

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

APPENDIX

JOSEPH DAVIS

Petitioner

v.

UNITED STATES OF AMERICA

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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION**

UNITED STATES OF AMERICA

v.

JOSEPH DAVIS,
Defendant.

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Case No. 1998 FEL 008587

Judge Gerald I. Fisher

ORDER

Before this Court for consideration are Defendant Joseph Davis's *pro se* Motion for Sentence Reduction, dated May 15, 2020 and received by this Court July 1, 2020, in which Mr. Davis sought, in part, compassionate release; Defendant's Motion for Compassionate Release, filed by appointed counsel on January 1, 2021; and the United States' Opposition to Defendant's Compassionate Release Motion, submitted January 25th, 2021. In addition, on June 1, 2021, in response to an order from this Court, the Government provided information that Mr. Davis had not contracted the COVID-19 virus and has been fully vaccinated as of April 21, 2021.

Having considered the submissions of the parties and the entire record of this case, this Court finds that Mr. Davis has not demonstrated that he no longer poses a danger to the community. In addition, Mr. Davis' medical conditions—mild asthma and schizophrenia—do not constitute “extraordinary and compelling reasons” for release; nor is he particularly prone to the deleterious effects of COVID-19 because he has been fully vaccinated.

Accordingly, it is this 15th day of June 2021, hereby

ORDERED that his Motion for Sentence Reduction and his Motion for Compassionate Release are **DENIED**.

I. BACKGROUND

According to the evidence presented at trial, in 1998, Joseph Davis and three co-conspirators (Rico Allison, Dwayne Allison and Ronald Morton) were heroin dealers operating in the 4100 block of Wheeler Road, S.E., Washington D.C. Gov. Opp. at 1. In late May or early June of that year, Mr. Allison and Mr. Morton broke into a vehicle owned by another drug dealer, John Ellis, and stole his money, heroin, and a firearm. Gov. Ex. A at 5. They proceeded

to sell the stolen heroin. *Id.* At some point, Mr. Ellis learned of the theft and approached Mr. Davis, asking that his firearm and heroin be returned, but Mr. Davis claimed he did not know anything about it. Gov. Opp. at 2. Feeling disrespected, Mr. Ellis proceeded to shoot and wound Mr. Morton on June 18, 1998. *Id.* This shooting sparked a violent neighborhood conflict, with Mr. Davis and the Allison brothers plotting revenge against Mr. Ellis and his associate, Robert Johnson. *Id.* at 2–3.

On July 2, 1998, Mr. Davis started shooting at Mr. Johnson and several others as they were leaving a store. *Id.* at 3. Three men, including Davon Rose, returned fire. Gov. Ex. B at 2. Mr. Davis shot Mr. Rose in the stomach, wounding him. Gov. Opp. at 3. Mr. Davis later told Mr. Ellis that he considered Mr. Johnson and Mr. Rose to be “flunkies” and said he had shot Mr. Rose in the stomach so “he could suffer.” *Id.* On July 15, 1998, Mr. Davis again shot at Mr. Johnson and Mr. Ellis as they were driving around in Mr. Ellis’ car; fortunately, both escaped uninjured. *Id.* at 4. However, a bystander named Beren Vest was shot in the head and wounded. Gov. Ex. B at 2.

On October 3, 1998, Mr. Davis, the Allison brothers, and several unknown co-conspirators drove a van into a parking lot by a convenience store, pointed a gun out the window, and fired shots. Def. Mot. at 4–5. James Simms, an uninvolved bystander, was shot in the neck and killed. *Id.* at 3–4. A witness identified Mr. Davis as the shooter, and heard him say “You b***h-ass n****s” during the shooting. *Id.* at 4.¹

On an unknown date in October 1998, Mr. Davis and the Allison brothers robbed Dianne Fogg, who was friends with Mr. Ellis. Gov. Opp. at 4–5. One of the Allison brothers forced Ms. Fogg into an alleyway at gunpoint, where Mr. Davis hit her in the head with a firearm and told her to “give [her] money up.” *Id.* at 5. Mr. Davis and the Allison brothers stole Ms. Fogg’s money and heroin. *Id.* That same month, Mr. Davis also encountered Mr. Ellis’ mother, Deidra Paris, near a deli in Southeast D.C. *Id.* Ms. Paris tried to avoid Mr. Davis, because she knew of the ongoing dispute, but he approached her anyway and threatened her with a gun. *Id.* Mr. Davis told Ms. Paris he would kill her and her son to get to Mr. Ellis if he had to, telling her “I’ll kill you b***h, I’ll kill you.” *Id.*

¹ At trial, the jury was unable to reach a verdict on the murder charge arising from Mr. Simms’ death, and the Government later dismissed it. Gov. Opp. at 5.

On October 25, 1998, Andrea Caldwell was at a gathering with several other people in the 4000 block of Wahler Place, S.E. Mr. Davis approached the group carrying an AK-47 assault rifle. *Id.* at 5–6. He grabbed Ms. Caldwell and started pulling her, asking “b***h, why you tell everybody what I did to you?”² Gov. Opp. at 5–6; Gov. Exh. B at 2. Mr. Davis asked where Mr. Ellis was, learned he was at a nearby cookout, and started walking in that direction. Gov. Opp. at 6. Mr. Ellis was leaving the cookout in his car to get high, when he saw Mr. Davis approach with a gun. Gov. Opp. at 6; Gov. Exh. B at 2. Mr. Ellis was about to return to warn the others, when he heard gunshots. Gov. Opp. at 6; Gov. Exh. B at 2-3. Ms. Caldwell was also near the cookout, and heard gunshots and saw Mr. Davis shooting. *Id.* One cookout attendee, Andre McCall, was shot and killed. Gov. Opp. at 6–7; Gov. Exh. B at 3. Mr. Davis saw Ms. Caldwell again and told her: “B***h, I might as well kill you because you (are) going to snitch.” Gov. Opp. at 6; Gov. Exh. B at 3. But when Mr. Davis tried to shoot her, his gun apparently jammed, and when police arrived, he left. *Id.*

On November 25, 1998, Mr. Davis was arrested for the murder of Mr. Simms, and a search of his person uncovered 1.3 grams of heroin packaged in 14 ziplock bags. Gov. Opp. at 7. On August 4th, 1999, a grand jury indicted Mr. Davis for conspiracy, seven counts of assault with intent to kill while armed, five counts of possessing a firearm during a crime of violence, four counts of carrying a pistol without a license within 1,000 feet of an elementary school, two counts of first-degree murder while armed (premeditated), two counts of threatening to injure a person, armed robbery, assault with intent to commit robbery while armed, and unlawful possession of heroin and cocaine with intent to distribute within 1,000 feet of an elementary school. *Id.*

Mr. Davis’ jury trial began on February 14, 2001. Gov. Opp. at 8. On March 7, 2001, the jury convicted Mr. Davis of seventeen charges: conspiracy; four counts of assault with intent to kill while armed; four counts of possessing a firearm during a crime of violence; two counts of carrying a pistol without a license within one thousand feet of an elementary school; the first-degree murder of Mr. McCall while armed (premeditated); two counts of threatening to injure a person; armed robbery; and unlawful possession with intent to distribute heroin within one thousand feet of an elementary school. *Id.* Other charges were dismissed by the Court or by the

² It is unclear from the record what, if anything, Mr. Davis had done to Ms. Caldwell or whom, if anyone, she had told about it.

Government. Gov. Opp. at 8. On August 24, 2001, the trial judge, the Honorable Lee F. Satterfield, sentenced Mr. Davis to an aggregate term of imprisonment of 75 years to life. *Id.*

Mr. Davis filed a notice of appeal on September 25, 2001. *Id.* at 9. He also filed a motion for a mistrial or new trial on February 26th, 2002. *Id.* Judge Satterfield held an evidentiary hearing and ultimately denied the motion. *Id.* Mr. Davis filed a timely appeal in 2004, arguing that there was insufficient evidence to support his conspiracy conviction, that the trial court had made evidentiary errors, and that his motion for a new trial had been improperly denied. *Id.* The Court of Appeals denied Mr. Davis' claims and affirmed his convictions and sentences in 2007. *Id.*

On July 7, 2020, Mr. Davis filed his *pro se* compassionate release motion, and on January 1, 2021, appointed counsel filed the supplement to the original motion. The Government filed its opposition on January 25, 2021.

Mr. Davis argues that he merits immediate release under the recently enacted COVID-19 Response Supplemental Emergency Act of 2020 because his schizophrenia and asthma place him at risk from COVID-19 and because he is no longer a danger to the community. The Government argues that Mr. Davis should not be released because he remains dangerous as evidenced by the severity of his crimes, his substantial disciplinary record as an inmate, and his lengthy criminal record. Additionally, the Government argues that Mr. Davis is ineligible for compassionate release because he has not demonstrated that he suffers from a medical condition that would significantly increase his risk of severe complications from COVID-19.

II. ANALYSIS

A. Request for Relief Under the Emergency Act

To date, COVID-19 has killed over 600,000 people in the United States and infected more than 33,400,000. *See* Johns Hopkins Univ. & Med., *Coronavirus Resource Center*, <https://bit.ly/31Y81fB> (last visited June 15, 2021). “[T]hat individuals in jails and prisons are particularly vulnerable during this pandemic, is beyond doubt and could hardly be overstated.” *Mitchell v. United States*, 234 A.3d 1203, 1211, n. 13 (D.C. 2020). The Centers for Disease Control (“CDC”) has noted that correctional and detention facilities face “unique challenges” for the control of COVID-19 transmission among incarcerated persons, prison staff, and visitors, including highly congregational environments, inability of most patients to leave the facility, the

daily ingress and egress by staff, the limited options for medical isolation, unease and misinformation among the incarcerated residents, and the limited ability of incarcerated persons to exercise effective disease prevention measures such as social distancing and frequent handwashing. *See* Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Control (Feb. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>. Despite various efforts to fight the spread of the virus, including reducing the inflow of persons to penal institutions and releasing other detained individuals, federal correctional institutions experienced significant numbers of coronavirus infections. *See* Editorial, *Coronavirus Rages Through Prisons*, N.Y. TIMES, Nov. 22, 2020, Sunday Review p. 6 (citing the Marshall Project, *A State-By-State Look at Coronavirus in Prisons*). Not until recently has BOP been able to begin to effectively deal with the outbreak in its facilities. According to its website, by mid-May, all of BOP's more than 150,000 inmates had been offered the vaccine; as of May 31, 2021, BOP had administered more than 190,000 doses to staff and inmates; and as of today, 100 federal inmates and 132 BOP staff have confirmed positive test results for COVID-19 nationwide, and there are 264 outstanding COVID-19 cases. *See* Federal Bureau of Prisons COVID-19 Update (June 15, 2021), <https://www.bop.gov/coronavirus/>.

To address the impact of the COVID-19 pandemic on prisoners incarcerated pursuant to Superior Court sentences, the D.C. Council enacted D.C. Code § 24-403.04 as part of the Emergency Act.³ Pursuant to the statute, the criteria the Court must evaluate are whether the

³ The legislation became permanent as part of the "Second Look Amendment Act" (now known as "Omnibus Public Safety and Justice Amendment Act of 2020"), Act 23-568. D.C. Code § 24-403.04 now provides:

(a) Notwithstanding any other provision of law, the court may modify a term of imprisonment imposed upon a defendant if it determines the defendant is not a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3553(a) and evidence of the defendant's rehabilitation while incarcerated, and:

- (1) The defendant has a terminal illness, which means a disease or condition with an end-of-life trajectory;
- (2) The defendant is 60 years of age or older and has served at least 20 years in prison; or
- (3) Other extraordinary and compelling reasons warrant such a modification, including:

(A) A debilitating medical condition involving an incurable illness, or a debilitating injury from which the defendant will not recover;

(B) Elderly age, defined as a defendant who:

- (i) Is 60 years of age or older;
- (ii) Has served the lesser of 15 years or 75% of the defendant's sentence; and
- (iii) Suffers from a chronic or serious medical condition related to the aging process or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19;

(C) Death or incapacitation of the family member caregiver of the defendant's children; or

defendant (1) is no longer a danger to the community, and (2) has been sufficiently rehabilitated. If the defendant is rehabilitated and is not a danger, then the Court evaluates the last prong of the test: whether the defendant has either (A) a terminal illness, (B) is over 60 and has served more than 20 years in prison, or (C) there are other extraordinary and compelling reasons for release, such as a debilitating medical condition, old age, or death or incapacity of a caregiver for defendant's children or partner.

In short, Mr. Davis, who is 45 years old, must demonstrate (1) he suffers from a medical condition or there is some other circumstance that constitutes an extraordinary and compelling reason warranting his release; (2) he is no longer a danger to the community; and (3) relatedly, he has been sufficiently rehabilitated.

B. Danger to Community and Rehabilitation

In assessing whether Mr. Davis is a danger to the community, the Court must evaluate the somewhat overlapping factors listed in 18 U.S.C. §§ 3142(g) and 3553(a): (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence and the weight of evidence against the Defendant; (2) the Defendant's history and characteristics⁴; (3) the threat posed by the Defendant to the community; and (4) the need for the sentence.

Mr. Davis argues that his age at the time of the offense, difficult upbringing, and mental illness should be considered as mitigating factors. He also points to the coursework he has taken in prison and his aunt's promise to support him upon his release. The Government argues that Mr. Davis committed a series of premeditated violent crimes and had a lengthy criminal history at the time of his arrest, including violent offenses and weapons charges. The Government further points to Mr. Davis' disciplinary record from the Bureau of Prisons, which shows he has accrued 32 infractions as an inmate—many of them recently.

(D) Incapacitation of a spouse or a domestic partner when the defendant would be the only available caregiver for the spouse or domestic partner.

⁴ History and characteristics include: (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law[.] See generally 18 U.S.C. § 3142 (g)(3).

1. Nature and Circumstance of Offenses

A jury convicted Mr. Davis of a plethora of serious criminal charges, including first-degree premeditated murder of Mr. McCall, and four separate counts of assault to kill while armed. Gov. Opp. at 8. At trial, multiple witnesses identified Mr. Davis as the shooter of Andre McCall and several others linked him to the events that resulted in his convictions for the four counts of assault with intent to kill while armed and other charges. Gov. Ex. B at 2–4. At the time of trial, Mr. Davis denied responsibility and claimed he had been “set up.” Gov. Ex. A at 7. Mr. Davis does not contest the facts of these incidents as presented by the Government, and now says that he accepts full responsibility for his actions. Def. Mot. at 5.

The Court finds that the nature and circumstances of Mr. Davis’ crimes weigh strongly against his release. Mr. Davis and his co-conspirators engaged in a series of premeditated armed violent crimes, terrorizing a neighborhood for months. He murdered at least one person and attempted to kill several others. His threatening and violent conduct was directed not only towards his rivals in the drug trade, but also at family members, bystanders, and potential witnesses. Although the Court appreciates that Mr. Davis now accepts responsibility, the nature of his crimes strongly suggests he would pose a danger to the community if released.

2. History and Characteristics of Defendant

Mr. Davis had a significant criminal history prior to the events at issue in this case, despite only being 23 at the time. Mr. Davis had prior convictions for Robbery, Possession with Intent to Distribute Heroin, and Attempted Larceny.⁵

In a handwritten letter submitted to the Court, Mr. Davis writes that he had a difficult upbringing in Southeast D.C. and was surrounded by violence as a young man. Def. Ex. 4. Mr. Davis regularly abused marijuana from the age of fourteen until roughly three years before the commission of the offenses in question. Gov. Ex. A at 13. His sister says both she and Mr. Davis grew up with a drug addicted mother and father, and had little parental guidance as a result. Def. Mot. at 27. She also states that Mr. Davis suffered from schizophrenia and asthma during his childhood and adolescence. *Id.* at 26.

⁵ He had also been arrested for Possession of Marijuana (twice), Possession of Stolen Property, Assault with a Dangerous Weapon, Simple Assault (twice), Threat to Injure a Person, Destruction of Property, Unauthorized Use of a Livestock Motor Vehicle, Unauthorized Use of an Automobile, and Domestic Assault, Gov. Opp. at 21, but these charges were either dismissed or no-papered. Gov. Ex. A at 7–12.

If released, Mr. Davis plans to reside with his aunt, Carol Adams, in Lanham, Maryland. *Id.* at 25. Ms. Adams has worked for the District of Columbia Department of Corrections for 30 years and is aware of the difficulties surrounding release of defendants who have spent time in prison. Def. Mot. at 25–26. Ms. Adams will only let Mr. Davis reside with her while he is proactively seeking employment, and she will provide groceries and pay utilities. *Id.* at 26. Mr. Davis says that if released, he would eventually like to start a nonprofit program for youth. Def. Ex. 4. The Government notes that Mr. Davis does not explain how he will seek employment or acquire health care, and argues his release plan is not adequate to assure his successful reintegration into society. Gov. Opp. at 23.

This Court agrees that Mr. Davis’ mental health issues and difficult upbringing are mitigating factors. However, the Court finds Mr. Davis’ criminal history quite concerning, as it includes both violent crimes and narcotics trafficking offenses akin to some of those he committed in this case. Ultimately, this Court concludes that Mr. Davis’ history and characteristics weigh against his release, and is not convinced that Mr. Davis’ release plan is comprehensive enough, or sufficiently directed to his personality traits and the community influences that led to his violent criminal behavior, to ensure he would not be a threat to the community if released.

3. The Threat Mr. Davis Poses to the Community

The Court also must consider the possible danger Mr. Davis may pose to the community if he is released early. In addition to the conduct supporting his convictions and his history and characteristics, Mr. Davis’ disciplinary record while in prison suggests he would continue to pose a danger to others if he is set free.

Mr. Davis has incurred 32 disciplinary infractions while incarcerated, eight of which occurred in the past three years. Gov. Opp. at 22. The Bureau of Prisons (BOP) classifies infractions in four categories, with level 100 infractions considered the most serious and level 400 the least serious. *Id.* Mr. Davis “has incurred eight Level 100, thirteen Level 200, and eleven Level 300 infractions, seven of which were for sexual acts in the presence of female corrections officers and his psychologist.” *Id.* Mr. Davis’ disciplinary infractions also include making threats of bodily harm, assault, lighting a fire, and possession of a prohibited weapon. *Id.* The assault and weapons possession infractions both occurred within the last three years. Gov.

Ex. E at 2. Mr. Davis' inmate profile indicates his threat level and risk of recidivism are high. The Government characterizes his overall disciplinary record as "abysmal." Gov. Opp. at 22.

Additionally, Mr. Davis has failed to remediate what appears to be a substantial issue with substance abuse. Both Mr. Davis' past convictions and his convictions at issue in this matter involved narcotics possession and distribution, and he has incurred disciplinary infractions related to drug or alcohol violations on four occasions while incarcerated. Gov. Opp. at 8, 21–22. Mr. Davis committed an assault in 2018, and later told BOP staff that he was so impaired at the time he could not recall what happened. *Id.* Despite this, Mr. Davis has failed to complete his drug education requirement while incarcerated. Def. Mot. at 23–24; Gov. Opp. at 22.

Mr. Davis' prison disciplinary record is very troubling, especially his recent possession of a weapon and his assaultive conduct. And his failure to address his substance abuse issues while incarcerated adds to the concern about the danger he would pose if freed. Mr. Davis' involvement with narcotics led to the lethal violence that resulted in his imprisonment, and he has continued to engage in dangerous and violent conduct while incarcerated. As such, this Court is not persuaded that Mr. Davis can be safely released at this time.

4. Rehabilitation

This Court also must evaluate whether Mr. Davis has been sufficiently rehabilitated. Mr. Davis points to the coursework he has completed in BOP custody as evidence of his rehabilitation. Def. Mot. at 23–24. Mr. Davis has completed 13 classes, including a Victim Impact Seminar, and courses on Hazardous Material Transportation, Victorious Christian Living, and Small Business. *Id.* In the letter he submitted to the Court as a part of his motion for compassionate release, Mr. Davis, now 45, expressed that he has changed and is no longer the man he was 23 years ago. Def. Ex. 4. He extends an apology to the victims of his crimes and says that he takes responsibility for his actions as a younger man. *Id.*

Though this Court accepts as genuine Mr. Davis' apology and his belief that he has been rehabilitated, actions are far more convincing than words. Here, as the Government points out, Mr. Davis' deeds do not demonstrate changed behavior. Instead, his poor prison disciplinary record—including his relatively recent acts of violence and weapons possession—strongly suggests that he is highly unlikely to conform his behavior to the rules, regulations, and social

norms if he is placed back in society. Furthermore, even though Mr. Davis has taken several classes, few have addressed the psychological underpinnings of his violent behavior and his indifference to the suffering of his victims. And as noted, Mr. Davis has failed to complete his drug education requirement. *Id.*

This Court is not convinced that Mr. Davis has successfully changed and matured or that he has adequately remediated the underlying issues that led him to commit his crimes. Thus, it cannot conclude that he is sufficiently rehabilitated.

5. Need for the Sentence Imposed

This Court must also determine the need for the sentence imposed by considering the factors relevant to the question of dangerousness that are included in 18 U.S.C. § 3553(a). *See Bailey v. United States*, 2021 D.C. App. LEXIS 137 (June 3, 2021), at *9-12 and n.9. The pertinent factors this Court must assess are the seriousness of the offense, the provision of just punishment for the offense, deterrence of Mr. Davis from committing future criminal conduct, and protection of the public. *See Bailey v. United States*, Nos. 21-CO-26 and 21-CO-27 (D.C. June 3, 2021) at 5-8. In essence, these factors present two questions: (1) whether the original sentence was appropriate and (2) whether additional incarceration is necessary?

Although the 75-year minimum sentence Judge Satterfield imposed is quite lengthy, it reflected the extensive series of violent acts Mr. Davis committed in 1998, which killed at least one and perhaps two people, injured others, and terrorized a community for months. This Court cannot say that the sentence was excessive when levied.

As of now, Mr. Davis has served 23 years of his minimum sentence. The question that is left is whether further incarceration is appropriate to satisfy the statutory concerns directed to the question of current and future dangerousness. *See Bailey* at 5-8. The Government argues that early release is not warranted in this case because Mr. Davis' serious criminal offenses demonstrate his "utter lack of respect for the law and the community." Gov. Opp. at 23. Mr. Davis argues that his personal comments to the Court and the educational coursework he has completed show he has made "substantial progress as an individual" while incarcerated. Def. Mot. at 29.

This Court appreciates the progress that Mr. Davis has made, but concludes that further incarceration is necessary because Mr. Davis' violent conduct in prison and failure to adequately

address his substance abuse issues are strong evidence that he has not reversed his violent tendencies that caused him to commit the brutal crimes in this case or his earlier violent offenses. Further incarceration of Mr. Davis is warranted in order to ensure protection of the public and afford Mr. Davis additional opportunity to engage in treatment and participate in classes that will afford him the tools to avoid criminal conduct when he returns to society.

Having weighed the considerations relevant to the question of dangerousness, this Court concludes that Mr. Davis has fallen far short of carrying his burden to prove, by a preponderance of the evidence, that he would not present a significant threat to the safety of others if he were released.

C. Extraordinary and Compelling Reasons

Even if Mr. Davis had demonstrated he is no longer a danger, in order to prevail on a motion for compassionate release, he must also show “extraordinary and compelling reasons” warranting relief. D.C. Code § 24-403.04(a)(3). Although the examples of qualifying circumstances provided in the Emergency Act suggest that it is meant to apply to defendants who are older and serving lengthy sentences, *see* D.C. Code § 24-403.04(a)(1) and (2), the better reading of the statute is that those examples are non-exclusive and that subsection (a)(3) allows for a wider range of qualifying conditions.

Mr. Davis maintains that he satisfies the requirements of subsection (a)(3) because he suffers from asthma and schizophrenia. Def. Mot. at 2. He argues that these conditions qualify as co-morbidities and create an extraordinary and compelling circumstance justifying release because they make him acutely vulnerable to the severe consequences of contracting COVID-19. Def. Mot. at 19. In its Opposition, the Government disputes this and points out that though Mr. Davis has mild asthma, that does not leave him at an increased risk of severe illness or death if he contracts COVID-19, and according to BOP records, Mr. Davis’ schizophrenia is likely feigned. Gov. Opp. at 1, 18. In addition, in its supplemental filing, the Government has informed this Court that Mr. Davis has not contracted the virus and has been successfully vaccinated.

It is undisputed that Mr. Davis is diagnosed with asthma. Def. Mot. at 2. A doctor’s note from Mr. Davis’ clinical encounter on February 14, 2019, stated that Mr. Davis needed to use albuterol at least twice daily to control his asthma. Def. Ex. 1 at 13. Further, Mr. Davis suffered

from an upper respiratory infection and acute bronchitis on December 27th, 2019, and while being treated for that condition, he was prescribed an albuterol inhaler for asthma, but indicated he did not want to use it too much. *Id.* at 6; Def. Ex. 1 at 1. The evaluating physician's assistant recommended he take two puffs of albuterol every two hours "as needed for shortness of breath and wheezing." Def. Ex. 1 at 3.

The Government counters that Mr. Davis is 45 years old and relatively healthy. Gov. Opp. at 1. Mr. Davis is designated by the BOP as Care Level 1, "which denotes healthy or simple chronic care," and that he is cleared for work. *Id.* at 15. Mr. Davis does not describe the severity of his asthma in his motion, and the Government contends it is mild and controlled. *Id.* at 17. Further, there is "no indication that his asthma is affecting his daily life" when Mr. Davis is taking his medication as prescribed. *Id.* at 18.

Mr. Davis also contends that as a schizophrenic, he is at a higher risk of complications from, or a severe case of, COVID-19. Def. Mot. at 10–11. Mr. Davis presents research suggesting that schizophrenics are at a higher risk of contracting COVID-19 because they have impaired decision making and a more difficult time complying with protective measures such as social distancing. *Id.* at 11. He also argues that distress from social distancing measures may make schizophrenics more vulnerable to relapse. *Id.* at 10. Finally, Mr. Davis notes that the Sentencing Commission has recognized that "mental health needs may also be a basis for granting compassionate release." *Id.* at 12.

The Government argues that Mr. Davis' claims of mental illness are either feigned or exaggerated. Gov. Opp. at 18. Mr. Davis' BOP health records from December 9th and 11th, 2019 indicate that a psychologist declined to diagnose him with schizophrenia and concluded that he is "either feigning or greatly exaggerating mental health concerns." Def. Ex. 1 at 4–5; Gov. Opp. at 18. The Government also notes that Mr. Davis has previously "admitted [to making] suicidal claims [in] an effort to alter the dosage of his medication and get medical professionals to comply with his demands for alterations to medication." Gov. Opp. at 18.

As a starting point, this Court rejects Mr. Davis' argument that the prevalence of COVID-19 among inmates is grounds for his release. It is not the prospect of contracting COVID-19 that qualifies a prisoner for relief under the statute—were that the case, all federal and state prisoners would be able to demonstrate extraordinary and compelling circumstances, given how prevalent the virus is in this country's prisons and jails. It is the individual prisoner's heightened

susceptibility to the extreme consequences should he/she contract COVID-19 that the Emergency Act seeks to address when a medical condition is the basis for a request for compassionate release. D.C. Code § 24-403.04(a)(1)(B).

For similar reasons, this Court finds that Mr. Davis' alleged schizophrenia cannot establish a basis for compassionate release. It is far from clear that Mr. Davis actually suffers from schizophrenia, and his "documented history of feigning mental health symptoms" gives the Court pause. Gov. Ex. D at 98. But even taking Mr. Davis' claim to suffer from that mental illness at face value, the evidence he presents shows only that people with schizophrenia "may be more susceptible to transmission of COVID-19" because of their impaired decision making and judgment. Def. Mot. at 11. As just noted, it is an individual inmate's susceptibility to extreme complications *having contracted* COVID-19—not the *likelihood of contracting* it—which establishes an extraordinary and compelling circumstance for the purposes of the Emergency Act.

Mr. Davis' diagnosis of asthma also does not meet the requirements of the Emergency Act. The CDC's most recent guidance states that individuals with "moderate to severe" asthma "might be at an increased risk for severe illness" from COVID-19. Def. Mot. at 12–13. Medical documentation establishes that Mr. Davis suffers from asthma. Def. Ex. 1 at 1. But the burden of establishing an extraordinary and compelling circumstance under the Emergency Act is the Defendant's, and this Court has not been presented with evidence supporting the conclusion that Mr. Davis' asthma is moderate or severe. Rather his symptoms, as documented in his medical records, suggest that he does not meet the criteria for moderate to severe asthma as defined under the BOP's clinical practice guidelines. Gov. Opp. at 17–18. Given the evidence presented and the CDC's guidelines, this Court finds Mr. Davis has not shown his asthma is severe enough to constitute an extraordinary and compelling circumstance.

Finally, even were Mr. Davis' mental illness and asthma severe enough so as to make him particularly susceptible to the more severe consequences of the virus, he still would not be able to establish an "extraordinary and compelling" circumstance for release because, fortunately, he has been successfully vaccinated against the disease. Thus, his risk of being infected is extremely low. The vast majority of federal district courts who have considered whether inmates can establish extraordinary and compelling circumstances when they have been

fully vaccinated have ruled that they cannot.⁶ All judges of our court who have encountered the issue have followed suit.⁷ Based upon a review of those decisions and the currently available scientific evidence, this Court is compelled to agree. Consequently, this Court concludes that Mr. Davis' medical conditions do not produce "an acute vulnerability to severe medical conditions or death as a result of COVID-19," D.C. Code § 24.403.04(a)(3)(B)(iii), and he does not qualify for compassionate release.⁸

III. CONCLUSION

Having considered Mr. Davis's motion, the related responsive pleadings, and the entire record herein, and having concluded that Mr. Davis has not met his burdens to prove, by a preponderance of the evidence, that he is no longer a danger to others and that his medical conditions establish an extraordinary and compelling justification for his release, it is this 15th day of June 2021, hereby

ORDERED that Mr. Davis' motion for compassionate release is **DENIED**.



Honorable Gerald I. Fisher
Associate Judge
(Signed in Chambers)

⁶ See, e.g., *United States v. Moore*, 2020 U.S. Dist. LEXIS 232051, at *3 (E.D. Pa. Dec. 10, 2020); *United States v. Burks*, 2020 U.S. Dist. LEXIS 151922, at *3 (W.D.N.C. Aug. 21, 2020); *United States v. Krietzman*, 2020 U.S. Dist. LEXIS 135505, at *3 (N.D. Cal. July 30, 2020);

⁷ See *United States v. Autrey*, Case No. 1997-FEL-9413, April 27, 2021 Order, at 7 (Salerno, J.); *United States v. Brown*, 2003-FEL-7087, May 10, 2021 Order, at 5 (Becker, J.); *United States v. Gaddis*, Case No. 2006 CF2 10149, May 5, 2021 Order, at 4 (McKenna, J.); *United States v. Napper*, Case No. 1994-FEL-3239, March 23, 2021 Order, at 9-10 (O'Keefe, J.); *United States v. Welch*, Case No. 1996-FEL-2349, April 30, 2021 Order, at 6 (Krauthamer, J.).

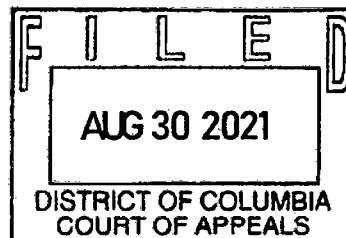
⁸ Mr. Davis also contends that his race and status as an incarcerated person weigh in favor of release, because incarcerated African-Americans are generally overrepresented in COVID-19 infections and deaths. Def. Mot. at 14. But while there are racial disparities in COVID-19 infection rates and outcomes, studies have not found these outcomes to be a product of race as an independent factor. Rather, they appear to be related to the co-morbidities associated with other societal inequities such as living conditions and medical care. See, e.g., Wiley, Z., *Age, Comorbid Conditions, and Racial Disparities in COVID-19 Outcomes*, Journal of Racial and Ethnic Health Disparities (Jan. 2021). As the Government points out, there is no evidence here that Black inmates at USP Thomson are receiving inferior medical care. Gov. Opp. at 14.

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**District of Columbia
Court of Appeals**



Nos. 21-CO-414

JOSEPH D. DAVIS,

Appellant,

v.

1998 FEL 8587

UNITED STATES,

Appellee.

BEFORE: Glickman and Thompson, Associate Judges, and Nebeker, Senior Judge.

J U D G M E N T

On consideration of appellant's motion for summary reversal, appellee's opposition and cross-motion for summary affirmance, and the record on appeal, it is

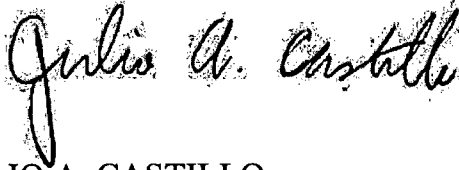
ORDERED that appellant's motion for summary reversal is denied. *See Watson v. United States*, 73 A.3d 130 (D.C. 2013). It is

FURTHER ORDERED that appellee's cross-motion for summary affirmance is granted. *See id.* Appellant challenges the trial court's order denying his motion for compassionate release, pursuant to D.C. Code § 24-403.04, arguing that the trial court erred in concluding that his potential dangerousness outweighed the need for compassionate release. However, the statute requires the trial court to make separate findings of eligibility and dangerousness. *See* D.C. Code § 24-403.04(a) (requiring the trial court to modify a sentence for an eligible defendant if it determines that the defendant is not a danger to the community or any other person *and* meets any of the eligibility criteria). Here, the trial court weighed the statutory factors and determined that appellant had failed to establish non-dangerousness by a preponderance of the evidence, noting his criminal history, the nature and circumstances of the underlying offense, disciplinary record while incarcerated, and failure to complete drug education. Because we hold the trial court did not abuse its discretion on the issue of dangerousness, we need not reach the issue of eligibility. *See District of Columbia v. WICAL Ltd. P'ship*, 630 A.2d 174, 182 (D.C. 1993) ("Courts should not decide more than the occasion demands."). It is

No. 21-CO-414

FURTHER ORDERED and ADJUDGED that the order on appeal is affirmed.

ENTERED BY DIRECTION OF THE COURT:

A handwritten signature in black ink, reading "Julio A. Castillo". The signature is written in a cursive style with a large, stylized initial 'J'.

JULIO A. CASTILLO
Clerk of the Court

Copies e-served to:

Honorable Gerald I. Fisher

Director, Criminal Division

Steven R. Kiersh, Esquire

Chrisellen R. Kolb, Esquire
US Attorney's Office

cml