMERICA

v.

KADEEM WILLINGHAM,

Defendant.
_____/

RESPONSE IN OPPOSITION TO MOTION TO
REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1A)(i)

The United States of America, through the undersigned Assistant United States Attorney, submits this response in opposition to defendant Kadeem Willingham's motion to reduce sentence pursuant to Title 18, United States Code, Section 3582(c)(1A)(i). (ECF No. 139.)[1]

Defendant Willingham seeks compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) based on the length of the mandatory sentences he received for violations of 18 U.S.C. § 924(c) in relation to the terms that would be applied under current law. This Court lacks authority to grant this relief, and the motion should be denied.

I. Background.

On April 16, 2015, a federal grand jury in the Southern District of Florida returned a six count indictment against Willingham and another co-defendant. (ECF No. 8.) The Indictment charged Willingham with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §

[1] After filing his motion, Defendant filed a letter addressed to this Court. (ECF No. 141.) To the extent that the letter requires a response, this brief constitutes the Government's response.

1951 (Count 1), four Hobbs Act robberies, also in violation of 18 U.S.C. § 1951 (Counts 3-6), and one related count of using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 2). (ECF No. 8.)

On June 4, 2015, the federal grand jury superseded the indictment against Willingham and added new co-defendant. (ECF No. 38.) The Superseding Indictment charged Willingham with two counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Counts 1 and 6), four Hobbs Act robberies, in violation of 18 U.S.C. § 1951 (Counts 2, 4, 7, and 11), one attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 9), and five related counts of using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 3, 5, 8, 10, and 12). *Id.*

On July 15, 2015, Willingham pleaded guilty to two counts of 924(c) (Counts 3 and 8). (ECF No. 60.) On September 25, 2015, Willingham was sentenced to a total sentence of 384 months' imprisonment. (ECF No. 84.) This sentence was comprised of two minimum mandatory sentences that must run consecutively. One count was 7 years, and the second count was 25 years.

On October 5, 2016, Willingham filed his first post-conviction motion pursuant to Title 18, United States Code, Section 2255, arguing that Hobbs Act robbery no longer qualified as a predicate "crime of violence," under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (ECF No. 126.) The Court denied the motion. (ECF No. 127.)

On February 22, 2019, Willingham filed his second post-conviction motion pursuant to section 2255. (ECF No. 135.) Willingham's motion was based on the passage of the First Step Act, and he argued for its retroactive application and unlawfulness of imposing consecutive minimum mandatory sentences. *Id.* In denying the motion, this Court determined that Willingham's motion constituted an unauthorized second or successive section 2255 motion and was, thus, subject to

dismissal for lack of jurisdiction. (ECF No. 136.) This Court also determined that—even if Willingham's motion could be construed as a motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(B)—Willingham was unentitled to relief because section 403 of the First Step Act was not made retroactive. This Court explained, "Section 403 does not provide express authorization to modify an existing sentence. Rather, it expressly denies such power." *Id.*

On appeal, in a decision dated March 4, 2020, the Eleventh Circuit affirmed and explained, "[t]he district court concluded correctly that it lacked authority to reduce Willingham's sentence pursuant to section 403." *Willingham v. United States*, 805 F. App'x 815, 817 (11th Cir. 2020).

On April 17, 2020, Willingham filed a request with the Bureau of Prisons for compassionate release pursuant to the First Step Act. (Ex. 1.) On April 24, 2020, the warden denied his request. (Ex. 2.)

On June 5, 2020, Willingham filed the instant motion pursuant to section 3582. Willingham again relies on section 403 and argues that compelling and extraordinary circumstances warrant a reduction in his sentence because section 924(c) no longer imposes a sentence of 25 years after the first 924(c), unless there is a prior conviction for 924(c).

II. Discussion.

The defendant seeks compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), which permits a court to reduce a sentence upon a showing of "extraordinary and compelling circumstances." The defendant asserts that his service of a sentence that would not be imposed under current law presents such a circumstance, allowing the Court to reduce his sentence to time served. However, that circumstance as a matter of law does not by itself allow relief under Section 3582(c)(1)(A)(i), and the motion must be denied.

A. Defendant Effectively Seeks Retroactive Application of the First Step Act

The defendant, in effect, is seeking retroactive application of Section 403 of the First Step Act of 2018, which reduced the penalty for multiple 924(c) violations committed by an offender who had not previously incurred a 924(c) conviction. This Court already rejected that argument when it denied Willingham's second post-conviction motion. (ECF No. 136.) ("Section 403 does not provide express authorization to modify an existing sentence. Rather, it expressly denies such power."). The Eleventh Circuit agreed with this Court on March 4, 2020, when it affirmed this Court's denial and stated, "[t]he district court concluded correctly that it lacked authority to reduce Willingham's sentence pursuant to section 403." *Willingham*, 805 F. App'x at 817.

B. Congress Tasked the Sentencing Commission to Define "Extraordinary and Compelling Circumstances" Allowing Compassionate Release.

Defendant argues the compassionate-release authority in § 3582(c)(1)(A)(i) authorizes what § 403(b) did not. The Act amended § 3582(c)(1)(A)(i) to allow prisoners to seek court intervention (after exhausting administrative remedies) if *inter alia* "(i) extraordinary and compelling reasons warrant such a reduction … [if] such a reduction is consistent with applicable policy statements issued by the Sentencing Commission …."

According to Defendant, those amendments vested this Court with authority to identify what extraordinary and compelling circumstances may warrant a sentence reduction. But that is not true. He ignores that the Act left unchanged a critical statutory command: any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

Congress directed the Sentencing Commission to determine permissible grounds for compassionate release. That directive is expressed in several statutes. *See* 28 U.S.C.

§§ 994(a)(2)(C), 994(t). Here, the applicable policy statement appears at USSG § 1B1.13 and does not provide any basis for a sentence reduction based on concern over sentence length.

This policy statement is binding under § 3582(c)(1)(A)'s express terms. And because § 3582 concerns only possible sentence reductions, not increases, it is not subject to *Booker v. United States*, 543 U.S. 220 (2005) (any guideline increasing a sentence must be advisory). This issue was resolved in *Dillon v. United States*, 560 U.S. 817 (2010), which makes clear that § 3582's requirement—that courts heed the Sentencing Commission's restrictions—is binding.

Dillon concerned a motion for a sentence reduction under § 3582(c)(2), which allows a sentence reduction in limited circumstances—upon the Commission's adoption of a retroactive guideline amendment lowering a guideline range. That subsection allows reduction "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"—language identical to that which appears in § 3582(c)(1)(A). The Court held the Commission's pertinent policy statement concerning retroactive guideline amendments (USSG § 1B1.10) is binding, particularly its directive that a permissible sentence reduction is limited to the bottom of the revised guideline range, without application of *Booker*. *See Dillon*, 560 U.S. at 826. *Dillon* emphasized that a sentence reduction under § 3582(c)(2) is not a resentencing proceeding, but rather "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines," without any possibility of increase in a sentence. *Id.* at 828. The Court stressed the opening passage of § 3582(c)—"[t]he court may not modify a term of imprisonment once it has been imposed except that"—and the specific language of § 3582(c)(2), which gives courts power to "reduce" a sentence, not increase it. For this and other reasons—that the provision applies only to a limited class of prisoners, that Fed. R. Crim. P. 43(b)(4) does not require the defendant's presence at § 3582(c)proceedings, and

that Congress explicitly gave the Sentencing Commission a significant role in determining eligibility—*Dillon* held that *Booker* is inapplicable and the Commission's relevant policy statement is controlling.

Dillon applies in equal force here. A motion for compassionate release rests on an act of Congressional lenity. It appears under the same prefatory language of § 3582(c) ("The court may not modify a term of imprisonment once it has been imposed except that"), and explicitly refers to an action to "reduce" a sentence. It applies only to a limited class of prisoners, and does not warrant a full resentencing procedure. The statutory language is binding: a court may reduce a sentence based on "extraordinary and compelling reasons" only if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i). Defendant's position, that Congress aimed to afford courts discretion to determine in individual cases whether there is a basis for a sentence reduction, simply ignores the statute's text and *Dillon*.

Defendant cites S. Rep No. 98-225 (1983) (Mot. at 12), but it does not contradict the statutes (nor could it). This report was issued in relation to the Comprehensive Crime Control Act of 1984, in which the compassionate-release provision was adopted. At the time, Congress endeavored to abolish indeterminate sentencing and the related parole system, determining that fairness required consistent and predictable sentencing of like offenders. The report observed:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. 98-225, at 55-56. The Committee later described "the unusual case" where a defendant's

circumstances "are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner," and the BOP Director could petition a court to reduce the sentence, and which could be granted if the court "found that reduction was justified by 'extraordinary and compelling reasons' and was consistent with applicable policy statements issued by the Sentencing Commission." *Id.* at 121. These statements fully are consistent with the statutes as ultimately passed, which direct courts to grant compassionate release only as consistent with the policy statement of the Sentencing Commission.

B. The Governing Policy Statement Does Not Permit Relief Based on Disagreement with the Length of a Mandatory Sentence.

With a Congressional mandate, the Sentencing Commission set forth the policy statement governing compassionate release in § 1B1.13. The Commission defined extraordinary circumstances to include medical condition, age, and family responsibilities. Application note 1 fleshed out when "extraordinary and compelling reasons exist," and as relevant to the Motion includes: "(D) Other Reasons.--As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." USSG § 1B1.13 notes.

BOP has issued a regulation defining its own consideration of compassionate-release requests under subsection (D). Program Statement 5050.50, https://www.bop.gov/policy/progstat/5050_050_EN.pdf. This was amended after the Act passed.

Neither the policy statement nor the BOP regulation provide any basis for compassionate release based on reevaluation of the severity of the original sentence. Here, Defendant does not set forth anything more. He asserts that he is rehabilitated (which by itself, under 28 U.S.C. § 994(t), may not be the basis for relief), and that the original mandatory minimum sentence was too extreme

as revealed by the recent statutory amendment. This does not set forth an allowable basis for relief consistent with the Sentencing Commission's policy statement. *See* USSG § 1B1.13.

This is unsurprising. The Sentencing Reform Act ("SRA") calls for consistent sentencing and provides very limited grounds later to alter sentences. Specifically, § 3582(c) prohibits a court from modifying a prison sentence except in three limited circumstances: (1) where extraordinary and compelling reasons warrant a reduction; (2) where another statute or Fed. R. Crim. P. 35 expressly permits a sentence modification; or (3) where a defendant has been sentenced to a prison term based on a sentencing range that subsequently was lowered by the Commission and certain other requirements are met. *See also United States v. Washington*, 549 F.3d 905, 915-16 (3d Cir. 2008) (sentence may be modified only pursuant to § 3582(c) or Rule 35, and a district court otherwise lacks jurisdiction to modify a previously imposed sentence). Under Section 3582(c), "[i]n the sentencing context, there is simply no such thing as a 'motion to reconsider' an otherwise final sentence." *United States v. Celedon*, 353 F. App'x 278, 281 (11th Cir. 2009) (quoting *United States v. Dotz*, 455 F.3d 644, 648 (6th Cir. 2006)).

Consistent with the statutory scheme, the grounds for compassionate release all are based on inherently individual circumstances—health, age, and family responsibilities—and nothing comparable to the propriety of statutory penalties applied to thousands of offenders.

Defendant's sought-after remedy would profoundly alter the carefully designed sentencing scheme. It would afford individual judges the authority, in effect, to exercise a parole power that Congress specifically abolished in 1984, or exercise a clemency function that the Constitution affords exclusively to the President. *See* U.S. Const., Art. II, § 2, cl. 1. If Defendant's scheme were accepted, a judge could, for instance, impose a mandatory sentence as dictated by Congress, and after the judgment became final, then reduce it upon a declaration that imposing that sentence in

the particular case is "extraordinary" and unwarranted. This inevitably would result in varying determinations and undermine the finality of sentences, a concept "which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989).

Defendant's suggested action also clashes with the Constitution. Article I, Section 8 charges Congress with setting criminal penalties. *See Mistretta v. United States*, 488 U.S. 361, 363 (1989); *United States v. Wiltberger*, 18 U.S. 76, 94 (1820) (identifying "the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). Congress' authority in this regard extends to identifying the relative seriousness of offenses, and "in evaluating the magnitude of the harm caused by" an offense, courts "defer to the findings made by Congress." *United States v. MacEwan*, 445 F.3d 237, 249 (3d Cir. 2006). "Whatever views may be entertained regarding severity of punishment … these are peculiarly questions of legislative policy." *Dorszynski v. United States*, 418 U.S. 424, 442 (1974) (ellipsis in original) (citation omitted).

Congress tasked the Sentencing Commission, not the courts, with determining what constitutes an "extraordinary and compelling reason" justifying compassionate release. The Commission's policy statement states four categories of reasons that qualify. Defendant's Motion does not align with any of those reasons. He is statutorily ineligible for compassionate release.

4. The Decisions Supporting Defendant's Position Are Unpersuasive.

Many courts agree with the Government, holding the policy statement remains controlling. *E.g.*, *United States v. Mollica*, 2020 WL 1914956, at *4 (N.D. Ala. Apr. 20, 2020); *United States v. Willingham*, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019) (stating cases finding court discretion "rest upon a faulty premise that the First Step Act somehow rendered the Sentencing

Commission's policy statement an inappropriate expression of policy. This interpretation, and it appears to be an interpretation gleaned primarily from the salutary purpose expressed in the title of Section 603(b) of the First Step Act, contravenes express Congressional intent that the Sentencing Commission, not the judiciary, determine what constitutes an appropriate use of the 'compassionate release' provision"); *United States v. McGraw*, 2019 WL 2059488, *2 (S.D. Ind. 2019); *United States v. Neubert*, 2020 WL 1285624, at *3 (S.D. Ind. Mar. 17, 2020) ("a reduction under § 582(c)(1)(A) is not warranted because the disparity between Mr. Neubert's actual sentence and the one he would receive if he committed his crimes today is not an 'extraordinary and compelling circumstance.' Instead, it is what the plain language of § 403 [of the Act] requires."); *United States v. Ebbers*, 2020 WL 91399, *4 (S.D.N.Y. Jan. 8, 2020); *United States v. Pitts*, 2020 WL 1676365, at *7 (W.D. Va. Apr. 6, 2020) (refusing to commit inappropriate "end run" around non-retroactivity of First Step Act § 403). *Cf. United States v. Rivernider*, 2019 WL 3816671, at *3 (D. Conn. Aug. 14, 2019) ("In support of his claim under subdivision (D), the defendant makes a variety of assertions: his convictions and sentence are unlawful, he has served substantially more time in prison than he expected to serve when he pleaded guilty, he has been mistreated and treated unfairly, and his minor children are suffering in his absence. None of these factors is comparable to the Commission's criteria for compassionate release."). *Accord United States v. Juravel*, 802 F. App'x 474, 477 (11th Cir. 2020) (labeling policy statement in USSG § 1B.10 as binding, and noting Sentencing Commission was "sole" arbiter of when applied).

The first appellate decision agrees with the Government's view. *United States v. Saldana*, 2020 WL 1486892, at *3 (10th Cir. Mar. 26, 2020) held compassionate release is not available based on a change in sentencing law that would produce a lower sentence today, stating: "neither the § 1B1.13 commentary nor BOP Program Statement 5050.50 identify post-sentencing

developments in case law as an 'extraordinary and compelling reason' warranting a sentence reduction." Accordingly, courts lack jurisdiction to grant compassionate release on this basis.

But a number of district courts have found that a court may itself define circumstances permitting compassionate release, unfettered by the Commission's policy statement. Most of these cases present limited reasoning and none address the extensive arguments presented here concerning the clear statutory language. Indeed, none recognize or address the significance of the Supreme Court's *Dillon* decision in addressing this issue. *E.g.*, *United States v. Rodriguez*, 2019 WL 6311388, at *7 (N.D. Cal. Nov. 25, 2019); *United States v. Perez*, 2020 WL 1180719 (D. Kan. Mar. 11, 2020);[2] *United States v. Bucci*, 2019 WL 5075964, at *1 (D. Mass. Sept. 16, 2019); *United States v. Urkevich*, 2019 WL 6037391 (D. Neb. Nov. 14, 2019); *United States v. Beck*, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019); *United States v. Cantu*, 2019 WL 2498923, at *5 (S.D. Tex. June 17, 2019); *United States v. Maumau*, 2020 WL 806121 (D. Utah Feb. 18, 2020); *United States v. Redd*, 2020 WL 1248493 (E.D. Va. Mar. 16, 2020).

In many cases where courts articulated a power to consider circumstances not identified by the Sentencing Commission, the relief was in fact based on traditional considerations of health, age, and family circumstances, which the Commission had identified as proper. *E.g.*, *Cantu*, 2019 WL 2498923, at *1 (inmate was "elderly," and government agreed home confinement warranted); *United States v. Cantu-Rivera*, 2019 WL 2578272 (S.D. Tex. June 24, 2019) (although suggesting the policy statement is not binding, granting release based on the defendant's age and significant

[2] *Perez* granted compassionate release because the sentence was imposed under mandatory guidelines, *and* because the defendant met BOP criteria for relief for older inmates. There, the government stated only the availability of relief was unsettled, while acknowledging the "majority" view permitting the court to replace BOP to determine if eligible for compassionate release. The government did not present the arguments offered here. Indeed, in most of the adverse decisions cited here, the government regrettably did not present all the arguments stated here.

health issues, as well as because he would receive a lower sentence today).

In recent months, courts have granted the relief Defendant seeks, and reduced sentences based on pre-Act § 924(c) charges. *See supra*; *see also, e.g.*, *United States v. Wade*, 2020 WL 1864906 (C.D. Cal. Apr. 13, 2020); *United States v. Haynes*, 2020 WL 1941478 (E.D.N.Y. Apr. 22, 2020); *United States v. Marks*, 2020 WL 1908911, at *7 (W.D.N.Y. Apr. 20, 2020); *United States v. McPherson*, 2020 WL 1862596 (W.D. Wash. Apr. 14, 2020). These decisions mostly rely on earlier cases, without tackling the significant and insuperable barriers explained above.

Cantu presents one of the more extensive discussions, and is most frequently cited (including by Defendant). It devotes most of the pertinent discussion, 2019 WL 2498923, at *3-5, to the proposition that the portion of the guideline commentary that conditions relief on a BOP motion, consistent with the earlier statute, no longer is operative, as a policy statement may not conflict with a governing statute. From that premise, however, *Cantu* unjustifiably concludes "that when a defendant brings a motion for a sentence reduction under the amended [§ 3582(c)(1)(A)], the Court can determine whether any extraordinary and compelling reasons other than those delineated in USSG § 1B1.13 cmt. n.1(A)-(C) warrant granting relief." *Id.* at *5.

In support, *Cantu* relies first on the proposition that Congress aimed to increase the amount of compassionate release, and the fact that the title of First Step Act § 603(b) is "Increasing the Use and Transparency of Compassionate Release." But as *United States v. Lynn*, 2019 WL 3805349, at *3-4 (S.D. Ala. Aug. 13, 2019) explained in its lengthy rejection of *Cantu*, there is much in the Act that expands the availability of compassionate release, from the authorization of direct defense requests to a sentencing court, to provisions requiring notification and assistance to prisoners who may prepare requests. Nothing in the Act, however, revises the explicit directives in §§ 994(t) and 3582(c)(1)(A) requiring compliance with the Sentencing Commission's policy

statement. And as *Lynn* correctly concluded, "[i]f the policy statement needs tweaking in light of Section 603(b), that tweaking must be accomplished by the Commission, not by the courts." 2019 WL 3805349, at *4 & n.5 (noting it is not "easy to believe that Congress, which plainly desired the Commission to pour content into 'extraordinary and compelling reasons,' intended to eliminate that content by allowing defendants to move for compassionate release.'").

Next, *Cantu* relies on USSG § 1B1.13 application note 1(D), which authorizes a reduction if, "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." 2019 WL 2498923, at *4-5. *Cantu* suggests that because BOP no longer is the "sole determiner of what constitutes an extraordinary and compelling reason," application note 1(D) "is not applicable when a defendant requests relief under § 3582(c)(1)(A)," and the district court, rather than the BOP, now may identify extraordinary and compelling reasons warranting a sentence reduction other than those set forth elsewhere in the policy statement. *Id.* Neither conclusion follows. First, even where a defendant moves for compassionate release, it remains sensible to permit BOP to use its expertise to identify additional extraordinary circumstances warranting compassionate release, whether specific to the defendant or applicable generally. And second, even if application note 1(D) does not apply where a defendant moves for compassionate release, *Cantu* does not explain how that note or any other portion of § 1B1.13 grants courts unfettered authority to determine what constitutes an extraordinary and compelling reason untethered to those set forth elsewhere in the policy statement. In other words, even after the Act, Congress has "left the task of fleshing out the universe of extraordinary and compelling reasons to the Commission, not the judiciary. The Court is not freed by congressional silence but bound by Commission policy statements that Congress has expressly required the courts to

follow." *Lynn*, 2019 WL 3805349, at *5. *See Ebbers*, 2020 WL 91399, at *4 ("Congress in fact only expanded access to the courts; it did not change the standard.").

In *Maumau*, the court took a different tack, stating:

> in reaching this conclusion, [the court's] reasoning is slightly different from some of the other district courts …. A few of those cases frame the First Step Act as shifting discretion from the Bureau of Prisons Director to the district courts. But in this court's view, the district courts have always had the discretion to determine what counts as compelling and extraordinary. The courts have never been a rubber stamp for compassionate release decisions made by the Bureau of Prisons…. The key change made by the First Step Act is not a redistribution of discretion, but the removal of the Director's role as a gatekeeper.

Maumau, 2020 WL 806121, at *4 n.5 (citations omitted). But *Maumau*, like the decisions agreeing with it,[3] ignores the statutory command in § 3582(c)(1)(A)(i) that, when exercising its discretion, a district court may only grant a reduction that "is consistent with applicable policy statements issued by the Sentencing Commission." *Maumau* never addresses that provision, or the Supreme Court's interpretation in *Dillon*. That provision is why a court cannot grant relief based solely on disagreement with sentence length, or based on applying an otherwise non-retroactive change in sentencing law (bases the Sentencing Commission has not authorized).

The decisions we criticize here are ushering in a new era, in which courts incorrectly are assuming a sweeping parole power that Congress never declared, certainly not in the compassionate-release statute. *Marks*, relied on by Defendant, states, "I recognize that the Court does not sit as a super parole board. The Court has no inherent power to grant clemency to previously sentenced defendants, whether based on their good conduct in prison or for any other

[3] These adverse decisions ignore *Dillon* and, in several cases, erroneously state that this guideline statement is advisory due to *Booker*. *E.g.*, *Haynes*, 2020 WL 1941478 at *12 ("*Booker* establishes that the Guidelines and their commentary are unquestionably not binding on the Courts.").

reasons, no matter how compelling those reasons might seem." 2020 WL 1908911, at *16. The court then proceeded to do exactly that, declaring that "Congress has expanded courts' powers to modify defendants' sentences." *Id.* at *17. That expansion is not expressed anywhere in the Act, which, as relevant here, merely authorized inmates to petition for compassionate release directly, subject to terms set by the Sentencing Commission.

We request that this Court not follow these (and other) mistaken rulings.

D. The Defendant Should Not Receive Relief.

Even if the defendant were statutorily eligible for consideration of compassionate release (which he is not), such relief is always discretionary, and this Court should exercise its discretion to deny it. In the offense conduct, Defendant brandished a firearm in each of the five robberies he committed. He was arguably the leader during these robberies. He formed two separate robbery teams. The first was with Tyrone Coley. After committing two armed robberies with Coley, Coley was arrested. Undeterred that Coley was facing 30+ years in prison, Defendant joined forces with Donell Barkes and committed three more armed robberies. During one of the robberies, Barkes stepped on two of the victims' heads.

Although Defendant only pleaded to two 924(c)s, his factual proffer admits to committing the five armed robberies while brandishing a firearm. For his actions, Defendant was facing 107 years of minimum mandatories, plus the guideline range for the Hobbs Act robberies. Had the defendant committed the same crimes today, he would be facing a minimum mandatory sentence of 35 years imprisonment, followed by the guideline sentence for Hobbs Act robbery, which is still above the 32-year-sentence that he received.

Further, Title 18, United States Code, Section 3553(a) factors strongly disfavor a sentence reduction. Although commendable that Defendant has behaved well in prison[4] and has worked to educate himself, this cannot erase the circumstances of his crimes. Even assuming Defendant's facts tip some § 3553(a) factors in his favor, they are outweighed by the combined force of several other factors: "the nature and circumstances of the offense" and "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law ... to provide just punishment for the offense ... to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." Defendant robbed five stores at gunpoint and traumatized many victims. That behavior is deserving of a lengthy prison term.

III. Conclusion.

The defendant does not set forth any basis for compassionate release authorized by law, and his motion for relief should therefore be denied.

Respectfully submitted,

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

By: /s/ *Daniel Cervantes*

DANIEL CERVANTES
Assistant United States Attorney
Florida Bar No.40836
U.S. Attorney's Office - SDFL
99 N.E. 4th Street
Miami, FL 33132-2111
Telephone: (305) 961-9031
Facsimile: (305) 536-4699
Email: daniel.cervantes@usdoj.gov

[4] Willingham's Discipline History (Ex. 3).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 25, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ *Daniel Cervantes*
DANIEL CERVANTES

Before completing this application, please review Program Statement 5050.50, Compassionate Release/Reduction in Sentence (RIS), available in the law library.

REDUCTION IN SENTENCE APPLICATION

NAME: Kadeem Willingham **REG No.** 06069-104 **Date:** 4/25/20

WHO IS YOUR PHYSICIAN (circle): Franco Li Bonnet-Engebretson Venuto

Choose One Criteria: You can only apply under one criteria.

Extraordinary/Compelling Circumstances:

- ☐ Medical Circumstances:
  - ☐ Terminal Medical Condition – Terminal Diagnosis with 18 months or less life expectancy.
  - ☐ Debilitated Medical Condition – Illness that has you partially (50%) or completely (100%) disabled.
- ☐ Elderly Inmates with a Medical Condition:
  - ☐ "New Law" Elderly Inmates – Have to have served 30 years of a sentence.
  - ☐ Elderly with Medical Conditions – 65 yrs. old or older, a deteriorating medical condition, served 50% of your sentence.
- ☐ Elderly Inmates without a Medical Condition: - 65 yrs. old or older, Served 10 yrs. or 75% of your sentence (which is greater)
- ☐ Death or Incapacitation of the Family Member Caregiver of an inmate's dependent child: -provide verifiable documentation the child is "suddenly" without a caretaker, the family member is in an incapacitated state and is unable to care for the child.
- ☐ Incapacitation of a Spouse or Registered Partner: -Provide verifiable medical documentation of incapacitated state.
- ☒ Other:-Extraordinary and Compelling Circumstance

To be filled out by Inmate:

Briefly describe your medical condition or extraordinary and compelling circumstance:

An injustice of facing a term of incarceration longer than Congress now deems warranted for the Stacking of the 924(c). Hence, the First Step Act.

If you have applied before, has anything changed in your medical condition since your last application? _____

Proposed Release Plan (**must have ALL of the following**):

Name and contact information of who you will live with: Antwan Proctor and Ashley Grove 912-509-9847 or 765-374-3262

When was the last time you spoke to this person concerning your release plan? This Week, April 25th

Is this person willing to care for you? Yes

Address of where you will be living: 2415 Fletcher Street Anderson, Indiana 46016

Where will you receive your medical treatment (if applicable)? _____

How will you pay for your treatment (if applicable)? _____

Additional Comments: If I were sentenced today I could only receive One 924(c) charge, being that I never had a prior conviction of one before this. That would result in me having a 7yr conviction rather than a 32yr conviction which I am presently serving.

Before completing this application, please review Program Statement 5050.50, Compassionate Release/Reduction in Sentence (RIS), available in the law library.

If the inmate has not provided adequate information and documentation as set forth on this form and in P.S 5050.50, the Warden may deny the inmate's request at the institution level.

For Staff Use Only:

Before completing this review, please read Program Statement 5050.50, Compassionate Release/Reduction in Sentence (RIS), updated January 17, 2019. Please note that inmates should, under most circumstances, request a RIS is writing before an eligibility review is completed. Inmates may qualify for a RIS under several categories as outlined below:

MEDICAL WITH A TERMINAL DIAGNOSIS (Category: Med Terminal)
1. Does the inmate have a documented medical diagnosis from a physician with a prognosis of life expectancy of 18-months or less?
Yes No
If yes, list the terminal diagnosis. If no, inmate does not qualify under this category.

_____

MEDICAL WITH A NON-TERMINAL DIAGNOSIS (Category: Med Non-Terminal)
1. Does the inmate have a documented medical diagnosis of an incurable, progressive illness or has the inmate suffered a debilitating injury from which he/she will not recover?
Yes No

2. AND, is the inmate completely disabled, unable to perform activities of daily living and totally confined to a bed or chair OR is the inmate only capable of limited self-care and confined to a bed or chair more than 50% of waking hours?
Yes No

If "Yes", list the medical diagnosis. If "No" is checked for either of the above items the inmate does not qualify under this category.

_____

INMATES AGE 65 OR OLDER WITH A MEDICAL CONDITION (Category: Elderly Med Condition/65/50%)
1. Has inmate served at least 50% of their sentence? (If no, inmate does not qualify under this category. If yes, proceed.)
Yes No

2. Does inmate suffer from a documented chronic or serious medical condition?
Yes No

3. Has the inmate experienced a deteriorating mental or physical health condition that substantially diminishes his/her ability to function in a correctional environment?
Yes No

4. Will conventional treatment provide a substantial improvement to the inmate's mental or physical condition? (If yes, inmate does not qualify under this category)
Yes No

If "Yes" on item 2 or 3, list the condition. (Either item 2 or 3 above must be checked "Yes" for inmate to qualify under this category.)

_____

INMATES AGE 65 OR OLDER REGARDLESS OF MEDICAL CONDITION (Category: Elderly Other/65/75%)
1. Has inmate served the greater of 10 years or 75% of their term of imprisonment to which they were sentence? (If no, inmate does not qualify under this category)
Yes No

CAREGIVER (Non-Med Caregiver)
If an inmate is applying for a RIS due to the death or incapacitation of their child's caregiver or the incapacitation of their spouse or registered partner, refer him/her to PS 5050.50 for the required documentation. Staff are not responsible for gathering the inmate's supporting documentation.

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISO**

TO: (Name and Title of Staff Member) Mr. Perry Unit team	DATE: 4/17/20
FROM: Kadeem Willingham	REGISTER NO.: 06069-104
WORK ASSIGNMENT: N/A	UNIT: C-2

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Can you look into what I would need to file for Compassionate release under the Stacking of the 924(c) in the first step act. 2 individuals have gotten relief due to the harshness of their Sentence. It was stated that if they were sentenced today they wouldn't have received the amount of time they had. I'm in a similar Situation due to the Stacking. Let me know what I would need to do. Please and thank you Sir.

(Do not write below this line)

DISPOSITION:

Signature Staff Mem

Response to Inmate Request to Staff

Inmate: WILLINGHAM, Kadeem
Register Number: 06069-104
Institution / Housing Unit: COM / C-2

This is in response to your Inmate Request to Staff Member. You have requested to be considered for early release under 18 U.S.C. 3582 (c)(1)(A). You are requesting release based on extraordinary and compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.

A thorough review of your request was completed. Utilizing Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), dated January 17, 2019, you have not demonstrated extraordinary or compelling circumstances which would warrant a reduction in sentence under BOP guidelines. To the extent you believe your sentence should be reduced pursuant to the sentence reform provisions of the First Step Act of 2018, you may raise those concerns directly with your sentencing court. The Federal Bureau of Prisons has no authority to reduce a sentence pursuant to those provisions or based on sentence length.

Accordingly, your request is denied. If you are not satisfied with this response, you may appeal through the Administrative Remedy Program.

C. M. Rijos, Acting Warden

4/24/20
Date

PROVIDED COPY TO I/M WILLINGHAM ON 4-29-2020. A. PERRY, CSW
AP

```
  MIAFH          *          INMATE DISCIPLINE DATA          *     06-09-2020
PAGE 001 OF 001 *     CHRONOLOGICAL DISCIPLINARY RECORD     *     17:34:48

REGISTER NO: 06069-104 NAME..: WILLINGHAM, KADEEM
FUNCTION...: PRT       FORMAT: CHRONO    LIMIT TO ___ MOS PRIOR TO 06-09-2020

--------------------------------------------------------------------------------
REPORT NUMBER/STATUS.: 3392360 - SANCTIONED INCIDENT DATE/TIME: 04-25-2020 1703
UDC HEARING DATE/TIME: 04-30-2020 1415
FACL/UDC/CHAIRPERSON.: COM/C 1-2/T. WEST
REPORT REMARKS.......: UDC FINDS INMATE GUILTY BASED ON HIS ADMISSION OF THE PR
                       OHIBITED ACT
   328  GIVING/ACCEPTNG MONEY W/O AUTH - FREQ: 1
        LP EMAIL   / 30 DAYS / CS
                   FROM: 05-01-2020  THRU: 05-30-2020
        COMP:    LAW:    GUILTY-LP EMAIL 30 DAYS TO BEGIN 05-01-2020
```

G0005 TRANSACTION SUCCESSFULLY COMPLETED - CONTINUE PROCESSING IF DESIRED

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60079-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KADEEM WILLINGHAM,

Defendant.
_____:

DEFENDANT'S REPLY TO GOVERNMENT'S REPSONSE IN OPPOSITION TO DEFEDANT'S MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3285(c)(1)(A)(i)

The defendant, Kadeem Willingham, through undersigned counsel, replies to the government's response in opposition to Defendant's Motion to Reduce Sentence pursuant to 18 U.S.C. § 3285(c)(1)(A)(i), and in support thereof, Mr. Willingham states:

Introduction

On September 25, 2015, this Court sentenced Mr. Willingham to a term of 384 months (32 years) imprisonment after Mr. Willingham pled guilty to two counts of brandishing a firearm, in violation 18 U.S.C. § 924(c)(1)(A)(ii). DE 84. Pursuant to the law that existed at the time Mr. Willingham was sentenced, the Court sentenced Mr. Willingham to a mandatory 7 years imprisonment for the first brandishing count, followed by a mandatory consecutive 25 years imprisonment for the second brandishing count. *See* 18 U.S.C. §§ 924(c)(1)(A)(ii) and (C) (West 2015).

In December 2018, Congress amended section 924(c) to ensure the twenty-five year consecutive term for a successive section 924(c) offense does not apply unless the defendant had a previous, final section 924(c) conviction at the time of the offense. *See* First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5222, § 403; 18 U.S.C. § 924(c)(1)(C)(West 2019). Under the current version of the law, a court is not required to impose a consecutive 25-year imprisonment for a second brandishing offense when the government charges the first and second brandishing offense in the same indictment.

Mr. Willingham seeks a reduction of sentence pursuant to 18 U.S.C. §3582(c). DE 139. As grounds for his reduction, Mr. Willingham argues that Congress never intended that sentences for § 924(c) convictions be stacked in the manner that produced the sentence that the Court imposed in his case. Willingham further argues that his educational and rehabilitative accomplishments; his disciplinary record and his remorsefulness are reasons for reducing his sentence.

The government opposes the reduction. The government argues that the fact that Mr. Willingham was sentenced to a term of imprisonment that would not likely be imposed if he was sentenced today is not grounds for a sentence reduction under § 3582(c)(1)(A)(i). The government further argues that even if Mr. Willingham was statutorily eligible for consideration of compassionate release, this Court should exercise its discretion and deny Mr. Willingham's motion.

Argument and Memorandum of Law

I. This Court may independently assess whether extraordinary and compelling reasons for a sentence reduction exist under 18 U.S.C. § 3582

Federal courts may reduce a prisoner's sentence under the circumstances outlined in 18 U.S.C. § 3852(c). Under § 3852(c)(1)(A)(i), a court may reduce a prisoner's sentence "if it finds that" (1) "extraordinary and compelling reasons warrant such a reduction" and (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission. *United States v. Rodriguez*, 2020 WL 1627331, at *2 (E.D. Pa. Apr. 1, 2020).

Before the passage of the First Step Act, incarcerated people seeking compassionate release could only petition the Bureau of Prisons, not the district courts directly. *United States v. Adeyemi*, 2020 WL 3642478, at *9 (E.D. Pa. July 6, 2020); *See* P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). Congress passed and President Trump signed the First Step Act in 2018, a landmark piece of criminal-justice reform legislation that "amended numerous portions of the U.S. Code to promote rehabilitation of prisoners and unwind decades of mass incarceration. *United States v. Rodriguez*, 2020 WL 1627331, at *2 (E.D. Pa. Apr. 1, 2020).

The government argues that because § 3582(c)(1)(A)(ii), provides that "any sentence reduction must be consistent with applicable policy statements issued by the Sentencing Commission, this Court has no authority to identify what

extraordinary and compelling circumstances may warrant a sentence reduction. *See* (DE 143:4). A vast majority of courts that have considered the issue have rejected the government's argument. *See Adeyemi*, 2020 WL 3642478, at *10, n. 123 (compiling cases).

It is true that § 3852(c)(1)(A) requires courts to act consistently with applicable policy statements under the Sentencing Guidelines, but the Sentencing Commission has not issued a policy statement that addresses prisoner-filed motions since the First Step Act was enacted. *Rodriguez*, 2020 WL 1627331, at *4; *United States v. Beck*, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019). While the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment of whether "extraordinary and compelling reasons" warrant a sentence reduction under § 3582(c)(1)(A)(i). An interpretation of the old policy statement as binding on the new compassionate release procedure is likely inconsistent with the Commission's statutory role. *Beck*, 425 F. Supp. 3d at 579.

The government argues that the United States Supreme Court in *Dillon v. United States*, 560 U.S. 817 (2010) supports its position that any sentence reduction pursuant to § 3582(c) must be consistent with the Sentencing Commission's policy statements. The government applies *Dillion* too broadly.

In *Dillon,* the Supreme Court held *Booker's* reasoning inapplicable to section 3582(c)(2) sentence modification proceedings when the Commission adopts a retroactive guideline amendment lowering a guideline range because, as a congressional act of lenity, the reduction in sentence under the statute is not

constitutionally compelled. 560 U.S. 817 at 828. The Supreme Court relied on the "narrow scope" of Section 3582(c)(2)'s text, along with the "substantial role Congress gave the Sentencing Commission with respect to sentence-modification proceedings," to conclude that a sentencing reduction under Section 3582(c)(2) was not a "resentencing" proceeding. 560 U.S. 817 at 826. Both those considerations are absent here.

In *Stinson v. United States*, 508 U.S. 36, 45-47 (1993), the Supreme Court made Commission commentary explaining a guideline binding unless it violates the Constitution or a federal law or is plainly erroneous or inconsistent with the guideline. In *United States v. LaBonte*, 520 U.S. 751 (1997), the Supreme Court applied *Stinson* to invalidate Sentencing Commission's commentary contradictory of the plain language of a Congressional directive.

The Sentencing Commission Policy statements and commentary applicable to 18 U.S.C. § 3582(c)(1)(A) appears at U.S.S.G. § 1B1.13. Mr. Willingham argues that portions of the Sentencing Commission's commentary to policy statement section 1B1.13—including the introductory phrase providing only the Director of the Bureau of Prisons authority to define extraordinary and compelling reasons under Note 1(D)—is not authoritative because it contravenes federal law. *See Adeyemi*, 2020 WL 3642478 at * 13. In addition, the First Step Act amendment allowing incarcerated people to petition directly to the courts for compassionate release as long as they fulfilled a minimal exhaustion requirement "removed the Bureau of Prisons exclusive gatekeeper role. *Id.* Congress's decision not to add a

provision reserving the determination of extraordinary and compelling reasons to the Director of the Bureau of Prisons indicates it did not intend to limit the court's authority in such a manner. *Id.*

As amended, § 3582(c)(1)(A)(i) provides in part: "the court ... may reduce the term of imprisonment ... if it finds that ... extraordinary and compelling reasons warrant such a reduction." The plain language of the statute requires the court—not the Director of the Bureau of Prisons—to "find" extraordinary and compelling reasons. Only after this sentence does Congress require the court to make decisions "consistent with applicable policy statements issued by the Sentencing Commission.

The plain statutory language allows the court–not the Commission or the Bureau of Prisons—to determine whether extraordinary and compelling reasons exist. Congress's subsequent instruction that courts must only reduce sentences consistent with applicable Commission policy statements does not alter this conclusion. Congress instead requires courts to consult the Commission's policy statements, leaving the ultimate decision to judges. *Adeyemi*, 2020 WL 3642478, at *15. Accordingly, this Court may determine whether extraordinary or compelling reasons exist in Mr. Willingham's case.

This Court consider the length of Mr. Willingham's sentence in conjunction with other factors to determine whether there exist extraordinary and compelling reasons to reduce Mr. Willingham's sentence.

It is not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis. *Adeyemi*, 2020 WL 3642478 at *21; *United States v. Maumau*, 2020 WL 806121, at *7 (D. Utah Feb. 18, 2020). Several courts have found that the amendment to section 924(c) stacking provisions when combined with other factors was an extraordinary and compelling reason to reduce a sentence pursuant to §3582(c)(1)(A)(i). *See United States v. Adeyemi*, WL 3642478 (E.D. Pa. July 6, 2020); *United States v. Haynes*, 2020 WL 1941478 (E.D.N.Y. Apr. 22, 2020); *United States v. Marks*, 2020 WL 1908911 (W.D.N.Y. Apr. 20, 2020); *United States v. Urkevich*, 2019 WL 6037391 (D. Neb. Nov. 14, 2019).

Mr. Willingham does not rely solely on the length of his sentence in seeking a reduction under §3582 but other factors consistent with 18 U.S.C. § 3553 and Bureau of Prisons Program Statement Program Statement 5050.50. In January 2019, after the passage of the First Step Act, the Bureau of Prisons issued Program Statement 5050.50 to expand on the enumerated reasons for release, but it also listed "other" factors the Bureau of Prisons should consider in determining whether extraordinary and compelling reasons exist. The other factors include: the nature and circumstances of the defendant's offense, his criminal history, comments from victims, unresolved detainers, supervised release violations, institutional adjustment, disciplinary infractions, personal history derived from the presentence investigation report, length of sentence and amount of time served, current age and

age at the time of offense and sentencing, release plans, and "[w]hether release would minimize the severity of the offense. U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5050.50, January 17, 2018, available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf (last accessed July 30, 2020).

In this case, Mr. Willingham brandished a firearm while committing robberies and concedes that he committed serious offense. However, although the law defines robberies as violent offenses, the robberies did not result in anyone sustaining serious injuries.

To say Mr. Willingham had a difficult childhood would be an understatement. He never knew his father and his mother was a lifelong drug addict. Presentence Investigation Report (PSIR) ¶ 46. Indeed Mr. Willingham was born with drugs in his system. *Id*. From age 5 to 16, Mr. Willingham was in foster care. PSIR ¶ 48. During his stay in foster care, he was sexually abused on multiple occasions. PSIR ¶ 49.

Mr. Willingham committed the robberies when he was 22 years old and had zero criminal history points when the Court imposed the sentence. At the risk of sounding cliché, many defendants who commit homicides are sentenced to far less time than the 32 years that Mr. Willingham received for his crimes.

Mr. Willingham has completed many educational and rehabilitative courses, including completing his graduate equivalency diploma, ethics in business, and critical thinking. Mr. Willingham's educational data transcript and summary

reentry plan is attached hereto as exhibits 1 and 2. Mr. Willingham has had only one minor disciplinary infraction during his term of incarceration. Mr. Willingham's disciplinary record is attached hereto as exhibit 3.

Mr. Willingham advised the Court in his *pro se* motion that upon release he intends to reside with his God-brother in Indiana. Mr. Willingham has also expressed his remorsefulness (DE 39).

In a letter filed with the Court, Mr. Willingham writes that when he was sentence in 2015, the Court stated that it wished there was something the Court could do to help Mr. Willingham but his hands were tied. Undoubtedly, the Court was referring to the law, as it existed when the Court sentenced Mr. Willingham in 2015. However, the Court is no longer constrained by the law as it existed in 2015 and may under the §3582(c)(1)(A)(i) as amended by the First Step Act, impose a more reasonable sentence. *See Maumau,* 2020 WL 806121 at *8 (a downward adjustment may be made even it results in Mr. Willingham's continued incarceration).

WHEREFORE, the Defendant, Kadeem Willingham, respectfully request that the Court reduce his sentence pursuant to 18 U.S.C. §3285(c)(1)(A)(i).

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: s/ ***Daryl E. Wilcox***
Daryl E. Wilcox
Assistant Federal Public Defender
Florida Bar No. 838845
One E. Broward Boulevard, Suite 1100
Fort Lauderdale, FL 33301-1842
(954) 356-7436
Daryl_Wilcox@fd.org, E-mail

CERTIFICATE OF SERVICE

I HEREBY certify that on July 31, 2020 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

By: ***s/Daryl E. Wilcox***
Daryl E. Wilcox

COMF9 * INMATE EDUCATION DATA * 07-16-2020
PAGE 001 OF 001 * TRANSCRIPT * 14:54:50

REGISTER NO: 06069-104 NAME..: WILLINGHAM FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: COM-COLEMAN MED FCI

EDUCATION INFORMATION

FACL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
COM	ESL HAS	ENGLISH PROFICIENT	01-14-2016 1518	CURRENT
COM	GED HAS	COMPLETED GED OR HS DIPLOMA	03-18-2016 0904	CURRENT

EDUCATION COURSES

SUB-FACL	DESCRIPTION	START DATE	STOP DATE	EVNT	AC	LV	HRS
COM	FOOTBALL SPORTS RULES	09-13-2019	09-16-2019	P	C	P	4
COM	BASKETBALL SPORTS RULES	02-20-2019	03-02-2019	P	C	P	4
EST	ETHICS IN BUSINESS (EM #2)	04-24-2018	06-27-2018	P	C	P	8
EST	SELECTIVE SERVICE (CR#4)	01-19-2018	01-19-2018	P	C	P	1
EST	CRITICAL THINKING (PG #6)	08-01-2017	08-29-2017	P	C	P	8
EST	HOUSEKEEPING APPRENTICESHIP #6	06-12-2016	02-02-2017	P	C	A	2000
EST	INFECTIOUS DISEASE PREVT(HN#1)	01-28-2016	01-28-2016	P	C	P	1

HIGH TEST SCORES

TEST	SUBTEST	SCORE	TEST DATE	TEST FACL	FORM	STATE
TABE M	LANGUAGE	8.6	03-08-2016	EST	9	
	MATH APPL	7.5	03-08-2016	EST	9	
	MATH COMP	7.8	03-08-2016	EST	9	
	READING	9.9	03-08-2016	EST	9	

G0000 TRANSACTION SUCCESSFULLY COMPLETED

Summary Reentry Plan - Progress Report

Dept. of Justice / Federal Bureau of Prisons

Plan is for inmate: WILLINGHAM, KADEEM 06069-104

SEQUENCE: 00191994

Report Date: 07-18-2020

Facility:	COM COLEMAN MED FCI	Custody Level:	IN
Name:	WILLINGHAM, KADEEM	Security Level:	MEDIUM
Register No.:	**06069-104**	Proj. Rel Date:	07-23-2042
Quarters:	C03-065U	Release Method:	GCT REL
Age:	27	DNA Status:	MIM14312 / 04-20-2015
Date of Birth:	10-28-1992		

Contact Information

Release contact & address

Antwon Proctor, BROTHER

2415 Fletcher Street, Anderson, IN 46016 US

Phone (mobile) : (912) 572-4911

Phone (Work) : (765) 374-8262

Offenses and Sentences Imposed

Charge	Terms In Effect
18:924(C)(1)(A)(II) BRANDISHING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE (CT3)	84 MONTHS
18:924(C)(1)(A)(II) BRANDISHING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE (CT8)	300 MONTHS

Date Sentence Computation Began: 09-25-2015

Sentencing District: FLORIDA, SOUTHERN DISTRICT

Days FSGT / WSGT / DGCT	Days GCT or EGT / SGT	Time Served	+ Jail Credit	- InOp Time
0 / 0 / 0	270	Years: 5 Months: 3 Days: 2	+ 161 JC	- 0 InOp

Detainers

Detaining Agency	Remarks

NO DETAINER

Program Plans

He arrived at COM on September 27, 2018, as a nearer release transfer from FCI Estill, South Carolina. During his Program Review, he was encouraged to enroll in Job Fair series, Driver's License class, Money Smart, Personal Finance. Enroll in Vocational program and/or work in UNICOR to obtain employment skills for release. Enroll in parenting program. Save money in pre-release inmate account and have a copy of Birth Certificate, Social Security card and Driver's License sent in to Unit Team. He was encouraged to satisfy his court imposed financial obligations through participation in the Inmate Financial Responsibility Program and maintain clear conduct.

Current Work Assignments

Facl	Assignment	Description	Start
COM	C2 UNT EXT	C2 UNIT ORDERLY - EXTRA	06-22-2019

Work Assignment Summary

He was encouraged to obtain a work assignment and receive good-outstanding work reports from his detail supervisor.

Current Education Information

Facl	Assignment	Description	Start
COM	ESL HAS	ENGLISH PROFICIENT	01-14-2016
COM	GED HAS	COMPLETED GED OR HS DIPLOMA	03-18-2016

Education Courses

SubFacl	Action	Description	Start	Stop
COM	C	FOOTBALL SPORTS RULES	09-13-2019	09-16-2019
COM	C	BASKETBALL SPORTS RULES	02-20-2019	03-02-2019
EST	C	ETHICS IN BUSINESS (EM #2)	04-24-2018	06-27-2018
EST	C	SELECTIVE SERVICE (CR#4)	01-19-2018	01-19-2018
EST	C	CRITICAL THINKING (PG #6)	08-01-2017	08-29-2017

Summary Reentry Plan - Progress Report

Dept. of Justice / Federal Bureau of Prisons

Plan is for inmate: WILLINGHAM, KADEEM 06069-104

SEQUENCE: 00191994

Report Date: 07-18-2020

SubFacl	Action	Description	Start	Stop
EST	C	HOUSEKEEPING APPRENTICESHIP #6	06-12-2016	02-02-2017
EST	C	INFECTIOUS DISEASE PREVT(HN#1)	01-28-2016	01-28-2016

Education Information Summary

He obtained his High School Diploma/GED prior to incarceration. He has completed the majority of the classes and programs requested during programs reviews. He has demonstrated the ability to improve his current incarceration and prepare himself for outside employment.

Discipline Reports

Hearing Date	Prohibited Acts
04-30-2020	328 : GIVING/ACCEPTNG MONEY W/O AUTH

Discipline Summary

He received one moderate severity incident report during his incarceration. His interaction with staff and inmates is appropriate and no management concerns are noted at this time.

ARS Assignments

Facl	Assignment	Reason	Start	Stop
COM	A-DES	TRANSFER RECEIVED	09-27-2018	CURRENT
EST	A-DES	US DISTRICT COURT COMMITMENT	12-29-2015	09-05-2018

Current Care Assignments

Assignment	Description	Start
CARE1	HEALTHY OR SIMPLE CHRONIC CARE	10-19-2015
CARE1-MH	CARE1-MENTAL HEALTH	01-04-2016

Current Medical Duty Status Assignments

Assignment	Description	Start
REG DUTY	NO MEDICAL RESTR--REGULAR DUTY	10-21-2015
YES F/S	CLEARED FOR FOOD SERVICE	10-21-2015

Current PTP Assignments

Assignment	Description	Start

NO ASSIGNMENTS

Current Drug Assignments

Assignment	Description	Start
ED COMP	DRUG EDUCATION COMPLETE	10-14-2016

Physical and Mental Health Summary

He is a Care level 1 medical and Care level 1 mental health. He completed drug education. He is on regular duty medical status with no restrictions. Psychology staff have not expressed mental health concerns at this time

FRP Details

Most Recent Payment Plan

FRP Assignment: PART FINANC RESP-PARTICIPATES Start: 01-19-2016

Inmate Decision: **AGREED** **$25.00** Frequency: **QUARTERLY**

Payments past 6 months: **$0.00** Obligation Balance: **$5,496.00**

Financial Obligations

No.	Type	Amount	Balance	Payable	Status
1	ASSMT	$200.00	$150.00	IMMEDIATE	AGREED
		*** NO ADJUSTMENTS MADE IN LAST 6 MONTHS *****			
2	REST NV	$5,346.00	$5,346.00	IMMEDIATE	AGREED
		*** NO ADJUSTMENTS MADE IN LAST 6 MONTHS *****			

Financial Responsibility Summary

Summary Reentry Plan - Progress Report

Dept. of Justice / Federal Bureau of Prisons

Plan is for inmate: WILLINGHAM, KADEEM 06069-104

SEQUENCE: 00191994

Report Date: 07-18-2020

The Southern District of Florida ordered him to pay a $200.00 felony assessment fee and $5346.00 in restitution. He is actively participating in FRP and has a remaining balance of $150.00 and $5346.00 respectively. He is encouraged to make payments in a timely manner.

Release Planning

He is serving a 384-month sentence for a Brandishing a Firearm in Furtherance of a Crime of Violence. He plans to reside with his brother in Anderson, Indiana. This release plan has not been approved by the USPO. He intends to seek employment upon release. In preparation for RRC placement, employment, and reintegration in the community, he was encouraged to participate in Release Preparation Program as well as secure his social security card and birth certificate. The RPP course includes Interview Skills, USPO Reporting Requirements, Release and Gratuity, and Life Skills.

General Comments

** No notes entered **

Summary Reentry Plan - Progress Report

Dept. of Justice / Federal Bureau of Prisons

Plan is for inmate: WILLINGHAM, KADEEM 06069-104

SEQUENCE: 00191994

Report Date: 07-18-2020

Name: WILLINGHAM, KADEEM
Register Num: 06069-104
Age: 27
Date of Birth: 10-28-1992
DNA Status: MIM14312 / 04-20-2015

Inmate (WILLINGHAM, KADEEM, Register Num: 06069-104)

7-18-2020
Date

Chairperson

7-18-2020
Date

Case Manager

7-18-2020
Date

```
  COMF9          *          INMATE DISCIPLINE DATA          *     07-16-2020
PAGE 001 OF 001 *     CHRONOLOGICAL DISCIPLINARY RECORD      *     14:55:28

REGISTER NO: 06069-104 NAME..: WILLINGHAM, KADEEM
FUNCTION...: PRT       FORMAT: CHRONO    LIMIT TO ___ MOS PRIOR TO 07-16-2020

--------------------------------------------------------------------------------
REPORT NUMBER/STATUS.: 3392360 - SANCTIONED INCIDENT DATE/TIME: 04-25-2020 1703
UDC HEARING DATE/TIME: 04-30-2020 1415
FACL/UDC/CHAIRPERSON.: COM/C 1-2/T. WEST
REPORT REMARKS.......: UDC FINDS INMATE GUILTY BASED ON HIS ADMISSION OF THE PR
                       OHIBITED ACT
   328  GIVING/ACCEPTNG MONEY W/O AUTH - FREQ: 1
        LP EMAIL   / 30 DAYS / CS
                   FROM: 05-01-2020  THRU: 05-30-2020
        COMP:    LAW:    GUILTY-LP EMAIL 30 DAYS TO BEGIN 05-01-2020
```

G0005 TRANSACTION SUCCESSFULLY COMPLETED - CONTINUE PROCESSING IF DESIRED

A-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60079-CR-COHN

UNITED STATES OF AMERICA,

v.

KADEEM WILLINGHAM,

Defendant.
_____/

ORDER DENYING MOTION FOR COMPASSIONATE RELEASE

THIS CAUSE is before the Court upon Defendant Kadeem Willingham's Motion for Compassionate Release ("Motion") [DE 139]. The Court has considered the Motion, the Government's Response [DE 143], Defendant's Reply [147], and the record in this case, and is otherwise advised in the premises.

On July 15, 2015, Defendant pled guilty to two counts (Count 3 and 8) of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). DE 58. On September 25, 2015, the Court sentenced Defendant to a 7-year mandatory minimum sentence on Count 3 to run consecutively with a 25-year mandatory minimum sentence on Count 8. DE 84. Now, having served approximately 5 years of his 32-year sentence, Defendant seeks compassionate release under 18 U.S.C. § 3582(c)(1)(A). He argues that the length of his sentence, based on the since-eliminated practice of "stacking" multiple mandatory sentences for violations of 924(c), combined with other factors including his personal history, rehabilitation, and lack of disciplinary infractions while incarcerated, constitute "extraordinary and compelling reasons" warranting a sentence reduction under § 3582(c)(1)(A).

"The authority of a district court to modify an imprisonment sentence is narrowly limited by statute." United States v. Phillips, 597 F.3d 1190, 1194–95 (11th Cir. 2010). Under 18 U.S.C. § 3582(c), a district court may modify a sentence only if: (1) after considering the 18 U.S.C. § 3553(a) sentencing factors, it finds that "extraordinary and compelling reasons" warrant a reduction of a defendant's term of imprisonment and that the "reduction is consistent with applicable policy statements issued by the Sentencing Commission"; (2) a modification is expressly permitted by statute or Federal Rule of Criminal Procedure 35; or (3) the defendant was sentenced based on a guidelines range that subsequently was lowered by the Sentencing Commission and other requirements are met. See 18 U.S.C. § 3582(c). As noted above, Defendant seeks relief under the first provision, the "compassionate release" provision of 18 U.S.C. § 3582(c)(1)(A).

Prior to the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 ("FSA"), only the Director of the Bureau of Prisons ("BOP") could bring a motion for compassionate release. The FSA amended § 3582(c) to permit defendants to directly petition district courts after a short administrative exhaustion period (which has been satisfied here). But the FSA did not eliminate § 3582(c)'s requirement that sentence reductions be "consistent with applicable policy statements issued by the Sentencing Commission."

Congress has directed the Sentencing Commission to promulgate policy statements defining "what should be considered extraordinary and compelling reasons for [a] sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). Congress further expressly provided that "[r]ehabilitation

of the defendant alone shall not be considered an extraordinary and compelling reason." Id. The Sentencing Commission has listed four categories of extraordinary and compelling reasons: "(A) Medical Condition of the Defendant," "(B) Age of the Defendant," "(C) Family Circumstances," and "(D) Other Reasons." U.S.S.G. § 1B1.13, cmt. n.1. Defendant relies on "(D) Other Reasons." Commentary to § 1B1.13 defines "Other Reasons" to include "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)," "[a]s determined by the Director of the Bureau of Prisons." Id., cmt. n.1(D).

BOP Program Statement 5050.50 identifies several nonexclusive factors that the Director of the BOP assesses to determine whether an "extraordinary and compelling reason" exists under the fourth prong of the Sentencing Commission's policy statement: the defendant's criminal and personal history, nature of his offense, disciplinary infractions, length of sentence and amount of time served, current age and age at the time of offense and sentencing, release plans, and "[w]hether release would minimize the severity of the offense." BOP Program Statement 5050.50 at 12 (2019).

Notably, "neither the § 1B1.13 commentary nor BOP Program Statement 5050.50 identify post-sentencing developments in case law as an 'extraordinary and compelling reason' warranting a sentence reduction." United States v. Saldana, 807 Fed. Appx. 816, 820 (10th Cir. 2020). Yet this is the crux of Defendant's Motion – that post-sentencing developments in the law (Section 403 of the FSA's elimination of the so-called "stacking" provision of 18 U.S.C. § 924(c)(1)(C)) show that Congress never intended § 924(c) to result in sentences as harsh as Defendant's sentence and constitute an extraordinary and compelling reason for reducing Defendant's sentence.

Thus, to accept Defendant's argument, the Court would have to ignore statutory language requiring that sentence reductions for "extraordinary and compelling reasons" be consistent with the Sentencing Commission's policy statements and essentially superimpose the Court's own policy preferences over those of the Sentencing Commission and the Bureau of Prisons. Defendant argues that this is permissible because "the Sentencing Commission has not issued a policy statement that addresses prisoner-filed motions since the First Step Act was enacted" and that "the old policy statement . . . does not constrain the Court's independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction." DE 147 at 4.

The Court recognizes that several district courts have accepted similar arguments and found that the "D (Other Reasons)" category of extraordinary and compelling reasons is not limited to those determined by BOP but may include additional reasons determined by the Court. See, e.g., United States v. Cantu, 423 F. Supp. 3d 345, 351 (S.D. Tex. 2019). The Court has carefully considered these decisions, but, respectfully, cannot agree that they correctly interpret the FSA's impact on § 3582(c)(1)(A).

For instance, the Cantu court held that given the FSA's amendments to § 3582(c)(1)(A), the provision requiring that sentence reductions for "extraordinary and compelling reasons" be consistent with the Sentencing Commission's policy statements "no longer fits with the statute." Id. As support, the court noted that the title of the section of the FSA that amends 18 U.S.C. § 3582 is "Increasing the Use and Transparency of Compassionate Release." Id. The court reasoned that continuing to allow the BOP to determine whether release under the "D (Other Reasons)" category

was warranted would render defendants' motions for compassionate release of "no avail" and thus "contravene the explicit purpose of the new amendments" by not increasing the use of compassionate release. Id.

The Court is unpersuaded by this analysis because, as cogently explained in United States v. Lynn, 2019 WL 3805349, at *3 (S.D. Ala. Aug. 13, 2019), "it does not follow that any circumstance that fails to maximize the use of compassionate release contravenes the purpose of the Act's amendment of Section 3582(c)(1)(A)." As the Lynn court noted, the FSA accomplishes its purpose of increasing the use of compassionate release by, *inter alia*, permitting defendants to move for compassionate release. Id. And of course, many of these motions will be based on the first three categories of extraordinary and compelling reasons which do not depend on a BOP determination. Thus, the Court agrees with Lynn's conclusion that "[t]here is . . . no tension between a legislative purpose to 'increas[e] the use' of compassionate release and a policy statement providing for BOP to make the determination as to one kind (out of [four]) of extraordinary and compelling reasons for such release." Id.

In sum, it is clear that "the text of 18 U.S.C. § 3582(c)(2) requires courts to abide by [the Sentencing Commission's] policy statements." United States v. Colon, 707 F.3d 1255, 1259 (11th Cir. 2013). See also United States v. Maiello, 805 F.3d 992, 998 (11th Cir. 2015) ("In a section 3582(c)(2) proceeding, the Commission's policy statements are binding, and courts lack authority to disregard them.") (citing Dillon v. United States, 560 U.S. 817, 825-28 (2010)); Stinson v. United States, 508 U.S. 36, 42 (1993) ("The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements."). And it is equally clear that a reduction of Defendant's sentence based

principally on post-sentencing developments in the law would be inconsistent with the Sentencing Commission's policy statements. Accordingly, the Court lacks jurisdiction to reduce Defendant's sentence on this basis.[1] In so holding, this Court is among the numerous district courts that, for various reasons, "continue to follow the guidance of the Sentencing Commission's policy statement limiting the scope of 'extraordinary and compelling reasons' that warrant compassionate release under § 3582(c)(1)." United States v. Aruda, 2020 WL 4043496, at *4 (D. Haw. July 17, 2020) (collecting cases).

The Court's conclusion is buttressed by strong policy considerations. As the Government notes, when the FSA reduced the penalty for multiple 924(c) violations committed by an offender who had not previously incurred a 924(c) conviction, Congress expressly declined to make this section of the FSA retroactively applicable. See FSA § 403(b) (amendments to section 924(c) "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." (emphasis added)). In fact, the Court has previously ruled, in connection with its denial of Defendant's second post-conviction motion, that it lacked authority to reduce his sentence pursuant to Section 403 of the FSA. DE 136. The Eleventh Circuit has since affirmed the Court's denial. See Willingham v. United States, 805 Fed. Appx. 815, 817 (11th Cir. 2020) (holding that "[b]y its plain language, section 403 [of the FSA] is . . . inapplicable to Willingham" because he was sentenced more than three years before Congress enacted the FSA and that,

[1] The Court is aware that Defendant "does not rely solely on the length of his sentence in seeking a reduction under §3582 but other factors consistent with 18 U.S.C. § 3553 and [BOP] Program Statement 5050.50." DE 147 at 7. While the Court commends Defendant on his efforts to rehabilitate himself, when it limits its consideration—as it must—to those reasons that are "consistent with applicable policy statements issued by the Sentencing Commission," it cannot find that they constitute "extraordinary and compelling reasons" warranting a sentence reduction.

accordingly, "[t]he district court concluded correctly that it lacked authority to reduce Willingham's sentence pursuant to section 403."). Adopting Defendant's arguments would inappropriately ignore the statutory limitations Congress imposed on the § 924(c) amendment.

Additionally, as the Government correctly notes, if Defendant's argument "were accepted, a judge could . . . impose a mandatory sentence as dictated by Congress, and after the judgment became final, then reduce it upon a declaration that imposing that sentence in the particular case is 'extraordinary' and unwarranted." DE 143 at 8-9. The Court agrees that this would undermine the finality of sentences and clash with Congress's constitutional authority "to say what shall be a crime and how that crime shall be punished." United States v. Holmes, 838 F.2d 1175, 1178 (11th Cir. 1988) (quoting United States v. Smith, 686 F.2d 234, 239 (5th Cir. 1982)). Accordingly, it is

ORDERED AND ADJUDGED that Defendant Kadeem Willingham's Motion for Compassionate Release [DE 139] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of August, 2020.

JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF
Pro se parties via U.S. mail to address on file

A-9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60079-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KADEEM WILLINGHAM,

Defendant.
_____:

MOTION TO RECONSIDER DEFEDANT'S MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3285(c)(1)(A)(i)

The defendant, Kadeem Willingham, through undersigned counsel, moves for reconsideration of the Court's denial of Defendant's Motion to Reduce Sentence pursuant to 18 U.S.C. § 3285(c)(1)(A)(i), and in support thereof, Mr. Willingham states:

Introduction

On June 5, 2020, Mr. Willingham filed a *pro se* Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3285(c)(1)(A)(i). (DE 139). The government filed its Response in Opposition on June 25, 2020. (DE 143). The undersigned filed a Reply to the Government's Response in Opposition on July 31, 2020. (DE 147). The Court entered its Order denying the Motion to Reduce Sentence on August 5, 2020. (DE 148).

Argument and Memorandum of Law

In the motion to reduce sentence, Mr. Willingham's argues that the Court can consider the amendment of the sentencing stacking provisions of 18 U.S.C.§ 924(c) by the First Step Act along with other factors to determine whether compelling and extraordinary circumstances exist warranting a reduction in sentence.

In denying Mr. Willingham's motion to reduce sentence, the Court ruled that post sentencing developments in case law could not be considered as an extraordinary and compelling reason which would justify a sentence reduction pursuant to 18 U.S.C. § 3585(c)(1)(A)(i). Citing 28 U.S.C. § 994(t), the Court reasoned that Congress directed the Sentencing Commission to promulgate policy statements defining "what should be considered extraordinary and compelling reasons for [a] sentence reduction.

The Court further reasoned that pursuant to the commentary under U.S.S.G. § 1B1.13, an extraordinary and compelling reason other than medical condition, age or family circumstances must be determined by the Director of the Bureau of Prisons (BOP). *See* U.S.S.G. § 1B1.13, comment. (n.1). The Court found that BOP Program Statement 5050.50 listed several reasons apart from condition, age or family circumstances to be considered when determining whether extraordinary or compelling reasons exists.

The Court concluded that neither the § 1B1.13 commentary nor BOP Program Statement 5050.50 identified post-sentencing developments in case law

as an "extraordinary and compelling reason warranting a sentence reduction." In support of its analysis, the Court cited *United States v. Lynn*, 2019 WL 3805349 (S.D. Ala. Aug. 13, 2019). However, the Court admitted that several courts have taken an opposite view.

The opposing view is that district courts may consider whether extraordinary and compelling reason other than those specifically identified in the policy statement warrants a reduction in sentence. The courts adopting this view recognize that prior to the passage of the First Step Act, only the BOP could file motions for compassionate release and the Sentencing Commission has not promulgated a policy statement applicable to motions for compassionate release filed by defendants under the First Step Act. Therefore, courts are free to identify and consider extraordinary and compelling reasons other than those specifically identified in the application notes to the old policy statement. *See United States v. Beck*, 425 F. Supp. 3d 573, 580 (M.D.N.C. 2019).

Mr. Willingham submits that the greater weight of authorities supports the view that a court may consider whether a change in sentencing law, particularly "in combination with" other factors, constitutes an extraordinary and compelling reason for release. *See United States v. Adeyemi*, * 20 (E.D. Pa. July 6, 2020). Indeed, the Judge in *Adyemi* expressly stated that the *Lynn* case represented the minority view. *Adeyemi* 2020 WL 3642478 at * 11. *See also United States v. Pichardo,* 2020 WL 3819602 *2 (S.D.N.Y. July 8, 2020) ("Following the passage of the First Step Act, courts may independently determine whether such 'other

reasons' are present in a given case, without deference to the determination made by the BOP."); *United States v. Mathison*, 2020 WL 3263042 *4 (N.D. Iowa June 17, 2020) (a number of district courts have concluded that U.S.S.G § 1B1.13 cmt. n.1 does not restrain a court's assessment of extraordinary and compelling reasons, disagreeing with *Lynn*); *United States v. Brown,* 411 F. Supp. 3d 446 (S.D. Iowa 2019), order amended on reconsideration, No. 4:05-CR-00227-1, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020)(district court may consider a sentencing disparity resulting from changes in the law when assessing if there are extraordinary and compelling reasons supporting release); *United States v. Rodriguez*, 2020 WL 1627331 *4 (E.D. Pa. Apr. 1, 2020)(majority view that district courts can make independent assessment of extraordinary and compelling circumstances and *Lynn* case represents minority view); *United States v. O'Neil*, 2020 WL 2892236 *4 (S.D. Iowa June 2, 2020); (in absence of an applicable policy statement, courts can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)–(C) warrant granting relief, disagreeing with *Lynn*); *United States v. Clark*, 2020 WL 3395540 *4 (S.D. Iowa June 17, 2020)(in absence of policy statement, courts can determine existence of extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)–(C), unpersuaded by *Lynn*). Simply put, a Guideline policy statement that is inconsistent with newly enacted Congressional legislation should not bind the Court. Accordingly, this Court should consider whether the disparity caused by the stacking of § 924(c) sentences is an extraordinary and compelling

reason for reducing a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

Mr. Willingham received a sentence of 384 months. According to the Presentence Investigation Report (PSIR), Mr. Willingham was responsible for committing or attempting to commit five robberies. PSIR ¶ 31. One of Mr. Willingham's codefendants, Tyrone Coley, was responsible for committing seven robberies. PSIR ¶ 30. However, Mr. Coley was sentenced to a total term of imprisonment of 154 months. Although Mr. Willingham pled guilty to two counts of brandishing a firearm while Mr. Coley only pled guilty to one count of brandishing, the sentencing disparity is not a fair representation of their relative culpability. Under 18 U.S.C. § 3553(a)(6), the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct is a factor the Court should consider when fashioning a reasonable sentence. Mr. Willingham would respectfully request that the Court consider the sentencing disparity with the other reasons he listed in the motion to reduce sentence and reply.

Under § 3553, the overriding goal of sentencing is to impose a sentence sufficient but not greater than necessary to accomplish the goals of sentencing. Mr. Willingham respectfully submits that 384 month sentence produced by the former mandatory minimums created a sentence that was far greater than necessary to fulfill the § 3553(a) factors. *See McCoy v. United States,* No. 2:03-CR-197, 2020 WL 2738225, at *6 (E.D. Va. May 26, 2020)(421 month term of imprisonment partly based on stacked § 924 counts reduced to 204 months' time served)

WHEREFORE, the defendant, Kadeem Willingham, respectfully requests that the Court reconsider the Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3285(c)(1)(A)(i).

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: s/ ***Daryl E. Wilcox***
Daryl E. Wilcox
Assistant Federal Public Defender
Florida Bar No. 838845
One E. Broward Boulevard, Suite 1100
Fort Lauderdale, FL 33301-1842
(954) 356-7436
Daryl_Wilcox@fd.org, E-mail

CERTIFICATE OF SERVICE

I HEREBY certify that on August 20, 2020 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

By: ***s/Daryl E. Wilcox***
Daryl E. Wilcox

A-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60079-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KADEEM WILLINGHAM,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court on Defendant Kadeem Willingham's Motion to Reconsider Defendant's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3285(c)(1)(A)(i) ("Motion") [DE 149.] The Court has considered the Motion and is otherwise advised in the premises.

Defendant seeks reconsideration of the undersigned's Order Denying Motion for Compassionate Release ("Order") [DE 148.] In the Order, the Court held that it lacked jurisdiction to reduce Defendant's sentence under 18 U.S.C. § 3582(c)(1)(A) based on post-sentencing developments in the law because such a reduction would be inconsistent with the Sentencing Commission's applicable policy statement.

"Though the Federal Rules of Criminal Procedure do not specifically authorize motions for reconsideration, federal district courts have substantial discretion in ruling on such motions in the criminal context." United States v. Sabooni, 09-20298-CR, 2014 WL 4385446, at *1 (S.D. Fla. Sept. 4, 2014) (citation omitted). In the criminal context, motions for reconsideration "are well-taken when they present one or more of the following: (1) an intervening change in controlling law; (2) the availability of new

evidence; or (3) the need to correct clear error or manifest injustice." [Id.] (citation omitted). Such motions "should not simply rehash previously litigated issues," and "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." United States v. Russo, 11-6337-RSR, 2011 WL 3044844, at *1 (S.D. Fla. July 25, 2011) (citations omitted).

In the instant Motion, Defendant does not argue that there has been an intervening change in controlling law, present previously unavailable evidence, or show that reconsideration is necessary to correct a clear error or manifest injustice. Thus, the Court concludes that Defendant has failed to meet the standard for reconsideration. Accordingly, it is

ORDERED AND ADJUDGED that Defendant Kadeem Willingham's Motion to Reconsider Defendant's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3285(c)(1)(A)(i) [DE 149] is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 8th day of September, 2020.

JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF