APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

October 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PIYARATH S. KAYARATH,

Defendant - Appellant.

No. 21-3123
(D.C. No. 6:94-CR-10128-JWB-2)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.**

Appellant Piyarath S. Kayarath, proceeding pro se, asks us to reverse the district court's order denying in part and dismissing in part his motion for compassionate release under 18 U.S.C. § 3582(c)(1).[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining Kayarath's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Because Kayarath appears pro se, we liberally construe his pleadings but won't act as his advocate. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

APPENDIX A

BACKGROUND

I. Factual Background

In 1994, Kayarath, then age 18, and four other young men robbed the owners of a restaurant in Wichita, Kansas. During the robbery, one of the other men beat, shot, and killed Barbara Sun, one of the owners. In 1997, a jury convicted Kayarath on two counts: (1) Hobbs Act robbery, in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2; and (2) carrying and using a firearm during and in relation to a crime of violence, as defined by 18 U.S.C. § 924(c)(1), and during the course thereof causing the death of a person by murder through use of a firearm, in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2.[2] The judge sentenced him to 240 months' imprisonment for the Hobbs Act conviction and life imprisonment for the § 924 (j)(1) conviction. This was the mandatory sentence before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). We upheld the jury's verdict and his sentence. *Kayarath*, 41 F. App'x at 257.

II. Procedural Background

In February 2021, Kayarath requested that the warden seek compassionate release on Kayarath's behalf. The warden declined. As allowed by the First Step Act, Kayarath then moved the district court for compassionate release under 18 U.S.C. § 3582(c)(1). He cited four bases: (1) the risks posed to his health by COVID-19; (2) his rehabilitation; (3) his time-served (twenty-six years); and (4) the "uncertainty" over his § 924(j)(1)

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[2] At the time of Kayarath's conviction, § 924(j)(1) was codified at § 924(i)(1). *See United States v. Kayarath*, 41 F. App'x 255, 257 (10th Cir. 2002). We refer to § 924(j)(1), the current location of the provision at issue, in this order.

conviction. In response, the government argued that Kayarath's motion failed because he alleged no more than a cursory fear of contracting COVID-19, he was vaccinated, and the § 3553(a) factors weighed against any reduction of his life sentence. In reply, Kayarath reemphasized his arguments about the dangers posed to him by COVID-19. And, for the first time, he noted the district court had lacked discretion at his 1997 sentencing to consider his youth and impose a lesser sentence. Thus, he argued that, post-*Booker*, the advisory nature of the Sentencing Guidelines provided an extraordinary and compelling reason for a sentence reduction. In addition, Kayarath maintained that the § 3553(a) factors favored release.

The district court denied in part and dismissed in part[3] Kayarath's motion. In its order, the district court noted that the government had conceded that Kayarath satisfied the exhaustion requirements set forth in § 3582(c)(1)(A). Next, the district court held that Kayarath's risk of exposure to COVID-19, his rehabilitation efforts, his age, his time-served, and the fact that the Sentencing Guidelines are no longer mandatory didn't constitute extraordinary and compelling reasons under 18 U.S.C. § 3582(c)(1)(A).

The district court also determined that even if Kayarath could show extraordinary and compelling circumstances, it would still deny his motion after considering the § 3553(a) factors. Specifically, the district court ruled that Kayarath's life sentence reflected the seriousness of the offense, promoted respect for the law, deterred criminal

[3] The district court treated Kayarath's arguments about the "uncertainty" of his § 924(j)(1) conviction as a successive § 2255 motion over which it had no jurisdiction. Kayarath does not challenge that dismissal.

conduct, and protected the public from the possibility of further crimes. It also emphasized the serious nature of the offenses, Kayarath's responsibility for the murder committed by his "compatriot," and his criminal history.

DISCUSSION

I. Standard of Review

We review a district court's order denying a § 3582(c)(1)(A) motion for abuse-of-discretion. *See United States v. Williams*, 848 F. App'x 810, 812 (10th Cir. 2021). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *United States v. Battle*, 706 F.3d 1313, 1317 (10th Cir. 2013). Relevant here, "[b]ecause the weighing of the § 3553(a) factors is committed to the discretion of the district court, we cannot reverse 'unless we have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *United States v. Hald*, 8 F.4th 932, 949–50 (10th Cir. 2021) (quoting *United States v. Chavez-Meza*, 854 F.3d 655, 659 (10th Cir. 2017)).

II. Legal Background

In reviewing a motion under 18 U.S.C. § 3582(c)(1)(A), a district court must (1) "find whether extraordinary and compelling reasons warrant such a sentence reduction," (2) find whether a sentence "reduction is consistent with applicable policy statements issued by the Sentencing Commission," and (3) "consider any

applicable § 3553(a) factors[4] and determine whether, in its discretion, the reduction authorized by steps one and two is warranted in whole or in part under the particular circumstances of the case." *United States v. Maumau*, 993 F.3d 821, 831 (10th Cir. 2021) (brackets and internal quotations omitted). If a defendant's motion fails any of these steps, the district court may deny the motion without addressing the others. *See United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021).

III. Analysis

Kayarath argues that the district court erred by failing to fully analyze all relevant § 3553(a) factors. Specifically, Kayarath argues that the district court inaccurately discussed his history and characteristics, ignored the kind of sentences available, and failed to avoid unwarranted sentencing disparities. Kayarath also asserts that the district court "barely mention[ed]" his young age when he committed the offenses and disregarded the person he is today. Finally, Kayarath argues that the district court erred in its § 3553(a) analysis by presuming the reasonability of his life sentence and noting that

[4] The § 3553(a) factors are: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed to reflect the seriousness of the offense"; (3) "the kinds of sentences available"; (4) "the kinds of sentences available and sentencing range established for" the offense at the time of sentencing; (5) "any pertinent policy statement" in effect at the time of the defendant's sentencing; and (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(1)–(6).

"the same life sentence would be the applicable guideline sentence for a similar offense committed today."

Kayarath's "arguments do not establish that the district court based its decision on an error of law or a clearly erroneous assessment of the evidence when it determined that the [§ 3553(a)] factors weighed against" compassionate release. *Williams*, 848 F. App'x at 813 (quoting *United States v. Harmon*, 834 F. App'x 101, 102 (5th Cir. 2021)). The district court listed the six applicable § 3553(a) factors, highlighted those it found to be most relevant, and concluded that the imposed life sentence "remains sufficient, but not greater than necessary to meet the sentencing factors in § 3553(a) and punish the offense." "We have no reason to doubt that the district court in fact considered those factors, and nothing more was required." *Hald*, 8 F.4th at 949.

Further, Kayarath's contention that the district court improperly analyzed the individual § 3553(a) factors is meritless. The weighing of the factors is in the district court's discretion. *Hald*, 8 F.4th at 949. We cannot reverse without "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice under the circumstance." *Chavez-Meza*, 854 F.3d at 659 (internal quotation marks omitted). We have no such conviction here.

We also reject Kayarath's argument that the district court committed legal error by considering that "the same life sentence would be the applicable advisory guidelines sentence for a similar offense committed today," post-*Booker*. Kayarath contends that this statement improperly presumed his guidelines sentence to be reasonable. We have held that a district court errs when it applies a "presumption of reasonableness to the

advisory guidelines when *sentencing*." *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007) (emphasis added). But this alleged error did not occur at sentencing. And even assuming a court legally errs by making such a presumption when analyzing a § 3582(c)(1)(A)(i) motion, the district court here did no such thing. Its statement was a logical response to Kayarath's contention that it should consider a life sentence for his crime to be an extraordinary and compelling reason for release.

Moreover, even if we were to view the district court's statement as a presumption of reasonableness, in denying Kayarath's motion, the district court here did not solely rely on the authority of the Sentencing Guidelines. Rather, it specifically justified its decision by considering the § 3553(a) factors, and—recognizing that the Sentencing Guidelines are no longer mandatory—by considering potentially mitigating factors, such as Kayarath's age, his time-served, and the length of his sentence. *See United States v. Prieto-Chavez*, 268 F. App'x 695, 703 (10th Cir. 2008) (holding that although the district court erred in stating that a presumption of reasonableness applied, that error did not

affect the defendant's substantial rights, because the district court properly considered the § 3553(a) factors).

CONCLUSION

Because we do not believe the district court relied on an "incorrect conclusion of law or a clearly erroneous finding of fact" when conducting its § 3553(a) analysis, we affirm.[5] *Battle*, 706 F.3d at 1317.

Entered for the Court

Gregory A. Phillips
Circuit Judge

[5] Because we affirm on the § 3553(a) factors, we need not reach Kayarath's arguments about if the district court erred in concluding that he failed to establish extraordinary and compelling circumstances. "Even if these other arguments succeeded, the district court's decision would nevertheless stand on its § 3553(a) ruling in light of the district court's explicit statement that even if [Kayarath] could show extraordinary and compelling circumstances, it would deny relief based on the § 3553(a) factors." *Williams*, 848 F. App'x at 813 n.3 (10th Cir. 2021).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 94-10128-02-JWB

PIYARATH KAYARATH,[1]

Defendant.

MEMORANDUM AND ORDER

This matter is before the court on Defendant's motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). (Doc. 725.) The motion is fully briefed and is ripe for decision. (Docs. 726, 727.) For the reasons stated herein, Defendant's motion is DENIED IN PART and DISMISSED IN PART.

I. Facts and Procedural History

On January 4, 1996, Defendant and another individual were charged in two counts of a second superseding indictment. (Doc. 138.) Count One charged a Hobbs Act robbery, in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2, based on a November 8, 1994 robbery of the Mandarin Chinese Restaurant and Lounge in Wichita, Kansas. Count Two charged the unlawful carrying and use of a firearm during and in relation to the robbery and causing the death of a person through the use of the firearm, which killing was a murder, in violation of 18 U.S.C. § 924(j)(1)[2] and 18

[1] Defendant's first name is alternatively spelled in the record as "Piyaroth." (*See e.g.*, Doc. 138 at 1.).

[2] At the time of indictment and trial, this provision was designated as § 924(i)(1). (It was one of two different subsections that were inadvertently given the same number.) It has since been redesignated as § 924(j)(1) and is referred to here by its current designation.

APPENDIX B

U.S.C. § 2, "in that the defendants, with malice aforethought, did unlawfully kill Barbara Sun by shooting her with a firearm in the perpetration of the robbery...." (Doc. 138 at 2.)

The charges against Defendant were tried to a jury. On January 1, 1997, the jury returned a verdict of guilty on both counts. (Doc. 499.) On April 15, 1997, the court sentenced Defendant to 240 months imprisonment on Count One and to life imprisonment without the possibility of release on Count Two, with the counts to run concurrently.[3] (Doc. 525.) The judgment was affirmed on direct appeal.[4] (Doc. 635.)

On June 29, 2001, Defendant filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. Although the motion included a challenge to the conviction in the instant case, it was apparently docketed in a separate case against Defendant, *United States v. Kayarath,* No. 94-10123-02-JWB (D. Kan., Doc. 152.) The motion was denied by the court on July 12, 2001. (*Id.*, Doc. 153.) Defendant then unsuccessfully sought permission from the Tenth Circuit on two separate occasions to file a second or successive § 2255 motion, but those requests were denied. (Docs. 692, 704.) A third such request, which was based on the Supreme Court's invalidation of the "residual clause" of § 924(c)(3)(B) in *United States v. Davis,* 139 S. Ct. 2319 (2019), was granted (Doc. 707), and Defendant thereafter filed another motion to vacate sentence. (Doc. 710.) This court denied the motion, however, because under Tenth Circuit law a Hobbs Act robbery is categorically considered a crime of violence under the "elements clause" of § 924(c)(3)(A), such

[3] The sentence was consistent with the guideline range for imprisonment, which was based on a total offense level of 43 and a criminal history category of III. Presentence Report (PSR) ¶ 79. Defendant's criminal history included a plea of guilty to four counts of a superseding indictment in Case No. 94-10123-02. Those counts charged two § 1951 offenses and two § 924(c) offenses relating to the robbery of two Sonic Drive-In restaurants. (No. 94-10123-02, Doc. 30.) Defendant was initially sentenced in December of 1995 to 330 months imprisonment in that case (*Id.*, Doc. 96), but in August of 1996 the sentence was reduced to 240 months. (*Id.*, Doc. 123.)

[4] As the Tenth Circuit noted on appeal, the evidence presented by the government showed Defendant was one of five individuals involved in the robbery (a fact he later admitted) and the gun in question belonged to Defendant. One of the other individuals used the gun to kill Mrs. Sun when she could not open a restaurant safe. (Doc. 635 at 3-4.)

that Defendant's conviction was not based on the invalid residual clause. (Doc. 715.) Defendant appealed that ruling, but on July 30, 2020, the Tenth Circuit dismissed the appeal. (Doc. 722.)

On May 10, 2021, Defendant filed the instant motion for reduction of sentence, which argues that the "the high risk of serious illness or death ... that COVID-19 poses to him ... is an extraordinary and compelling circumstance that warrants a reduction in this case." (Doc. 725 at 2.) Defendant further contends his "exemplary rehabilitation, length of time incarcerated, and the uncertainty of whether the jury ... unanimously selected § 924(c) or § 924(j) for Count Two conviction points in favor of compassionate release" and warrants a reduction in sentence to time served. (*Id.*) Alternatively, Defendant argues a reduction to a sentence of 30 years would be appropriate. (Doc. 727 at 19.) In response, the government asserts that Defendant has failed to show extraordinary and compelling reasons for a reduction. Moreover, it argues the factors in § 3553(a) weigh heavily against a reduction. (Doc. 726 at 13.) Finally, insofar as Defendant's motion challenges jury instructions or constitutional aspects of his conviction, the government argues the motion is a successive § 2255 that must be dismissed for lack of jurisdiction. (*Id.* at 16.)

II. Legal Standards

"Federal courts are forbidden, as a general matter, to modify a term of imprisonment once it has been imposed, but [that] rule of finality is subject to a few narrow exceptions." *United States v. McGee*, 992 F.3d 1035, 1041 (10th Cir. 2021) (quoting *Freeman v. United States*, 564 U.S. 522, 526 (2011)). One exception is found in the "compassionate release" provision of 18 U.S.C. § 3582(c)(1)(A). Prior to 2018, that section only authorized the Director of the Bureau of Prisons to move for a sentence reduction. *McGee*, 992 F.3d at 1041. The First Step Act changed this to allow a defendant to file his own motion for reduction if certain conditions are met. *Id.*

The Tenth Circuit recently endorsed a three-step test for deciding motions under § 3582(c)(1)(A). *Id.* at 1042 (citing *United States v. Jones*, 980 F.3d 1098, 1107 (6th Cir. 2020)). If a defendant has administratively exhausted his claim,[5] the court may reduce a sentence if three requirements are met: (1) "extraordinary and compelling" reasons warrant a reduction; (2) the "reduction is consistent with applicable policy statements issued by the Sentencing Commission;" and (3) the reduction is consistent with any applicable factors set forth in 18 U.S.C. § 3553(a). *Id.* A court may deny the motion when any requirement is lacking and the court need not address the other requirements. *Id.* at 1043. But all the requirements must be addressed when the court grants a motion for release under the statute. *Id.*

The Tenth Circuit has held that the court has independent discretion to determine whether a defendant has shown "extraordinary and compelling reasons" that warrant a reduction. *See McGee*, 992 F.3d at 1044, 1048. "[E]xtraordinary" means "exceptional to a very marked extent." *United States v. Ford*, No. CR 10-20129-07-KHV, 2021 WL 1721054, at *3 (D. Kan. Apr. 30, 2021) (quoting *United States v. Baydoun*, No. 16-20057, 2020 WL 4282189, at *2 (E.D. Mich. July 27, 2020) (quoting extraordinary, Webster's Third International Dictionary, Unabridged (2020)). Although not binding on this court, the Sentencing Commission has recognized that grounds for release due to extraordinary and compelling reasons can include a (1) defendant's medical condition; (2) age; (3) family circumstances; and (4) a catchall category of an "extraordinary and compelling reason other than, or in combination with," the first three categories. *Id.* (citing U.S.S.G. § 1B1.13, Reduction In Term Of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement), cmt. n.1 (Nov. 2018)) and *United States v. Carr*, No. 20-1152, ___F. App'x. ___, 2021 WL 1400705, at *4 (10th Cir. Apr. 14, 2021) (district court has discretion

[5] The government concedes Defendant has exhausted his administrative remedies on the motion. (Doc. 726 at 5.)

to consider definition of extraordinary and compelling reasons in Section 1B1.13 application notes).

With respect to the second requirement (whether a reduction is consistent with applicable policy statements), the Tenth Circuit has held that the current Sentencing Commission policy statement on extraordinary circumstances does not constrain a court's discretion to determine whether circumstances are extraordinary and compelling because that provision applies only to motions filed by the Director of the BOP, not to motions filed by a defendant. *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021).

Defendant bears the burden of establishing that compassionate release is warranted under the statute. *See, e.g., United States v. Dial*, No. 17-20068-JAR, 2020 WL 4933537 (D. Kan. Aug. 24, 2020); *United States v. Dixon*, No. 18-10027-02-JWB, 2020 WL 6483152, at *2 (D. Kan. Nov. 4, 2020).

III. Analysis

A. Extraordinary and Compelling Reasons.

The court finds the allegations in Defendant's motion fail to show extraordinary and compelling reasons for a sentence reduction. Defendant relies primarily on the alleged danger he faces of suffering serious illness or death from COVID-19. But the motion fails to show he faces a health risk significantly greater than the risk faced by persons who are not incarcerated. Defendant is currently housed at USP Atwater in California. His motion alleges that BOP "reports 122 active COVID-19 cases among inmates and eight staff cases at USP Atwater." (*See* Doc. 725 at 8.) But the numbers he cites were from January 5, 2021. BOP has now undertaken "extensive and professional efforts to curtail the virus's spread." *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). According to BOP's website, USP Atwater currently reports zero inmate cases

and two staff cases of COVID-19. *See* https://www.bop.gov/coronavirus/ (last accessed June 24, 2021). In fact, out of the 129,200 federal inmates incarcerated at this time, only 71 inmates nationwide currently have confirmed positive test results. *Id.* Moreover, as Defendant concedes, he has now received the COVID-19 vaccine and to the best of his knowledge he has no serious health conditions that would put him at a heightened or imminent risk of serious illness or death if he were to contract COVID-19. (Doc. 727 at 4.) Defendant is currently 45 years old. Under the circumstances, Defendant has failed to show any health-related extraordinary or compelling reasons for a sentence reduction. *See United States v. Verdin-Garcia*, No. 05-20017-01-JWL, 2021 WL 2144801, at *2 (D. Kan. May 26, 2021) (no inmates with active infections weighs against compassionate release); *United States v. Young*, No. CR 10-20076-01-KHV, 2021 WL 1999147, at *3 (D. Kan. May 19, 2021).

Defendant also alleges he has demonstrated "exemplary rehabilitation" that weighs in favor of compassionate release. (Doc. 725 at 2.) Defendant has clearly made efforts to take advantage of educational opportunities in prison, including obtaining his General Educational Development (GED) certificate and completing a 500-hour challenge program. (Doc. 725-2 at 3-4.) A letter of support from a psychologist also indicates Defendant made positive contributions to the challenge program in which he participated. (Doc. 725-3.) A report dated February 10, 2021 indicates Defendant has been free of any disciplinary incidents since June 2013. (Doc. 725-2 at 3.) These efforts are commendable and show Defendant has made a significant effort to better himself. Even so, the court is not persuaded that these efforts, alone or in combination with the other circumstances alleged by Defendant, amount to extraordinary and compelling reasons that warrant a reduction in Defendant's sentence. Prisoners are expected to follow institutional rules, and taking advantage of educational opportunities provided in prison as Defendant has done is

commendable, but it is not itself a compelling reason for a sentence reduction. *Cf. United States v. Harris,* 505 F. Supp. 3d 1152, 2020 WL 7122430, *11 (D. Kan. Dec. 4, 2020) (defendant's "admirable commitment to education and personal growth while incarcerated" was not a basis for sentence reduction).

Defendant also asserts that his young age at the time of the offenses (age 18) and the long term he has now served in prison (over 26 years) constitute extraordinary and compelling reasons for a sentence reduction. These are legitimate factors to consider, as a life sentence for crimes committed by an 18-year-old is, outside of the death penalty, the most severe and punitive sentence that can be imposed. At the same time, it must be recognized that the sentence resulted from the sentencing judge's consideration of the particular facts of the case, and was a sentence contemplated both by the governing law and the federal sentencing guidelines. Defendant also points out that although his sentence of life imprisonment was a guideline sentence, the guidelines were "mandatory" at the time and not advisory as they later became. *See United States v. Booker,* 543 U.S. 220, 245 (2005). But the same life sentence would be the applicable advisory guideline sentence for a similar offense committed today. The court is not persuaded that *Booker* or any of the other circumstances cited by Defendant warrant a sentence reduction. Ultimately, Defendant fails to meet his burden of showing that there are extraordinary and compelling reasons for a sentence reduction.

Defendant's motion also relies in part on alleged "uncertainty" as to whether the jury reached a unanimous verdict on Count Two and whether it found all the elements of a § 924(j)(1) offense. (Doc. 725 at 10-16.) The court agrees with the government, however, that insofar as the motion includes such allegations, it is properly characterized as a motion for relief under 28 U.S.C. § 2255. Regardless of how a movant characterizes a post-judgment motion, "it must be treated as

a § 2255 motion if it 'asserts or reasserts a federal basis for relief' from the movant's conviction or sentence." *United States v. Sears,* 836 F. App'x 697, 699 (10th Cir. 2020) (quoting *In re Lindsey,* 582 F.3d 1173, 1175 (10th Cir. 2009)). *See also United States v. Nelson,* 465 F.3d 1145, 1148 (10th Cir. 2006) (a § 2255 motion "is one claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ....") Here, Defendant seeks relief from the sentence in part by claiming his conviction violated the Sixth Amendment. (*See* Doc. 725 at 13) ("the Sixth Amendment requires that every element of § 924(c) must be proved 'beyond a reasonable doubt.' The general verdict failed to give this dual-assurance of 'unanimity' and 'guilt-beyond-a-reasonable-doubt....'") *Cf. United States v. Logan,* ___F. Supp. 3d ___, 2021 WL 1221481, *9 (D. Minn. Apr. 1, 2021) (defendant is "in effect using a compassionate-release motion to bring yet another challenge to the validity of his sentence," arguing that "what is extraordinary about his situation is that he is serving an illegal sentence.") As recounted previously, Defendant already filed at least one § 2255 motion challenging his conviction, meaning this court has no jurisdiction to rule on his current allegations insofar as they claim the conviction or sentence is invalid. *See* 28 U.S.C. § 2255(h) (second or successive § 2255 motion must be certified by court of appeals); *Nelson,* 465 F.3d at 1148 (if the pleading must be treated as a § 2255, the district court does not even have jurisdiction to deny the relief sought). The court will accordingly dismiss the allegations that Defendant's conviction or sentence is constitutionally infirm. Insofar as Defendant attempts to avoid this result by suggesting the court nevertheless has discretion to consider "uncertainty" in the context of a motion for compassionate release, the court declines to give the allegations any weight. Defendant's conviction is final and

presumed valid until shown otherwise, and nothing in the current motion demonstrates any basis for reducing the sentence on account of legal uncertainty.[6]

The court has considered all of the factors asserted by Defendant in his motion, but concludes Defendant has not shown extraordinary and compelling reasons exist for a reduction in his sentence.

B. Section 3553(a) Factors

Even if the circumstances alleged by Defendant could be considered extraordinary and compelling, the court would nevertheless deny the motion for reduction based upon a consideration of the factors in 18 U.S.C. § 3553(a).

Prior to granting a motion for compassionate release, the court must consider the sentencing factors set forth in § 3553(a). *United States v. Reece*, No. 16-20088-JAR, 2020 WL 3960436, at *2, 7 (D. Kan. July 13, 2020). The factors include the nature of the offense and Defendant's personal history and characteristics; the need for the sentence imposed to provide reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of Defendant, and provide Defendant with needed training and care; the kinds of sentences available; the need for rehabilitative services; the applicable Guideline sentence; and the need to avoid unwarranted sentence disparities among similarly-situated defendants. 18 U.S.C. § 3553(a)(1)-(6).

[6] Defendant ignores or mischaracterizes jury instructions that informed the jury that their verdict "must be unanimous" (Doc. 501 at 42), and which required them either to find that Defendant committed each of the essential elements of § 924(j)(1) (Doc. 501 at 32), or that someone else committed each of the essential elements and Defendant knowingly aided and abetted them in the commission of the offense (Doc. 501 at 36-37), before it could convict Defendant on Count Two.

Defendant was sentenced to life imprisonment based on his willing participation in crimes that resulted in the death of Mrs. Barbara Sun. The nature of the offenses is shown by the following summary, which is derived from the PSR. Mrs. Sun was an immigrant to this country who dreamed with her husband of owning a restaurant. They were able to purchase a building that formerly housed a restaurant in Wichita and opened the Mandarin Chinese Restaurant and Lounge. The equipment that came with the building purchase included a combination safe, although the Suns never used it because they did not know the combination and had nothing of value to keep in it. The Suns operated the restaurant for six years; for part of that time they lived on the second floor above the restaurant. Mrs. Sun, who was 35 years old, worked as the hostess, greeting customers and seating them, while Mr. Sun was the primary cook for the restaurant. The Suns had two daughters, ages 8 and 5, both of whom were born in Wichita. The Suns' daughters often stayed at the restaurant following school and would help with chores or play on the second floor.

Defendant was one of five young men who planned the robbery of the restaurant. Several of the men were members of a street gang. They were unemployed and shared money that they obtained through robbery, burglary, and theft, often using the money to buy drugs. One of the men suggested robbing the Mandarin Restaurant because he believed the Suns maintained gold and jewelry on the premises. The restaurant foyer in fact had a glass display case in it containing jewelry, but it was only costume jewelry and was of nominal value. The robbery plan called for the occupants of the Mandarin to be gathered together and tied up, with one of the robbers guarding them, while the others would take one of the proprietors to another area and demand that they turn over money and jewelry. The men decided to take two handguns with them, a 9mm Beretta and a .32 caliber revolver. As the Tenth Circuit noted in *United States v. Kayarath,* 149 F.3d 1192

(Table), 1998 WL 327682, *2 (10th Cir. June 19, 1998), the government presented evidence at trial that the 9mm Beretta belonged to Defendant.

Late in the evening of November 8, 1994, the men drove to the restaurant in two cars, one of which was stolen earlier in the day. They saw cars in the parking lot and decided to wait until the customers were gone. They drove to a nearby mall and burglarized a car, getting into a scuffle with the car owner when he emerged from the mall. The men then drove back to the restaurant and four of them (including Defendant) entered, one wearing a mask. Mrs. Sun was seated in the restaurant lounge helping her daughters with their homework. Mr. Sun was cleaning the kitchen. Two men, including Defendant, grabbed Mr. Sun and demanded that he open the cash register. The men then ordered Mr. Sun to get on the floor near the bar and bound his hands. They also tied up a waiter and Mrs. Sun. The Suns' two daughters were not tied up but were ordered to remain with their father. Two of the men grabbed Mrs. Sun by her hair and forced her upstairs, ramming her head on the bar and wall as she struggled. Upstairs, the men demanded Mrs. Sun open the safe. She tried to explain that she did not know the combination. The two men upstairs ransacked the room looking for valuables. Defendant, who had been downstairs with the other captives, joined the two men upstairs and obtained the .32 caliber revolver from one of them before returning downstairs.

When the two men upstairs found no valuables, they began to beat Mrs. Sun with their fists and blunt objects and began kicking her. She sustained severe bruising to her head, face, neck, arms, torso, and legs. One of the men, Bountaem Chanthadara, took out the 9mm handgun and proceeded to shoot Mrs. Sun at close range five times.[7] The details of the wounds, from which

[7] Prosecutors sought the death penalty against Chanthadara and a district judge sentenced him to death, but the sentence was vacated on appeal. *United States v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000). On remand, Chanthadara was sentenced to life without the possibility of release. (Doc. 650.) Chanthadara died in prison in late 2019. (*See* Doc. 706.)

Mrs. Sun soon died, are too horrible to set forth here. While this was going on, Defendant was downstairs continuing to search for valuables. He fired the .32 caliber revolver at a cash register in an unsuccessful attempt to open it. The two men who were upstairs came down and the four men then exited the restaurant, with Chanthadara tipping over the glass jewelry case in the foyer on his way out, leaving a palm print on the glass that investigators would later find. The men drove away. They obtained a total of about $100 in the robbery.

Mr. Sun and the waiter managed to free themselves from their restraints. Mr. Sun sent his eight-year old daughter to seek help from a nearby restaurant, while he went to search upstairs for his wife. He found her lying on the floor covered in blood. Mr. Sun's daughter returned with an employee from a neighboring restaurant. The girl followed the employee upstairs and saw her mother lying, dead or dying, amongst the debris on the floor.

The need for the sentence imposed to reflect the seriousness of the offense does not weigh in favor of a sentence reduction. The offenses of which Defendant was convicted are obviously extremely serious in nature. They resulted in the brutal and senseless death of an innocent young mother who, insofar as the record shows, only tried to work hard and take care of her family. Defendant did not shoot Mrs. Sun, but he was a willful participant in the robbery and firearm offenses, and as such was legally responsible for the murder committed by his compatriot in the course of the robbery.

Defendant was himself an immigrant to the United States, having been brought here as a small child. He comes from a supportive family. Defendant was only 18 years old at the time of the offenses. Yet, Defendant's involvement in this case was not his first foray into violent offenses. One or two months before the Mandarin Restaurant robbery, Defendant participated with one or more of the same individuals in two other robberies. In the first incident, Defendant, armed with

a knife, and a co-defendant, armed with a gun, entered a restaurant. The co-defendant fired three shots as the men ordered employees to the back of the building, where the men robbed them. In the second robbery, Defendant (armed with a gun) and two of his co-defendants entered a restaurant, ordered the employees to lie down on the floor, and robbed them. The men ordered one employee, at gunpoint, to unlock the restaurant's safe, which he did, after which the men cleared out the safe and one of the co-defendants then fired a gunshot into the ceiling. Defendant entered a plea of guilty to two counts of robbery under § 1951 and two § 924(c) firearm counts stemming from these robberies. *See United States v. Kayarath,* No. 94-10123-02 (D. Kan.).

A reduction in Defendant's sentence would not, in the court's estimation, reflect the seriousness of the offense or promote respect for the law. Nor would it serve to deter criminal conduct or protect the public from further crimes of Defendant. Defendant received a severe sentence for his offenses, but it was a sentence authorized by law and commensurate with the harm caused by the offenses. As the Tenth Circuit noted in affirming the judgment against Defendant, this is a tragic case, in part because of Defendant's young age at the time, but primarily because the crimes Defendant and his co-defendants committed "were violent and unprovoked, and decimated the Sun family." *Kayarath,* 1998 WL 327682, *5.

The court finds that the imposed sentence remains sufficient, but not greater than necessary, to meet the sentencing factors in § 3553(a) and punish the offense.

IV. Conclusion

Defendant's motion to reduce sentence (Doc. 725) is DENIED IN PART and DISMISSED IN PART. The motion is DISMISSED for lack of jurisdiction insofar as it alleges that Defendant's conviction or sentence is invalid; such allegations constitute a second or consecutive § 2255 motion over which this court has no jurisdiction. 28 U.S.C. § 2255(h). The court further denies a

certificate of appealability with respect to those allegations. *See* 28 U.S.C. § 2253(c)(2). The motion is otherwise DENIED on the merits.

IT IS SO ORDERED this 25th day of June, 2021.

s/ John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

APPENDIX

Science Supporting Immaturity Exception

1. Studies

Psychology and brain imaging studies demonstrate fundamental differences between **{792 F. Supp. 2d 497}** adolescent and adult minds. Critical "parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 130 S. Ct. at 2026 (citing Brief for The American Medical Association, et al. as Amici Curiae Supporting Neither Party 16-24, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2009 WL 2247127 at *16-24 (hereinafter *Graham* AMA Brief); Brief for The American Psychological Association et al. as Amici Curiae Supporting Petitioners at 22-27 (No. 08-7412), 2009 WL 2236778 at *22-28 (hereinafter *Graham* APA Brief)).

"Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 570). "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570.

"Drawing the line at 18 years of age is subject . . . to the objections . . . against **{2011 U.S. Dist. LEXIS 409}**categorical rules." *Id.* at 574. "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* While 18 may be the "point where society draws the line for many purposes between childhood and adulthood," scientific developments conclude that full adulthood is not biologically achieved until much later in life than age 18. *Id.* The American Psychological Association explains that differences between adolescents and adults with respect to "risk-taking, planning, inhibiting impulses, and generating alternatives" is connected to "adolescent behavioral immaturity: the human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood." Brief for the American Psychological Association and the Missouri Psychological Association as Amici Curiae Supporting Respondent at 9, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (No. 03-633), 2004 WL 1636447 at *9 (hereinafter *Roper* APA Brief).

> Deciding where to draw the chronological age boundary between adolescence and adulthood for purposes of justice policy is a more complex challenge than setting the minimum age of juvenile court jurisdiction **{2011 U.S. Dist. LEXIS 410}**because several concerns are important but may not point in the same direction. The first is psychological development; the line should be drawn with attention to the process of maturation, ideally shielding immature youths from adult prosecution and punishment while holding mature individuals fully accountable. This factor turns out to be somewhat complex, however, because, as we have explained, the relevant psychological abilities and capacities do not develop in lockstep fashion, but progress at different rates. Thus, logical reasoning and information processing capacities that are most relevant to competence to stand trial mature through pre-adolescence and early adolescence, reaching adult levels around age fifteen or sixteen. In contrast, psychosocial capacities that influence involvement in criminal activity, such as impulse control, future orientation, or resistance to peer influence (as well as the regions of the brain that regulate these phenomenon), mature primarily in middle adolescence, continuing into late adolescence, and even into early adulthood. . . . Thus a jurisdictional boundary separating minors from adults based on studies of logical reasoning and basic cognitive **{2011 U.S. Dist. LEXIS 411}**abilities would classify adolescents as adults at a younger age than a boundary based on research on psychosocial development or brain maturation. Beyond this, there is a great deal of **{792 F. Supp. 2d 498}** individual variation in maturation rates; some youths are adultlike at age 15, while others are still immature in early adulthood. Adolescence and adulthood are not tidy developmental categories; the transition to

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adulthood is a gradual process. The upshot is that science does not dictate any specific age as the appropriate threshold for adult adjudication and punishment.Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice 236*, (2008); *see also* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 Hofstra L. Rev. 13, 39 (2009) ("Much of the developmental research suggests that the qualities highlighted by the Court [in *Roper v. Simmons*], described together as psycho-social immaturity, continue to apply to individuals into their twenties, even mid-twenties or beyond.").

Scott and Steinberg acknowledge that while the marker for adult adjudication is age eighteen, this line drawing is based on policy-about which the authors claim no expertise-rather than **{2011 U.S. Dist. LEXIS 412}**science. "Although studies of brain development indicate that continued maturation takes place until at least age twenty-five or so, policy makers would not likely endorse treating individuals who offend in their early twenties as juveniles . . ." *Id.* at 238.

Scientific studies on adolescent behavior conclude that adolescents are less able than adults to voluntarily control their behavior. "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking." Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Reviews 417, 421 (2000). Sensation seeking is a normal part of adolescent development, so much so that "it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence." *Id.* at 421.

These differences between adolescent and adult behavior are a result of "psychosocial limitations in [adolescents'] ability to consistently and reliably control their behavior." *Graham* AMA Brief at 6, (citing Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May be Less Culpable* ***{2011 U.S. Dist. LEXIS 413}*** *Than Adults*, 18 Behav. Sci. & L. 741, 742 (2000)); William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent and Adult Risk Taking: The Eighth Texas Tech Symposium on Interfaces in Psychology* 66, 67 (N. Bell & R. Bell eds., 1993).

One of the principle ways this reduced capacity to control behavior is expressed is by adolescents' difficulty with impulse control. "A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives." B.J. Casey et al., *The Adolescent Brain*, 28 Developmental Rev. 62, 64 (2008). Numerous studies document the limitations on adolescents' ability to control their impulses. *See, e.g.*, Casey, *supra*, at 64 ("A number of classic developmental studies have shown that this ability develops throughout childhood and adolescence."); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 2009 Ann. Rev. Clinical Psychol. 47, 58 (2009) ("[I]ndividuals become more resistant to peer influence and oriented to the future, and less drawn to immediate rewards and impulsive, as they mature from adolescence to adulthood."); **{2011 U.S. Dist. LEXIS 414}**Laurence Steinberg et. al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psych. 1764 (2008) (self-report and performance **{792 F. Supp. 2d 499}** measures on tests show "a linear decline in impulsivity between the ages of 10 and 30").

Structural differences between adolescent and adult brains, confirmed by recently developed brain imagery technology, demonstrate that critical regions of the brain responsible for controlling thoughts, emotions, impulsivity, and actions continue to develop through age 25. *See Graham* AMA Brief at 13-31. "Developmental neuroscience has now gathered extensive evidence that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain." *Id.* at 13. Brain imaging has allowed scientists to better understand the relationship between

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to the process of decreasing gray matter in the brain as it matures. *Id.* at 19 ("[P]runing of excess neurons and connections which make up the gray matter leads to greater efficiency of neural processing and strengthens the brain's ability to reason and consistently exercise good judgment. Thus, pruning establishes some pathways and extinguishes others, enhancing overall brain functions."). MRI technology has allowed for a better understanding of the pruning process and its impact on brain maturation.

> Gray matter volumes peak during the ages from 10-20 years, and the prefrontal cortex is one of the places where gray matter increases-before adolescence-and then gets pruned over time, beyond adolescence. The prefrontal cortex is also one of the last regions where pruning is complete and this region **{2011 U.S. Dist. LEXIS 419}**continues to thin past adolescence.*Graham* AMA Brief at 20-21. Pruning is one measure of brain maturity. One of the last regions of the brain to reach full maturity in the pruning process in the pre-frontal cortex - "the region most closely associated with risk assessment, impulse control, emotional regulation, decision-making, and planning. . . ." *Id.* at 21.

During adolescence, "white matter" in the brain increases by a process called "myelination." *See Roper* APA Brief at *11. "The presence of myelin makes communication between different parts of the brain faster and more reliable." *See* Elkhonon Goldberg, The Executive Brain: Frontal Lobes and the Civilized Mind 144 (2001). The increase in "white matter" or myelination "continues through adolescence into adulthood." *See Graham* AMA Brief at 22, n.68. "A longitudinal MRI study at the National Institute of Mental Health documented an increase in white matter continuing through the teenage years to at least age 22." *Roper* APA Brief at 11 (citing Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 861-62 (1999)).

"Late maturation of the frontal lobes is also consistent **{2011 U.S. Dist. LEXIS 420}**with electroencephalogram (EEG) research showing that the frontal executive region matures from ages 17-21 - after maturation appears to cease in **{792 F. Supp. 2d 501}** other brain regions." *Roper* APA Brief at *12, (citing William J. Hudspeth & Karl H. Pribram, *Psychophysiological Indices of Cerebral Maturation*, 21 Int'l J. Psychophysiology 19, 26-27 (1992)); *see also*, Mark Hanson, *What's the Matter with Kids Today*, ABA Journal, July 2010, at 50 (discussing scientific research that suggests psychosocial development continues into early adulthood resulting in shortsighted decisions, poor impulse control, and increased vulnerability to peer pressure during adolescence); Richard Knox, *The Teen Brain: It's Just Not grown Up Yet*, Nat'l Pub. Radio (March 1, 2010), (interview of Harvard University scientists and expert on epilepsy, Frances Jensen) ("Recent studies show that neural insulation [which connects the frontal lobes to the rest of the brain] isn't complete until the mid-20's."); *but cf.* Michael S. Gazzaniga, *Neuroscience in the Courtroom*, Sci. Amer. 54, 59 (Apr. 2011) (noting one study using "a technology called diffusion tensor imaging to **{2011 U.S. Dist. LEXIS 421}**examine the tracts of white matter that connect different control regions of the cortex in 91 teenage subjects" finding that "juveniles who engaged in risky behavior had tracts that looked *more adult* than did those of their more risk-averse peers") (emphasis in original).

In addition to structural immaturities, developmental neuroimaging studies show a relationship between the maturation of regions of the brain associated with "voluntary behavior control" and changes in how the brain functions. *See Graham* AMA Brief at 25 (citing Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. Child Psychol. & Psychiatry 1023, 1024 (2006)). "Studies show that the socioemotional system, which is responsible for motivating risky and reward-based behavior, develops earlier than the cognitive control system, which regulates such behavior. . . . The result is that adolescents experience increasing motivation for risky and reward-seeking behavior without a

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corresponding increase in the ability to self-regulate behavior." *Graham* AMA Brief at 26. Several parts of the brain including the amygdala and nucleus accumbens **{2011 U.S. Dist. LEXIS 422}**reveal this early development of the socioemotional system in adolescents. *Id.* at 26-27.

Adolescence is a period marked by great change, both physiologically and emotionally. The adolescent brain is structurally immature and continues to develop well into the twenties. In addition, adolescents' socioemotional system develops earlier than the system responsible for cognitive control and executive functions creating a conflict between reward-seeking behavior and self-regulating behavior.

> [A]dolescent behavior is characterized by a hyperactive reward-driven system (involving the nucleus accumbens), a limited harm-avoidant system (involving the amygdala), and an immature cognitive control system (involving the prefrontal cortex). As a result, adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment.*See Graham* AMA Brief at 30.

Recognized research demonstrates that adolescents as a group are less capable of controlling their impulses, regulating their behavior, and managing influences such as peer pressure than adults. As a result they are less capable of making rational and informed decisions in their **{2011 U.S. Dist. LEXIS 423}**own interest than are adults. This distinction must be part of the proportionality calculus. *See* Part III.B.v.a, *supra.* Self-regulating **{792 F. Supp. 2d 502}** behavior and control continue to develop throughout adolescence and early adulthood. It would not be appropriate to impose a mandatory five-year sentence of incarceration upon a "grossly naive and immature" young adult.

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Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT: The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by inserting after "that makes him substantially less culpable than the average participant" the following: "in the criminal activity", by striking "concerted" and inserting "the", by striking "is not precluded from consideration for" each place such term appears and inserting "may receive", by striking "role" both places such term appears and inserting "participation", and by striking "personal gain from a fraud offense and who had limited knowledge" and inserting "personal gain from a fraud offense or who had limited knowledge";

in Note 3(C) by inserting at the end the following new paragraphs:

" In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;

(ii) the degree to which the defendant participated in planning or organizing the criminal activity;

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(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.";

in Note 4 by striking "concerted" and inserting "the criminal";

and in Note 5 by inserting after "than most other participants" the following: "in the criminal activity".

REASON FOR AMENDMENT: This amendment is a result of the Commission's study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed

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case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended. In drug cases, the Commission's study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered "integral" to the successful commission of the offense.

This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment.

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