Appendix

Index to Appendix

A-1

2021 WL 4786732
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Anthony Jerome **BELL**, a.k.a. Amp, a.k.a. Ant, a.k.a. Huckabuck, Defendant-Appellant.

No. 21-10556
|
Non-Argument Calendar
|
Filed 10/14/2021

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:04-cr-60275-JIC-3

Attorneys and Law Firms

Phillip Drew Dirosa, U.S. Attorney's Office, Fort Lauderdale, FL, U.S. Attorney Service, Lisa A. Hirsch, Scott Dion, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.

Timothy Day, Federal Public Defender's Office, Fort Lauderdale, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before ROSENBAUM, LAGOA, and BRASHER, Circuit Judges.

Opinion

PER CURIAM:

***1** Anthony Bell is a federal prisoner serving a total 324-month sentence stemming from convictions in 2005 for conspiracy to distribute and possession with intent to distribute crack cocaine. In November 2020, he filed a motion seeking early release under 18 U.S.C. § 3582(c)(1)(A), as amended by § 603(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), alleging that he was at increased risk of becoming seriously ill from COVID-19 due to Myasthenia Gravis, an autoimmune neuromuscular disease, and the medication he takes for that condition, which suppresses his immune system. The district court concluded that Bell's medical condition presented "extraordinary and compelling reasons" for early release, as required by § 3582(c)(1)(A), but it decided, after considering the sentencing factors enumerated in 18 U.S.C. § 3553(a), as well as the requirements set forth in U.S.S.G. § 1B1.13, to deny Bell's request for early release.

On appeal, Bell argues that the district court erred by treating § 1B1.13 as binding and abused its discretion by relying on conduct from more than 16 years ago and failing to consider all the § 3553(a) factors, including his post-offense rehabilitation. After careful review, we affirm.

We review for abuse of discretion a district court's denial of a prisoner's § 3582(c)(1)(A) motion. *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021). A district court abuses its discretion when it applies an incorrect legal standard, relies on clearly erroneous facts, or commits a clear error of judgment. *Id.* at 911–12.

Under § 3582(c)(1)(A), a district court may grant a defendant's motion for a sentence reduction, after considering the § 3553(a) factors, "if it finds that ... extraordinary and compelling reasons warrant such a reduction" and that a "reduction is consistent with applicable policy statements" in the Sentencing Guidelines. 18 U.S.C. § 3582(c)(1)(A)(i). We have held that § 1B1.3 is "applicable" to all motions under § 3582(c)(1)(A), and, accordingly, "district courts may not reduce a sentence under Section 3582(c)(1)(A) unless a reduction would be consistent with [§] 1B1.13." *United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021).[1] Section 1B1.13, in turn, requires the court to find that "the defendant is not a danger to the safety of any other person or to the community." U.S.S.G. § 1B1.13(2).

1 *Bryant*, which was issued after Bell filed his brief in this case, forecloses his contention that U.S.S.G. § 1B1.13 is not binding.

Altogether, then, § 3582(c)(1)(A) imposes three conditions on granting a sentence reduction: (1) there must be "extraordinary and compelling reasons" for doing so; (2) the reduction must be supported by the § 3553(a) factors; and (3) granting a reduction "wouldn't endanger any person or the community within the meaning of § 1B1.13's policy statement." *United States v. Tinker*, —— F.4th ——, No. 20-14474, 2021 WL 4434621, at *2 (11th Cir. Sept. 28, 2021). Each condition is necessary, so the failure to satisfy one condition warrants denial of the motion. *See id.*

***2** The district court concluded that Bell's medical condition and treatment constituted an "extraordinary and compelling reason" and therefore satisfied the first condition. But it reasoned that Bell failed to satisfy the second two conditions due to his "violent conduct committed in connection with the narcotics trafficking conspiracy that led to his conviction in this case." Specifically, the court explained that Bell and a codefendant "kidnapped an individual they accused of being a government informant, drove him to a secluded area, shot him in the chest and left him for dead (although he survived)." Citing the nature and circumstances of the offense and the history and characteristics of the defendant, *see* 18 U.S.C. § 3553(a)(1), the court concluded that a reduction of Bell's sentence by seven years "would not promote the interests of justice but would minimize the severity of [Bell's] conduct." So the court denied the motion.

Bell maintains that the district court failed to consider factors that were due significant weight, including his evidence of post-offense rehabilitation, and based its denial solely on a single factor.

An order granting or denying compassionate release under § 3582(c)(1)(A) generally must indicate that the district court has considered "all applicable § 3553(a) factors." *United States v. Cook*, 998 F.3d 1180, 1184–85 (11th Cir. 2021). "[A] district court need not exhaustively analyze each § 3553(a) factor or articulate its findings in great detail," and an acknowledgement by the court that it has considered the § 3553(a) factors and the parties' arguments is ordinarily sufficient. *Tinker*, 2021 WL 4434621, at *5 (quotation marks omitted). Nevertheless, the court "must provide enough analysis that meaningful appellate review of the factors' application can take place." *Id.* (quotation marks omitted).

Moreover, the weight to give any particular § 3553(a) factor, whether great or slight, is committed to the district court's sound discretion. *Id.* "Even so, [a] district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Id.* (quotation marks omitted).

Here, the district court did not abuse its discretion in concluding that a reduction was not supported by the § 3553(a) factors.[2] *See id.* at *2. Even assuming the court was *required* to consider his post-offense rehabilitation, as Bell argues, the court did not need to explicitly reference or discuss his evidence of rehabilitation in its order. *See id.* at *5. And the record shows that the court considered several factors beyond the nature and circumstances of the offense and the history and characteristics of the defendant. *See* 18 U.S.C. § 3553(a)(1). The court weighed the need for the sentence to reflect the severity of the offense conduct. *See* 18 U.S.C. § 3553(a)(2). It also stated that it had considered the parties' filings, which discussed at length the factors that Bell contends the district court ignored. *See Tinker*, 2021 WL 4434621, at *5 (concluding that the court adequately considered the § 3553 factors in part because it "acknowledged the parties' filings, which discussed at length the factors that Tinker contends the district court ignored"). On the whole, we are satisfied that the court properly considered the § 3553(a) factors and did not abuse its discretion in denying compassionate release. *See Harris*, 989 F.3d at 911–12.

2 For that reason, we need not evaluate the district court's finding as to the danger releasing Bell would pose. *See* U.S.S.G. § 1B.13(2).

In sum, we affirm the denial of Bell's motion for early release under 18 U.S.C. § 3582(c)(1)(A).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 4786732

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-60275-CR-COHN(s)
21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
21 U.S.C. § 853

UNITED STATES OF AMERICA,

vs.

BRUCE HERMITT BELL,
a/k/a "Brian Elliott King,"
ANTHONY JEROME BELL,
a/k/a "Ant,"
a/k/a "Amp,"
a/k/a "Huckabuck," and
CURTIS VINCENT SHEFFIELD,

Defendants.
_____/

INDICTMENT

The Grand Jury charges that :

COUNT 1

Beginning in or about June, 2004, the exact date being unknown to the Grand Jury, and continuing through on or about October 13, 2004, in Broward County, in the Southern District of Florida, and elsewhere, the defendants,

BRUCE HERMITT BELL,
a/k/a "Brian Elliott King,"
ANTHONY JEROME BELL,
a/k/a "Ant,"
a/k/a "Amp,"

64
gp

a/k/a "Huckabuck," and
CURTIS VINCENT SHEFFIELD,

did knowingly and intentionally combine, conspire, confederate, and agree with each other and with others unknown to the Grand Jury, to possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Pursuant to Title 21, United States Code, Section 841(b)(1)(A), it is further alleged that the controlled substance, in fact, consisted of fifty grams or more of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as crack.

COUNT 2

On or about September 17, 2004, in Broward County, in the Southern District of Florida, the defendants,

BRUCE HERMITT BELL,
a/k/a "Brian Elliott King,"
ANTHONY JEROME BELL,
a/k/a "Ant,"
a/k/a "Amp,"
a/k/a "Huckabuck," and
CURTIS VINCENT SHEFFIELD,

did knowingly and intentionally possess with the intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Pursuant to Title 21, United States Code, Section 841(b)(1)(A), it is further alleged that the controlled substance, in fact, consisted of fifty grams or more of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as crack.

CRIMINAL FORFEITURE

1. The allegations of Counts 1 through 2 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of

America of certain property in which the defendants may have an interest, pursuant to the provisions of Title 21, United States Code, Section 853.

2. Upon conviction of any of the violations alleged in Counts 1 through 2, BRUCE HERMITT BELL, ANTHONY JEROME BELL and CURTIS VINCENT SHEFFIELD, (collectively, the "defendants") shall forfeit to the United States any property constituting or derived from any proceeds which the defendants obtained, directly or indirectly, as the result of such violations, and any property which the defendants used or intended to be used in any manner or part to commit or to facilitate the commission of such violations.

All pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

Ronald Carey
FOREPERSON

MARCOS DANIEL JIMENEZ
UNITED STATES ATTORNEY

SCOTT H. BEHNKE
ASSISTANT UNITED STATES ATTORNEY

Penalty Sheet(s) attached

Rev. 1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: BRUCE HERMITT BELL

Count #1:

Conspiracy to possess with intent to distribute 50 grams or more of crack cocaine; in violation of 21 U.S.C. §§846 and 841(a)(1).

*Max Penalty: Mandatory minimum 10 years' imprisonment; Maximum Life imprisonment, Mandatory minimum 5 years' supervised release, $4,000,000 fine

Count #2:

Possession with the intent to distribute 50 grams or more of crack cocaine; in violation of 21. U.S.C. §841(a)(1).

*Max Penalty: Mandatory Minimum 10 years' imprisonment; Maximum Life imprisonment, Mandatory minimum 5 years' supervised release, $4,000,000 fine

Count:

*Max Penalty:

Count:

*Max. Penalty:

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

REV. 12/12/96

Penalty Sheet(s) attached Rev. 1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: ANTHONY JEROME BELL

Count #1:

Conspiracy to possess with intent to distribute 50 grams or more of crack cocaine; in violation of 21 U.S.C. §§846 and 841(a)(1).
*Max Penalty: Mandatory minimum 10 years' imprisonment; Maximum Life imprisonment, Mandatory minimum 5 years' supervised release, $4,000,000 fine

Count #2:

Possession with the intent to distribute 50 grams or more of crack cocaine; in violation of 21. U.S.C. §841(a)(1).
*Max Penalty: Mandatory Minimum 10 years' imprisonment; Maximum Life imprisonment, Mandatory minimum 5 years' supervised release, $4,000,000 fine

Count:

*Max Penalty:

Count:

*Max. Penalty:

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

REV. 12/12/96

Penalty Sheet(s) attached Rev. 1/14/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: CURTIS VINCENT SHEFFIELD

Count #1:

Conspiracy to possess with intent to distribute 50 grams or more of crack cocaine; in violation of 21 U.S.C. §§846 and 841(a)(1).

*Max Penalty: Mandatory minimum 10 years' imprisonment; Maximum Life imprisonment, Mandatory minimum 5 years' supervised release, $4,000,000 fine

Count #2:

Possession with the intent to distribute 50 grams or more of crack cocaine; in violation of 21. U.S.C. §841(a)(1).

*Max Penalty: Mandatory Minimum 10 years' imprisonment; Maximum Life imprisonment, Mandatory minimum 5 years' supervised release, $4,000,000 fine

Count:

*Max Penalty:

Count:

*Max. Penalty:

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

REV. 12/12/96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

BRUCE HERMITT BELL,
ANTHONY JEROME BELL, and
CURTIS VINCENT SHEFFIELD.
Defendants.
_____/

CASE NO. 04-60275-Cr-COHN(S)

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

New Defendant(s) Yes X No ____
Number of New Defendants 1
Total number of counts 2

Court Division: (Select One)

____ Miami ____ Key West
__X__ FTL ____ WPB ____ FTP

I do hereby certify that:

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

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

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

4. This case will take 3-4 days for the parties to try.

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

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

6. Has this case been previously filed in this District Court? (Yes or No) NO
If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of 10/14/04
Defendant(s) in state custody as of _____
Rule 20 from the _____ District of _____

Is this a potential death penalty case? (Yes or No) NO

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? ____ Yes __X__ No

8. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? ____ Yes __X__ No
If yes, was it pending in the Central Region? ____ Yes ____ No

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

10. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to May 18, 2003? ____ Yes __X__ No

Scott H. Behnke

SCOTT H. BEHNKE
ASSISTANT UNITED STATES ATTORNEY
Court Id. No. A550005

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

ANTHONY JEROME BELL,

DEFENDANT.

CASE NUMBER
04-60275-CR-Cohn

THIS VOLUME:
PAGES 1-104

TRANSCRIPT of **SENTENCING HEARING** had before **THE HONORABLE JAMES I. COHN**, in Fort Lauderdale, Broward County, Florida, on **Thursday, July 14, 2005**, in the above-styled matter.

APPEARANCES:

FOR THE GOVERNMENT: SCOTT BEHNKE,
Assistant U.S. Attorney

FOR THE DEFENDANT: TIMOTHY DAY,
Assistant Federal Defender

ANITA LaROCCA
OFFICIAL COURT REPORTER
U. S. COURTHOUSE
299 E. BROWARD BLVD., 205-D
FORT LAUDERDALE, FLORIDA 33301
954-769-5498

resident there.

If you want me to substantiate that -- I proffered that. If you want me to substantiate that through my investigator, I can do that.

THE COURT: It's not necessary.

MR. DAY: Okay. I don't have any rebuttal evidence, Your Honor.

THE COURT: All right. I guess it's going to be necessary for me to listen to the tape that was introduced by the defense. How long is the tape?

MR. DAY: Judge, it's probably about fifteen or twenty minutes I'd say.

THE COURT: Well, it's in evidence, so I've got to listen to it. So let's take a break while I listen to it.

MR. BEHNKE: Judge, you have a tape player? If not, I brought one.

THE COURT: Yes, I need one.

[Brief recess]

THE COURT: All right. The record will reflect that Mr. Bell is present, represented by counsel.

Gentlemen, is there any additional argument?

MR. DAY: Judge, I would like to make an argument on behalf of Mr. Bell.

THE COURT: You may do so.

MR. DAY: Judge, just lastly, the Court accepted my

proffer from the investigator's records. Does that include the information about the three-way calls and the collect calls from the Broward County Jail?

THE COURT: Yes.

MR. DAY: Okay. Your Honor, on behalf of Anthony, what I'm asking for in this particular case is a fair sentence. And that is defined in 3553(a) as a sentence that's sufficient but not greater than that which is necessary to accomplish the goals of 3553(a).

And I just wanted to touch on a few of them for just a moment. The government is asking for a life sentence, Judge. I don't believe that's a fair sentence, and I don't think that that's a sentence that's called for under 3553(a) for a number of different reasons.

First of all, Your Honor, I don't think it's fair if you look at Anthony Bell's prior record. He has two carrying a concealed firearms, and a high speed fleeing that he was released from jail on. Those are the criminal offenses that he has.

Now, that puts him as a career offender in the Eleventh Circuit. He's not a career offender anywhere else, Your Honor, in any other circuit. And unless I was incorrect in my research, there is no other circuit that sees a carrying a concealed firearm as a crime of violence. But the Eleventh Circuit does, and that's what we have to deal with.

But I think that certainly the Court can look at that and see that those are offenses which really are legal fiction type offenses. If someone is convicted of other offenses, it's very clear that that included violence in and of itself. These do not. Now, do they have the potential for it?

The Eleventh Circuit says yes, all the other circuits that have ruled on the issue say no. And I believe, Judge, that by looking at Anthony Bell's criminal history and associating that with a criminal history category six, or even the five that he is without the career offender, that that is not the type of background that we see here week in and week out.

You sentence people, Judge, weekly. I don't have clients that are sentenced weekly, but it's pretty much bi-weekly. And the criminal history categories that I see in criminal history category six and five are severe. They amount to much more than two carrying concealed firearms and a high speed fleeing.

And I would ask the Court to consider that. And I know, Judge, I know he has a pending case, and we've heard that evidence here today. But that case is pending, Judge, and that case is pending in Dade County. And there's going to be a trial in that, and there's either going to be a conviction or an acquittal.

Now, based on what I heard today, I think that

certainly an acquittal is a possibility. Whether it's a probability or a likelihood, I think that someone listening to this particular testimony may say that Mr. O'Connor's not the kind of witness that is going to be able to sustain the burden of proof beyond a reasonable doubt.

But whatever, whatever the situation, Judge, that is pending. And I think it is wrong to take that, to take a pending case and to influence the sentencing in this particular case. Particularly in light of the fact if we use that as a factor, and then Mr. Bell is acquitted on that, where is that in regards to fairness in sentencing, where does that really put us.

THE COURT: Let me ask you this question --

MR. DAY: Yes, sir.

THE COURT: -- with respect to O'Connor's testimony. Can the Court consider O'Connor's testimony under 3553(a)(1), which relates to the nature and circumstances of the offense, and the history and characteristics of the defendant?

Is it proper for the Court to consider that, albeit the government has asked the Court to consider that evidence in relation to an upward departure under the guidelines, should the Court find that the guidelines are not three sixty to life?

MR. DAY: I don't think so, Judge.

THE COURT: You don't think I can?

MR. DAY: No, I don't. And the reason that I say that

is really based on the Sheppard case, the rationale that flows from the Sheppard case, and that is what the Court can consider as reliable evidence.

And the things that the Sheppard Court says, this is what's competent, this is what competent evidence is, is those things that an individual is charged with, pled to, agreed to, or convicted of. We don't have any of those. Now, I have to obviously state to the Court that that is specifically stated with regard to previous convictions.

But I believe that that analysis and that rationale applies here, as well. Especially, Judge, because of the light that this particular conduct may end up in an acquittal. I mean, where are we in that particular case? Now we've used something which resulted in an acquittal, and we've used that to influence a defendant in this particular case.

Now, had he been charged with it, Judge, then I believe that potentially the government's motion might be well taken. But as I indicated to the Court previously, it's very clear when you read those provisions that counsel cited in his pleading, it is the commission of the offense, did the commission of the offense result in bodily injury. It did not.

The commission of the offenses here, Your Honor, were a conspiracy to possess with intent to distribute cocaine, and possession with intent to distribute cocaine. Now, if the government wanted to charge that and put that before a jury and

prove it, then certainly this Court would be in the position to be able to accept that and to use that.

But I just think it's unfair under 3553(a) to consider that type of evidence. Continuing on, Your Honor, I don't think that the government's request for a life sentence is fair in light of the amount, in light of the amount of cocaine that we have in this particular case.

We get to 1.5 kilos or greater, and we get to a base offense level of thirty-eight by employing the hundred to one crack to powder ratio. And I'm not going to go into that in great detail, but as my pleadings clearly lay out, none other than the Sentencing Commission themselves say that that particular hundred to one crack ratio has a disproportionate effect on African-Americans, as does the career offender provision itself.

They have petitioned congress to reduce that, to make it one on one, and we're not --

THE COURT: That's all contained in your written submission, which the Court did review.

MR. DAY: That's correct. I'm giving a little bit of a summary here, and I'll wrap up. I'll wrap up.

The point that I wanted to make in addition to that is that you did limit the amount, as I understand it from Curtis Sheffield's lawyer, you did limit the amount of crack cocaine that Curtis Sheffield was responsible for. You limited that,

and correct me if I'm wrong, but you limited it to the crack that came from the two houses on September the 17th.

Mr. Schuster indicated to me that he made an objection under 1(b)1.8, and that is that that information only came to the knowledge of the government through debriefing, and so therefore that should not be held against him. Now, I wasn't here, so I'll defer, but Mr. Schuster said that you only held Curtis Sheffield responsible for that that came out of the two houses.

That, Your Honor, is barely over fifty grams. And if that was in fact the case -- and you're looking as if you're not sure that that was the case. Anyhow, I'll continue. And I could be wrong, but that's what -- I know that's what Mr. Schuster told me. What actually happened, Your Honor, maybe Mr. Behnke can speak to that. He was there.

I think that it would be -- if in fact that is the case, it would be wrong to hold Mr. Anthony Bell responsible for 1.5 kilos of cocaine, while allowing Mr. Sheffield to be responsible for only fifty -- I think it's in the fifties that came from those two houses on September the 17th.

And speaking of Mr. Sheffield, Your Honor, he got a thirty month sentence. Now, I understand, Judge, he pled guilty. I understand that he cooperated and got a reduction, and he should.

THE COURT: He testified for, what, two and-a-half,

three days, I believe.

MR. DAY: That's correct. Yes, he did, Your Honor. And he should get a reduction. He got thirty months, and he has the same role and the same amount, according to the PSI, as Mr. Anthony Bell.

So I understood he pled, I understood he got a reduction for cooperating, but now we are talking about a great disparity. We're talking thirty months as opposed to thirty years to life, okay, which will probably -- Anthony is twenty-three, that's probably fifty years or more. That is a grossly disproportionate sentence.

I understand there's going to be some disproportionality there because of the acceptance of responsibility reduction and the cooperation. But these are individuals, Your Honor, that have the same role and the same amount. And taking it a step further, I do know that last week Bruce Bell received a life sentence.

He, as I understand it in the PSI, is identified as the kingpin with the supervisor of five individuals or more, or whether it's four individuals or wherever it was. But he, Your Honor, received a life sentence.

So we'd be in a situation where what the government is asking for with regard to Anthony Bell, is the same amount as an individual whose been identified, and I think the testimony supported that, an individual who is the kingpin of this

particular operation. That's not fair. While at the same time, giving the person that had the same role and the same amount, a thirty month sentence.

I'm not quarreling with that sentence, Judge, Mr. Sheffield's, not at all. But that sentence and Bruce Bell's sentence and Anthony Bell's sentence, all three of those I think need to be looked at to make sure that we don't have an inappropriate disproportionality there. 3553(a)(6) says as much.

It says that the Court should fashion a sentence, in (a)(6), to include or shall consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. And as I said in my petition, Mr. Bell's, Anthony Bell's prior record is not a whole lot different than Mr. Curtis Sheffield.

Your Honor, I don't believe that a life sentence is fair in this particular case when you give somebody that -- and as far as Bruce Bell's concerned, Judge, I understand that was a mandatory sentence. The Court had no discretion but to give any sentence other than that, as I understand it, because he had the enhancing drug priors and the Court could do nothing.

The Court really wasn't conducting a 3553 analysis. But we are, Judge, and obviously we're doing that in spite of the objections I've made previously. But I'm just kind of moving on to the 3553 analysis. And I think, Judge, that when

you give someone a life sentence, I mean that's the end of the road.

You're basically saying we're done with you, it's over, we throw you on the trash heap, you're done, you will come out of prison in a coffin. I don't believe that based on the different sentences that we have in this particular case, the way that we got the amount, the hundred to one crack ratio, the career offender, all those disparities that I talked about, Your Honor, I don't believe that a life sentence is fair.

And finally, Judge, Anthony Bell is a twenty-three year old man. He, as the Court knows from the PSI and some of the testimony at trial, he goes to a foster home at age five because his mother's a crack addict and later develops AIDS. He never has a mother. He meets his father when he's seventeen. He never has supervision.

He grows up in impoverished conditions, essentially living in the street where there's a grandmother that's trying to do what she can do. And I don't think that the sum total of his life, the history and characteristics of this defendant, in conjunction with the things that I've offered to the Court, I don't believe, Judge, that they warrant and support a life sentence.

I'd ask the Court to give a sentence that's less than that, that's less than the guidelines, consistent with the arguments that I've made.

THE COURT: Let me address the objections that have been raised, and then after I do that, then I will give Mr. Bell an opportunity to be heard.

First of all, with respect to the Blakely objections and the ex post facto violation objection, the Court finds that the retroactive application of Booker, as being advisory rather than mandatory, does not violate the ex post facto principle of fair warning encompassed in the due process clause. So the defendant's objection in the regard will be overruled.

With respect to the career offender qualification, the Court finds that the defendant qualifies as a career offender under Section 4(b)1.1(a), as he was previously convicted of carrying a concealed firearm on two separate occasions, and aggravated fleeing and eluding high speed chase, or high speed eluding.

The defendant contests the carrying a concealed firearm as not being a crime of violence, albeit the defendant does concede that the Eleventh Circuit case of United States versus Gilbert, 138 F.3d 1371, is in point, and the Court is thus bound by that holding in Gilbert.

Which says that carrying a concealed weapon in violation of Florida law is a, quote, crime of violence, closed quote, under United States Sentencing Guidelines Section 4(b)1.2(1). And in that case, Gilbert was sentenced as a career offender. So that objection will be respectfully

overruled.

Now, with respect to the objections as to the two level enhancements for dangerous weapon, and the two level enhancement for obstruction of justice, and the objection to the base offense level predicated on an amount of cocaine base which was not found by the jury.

The Court would first note that with respect to paragraph forty-four of the presentence investigative report relating to the telephone conversation of April 19th, the Court is not going to consider that paragraph, as the Court finds that the evidence is somewhat lacking.

Nevertheless, the Court finds that with respect to each of the aforementioned enhancements, that there was sufficient testimony presented at trial to prove each of those enhancements. So the objections as to those enhancements will be overruled.

In addition, the Court has considered the request for a downward departure based on racial disparity, sentencing disparity with respect to the co-defendant Sheffield, and the over representation of criminal history.

The Court has also considered this request in light of the factors set forth in 18, United States Code, Section 3553. Although a departure would be authorized under the law both pre-Booker and post Booker, the Court finds that a departure is not warranted under the facts and circumstances of this

particular case.

Having made these rulings on the defendant's objections, the Court finds that the total offense level is forty-two; the criminal history category is six; the advisory guideline range is three hundred and sixty months to life; probation is not authorized.

The supervised release is five years; the fine range is twenty-five thousand dollars to eight million dollars; restitution is not applicable; and the special assessment is one hundred dollars as to each count, making a total of two hundred dollars.

Mr. Bell, I'll be glad to hear from you, sir.

MR. DAY: Judge, Mr. Bell chooses not to speak.

THE COURT: The Court has considered the statements of all parties, the presentence investigative report which contains the advisory guidelines, as well as those factors set forth in 18, United States Code, Section 3553(a)(1) through (7).

Based on the defendant's extensive criminal history and the seriousness of the instant offense, a sentence will be imposed within the advisory guideline range.

Furthermore, it is the finding of this Court that the defendant is not able to pay a fine; and accordingly, no fine shall be imposed.

Pursuant to the Sentencing Reform Act of 1984, it is

the judgment of this Court that the Defendant Anthony Jerome Bell is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of three hundred and sixty months.

This term consists of three hundred and sixty months as to each of Counts 1 and 2, to be served concurrently with each other.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years as to each of Counts 1 and 2, both terms to be run concurrently with each other.

Within seventy-two hours of release from custody, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit any federal, state, or local crimes; shall be prohibited from possessing a firearm or other dangerous devices; and shall not possess a controlled substance.

In addition, the defendant shall comply with the standard conditions of supervised release that have been adopted by this Court, and with the following special conditions:

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

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

The defendant shall participate in an approved treatment program for drug and/or alcohol abuse as directed by the U.S. Probation Officer, and abide by all supplemental conditions of treatment.

Participation may include inpatient and/or outpatient treatment if deemed necessary. The defendant will contribute to the cost of services rendered, that is co-payment, in an amount to be determined by the U.S. Probation Officer based on his ability to pay or the availability of third party payment.

It is further ordered that the defendant shall pay immediately to the United States a special assessment of one hundred dollars as to each of Counts 1 and 2, for a total of two hundred dollars.

Total sentence imposed is three hundred and sixty months imprisonment; five years supervised release; and a two hundred dollar special assessment.

The defendant's right, title, and interest to the property identified in the preliminary order of forfeiture, which has been entered by this Court and is incorporated by reference herein, is hereby forfeited.

Now that sentence has been imposed, does the defendant or his counsel object to the Court's finding of fact or to the

manner in which sentence was pronounced?

MR. DAY: Yes, Judge. I want to re-make the arguments that I have made both in writing and also orally. The Fifth Amendment argument and the Sixth Amendment argument regarding the enhancements needed to be pled in the indictment and proven to the jury beyond a reasonable doubt.

And those enhancements include the career offender and the amount of the cocaine, the criminal history, and the firearm enhancement.

Also, Your Honor, the due process ex post facto clause argument that I made to the Court, and the denial of the downward departure. And I would re-make those arguments again, Your Honor, at this time for preservation of the record.

THE COURT: So noted.

Pursuant to Rule 32 of the Rules of Criminal Procedure, Mr. Bell, you have the right to appeal the conviction and sentence imposed. Any notice of appeal must be filed within ten days after entry of judgment.

If you're unable to pay for the cost of an appeal, you may apply for leave to appeal informa pauperis.

Gentlemen, is there anything further?

MR. DAY: Nothing, Judge.

THE COURT: All right. This Court will stand in recess.

[Hearing concluded]

A-4

United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

ANTHONY JEROME BELL
a/k/a "Ant"
a/k/a "Amp"

JUDGMENT IN A CRIMINAL CASE

Case Number: 0:04CR60275-COHN

USM Number: 64087-004

Counsel For Defendant: TIMOTHY DAY
Counsel For The United States: SCOTT BEHNKE
Court Reporter: Anita Larocca

The defendant was found guilty on Counts I & II of the Superseding Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. 846	Conspiracy to possess with intent to distribute 50 grams or more of crack cocaine	10-13-2004	I
21 U.S.C. 841(a)(1)	Possession with intent to distribute 50 grams or more of crack cocaine	9-17-2004	II

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

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

Date of Imposition of Sentence:
7/14/2005

James I. Cohn

JAMES I. COHN
United States District Judge

July 14, 2005

170

FILED by _____ D.C.
JUL 14 2005
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. FT. LAUD

DEFENDANT: ANTHONY JEROME BELL
CASE NUMBER: 0:04CR60275-COHN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **360 MONTHS AS TO COUNTS I & II TO RUN CONCURRENTLY WITH EACH OTHER.**

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: ANTHONY JEROME BELL
CASE NUMBER: 0:04CR60275-COHN

SUPERVISED RELEASE

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: ANTHONY JEROME BELL
CASE NUMBER: 0:04CR60275-COHN

SPECIAL CONDITIONS OF SUPERVISION

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

The defendant shall participate in an approved treatment program for drug and/or alcohol abuse as directed by the U.S. Probation Office, and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment, if deemed necessary. The defendant will contribute to the costs of services rendered (co-payment) in an amount determined by the U.S. Probation Officer, based on ability to pay, or availability of third party payment.

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

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

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

DEFENDANT: ANTHONY JEROME BELL
CASE NUMBER: 0:04CR60275-COHN

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$200.00	**$**	**$**

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

DEFENDANT: ANTHONY JEROME BELL
CASE NUMBER: 0:04CR60275-COHN

SCHEDULE OF PAYMENTS

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

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

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

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

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

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

The defendant shall forfeit the defendant's interest in the following property to the United States:

The following property is forfeitable, the sum of $2,884.00, representing a money judgment for the value of the property involved in the offense and/or as property traceable to such property, as the result of the defendants' commission of the offense charged in Count 1 and Count 2 of the Superseding Indictment, for which the defendants are jointly and severally liable.

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

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

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY BELL,

Defendant.
_____/

MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582 and AMENDMENT 782 OF THE UNITED STATES SENTENCING GUIDELINES AND MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. 3582

The defendant, Anthony Bell, through counsel, respectfully requests that the Court reduce his sentence pursuant to 18 U.S.C. § 3582 and Amendment 782 of the United States Sentencing Guidelines, and in support thereof states:

1. On July 15, 2005, this Court sentenced Mr. Bell to a total of 360 months imprisonment after he was convicted by a jury of two counts of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. 846 and possession with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. 841 (a)(1). The sentence consisted of 360 months imprisonment as to Counts I and II to run concurrently with each other (DE-170). On May 29, 2015 Mr. Bell filed Defendant's Motion for Determination of Eligibility with the

Court (DE-326) requesting a determination of his eligibility for a reduction pursuant to Amendment 782 and also for a determination of the appointment of counsel. The Court appointed the Office of the Federal Defender with respect to Bell's motion (DE-327). Counsel has determined that in fact a motion should be filed and presents the following.

2. At the original sentencing, the Court determined that the base offense level for Mr. Bell was a level 38 due to a finding that the offense involved more than 1.5 kilograms of crack cocaine. (DE-203:100). The Court did not make more specific findings thus 1.5 kilos of crack cocaine is the amount for use in determining Bell's eligibility for relief pursuant to 18 U.S.C. 3582 (c)(2). *See United States v. Hamilton,* 715 F.3d 328, 340 (11th Cir. 2013). Additionally, the Court found two enhancements applicable–two levels for obstruction of justice and two levels because a dangerous weapon was possessed for a total offense level of 42 (DE-203:100). The Court determined that Mr. Bell was a career offender and even though his actual criminal history category was V (PSI at paragraph 69), the Court utilized the career offender criminal history VI for an advisory sentencing range of 360 months to life imprisonment (DE-203:100).

3. On April 20, 2014, the United Sentencing Commission submitted to Congress an amendment to the federal sentencing guidelines that revises the guideline applicable to drug trafficking offenses by changing how the base offense levels in the drug quantity tables are set. United States Sentencing Commission, Guidelines Manual, § 2D1.1. (Nov. 2014); id. app. C supp. amend. 782. Specifically, Amendment 782 reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in USSG § 2D1.1. Id. Therefore, effective November 1, 2014, the United States Sentencing Commission amended the base offense level under USSG § 2D1.1, such that a base offense level for drug offense involving more than 1.5

kilos of crack cocaine is now level 32. This guideline also includes the reduction pursuant to the Fair Sentencing Act. With the two level enhancement for the firearm and the two level enhancement for obstruction of justice Mr. Bell's adjusted offense level would be a 36 and with a non career offender criminal history category V, the advisory sentencing range would be 292 to 365 months. As a career offender he would be a level 37, criminal history category VI for a sentence of 360 months to life (See PSI at paragraph 56).

4. Mr. Bell was classified as a career offender based, in part, on a conviction for a "crime of violence" which was carrying a concealed firearm (which counsel objected to–however *United States v. Gilbert,* 138 F.3d 1371 (11th Cir. 1998) was the controlling law of the Circuit at that time). However, since Mr. Bell's adjusted guideline range was higher than the career offender range, the Court sentenced Mr. Bell using the adjusted guideline range (DE-203:100-101). Thereafter, carrying a concealed firearm was declared not to be a crime of violence for career offender pursuant to *United States v. Archer,* 531 F.3d 1347 (11th Cir. 2008). Subsequent to the ruling in *Archer,* counsel contacted Mr. Bell and notified him of the decision but also advised that under current law a motion pursuant to 28 U.S.C. 2255 would not be successful because his non career offender sentencing guideline range (which was utilized by the Court) was higher than the range designated by the career offender provision. Nonetheless, Mr. Bell filed a *pro se* petition pursuant to 28 U.S.C. 2255 arguing, among other things, that he was improperly designated as a career offender (DE-1,7 of civil case number 08-61645). The Court referred the petition to United States Magistrate Judge White who denied the petition (DE-18 of civil case number 08-61645). Thereafter, the Court adopted Magistrate White's Report and Recommendation and denied Mr. Bell's motion (DE-322). The end result of all of this is that while Mr. Bell can still technically be considered a career offender, in

fairness he should not be. Once the carrying a concealed firearm is eliminated from consideration, Bell does not qualify as a career offender. The PSI cited three convictions supporting the career offender designation–two carrying a concealed firearm convictions and one for aggravated fleeing-eluding/high speed fleeing and aggravated assault on a police officer (PSI at paragraph 56). Thus, Mr. Bell would only have one potentially qualifying conviction and would not be properly classified as a career offender. Mr. Bell requests that the Court consider this and in fairness reduce his sentence utilizing Amendment 782. As stated, the non career offender adjusted offense level with the application of Amendment 782 would be a level 36 and a criminal history of V for a range of 292 to 365 months. Mr. Bell requests that the Court reduce his sentence to 292 months. Mr. Bell would ask the Court not to ignore the legal realities of the fact that he is not properly a career offender and thus 18 U.S.C. 3582 (c) can be utilized to lower Mr. Bell's sentence in that Amendment 782 does reduce the adjusted offense level applicable to Bell distinguishing his case from *United States v. Moore,* 541 F.3d 1323 (11th Cir. 2008).

5. It is noteworthy, that after proposing Amendment 782, the Sentencing Commission held further hearings on the equitable issues involved in the application of the amended guideline ranges and concluded, on July 18, 2014, that this guideline amendment is so significant that it must be given retroactive effect under the Congressional authorization of 18 U.S.C. § 3582(c). Thus, USSG. § 1B1.10 also was amended by the Sentencing Commission to expressly make Amendment 782 retroactively applicable to previously-sentenced defendants. Thus, Mr. Bell requests that the benefits afforded through Amendment 782 be applied to him.

8. Assistant United States Attorney Scott Behnkke was contacted regrading this motion and he states that he defers taking a position on it until he has had an opportunity to review

the motion.

WHEREFORE, the defendant, Anthony Bell, respectfully requests pursuant to 18 U.S.C. § 3582 and Amendment 782 of the United States Sentencing Guidelines, that his sentenced be reduced to a sentence of 292 months on Counts I and II.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Timothy M. Day*
Timothy M. Day
Assistant Federal Public Defender
Florida Bar No. 360325
1 E. Broward Boulevard
Suite 1100
Fort Lauderdale, Florida 33301
(954) 356-7436
(954) 356-7556 (fax)
Timothy_Day@fd.org

CERTIFICATE OF SERVICE

I HEREBY certify that on September 18th, 2015 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Timothy M. Day*, AFPD
Timothy M. Day

SERVICE LIST

UNITED STATES v. ANTHONY BELL

CASE NO. 04-60275-CR-COHN

United States District Court, Southern District of Florida

Timothy M. Day, Esquire
Timothy_Day@fd.org
Federal Public Defender's Office
1 E. Broward Blvd.
Suite 1100
Fort Lauderdale, Florida 33301
Telephone: (954) 356-7436
Facsimile: (954) 356-7556
Attorney for Defendant
Service via CM/ECF]

Scott Behnke
United States Attorney's Office
500 E Broward Boulevard
7th Floor
Fort Lauderdale, FL 33301-3002
954-356-7392
Fax: 356-6964
Email: scott.behnke@usdoj.gov
[Service via CM/ECF]

J:\CRACK CASES\Bell, Anthony Reg 64087-004\MINUS - FL 2015-00447\Pleadings\reduction of sentence motion 3582 drug minus 2.wpd

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-60275-CR-COHN-SELTZER

UNITED STATES OF AMERICA,
Plaintiff,

VS.

ANTHONY BELL,
Defendant.
_____/

ORDER DENYING SENTENCE REDUCTION PURSUANT TO AMENDMENT 782

THIS CAUSE is before the Court upon Defendant Anthony Bell's Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582 and Amendment 782 of the United States Sentencing Guidelines [DE 328]. The Court has considered the motion, the Government's response [DE 330], and is otherwise advised in the premises.[1]

Mr. Bell was convicted by a jury of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine and possession with intent to distribute 50 grams or more of crack cocaine and was sentenced on July 14, 2005 to concurrent 360 month terms of imprisonment. His base offense level was 38 and the Court found two enhancements applicable - two levels for obstruction of justice and two levels for dangerous weapon - for a total offense level of 42. The Defendant was found to qualify as a career offender, however since the offense level for career offender was 37, the greater offense level of 42 was used together with the required criminal history of VI. Had the lower offense level of 37 been used with the criminal history category of VI, Mr. Bell's guideline range would still have been 360 months to life.

[1] No reply was filed within the time limitations set by Local Rule 7.1 (c).

In the instant motion, Mr. Bell seeks a sentence reduction pursuant to 18 U.S.C. § 3582 and Amendment 782 based in part on a reconsideration of his career offender status. He alleges that the predicate offense of felon in possession of a firearm no longer qualifies as a crime of violence. Therefore, Mr. Bell maintains his total offense level should be 36 with a criminal history category of V yielding a guideline range of 292 to 365 months imprisonment.

Career offenders do not qualify for a sentence reduction as a result of a retroactive amendment to the drug guideline. See *United States v. Moore*, 541 F.3d 1323 (11th Cir. 2008). The Court may not now reconsider Mr. Bell's career offender status, nor adjust his sentence on that basis. This Court does not have jurisdiction to consider extraneous resentencing issues. Mr. Bell must instead bring such a collateral attack on his sentence under 18 U.S.C. § 2255. See *United States v. Bravo*, 203 F. 3d 778, 782 (11th Cir. 2000).

Since Mr. Bell can not relitigate whether he was properly designated as a career offender, his status as a career offender bars relief under 18 U.S.C. § 3582 and Amendment 782. Accordingly, it is thereupon

ORDERED AND ADJUDGED that Defendant Anthony Bell's Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582 and Amendment 782 of the United States Sentencing Guidelines is hereby **DENIED.**

DONE AND ORDERED at Fort Lauderdale, Florida, this 4th day of November 2015.

JAMES I. COHN
UNITED STATES DISTRICT JUDGE

cc: Scott Behnke, AUSA
Timothy Day, AFPD
U.S. Marshals
Bureau of Prisons

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY BELL,

Defendant.
_____/

MOTION FOR SENTENCE CORRECTION PURSUANT TO THE FIRST STEP ACT OF 2018

Anthony Bell, through undersigned counsel, hereby files this Motion for Sentence Correction Pursuant to the First Step Act of 2018.

On February 27, 2019, Mr. Bell filed a *pro se* Motion for Reduction of Sentence Pursuant to the First Step Act of 2018 (DE 339). Undersigned counsel represented Mr. Bell at the trial in this matter and the Office of the Federal Defender represented Bell on his appeal. Counsel now files this Motion for Sentence Reduction Pursuant to the First Step Act because Anthony Bell qualifies for a reduction under the Act.

FACTUAL AND PROCEDURAL BACKGROUND

The superseding indictment against Mr. Bell charged two counts: (1) Count One for knowingly and intentionally conspiring to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and it was further alleged that the substance was fifty grams or more of a mixture and a substance

containing a detectable amount of cocaine base commonly referred to as crack, in violation of 21 U.S.C. 841(b)(1)(A), (2) Count Two for knowingly and intentionally possessing with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and it was further alleged that the controlled substance was fifty grams or more of a mixture and a substance containing a detectable amount of cocaine base commonly referred to as crack, in violation of 21 U.S.C. § 841(b)(1)(A)(DE 64). Counts one and two alleged fifty or more grams of crack cocaine which triggered the then-applicable ten-year statutory mandatory minimum and life maximum under 21 U.S.C. § 841(b)(1)(A).

On April 11, 2005, Mr. Bell was convicted by a jury of both counts in the indictment which again called for a ten year mandatory minimum and a life imprisonment statutory maximum (DE 144). The Presentence Investigation Report agreed and found that the applicable statutory mandatory minimum was ten years imprisonment and the statutory maximum was life imprisonment. *See* PSI at paragraph 99. The PSI also found Mr. Bell to be a career offender based on two convictions for carrying a concealed firearm, and one conviction for aggravated fleeing and eluding/high speed fleeing. PSI at paragraph 56. In addition, as a result of the life statutory maximum, the PSI concluded that the career offender provision called for a base offense level of 37 and a criminal history category of VI. *See* PSI at paragraph 56. Without the career offender finding, the adjusted offense level was 42 as that level was higher than the career offender level of 37. The level 42 was calculated by finding that the base offense level was 38, which was

calculated based on the PSI concluding that the offense involved 1.5 kilograms or more or crack cocaine (PSI at paragraph 50). Thereafter, two levels were added because a dangerous weapon was possessed and two levels were added for obstruction of justice (PSI at paragraphs 51 and 54). Mr. Bell's criminal history was calculated to be a category V (PSI at 69). However, pursuant to 4B1.1 the criminal history category was raised from V to VI (PSI at paragraphs 56, 69 and 70). As a result, the sentencing guideline range was 360 months to life. PSI at paragraph 100. On July 15, 2005, the Court imposed a low end sentence of 360 months as to Counts one and two to run concurrently with each other. (DE 170).

On September 18, 2015, after an unsuccessful appeal, Mr. Bell, through counsel, filed a Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582 and Amendment 782 contending that the provisions of the Fair Sentencing Act should be applied to him and also demonstrating that he no longer qualified as a career offender as carrying a concealed firearm was no longer a crime of violence for career offender enhancement citing *United States v. Archer,* 531 F. 3d 1347 (11th Cir. 2008)(DE-328). The Court denied this motion (DE 331).

I. Mr. Bell meets the criteria for eligibility for relief under the First Step Act.

At the time Mr. Bell was sentenced, there were three tiers of penalties for offenders convicted of possessing with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a):

- Section 841(b)(1)(C) provided for a sentencing range of up to 20 years if the offense involved less than 5 grams or an unspecified amount of cocaine base;

- Section 841 (b)(1)(B)(iii) provided for a sentencing range of 5 to 40 years if the offense involved "5 grams or more" but less than 50 grams of cocaine base; and,
- Section 841(b)(1)(A)(iii) provided for a sentencing range of 10 years to life if the offense involved "50 grams or more" of cocaine base.

21 U.S.C. § 841(b) (2005).

On August 3, 2010, Congress enacted the Fair Sentencing Act of 2010 (the "FSA"). 124 Stat. 2372. It did so because the Sentencing Commission and empirical data had found that the 1986 Anti-Drug Abuse Act's penalty scheme for cocaine base offenses was far too harsh and had a disparate impact on African-American defendants. *See Dorsey v. United States*, 567 U.S. 260, 268-69 (2012). Specifically, section 2 of the FSA changed the penalty structure for cocaine base offenses, as follows:

- Section 841(b)(1)(C) now provides for a sentencing range of up to 20 years if the offense involved less than 28 grams or an unspecified amount of cocaine base;
- Section 841(b)(1)(B)(iii) now provides for a sentencing range of 5 to 40 years if the offense involved "28 grams or more" but less than 280 grams of cocaine base; and,
- Section 841(b)(1)(A)(iii) now provides for a sentencing range of 10 years to life if the offense involved "280 grams or more" of cocaine base.

21 U.S.C. § 841(b) (2018); *see Dorsey,* 567 U.S. at 269 (explaining effect of Section 2 of the FSA).

The FSA went into effect immediately (August 3, 2010), and, partly to more thoroughly put an end to the "disproportionate status quo," the Supreme Court held that the new penalty structure would apply to any defendant sentenced after August 3, 2010, even if the offense was committed prior to that date. *Dorsey*, 567 U.S. at 278.

Still, this remedy to the disproportionate status quo fell far short since it left intact many unjust sentences that were imposed from 1986 through 2010 under the pre-FSA penalty structure. The First Step Act of 2018 has now created a freestanding remedy to retroactively reduce sentences of this type. It aims to empower courts to impose reduced sentences on any prisoner who is still serving a sentence for a cocaine base offense if that sentence was imposed when the pre-FSA penalty structure still applied. Section 404 of the First Step Act establishes its remedy in two steps, and it clearly applies to Mr. Bell at each step.

First, the Act defines what offenses are covered by its remedy:

> Definition of Covered Offense: In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.

Mr. Bell's two counts of conviction under 21 U.S.C. § 841(a), which prohibits cocaine base offenses, is a "covered offense." That is clearly so because Section 2 of the FSA "modified" the "statutory penalties" under § 841(b) for "violation[s]" of 21

U.S.C. §§ 841(a) and 846 that involved cocaine base, which were Mr. Bell's counts of conviction. And he committed that violation of the law before August 3, 2010.

Second, the Act provides the circumstances under which a district court can reduce the sentence for defendants who were previously sentenced for a "covered offense":

> Defendants Previously Sentenced: A court that imposed a sentence for a covered offense may, on motion of the defendant . . . , impose a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(*Id.*, Sec. 404(b).) This provision plainly applies to Mr. Bell because this Court previously "imposed a sentence" on him "for a covered offense," and he is moving for imposition of a reduced sentence. Thus, this Court can now "impose a reduced sentence" on Mr. Bell for his crack-cocaine offenses as if the FSA were in effect.

Third, the Act provides narrow limitations on this resentencing power. A court shall not entertain a motion made under Section 404 of the First Step Act to reduce a sentence "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010," or "if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits." (*Id.*, Sec. 404(b).) Limitation one does not apply. Although Mr. Bell filed a non-First Step motion to reduce his sentence in 2015 (See DE 328) this Court denied it (See DE 339).

In sum, proving eligibility under the First Step Act is relatively simple. A defendant is eligible if he was convicted of a cocaine base offense, was sentenced when the pre-FSA statutory penalties were still in effect, and continues to serve a sentence that has not already been reduced to post-FSA levels. Because Mr. Bell satisfies all of these requirements, the Court has the authority to impose a reduced sentence for his cocaine base convictions.

II. As a result of the First Step Act, the original 360-month sentence imposed on Mr. Bell was based on a statutory maximum no longer applicable and on guidelines that have been reduced which can and should be corrected under the First Step Act's authority.

The 360-month sentence that was imposed in Mr. Bell's case is now eligible to be corrected in light of the First Step Act. That 360-month sentence was predicated on three conditions that existed at the time of Mr. Bell's sentencing: (1) the applicability of the ten-year mandatory minimum and a statutory maximum of life imprisonment; (2) the career offender provision that increased the based offense level and criminal history category based on that statutory maximum and (3) the guidelines themselves which at that time began at a level 38 based on 1.5 kilos or more of crack.

First, as discussed *supra* in section I, the effect of the passage of the FSA in 2010 increased the quantity of cocaine base necessary to trigger the ten-year mandatory minimum (and a statutory maximum of life) from "50 grams or more" (what the jury found in DE-144) to "280 grams or more." *See Dorsey*, 567 U.S. at 269 (explaining effect of Section 2 of the FSA). The passage of the First Step Act has now made that change retroactive as discussed above.

At the time of Mr. Bell's sentencing in 2005, the allegations in Count one and two of "50 grams or more" subjected him to a ten-year mandatory minimum sentence with a life maximum. *See* 21 U.S.C. § 841(b)(1)(B)(iii).

Now, due to the applicability of the First Step Act to his case, neither the ten-year mandatory minimum nor the life year statutory maximum applies. This is because under the current version of § 841, as it has been amended by the FSA in 2010, the applicable threshold quantity of cocaine base that triggers that mandatory minimum sentence is 280 grams of cocaine base or crack cocaine.

As such, the second tier of penalties under 21 U.S.C. § 841(b)(1)(B) applies—that tier carries a five year mandatory minimum penalty and a forty-year statutory maximum penalty. Importantly, and as will be discussed, this affects the guidelines under 4B1.1. Critically, the First Step Act also changes the non-career offender guidelines applicable to Mr. Bell as they were 42 previously and are now a 36 (base offense level of 32 based on 1.5 kilos or more of cocaine base with two levels added for a dangerous weapon and two additional levels for obstruction of justice).

Under the Plain Language of the First Step Act, and the Supreme Court Precedents of *Apprendi* and *Alleyne*, Which Authoritatively Interpreted and Applied the Sixth Amendment, the Quantity of Crack Cocaine Charged in the Indictment and Found by the Jury at Trial Dictate the "Offense of Conviction", Corresponding Statutory Penalties and Controls the Application of the First Step Act

Notwithstanding the plain language of Section 404 discussed above, the quantity of cocaine base or crack that triggers relief under the First Step Act is that which is charged in the indictment (here 50 grams or more) not an amount listed in the PSI or discussed at sentencing.

Section 2 of the Fair Sentencing Act of 2010 modified the statutory penalties for convictions under 21 U.S.C. § 841 and § 960 by modifying the element of the offense at 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii), 960(b)(1)(C), and 960(b)(2)(C). Specifically, section 2 of the Fair Sentencing Act changed the drug quantity element at § 841(b)(1)(A)(iii) and § 960(b)(1)(C) from 50 grams to 280 grams, and the drug quantity element at § 841(b)(1)(B)(iii) and § 960(b)(2)(C) from 5 grams to 28 grams.

As noted above, Section 404 of the First Step Act provides that any defendant convicted of a "violation of a Federal criminal statute, the *statutory penalties* for which *were modified by section 2 or 3 of the Fair Sentencing Act* of 2010 that was committed before August 3, 2010" is eligible, Sec. 404(a), for the Court to "impose a reduced sentence *as if sections 2 and 3 of the Fair Sentencing Act* of 2010 *were in effect*," Sec. 404(b). In other words, both eligibility and imposition of a reduced sentence depend on the drug quantity element of the offense. Congress did not mention the defendant's actual conduct or relevant conduct.

An element is a fact that necessarily must be found by a jury beyond a reasonable doubt in order to convict a defendant of an offense or any aggravated offense. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162-63 (2013). Here, the element is the quantity that was necessary for conviction under 21 U.S.C. § 841(b)(1)(A)(iii) [or 841(b)(1)(B)(iii), 960(b)(1)(C), or 960(b)(2)(C)]. The element is the same whether the defendant was convicted by a jury or pled guilty: it is the drug quantity necessary for conviction under § 841(b)(1)(A)(iii). The drug quantity

mentioned in the PSI or discussed at sentencing was not necessary to the defendant's conviction, and thus is not an element.

The drug quantity that sets the "statutory penalty" under Section 404 is the quantity charged as an element in the indictment, and found as an element by a jury beyond a reasonable doubt or admitted as an element in a guilty plea. It is *not* the quantity alleged in the PSR, stated in a plea agreement, or found by the judge at sentencing. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Likewise, for "death or serious bodily injury results" to set the statutory penalty under Section 404, the government must have charged as an element and proved as an element to a jury beyond a reasonable doubt that use of the drug was the but for cause of death or serious bodily injury. *Burrage v. United States*, 134 S. Ct. 881 (2014).

This always was and remains the law. First, no statute enacted by Congress directed courts to use uncharged judge-found facts by a preponderance to set statutory ranges. "Congress did not unconstitutionally commit determination of drug quantity to a judge for a finding by a preponderance of the evidence. . . . [T]hat commitment was made by the judiciary, not the legislature." *United States v. Buckland*, 289 F.3d 558, 567 (9th Cir. 2002) (en banc). "[T]he statute does not say who makes the findings or which party bears what burden of persuasion," but instead "[left] it to the judiciary to sort out." *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001). "Section 841(b) itself is silent on the question of what procedures courts are to use in implementing its provisions, and [is] therefore

[consistent with] the rule in *Apprendi*." *United States v. Cernobyl*, 255 F.3d 1215, 1219 (10th Cir. 2001).

Second, using uncharged judge-found facts by a preponderance to increase a statutory range was *always* unconstitutional. That practice did not become unconstitutional when *Apprendi*, *Alleyne*, or *Burrage* were announced. When the Supreme Court announces a new rule of constitutional law, whether the Court declares that rule to be retroactive or nonretroactive, it does not "imply that the right at issue was not in existence prior to the date the 'new rule' was announced." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). Rather, "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law." *Id.* "Accordingly, the underlying right necessarily pre-exists [the Supreme Court's] articulation of the new rule." *Id.*

Third, when Congress enacted Section 404 of the First Step Act, *Apprendi*, *Alleyne* and *Burrage* were the law, and Congress is assumed to intend that its laws comply with the Constitution. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("[W]e assume [Congress] legislates in the light of constitutional limitations."); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

Thus, then and now, the statutory penalties may be based only on a fact charged as an element in an indictment and found as an element by a jury beyond a reasonable doubt or admitted as an element by the defendant in a guilty plea.

Moreover, the Court held in *United States v. Booker,* 543 U.S. 220, 123 S. Ct. 738 (2005), that increasing a guideline range based on uncharged facts found by a judge by a preponderance at sentencing violated the Sixth Amendment. To remedy the constitutional violation, the Court held that the guidelines must be treated as advisory only.

Clearly then, the 1.5 kilograms listed in the PSI cannot be the triggering mechanism today for a determination of the statutory minimum or maximum. That amount is 50 grams and thus as amended by the FSA in 2010 and as made retroactive to him by the First Step Act of 2018, the statutory minimum and maximum penalties for Mr. Bell's offenses are now a five year statutory minimum and a forty year statutory maximum—not the ten year statutory minimum and life statutory maximum applied to him at his sentencing. As a result, and according to the plain language of Section 404 of the First Step Act, Mr. Bell is entitled to relief because the *statutory penalties were modified by section 2 or 3 of the Fair Sentencing Act of 2010.* Thus, again according to the plain language of the Act, Mr. Bell is eligible for the Court to "impose a reduced sentence *as if sections 2 and 3 of the Fair Sentencing Act were in effect.* Sec. 404(b).

As a result and because the Fair Sentencing Act reduced the crack cocaine offense levels, Mr. Bell's corrected total offense level associated with 1.5 Kilos or

more of crack cocaine is 36 not 42 as previously calculated in 2005. This is so because the base offense level from the Fair Sentencing Act associated with 1.5 kilos or more of crack cocaine is now 32 not 36. *See* Fair Sentencing Act. Thereafter, two levels are added for a dangerous weapon and two levels for obstruction of justice for a total adjusted offense level of 36. With a criminal history category of VI the now applicable guideline range is 324-405 months. The Court sentenced Mr. Bell to the low end of the guidelines previously or 360 months. The low end of the guidelines now is 324 months.

Furthermore, the plain language of the First Step Act contains no limitation on the court upon re-sentencing. Indeed, the limitations on a sentencing court's authority under 18 U.S.C. § 3582(c)(2) are notably absent from § 3582(c)(1)(B) and Section 404 of the First Step Act. Unlike the limited authority granted under §3582(c)(2), a court proceeding under Section 404 operates entirely independently of the Sentencing Commission. The extent of a reduction in these proceedings is not circumscribed within a new range set by the Commission. Rather, the court is free to impose a reduced a sentence, within the bounds of the law, to any term it deems appropriate, after a full review of the merits. The considerations that shaped the Court's decision in *United States v. Dillon,* 506 U.S. 817 (2010) are thus *not* in play in proceedings pursuant to Section 404 of the Act**.** Because § 404 of the First Step Act grants the district court authority to "impose a reduced sentence," not to "reduce a sentence," neither 18 U.S.C. § 3582(c)(2) nor *Dillon* have any relevance here. The discretion the district court enjoys in a proceeding under Section 404 indicates it is,

as other courts have held, a plenary resentencing proceeding. *See also United States v. Copple*, 2019 WL 486440, at *2 (S.D. Ill. Feb. 7, 2019) (rejecting application of procedures set forth in 18 U.S.C. § 3582(c)(2) in proceeding under Section 404 of the First Step Act). Finally, the statutory language in Section 404 is *not* the same as that in § 3582(c)(2), and due to the differences in statutory language, the procedures under the two provisions are *not* the same.

All of the foregoing is important to Mr. Bell because the Court found that he qualified as a career offender based on two convictions for carrying a concealed firearm and a conviction for aggravated fleeing-eluding/high speed fleeing. As stated previously, carrying a concealed firearm no longer qualifies as a crime of violence pursuant to *United States v. Archer,* 531 F. 3d 1347 (11th Cir. 2008). Without those convictions Mr. Bell does not qualify as a career offender. Without the career offender designation he would be a criminal history category V and with an adjusted offense of 36 his sentencing range would be 292-365 months. As a result, Bell requests that the Court resentence him to 292 months. If the Court rejects this request Bell requests that he be re-sentenced to the low end (as the Court did previously) of the now applicable Fair Sentencing Act range of 324 months.

CONCLUSION

As demonstrated above, Mr. Bell is eligible for relief under the First Step Act and he requests that the Court resentence him as outlined above.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: ***s/ Timothy Day***
Timothy M.Day
Assistant Federal Public Defender
Florida Bar No. 360325
One East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301
Tel: 954-356-7436
E-Mail: Timothy_Day@fd.org

CERTIFICATE OF SERVICE

I HEREBY certify that on March 15, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ **Timothy Day, AFPD**
Timothy Day

A-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,

v.

ANTHONY BELL,

Defendant.
_____/

ORDER GRANTING IN PART MOTION FOR SENTENCE CORRECTION PURSUANT TO FIRST STEP ACT

THIS CAUSE came before the Court on Defendant Anthony Bell's Motion for Sentence Correction Pursuant to the First Step Act of 2018 ("Motion") [DE 346.] The Court has considered the Motion, the Government's Response [DE 349], Defendant's Reply [DE 350], and the record in this case, and is otherwise advised in the premises.

On April 11, 2005, a jury found Defendant guilty of Counts One and Two of a two-count Superseding Indictment. DE 144. Count One charged Defendant with conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and Count Two charged Defendant with possession with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). DE 64. As Counts One and Two each involved 50 or more grams of crack cocaine, they triggered the then-applicable ten-year statutory mandatory minimum and life maximum under 21 U.S.C. § 841(b)(1)(A). The Presentence Investigation Report ("PSI") found that, with respect to Count One, the offense involved 1.5 kilograms or more of crack cocaine. This resulted in a base offense level of 38. Thereafter, two levels were added because a dangerous weapon

was possessed, and two levels were added for obstruction of justice. Defendant's criminal history was calculated to be a category V. However, because Defendant was found to be a career offender, his criminal history category was raised to category VI pursuant to U.S.S.G. § 4B1.1. Based on a total offense level of 42 and a criminal history category VI, the guidelines imprisonment range was 360 months to life. On July 15, 2005, the Court imposed a low end sentence of 360 months as to Counts One and Two to run concurrently with each other. DE 170. Defendant now moves for a reduction of his sentence pursuant to the First Step Act of 2018. DE 346.

Section 404 of the First Step Act retroactively applies portions of the Fair Sentencing Act of 2010 ("FSA"), Pub. L. 111-220, 124 Stat. 2372, 2372 (2010), that lowered the threshold quantities triggering different statutory penalties for certain offenses involving crack cocaine base. Specifically, the First Step Act provides that "[a] court that imposed a sentence for a covered offense may, on motion of the defendant . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." Pub. L. 115-391. A "covered offense" is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." Id.

Defendant contends that he is eligible for relief under the First Step Act because the Federal criminal statutes that he violated are ones for which the statutory penalties were modified by Section 2 of the FSA. Section 2 of the FSA increased the quantity of crack cocaine required to trigger the statutory penalties set forth in 21 U.S.C. § 841(b)(1)(A) from 50 grams to 280 grams. Therefore, because Defendant was charged

with 50 grams or more of crack cocaine, and not at least 280 grams, Defendant argues that if Section 2 of the FSA was in effect at the time the offenses were committed, he would have faced a five-year mandatory minimum penalty and a forty-year statutory maximum penalty rather than a ten-year mandatory minimum sentence with a life maximum. The Government contends that because "[t]he actual weight of the drugs was 'more than 1.5 kilograms of crack cocaine a week . . . during the period of the conspiracy," even if Section 2 of the FSA had been in effect, it would have no impact on the Defendant's sentence because the Court found, by adopting the factual findings in the PSI, that the offense involved more than 280 grams of crack cocaine.

The Court finds that Defendant is eligible for relief under the First Step Act because the offenses of conviction are "covered offenses." "Under the plain language of the [First Step] Act, whether an offense is a 'covered offense' is determined by examining the statute that the defendant violated." United States v. Davis, 2019 WL 1054554, at *3 (W.D.N.Y. Mar. 6, 2019). In other words, "it is the statute of conviction, not actual conduct, that controls eligibility under the First Step Act." Id. at *2. Defendant was convicted of conspiracy to distribute 50 grams or more of crack cocaine and possession with the intent to distribute 50 grams or more of crack cocaine, and the penalties for those offenses were plainly affected by the Fair Sentencing Act. The modified statutory penalties applicable under the Fair Sentencing Act—a five-year mandatory minimum and forty-year statutory maximum—now render Defendant's guidelines imprisonment range 324 months to 405 months (based on a base offense

level of 32 for 1.5 kilograms or more of cocaine base with two levels added for a dangerous weapon and two additional levels for obstruction of justice).[1]

Having found Defendant eligible for relief under the First Step Act, the Court must next determine whether it should exercise its discretion to reduce Defendant's sentence. See First Step Act, § 404 (c) (providing that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section"). Having reviewed Defendant's record, the factors set forth in 18 U.S.C. § 3553(a), Defendant's post-sentencing conduct, and the nature and seriousness of the danger to any person or community that may be posed by a reduction in Defendant's sentence, the Court has determined that a reduction in Defendant's sentence is warranted under the First Step Act. Accordingly, it is thereupon

ORDERED AND ADJUDGED as follows:

1. Defendant Anthony Bell's Motion for Sentence Correction Pursuant to the First Step Act of 2018 [DE 346] is **GRANTED in part and DENIED** in part as set forth below:

   a. Defendant's term of incarceration is reduced to a term of 324 months as to Counts One and Two to run concurrently with each other.

   b. The Motion is **DENIED** in all other respects. All other provisions of the Court's prior sentence shall remain in full force and effect.

2. An amended judgment will be entered.

---

[1] Defendant also argues that he no longer qualifies as a career offender, but the Court has held the First Step Act does not provide for plenary resentencing. United States v. Mickey Pubien, Case No. 06-CR-60350, DE 879 at 3 (citing United States v. Potts, 2019 WL 1059837 (S.D. Fla. Mar. 6, 2019)). Therefore, the determination made at sentencing that Defendant qualifies as a career offender must remain unchanged.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of April, 2019.

JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF, pro se parties via U.S. mail to address on file, U.S. Marshals, and Bureau of Prisons

A-9

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY BELL,
Defendant,

EMERGENCY MOTION FOR COMPASSIONATE RELEASE UNDER 18 U.S.C. 3582(c)(1)(A) COVID-19 PANDEMIC

Comes Now the defendant, Anthony Bell, by and through pro-se at this time, and hereby moves the Court for emergency Compassionate Release based on extraordinary and compelling reasons (which were unforeseen at the time of sentencing) Under 18 U.S.C. Section 3582(c)(1)(A)(i), the COVID-19 Pandemic; BOP P.S. 5050.50.

As stated above the defendant is appearing pro-se because he is unable to afford counsel to litigate his position / standing and asks this Court respectfully

to give liberal construction to his pleadings consistent with the Supreme Courts' instructions in Haines V. Kerner, 404 U.S. 519 (1972). In support of this motion the defendant shows the Court as follows:

I. Introduction - Case Background

The defendant, Anthony Bell was convicted by a jury on April 11, 2005 of both counts in the superseding indictment: (1) for Knowingly and intentionally conspiring to possess with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846 and Count (2) possession with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). DE 64. On July 15, 2005, the Court imposed a low end sentence of 360 months as to **Counts** One and Two to run concurrently with each other. DE 170. On March 15, 2019, Timothy Day, AFPD filed a Motion for Sentence Correction Pursuant to the First Step Act of 2018 on the defendant, Anthony Bell's behalf. On April 26, 2019 the United States District Judge, Honorable James I. Cohn granted the defendant, Anthony Bell's Motion in part and denied in part which as a result the defendant Anthony Bell's term of incarceration was reduced to 324 months.

The defendant now moves for a reduction of his sentence pursuant Compassionate Release based on extraordinary

and compelling reasons Under 18 U.S.C. Section 3582 (c) (1)(A)(i), associated with the COVID-19 Pandemic. The defendant is currently detained at USP Florence - High Florence, Colorado and has served approxiately 189 months on his 324 month term of imprisonment.

II. EXHAUSTIN OF ADMINISTRATIVE REMEDIES

On May 15, 2020, the Warden of USP Florence, J.A. Barnhart appeared in the defendant's cellblock conducting his security rounds with institutional staff when the defendant dated and handed him his Compassionate Release Request pursuant BOP Program Statement 5050.50, which complied with 28 C.F.R. Section 571.61 that provides in pertinent part, "an prisoner initiates his request for a motion on his behalf under Section 3582 (c) by filing the request, in writing, with the Warden of his facility, and that the request state the circumstances the prisoner considers to be **extraordinary** and his proposed release plans." Following, the defendant observed the Warden hand his Compassionate Release Request to the Unit Manager who **presumably** is not designated to serve as the institutions' RIS Coordinator (IRC); who's principal responsibility is to receive and document RIS requests and other RIS-related information in the electronic tracking database. Being that the occurrence did not

strictly comply with PS 5050.50 (11) - "Tracking Reduction In Sentence Requests"; The defendant questioned his counselor concerning the matter and she assured him that his Reduction In Sentence Request was properly entered into the Tracking System (Compassionate Release Database). Id.

However, out of an abundance of caution, the defendant submitted his Compassionate Release Request to the Warden that very same day via institutional mail. See Attachment A1-A4. The defendants' Compassionate Release Request cited the COVID-19 Pandemic in combination with his chronic autoimmune neuromuscular disease, "Myasthenia Gravis" (MG) as extraordinary and compelling circumstances that warrant a reduction in his sentence.

Whereas, the defendant has not received a response to his Compassionate Release Request submitted to the Warden personally nor the one submitted via institutional mail on May 15, 2020. Thus, the defendant has elected to file a request for a reduction in sentence with this sentencing court pursuant to 18 U.S.C 3582 (c)(1)(d) due to the lapse of 30 days from the receipt of such a request by the Warden of the prisoner's facility. See Attachment A1-A4. The defendant submits that under these circumstances, the exhaustion requirement Under 18 U.S.C Section 3582 (c)(1)(A) has been met. Furthermore, in light of COVID-19, 30 days, yet alone any time beyond is anything but a risk. Each day, perhaps

each hour that elapses, threatens the defendant with great peril. See United States v. Gross, No. 15-CR-769 (AJN), 2020 WL 1673244, at *3 (S.D.N.Y. Apr. 6, 2020).

Wherefore, in light of the rapidly spreading COVID-19 Pandemic now ravishing the Bureau of Prisons (BOP), the defendant requests the Court to not delay its determination for Compassionate Release due to obvious shortcomings in the BOP, purposely diverting prisoners RIS requests, demonstrating that it has no intention of granting any relief through its so-called action plan which in actuality provides no true protection protocols for high risk individuals. See also, United States v. Esparza, No. 1:07-CR-00294-BLW, 2020 WL 1696084, at *2, (D. Idaho Apr. 7, 2020).

The defendant, Anthony Bell, hereby invokes the subject matter jurisdiction of the Honorable Court to grant his Motion for Emergency Compassionate Release Under 18 U.S.C. Section 3582(c)(1)(A)(i), based on extraordinary and compelling reasons.

III. EXTRAORDINARY AND COMPELLING CIRCUMSTANCES

The Court must now consider whether "extraordinary and compelling reasons warrant a sentence reduction," and are "consistent with applicable policy statements issued

by the Sentencing Commission," 18 U.S.C Section 3582 (c)(1)(A). Where the relevant policy statement, Section 1B1.13, explains that a sentence reduction under Section 3582 (c)(1)(A) may be ordered where a court determines, "after considering the factors set forth in 18 U.S.C. Section 3553 (a)," that "(1)(A) extraordinary and compelling reasons warrant the reduction; (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. Section 3142 (g); and (3) the reduction is consistent with this policy statement," U.S.S.G. 1B1.13 (2018).

The defendant, Anthony Bell, has been diagnosed with "Myasthenia Gravis" (MG) a serious autoimmune neuromuscular disease since 2007 and is administered **the** immunosuppressive medication of Prednisone which weakens **his** immune system, making him more susceptible to any infections, including SARS-CoV-2 and at an increased risk of contracting COVID-19. The defendants' autoimmune neuro-muscular disease has no known cure and is treated to possibly slow the progression of the disorder into other areas of the body. Thus, he can not discontinue his current immuno-suppressive medication unless specifically instructed to do so by a physician because stopping the medication can result in a disease flare, increasing the chances of picking up an infection. The Centers for Disease Control (CDC) Health officials have recognized that individuals with Chronic autoimmune neuro-

muscular diseases are deemed at greater risk of contracting COVID-19. Roughly, three years after the defendant, Anthony Bell began serving his then 360 month term of imprisonment; he was diagnosed Myasthenia Gravis (MG) at Dade County Jail (DCJ) and hospitalized in its infirmary nearly 3 months due to "ocular and bulbar" MG and muscular weakness. Following, his release from DCJs' infirmary the defendant made often and close intervals to Jackson Memorial Hospitals' Ward D for prisoners and Bulscom and Palmers' Eye Institute in Miami, Florida (from 2007 until the defendant was remanded to the Florida Department of Corrections (FDOC) in 2009) for the constant regression of his "MG".

While in the FDOC the defendants "MG" continued to flare up and he was hospitalized once again for several days in February of 2010 at the Reception Medical Center (RMC) in Lake Butler, Florida because he was experiencing "diplophia" (double vision) "dysphagia" (inability to swallow) muscular weakness, and low blood pressure. Subsequently, after his release from RMCs' hospice the defendant was transported frequently to the RMC in order to visit the neurologist, Dr. Gama for his MG until he was remanded to the custody of the Federal Bureau of Prisons (BOP) in 2012.

While in the custody of the BOP the defendant has endured several regressions of his MG through the

escalation and decreasing of his immunosuppressive medication which is detrimental in itself because it constantly alters the defendants' immune system making him susceptible to any infections, being that the immunosuppressive medication that he is being administered weakens his immune system.

Wherefore, Due to his incarceration, the defendant asserts he is unable to properly safeguard himself against infections whereas his medical condition and current conditions of confinement at USP Florence constitute extraordinary and compelling reasons to reduce his sentence. See United States v. Smith, NO. 12-CR-133 (JFK), 2020 WL 1849748, at *1, *4 (S.D.N.Y. Apr. 13, 2020)(citing U.S.S.G Section 1B1.13 commentary note 1 (A)(ii); see also United States v. McCarthy, NO. 3:17-CR-0230 (JCH), 2020 WL 1698732, *5 (D. Conn. Apr. 8, 2020), including United States v. Hernandez, No. 18-CR-834-(PAE), 2020 WL 1684062, at *3 (S.D.N.Y. Apr. 2, 2020) (COVID-19 presents a heightened risk for incarcerated defendants ... with autoimmune diseases.

The defendant, Anthony Bell is presently suffering from MG a serious autoimmune neuromuscular disease... that substantially diminishes the ability of the defendant to provide self care within the environment of a correctional facility and from which the defendant is not expected to recover from if he were to contract the coronavirus. Section 1B1.13 Cmt. n.1 (A)(ii). In fact, the spread of the Novel

Coronavirus, more specifically COVID-19, has presented extraordinary and unprecedented challenges for the Nation and poses a serious issue for prisons. Due to the infectious nature of COVID-19, the CDC and governments (state and federal) have advised individuals to practice good hygiene, social distancing, and isolation. However, social distancing is more difficult to practice for prisons, which shockingly guantees that **prisoners** remain in close proximity to one another, with limited to no testing at all and the significant risk that the virus will spread even more uncontrolably as guards and certain prisoners circulate throughout the facility.[2]

In United States v. Esparza, No. 1:07-CR-00294-BLW, 2020 WL 1696084, at *2 (D. Idaho Apr. 7, 2020)

2

Inmates at USP Florence are under mandatory cell sharing orders by Warden Barnhart and Associate Warden Kardin. If inmates do not comply, they will be physically forced in a cell with another inmate and disciplinary action taken as a conseq-ence.

the Court noted that "the presence of COVID-19 ... necessitates a more expansive interpretation of what self-care means." Id. at *3

Particularly in Esparza, the defendant seeking compassionate release was an elderly prisoner who suffered from a variety of maladies that put him at an increased risk of contracting COVID-19. See Generally, Id. There, the Court noted as follows:

> "The prison environment prevents the defendant from being able to effectively self-isolate in the ways that the CDC recommends for a person of his age and diminished health. In this moment, the inability for high risk individuals like the defendant, with comorbidities to fully isolate is an inability to provide self-care." U.S.S.G. Section 1B1.13 Cmt. n. 1 (A)(ii).

Therefore, so long as the defendant, Anthony Bell remains in custody, his capacity to protect himself from a serious, or even fatal infection from COVID-19 will be **compromised**. See Esparza, at *3. COVID-19 cases have already been confirmed at over 50 BOP facilities, and the BOP website continues to identify increased new cases and institutions each day that have had dozens of prisoners whom have died in BOP custody

from the Coronavirus. See https://www.bop.gov.Coronavirus.

The defendant, Anthony Bell, having demonstrated that he suffers from Myasthenia Gravis "MG" which places him at a greater risk of contracting COVID-19, and he is clearly unable to properly guard himself against while incarcerated at USP Florence, a reduction of the defendants' 324 months **sentence** to time served is consistent with U.S.S.G 1B1.13, whereas his "MG" is serious and he warrants protection from the risks of COVID-19, a risk that the Warden of USP Florence has shown outright deliberate indifference towards. Now due to the COVID-19 Pandemic rapidly spreading in the BOP, weighs in favor of the **defendant's** immediate release under Section 3582(c)(1)(A)(i), with his term of 324 months being more than half way completed and upon release he will immediately begin his 10 year term of Supervised Release on Home Incarceration.

The Esparza Court further noted that "[e]ven in the best run prisons, officials are finding it difficult if not impossible to follow the CDC Guidelines for protecting especially high risk individuals and preventing the spread of the virus among prisoners and staff: praticing fastidious hygiene and keeping a distance of atleast six feet from others." Id. (citing CDC and Prevention Control, What Law Enforcement Personnel Need to Know about Coronavirus Disease 2019, COVID-19). cdc.gov/Coronavirus/2019-ncov Comm-

unity / guidance - law - enforcement. html.

The defendant's "MG" falls squarely within the ambit of pre existing conditions that the CDC has unambiguously explained places him at the greater risk for COVID-19. The Warden of Florence is purposely mishandling prisoners' RIS Requests and Enforcing Mandatory Cell Sharing for ALL prisoners, NO Exceptions.

Adequately caring for someone with "MG" like the defendant, entails reducing the individuals' risk of exposure to COVID-19; but physically keeping him at USP-Florence under **Mandatory** cell sharing in a unit of 150 prisoners or more is not the "most effective manner" of mitigating that risk.

The Eighth Amendment prohibition on Cruel and Unusual Punishment includes unreasonable exposure to dangerous conditions in custody. See U.S. Const. Amend. VIII; see also Helling v. McKinney, 509 U.S. 25 (1993) (also stating, in dicta, "nor can we hold that prison officials may not be deliberately indifferent to the exposure of prisoners to a serious, communicable, or deadly disease on the ground that the complaining prisoner doesn't show any serious current symptoms").

At this time, it is not safe to assume as the Warden of USP-Florence has, that because COVID-19 has not entered the institution yet, that it will not enter the

institution because if it does or when it does, the defendant, Anthony Bell will face a substantially heightened risk of serious illness or **possibly** death, which justifies the Honorable Court in reducing his sentence with tailored conditions pursuant to 18 U.S.C. Section 3582 (c)(1)(A)(i). Under such Circumstances, a sentence reduction to time already served is sufficient, but not greater than necessary, to promote adequate deterrence, respect for the law, suffices to protect the public and provide just punishment. 18 U.S.C. Section 3553 (a).

Congress has entrusted the Courts with imposing such sentences "sufficient but not greater than necessary." Id. The defendants' 324 months sentence reflected what the Court found was sufficient but not greater than necessary," which now seemingly brings to light the death penalty, given the defendant's vunerability to COVID-19 and were he to be kept in prison under non-self isolation conditions with over 150 other prisoners unable to self isolate either in this extraordinary time; His health could be severely impacted. Such an outcome, the defendant asserts, would so greatly exceed "just punishment for his offenses." The defendant contends that this simply should not be permitted or risked; Each day, perhaps each hour that elapses, threatens the defendant **with** great **peril**. Gross, 2020 WL 1673244, at *3 (S.D.N.Y. Apr. 6,

2020).

Therefore, the defendants' Motion for Compassionate Release hinges on whether the risks presented by COVID-19, in combination with his health/medical condition, constitute extraordinary and compelling reasons for his release to the Courts. The Section 3553(a) Sentencing factors also support the defendants' release, such as the "need for the sentence imposed ... to provide the defendant with ... medical care ... in the most effective manner." 18 U.S.C. Section 3553(a)(2)(D). The defendant is unlikely to be able to receive the medical care he'll desperately need if he were to contract COVID-19 nor to follow the CDC Guidelines to self-quarantine or fully isolate at USP-Florence in the midst of this COVID-19 Pandemic. See Lisa Freeland et al., "We'll witness many more COVID-19 deaths in prisons if AG Barr and Congress don't act now," Wash. Post (Apr. 6, 2020), https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders/ (discussing "wholly inadequate medical care in Federal prisons").

The defendant, Anthony Bell, hereby requests that the Court take judicial notice that, for individuals like him with autoimmune diseases, COVID-19 is proven to cause severe medical complications and has an increased lethality. See Jones v. Wolf, 2020 WL 1643857, at *8 (W.D.N.Y.

Apr. 2, 2020); see also cdc.gov/Coronavirus/people-at-higher-risk-html. The COVID-19 Pandemic is extraordinary and unprecedented in modern times in this nation.

The crowded nature of prison facilities presents the prominent risk that COVID-19 becomes a feeding frenzy once it gains entry, it will ravish and spread among prisoners and realistically a high risk prisoner who contracts the virus while in prison will face a surplus of challenges caring for himself. United States v. Hernandez, 2020 WL 1684062, at *3 (S.D.N.Y. Apr. 2, 2020).

In these settings, recommended social distancing and hygiene procautions are more difficult to adhere to. In fact, the BOP has undertaken precautions to prevent the spread of COVID-19. Those attempted precautions have been largely unsucessful. bop.gov./coronavirus. Almost 1.5 in 10,000 federal prisoners have died due to COVID-19, with a 4.42% mortality rate among individuals who have contracted COVID-19 in Federal custody. cdc.gov/coronavirus/2019-ncov/guidance. 4/21/20. These numbers are doubling weekly, and on a population proportion basis, somewhat are higher than those for the U.S. Population. Approximately 3.5 in 1,000 prisoners in BOP custody have tested positive for COVID-19, By comparison, 2.2 in 1,000 people in the United States have tested postive. Sources: COVID-19 Coronavirus, Bureau of Prisons (April 21, 2020); population statistics, Bureau of Prisons (April 21, 2020);

Coronavirus in the U.S., latest map and case count, NY Times, May 10, 2020; U.S. and World Population Clock, U.S. Census Bureau (May 10, 2020); See also www.census.gov/popclock/.

IV. DANGEROUSNESS TO THE COMMUNITY

Third, the Court must now consider whether the defendant is "a danger to the safety of any other person or to the community." U.S.S.G. Section 1B1.13 (2). The defendant has not contracted the coronavirus to date and insofar as being granted compassionate release while not infected with the virus is evidence that the defendant poses no danger via community spread of the coronavirus.

While the defendant has been in custody, although he does not have an impeccable disciplinary record, he has bettered himself by obtaining his GED and Completing quite a few Education Courses and Rehabilitation Programs which include, but not limited to Re entry Preparation. See Attachment B. Prior to the defendant's present incarceration, his Criminal History Record is minimal and the defendant was only 23 years old when arrested for his current crimes. The defendant submits to the Court that he does not pose a risk of danger to his community as his release would be super-

vised by the U.S. Probation Office while in strict home incarceration in a COVID-19 free residence, with his Sister Hope Demons, (who is a Senior Registered Nurse and Health Services Administrator at Promise Hospice in Coleman, Florida) his nephew DaeQuan James, and niece Dae'Kira James at: 9107 County Road 205B, Wildwood, Florida 34785: Phone # 352-461-6476; Who is on standby to assist the Court and Probation Department in any aspect concerning the consideration/approval of this home incarceration. She's willing to submit to a personal interview and home tour with the Probation Department Officials at their availability for the purposes of approval. Most important the defendants' medical needs will be assessed and addressed through and by Florida Medicare and the defendant will not leave the place of residence/home incarceration except for to retrieve medical necessities, attend doctor appointments, and employment purposes that have received prior approval from the Probation Officer or Court. Which will also substantially reduce any risk further assumed that the defendant may pose to the community he is venturing possibly to for the first time. When combining all the forementioned above with the passage of time the defendant is unlikely to pose a threat to anyone or any community. The defendant is not a bad person, he was just a misguided 23 year old young man, who was a product of the environment

he was raised in which resulted in him being on the wrong side of the law more times than he should have he realizes. The defendant asserts that he has made mistakes that he is honestly remorseful about but those same mistakes have provided him with the means to become a better human being over all and he is respectfully asking this Court to give him the opportunity to prove so. But futher, He feels he should not be kept in prison in the face of substantial risk to his health and safety.

V. SECTION 3553 (a) FACTORS

The Final Criteria for a reduction in sentence requires the Court to consider whether a reduction is consistent with the applicable Section 3553 (a) factors. See 18 U.S.C. Section 3582 (c)(1)(A); U.S.S.G. Section 1B1.13; and in light of post-offense developments. Peppers v. United States, 562 U.S. 476, 490-493 (2011). 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

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatmeant in the most effective manner;

(4) the **Kind** of sentence and **the** sentencing range established [under the applicable Guidelines Sections]
... [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. Setion 3553(a)

"The Court should assess whether these factors outweigh the 'extraordinary and compelling reasons' warranting Compassionate release, particularly whether Compassionate release would undermine the goals of the original sentence." Id. As the defendant pointed out above, that he has a history of "MG" and is serving the imposed sentence of 324 months in which the Court can realize the possibility that there is a substantial risk that he will become seriously ill if he contracts COVID-19 or any relative virus or infection; With an unsettlingly high degree of probability that his 324 months term of imprisonment will transform into a death sentence as he virtually sits on death row in fear that COVID-19 will enter USP- Florence very soon.

That concern, combined with the fact that, as discussed above, the defendant does not pose an ongoing danger to his community or any other, strongly Counsels in favor of his early release to home incarceration where he will still be required to adhere to all rules and regulations imposed and immediately be required to begin serving his Supervised Release Conditions. As for 3553(a) factors, the defendants' crimes were notably non-violent admidst a preponderance of uncharged and alleged occurrences. The defendant has served

189 months of his 324 months term of imprisonment and contends that he in no way resembles mentally, emotionally, and physically the 23 year old character he was; When taken into custody for his crimes in 2004. The defendant has expressed great anguish for his past misdeeds with his psychologist, Dr. Kost at Coleman(1) USP during his anger management sessions and actually discovered that he has a very strong contempt for the individual he was. Thus, for the most part and despite his predicament has made tremendous strides in various areas and aspects of his life during his incarceration towards becoming and being a productive individual that the public and community will take note of for all the proper and sound reasons sooner than later he hopes.

Further, the defendant has aspirations of being a Nutrition Specialist for and to people with underlying conditions such as his but not limited to. As well as a mentor to at risk children in general because he seriously has faith in his ability to steer some of them away from the road that led him to a life of incarceration.

In addition to the amount of time that the defendant has served already, Complies with 3553(a)(2) and none of the other factors in 3553(a) weigh against granting the defendants' sentence reduction motion. Instead it militates in its favor when the Court now

considers the introductory sentence to 3553(a), which instructs the Court to "impose a sentence sufficient, but not greater than necessary" to punish, deter, protect the public, and rehabilitate the defendant. Wherefore, combined with the defendants' vunerability to COVID-19, the defendants' 324 months sentence could be coverted into a death sentence if he were to contract the COVID-19 virus. See 3553(a)(2)(D) ... the need for the sentence imposed ... to provide the defendant with medical care ... in the most effective manner." Id. The original sentence was not intended to impose the death penalty upon the defendant, Anthony Bell.

CONCLUSION

Now that the Court has been made aware of the fact that the defendants' Myasthenia Gravis presents the risk of him being substantially infected with the Coronavirus which could possibly kill him in prison, if he is kept in prison admidst the COVID-19 Pandemic. Therefore, he hopes the Court will reduce his sentence to time served and begin his Supervised Release Conditions Under Home Incarceration. Because the defendants' Myasthenia

Gravis has potentially became a risk for death against the COVID-19 virus under his current conditions in prison which is consistent also with U.S.S.G. Section 5H1.4 that relates to "extraordinary physical impairment," of the sort that defendant Bell suffers from also "may be reason to depart downward." Id.

Respectfully submitted, this 9th day of July 2020.

/s/ Anthony Bell
Anthony Bell
Reg.# 64087004
USP Florence
P.O. Box 7000
Florence, Colorado 81226

CERTIFICATE OF SERVICE

The defendant, Anthony Bell, has served a copy of this document today by First Class Mail with sufficient postage thereon to:

Office of the Clerk
299 East Broward Boulevard, Rm 108
Ft. Lauderdale, Florida 33301

Emily Smachetti,
Assistant United States Attorney
99 N.E. 4th Street
Miami, Florida 33132

Attachment "A"-1

BP-A0148
JUNE 10

INMATE REQUEST TO STAFF CDFRM

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) Warden J.A. Barnhart	DATE: 5/15/20
FROM: Anthony Bell	REGISTER NO.: 64087004
WORK ASSIGNMENT: N/A	UNIT: C/B - 115

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

I'm hereby requesting expedited review for Compassionate release under Program Statement 5050.50 section 8(c) which states "In the event the basis of the request is the medical condition of the prisoner, Staff SHALL expedite the request at all levels." Commentary statement to section 8(c) further provides that, A request for an expedited review permits the review process to be expedited, but does not lessen the requirement that

(Do not write below this line) (Attached Continuation)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate

PDF

Prescribed by P5511

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

FILE IN SECTION 6 UNLESS APPROPRIATE FOR PRIVACY FOLDER

SECTION 6

Attachment "A"-2

Anthony Bell
#64087004
5/15/20

Compassionate Release
Continuation pg. 1

documentation be provided.

My request is being made also in conjunction with Title 18 U.S.C. Section 3582(c)(1)(A)(i).

I make my request for the Expedited Review for Compassionate Release based on the COVID-19 outbreak and pandemic that is now rapidly spreading worldwide, nationally, and throughout B.O.P. institutions, in combination with my underlying diagnosed medical condition that the Centers for Disease Control (CDC) has identified as one being correlated with current COVID-19 infections, hospitalizations, and deaths. I'm presently taking the following medications for my underlying diagnosed medical condition of Myasthenia Gravis:

1) Prednisone 10MG Tabs once a day
2) Calcium Carbonate/Vit D 600MG/400 Unit Tabs once a day
3) Famotidine 20MG Tabs once a day

The Novel Coronavirus (COVID-19) are extraordinary and compelling circumstances which could not have reasonably been foreseen by my sentencing court at the time of my sentencing and satisfying the first requirement for submitting a compassionate release request to the warden.

If granted Compassionate Release or approved for Home Release/Detention to a coronvirus free residence

Attachment A-3

Anthony Bell
#64087004
5/15/20

Compassionate Release
Continuation pg. 2

with Hope Demons whom is my sister and resides at; 9107 County Road 205B, Wildwood, FL 34785, Phone # 352-461-6476. I will be able to financially afford to purchase my current medications and satisfy any and all terms of Home Detention / Supervised Release. Furthermore, there is also internet service at the above residence, Wherefore, I will be able to submit online employment applications. I know that before the wardens' approval is granted or this Compassionate Release / Home Detention referral is concluded, that the aspect of me posing a danger to anyone or the community will surface and need to be answered objectively.

Wherefore, the offenses in which I was convicted of are **undoubtedly** non-violent, I have also attained my GED, completed a litany of other educational class work including, but not limited to, a computer class, a victims impact awareness class and a stop the violence class during my 16 years of incarceration in pursuit of changing the individual I was and preparing myself in every way possible to reenter society and be a productive citizen. I have now served 189 monthes of the 324 monthes Im sentenced to which by any **measure** is a substantial punishment. However, if I were to contract COVID-19,

Attachment
A-4

Anthony Bell
#64087004
5/15/20

Compassionate Release
Continuation pg. 3

that 27 year term would instantly become a death penalty, a punishment that would honestly overrepresent the seriousness of my offenses. Therefore, I am at less risk for contracting the Coronavirus at home than in prison. Based on the above and forgoing, I pray and hope that I'm granted a Expedited Review for Compassionate Release under P.S. 5050.50 and U.S.C. Section 3582 (c)(1)(A)(i) Sentence Reduction or the alternative if more feasible, Home Confinement under the Cares Act of 2020.

Respectfully Submitted,
Anthony Bell

FLPIB * INMATE EDUCATION DATA * 06-25-2020
PAGE 001 OF 001 * TRANSCRIPT * 13:29:05

REGISTER NO: 64087-004 NAME..: BELL FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: FLP-FLORENCE HIGH USP

EDUCATION INFORMATION

FACL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
FLP	ESL HAS	ENGLISH PROFICIENT	05-31-2013 0556	CURRENT
FLP	GED HAS	COMPLETED GED OR HS DIPLOMA	05-31-2013 0555	CURRENT

EDUCATION COURSES

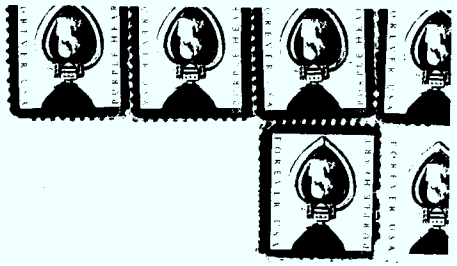
SUB-FACL	DESCRIPTION	START DATE	STOP DATE	EVNT	AC	LV	HRS
FLP	SHU ACE CHORES FOR KIDS	04-22-2020	05-06-2020	P	C	P	6
FLP	ACE DECIMALS CLASS	04-01-2020	04-08-2020	P	C	P	6
FLP	CDL PART 1	10-23-2019	11-20-2019	P	C	P	6
LEW SMU	SMU ACE ROUND G	04-30-2019	06-20-2019	P	C	P	20
LEW SMU	RADIO SMU PARENTING G RPP6	05-28-2019	06-12-2019	P	C	P	5
LEW SMU	RADIO SMU PARENTING F RPP6	03-26-2019	04-17-2019	P	C	P	5
LEW SMU	SMU ACE ROUND F	03-20-2019	04-13-2019	P	C	P	20
LEW SMU	ACTIVITY PACKET ROUND E	02-02-2019	02-02-2019	P	C	P	6
LEW SMU	SMU RADIO WELLNESS ROUND E	02-02-2019	02-02-2019	P	C	P	9
LEW SMU	PERSONAL DEVELOPMENT	10-18-2018	01-17-2019	P	C	P	10
LEW SMU	SMU PERSONAL GROWTH I RPP 6	05-22-2018	06-14-2018	P	C	P	3
COP	MINOR LEAGUE SPORTS RULES	07-15-2016	07-20-2016	P	C	P	4
COP	HEALTH/NUTRITION CLASS	07-04-2016	08-19-2016	P	C	P	10
COP	PHOTO CLASS	06-06-2016	06-14-2016	P	C	P	4
COP	TOURNAMENT MANAGEMENT CLASS	02-19-2016	02-20-2016	P	C	P	4
COP	ADVANCED LEATHER CLASS	10-19-2015	11-16-2015	P	C	P	16
COP	BASKETBALL SPORTS RULES	10-18-2015	10-24-2015	P	C	P	4
COP	FIELS MAINTENANCE CLASS	06-18-2015	06-27-2015	P	C	P	8
BSY	STOP THE VIOLENCE;9:00AM	09-09-2014	10-08-2014	P	C	P	12
BSY	COMPUTER AIDED INSTR. ORIENT.	06-19-2014	10-19-2014	P	C	P	1
BSY	VICTIM IMPACT AWARENESS M-F AM	07-02-2014	08-20-2014	P	C	P	12
JES	ACE GERMAN 1 CLASS @ FCI	07-29-2013	10-15-2013	P	C	P	18
JES	CREATIVE WRITING CLASS @ FCI	07-29-2013	10-15-2013	P	C	P	18
JES	LEGAL RESEARCH CLASS @ FCI	07-29-2013	10-15-2013	P	C	P	18
JES	LEGAL WRITING CLASS @ FCI	07-29-2013	07-29-2013	P	C	P	18
JES	RPP#1 AIDS AWARENESS	06-06-2013	06-06-2013	P	C	P	1

Attachment "B"

G0000 TRANSACTION SUCCESSFULLY COMPLETED

Anthony Bell #64087004
FLORENCE USP-HIGH
P.O. BOX 7000
FLORENCE, CO 81226

2-4-20



Office of the C
299 East Broward Blv
Ft. Lauderdale, Flori
33

A-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY BELL,

Defendant.
_____/

ANTHONY BELL'S MOTION FOR COMPASSIONATE RELEASE OR MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT FOR EXTRAORDINARY AND COMPELLING REASONS PURSUANT TO 18 U.S.C. § 3582(C)(1)(A)

Anthony Bell, through undersigned counsel, respectfully moves this Court pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) for an order reducing his sentence based on extraordinary and compelling reasons, that is that Mr. Bell was diagnosed in 2007 with Myasthenia Gravis (MG), a serious autoimmune neuromuscular disease which can be a life-threatening condition when it affects the muscles that control breathing. In addition, Mr. Bell has been prescribed prednisone since 2007, which compromises the immune system and leaves Mr. Bell vulnerable and defenseless to the COVID-19 virus. Thus, Mr. Bell satisfies the "extraordinary and compelling reasons" standard under §3582(c)(1)(A)(i).

FACTUAL BACKGROUND

The superseding indictment in the above-styled matter against Mr. Bell charged two counts: (1) Count One for knowingly and intentionally conspiring to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and it was further alleged that the substance was fifty grams or more of a mixture and a substance containing a detectable amount of cocaine base commonly referred to as crack, in violation of 21 U.S.C. § 841(b)(1)(A), (2) Count Two for knowingly and intentionally possessing with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and it was further alleged that the controlled substance was fifty grams or more of a mixture and a substance containing a detectable amount of cocaine base commonly referred to as crack, in violation of 21 U.S.C. § 841(b)(1)(A)(DE-64). Counts one and two alleged fifty or more grams of crack cocaine which triggered the then-applicable ten-year statutory mandatory minimum and life maximum under 21 U.S.C. § 841(b)(1)(A).

On April 11, 2005, Mr. Bell was convicted by a jury of both counts in the indictment which again called for a ten year mandatory minimum and a life imprisonment statutory maximum (DE 144). The Presentence Investigation Report agreed and found that the applicable statutory mandatory minimum was ten years' imprisonment and the statutory maximum was life imprisonment. *See* PSI at paragraph 99. Importantly, the PSI found Mr. Bell to be a career offender based on convictions for two counts of carrying a concealed firearm, and aggravated fleeing and eluding/high speed fleeing and aggravated assault on a police officer. PSI at

paragraph 56. In addition, as a result of the life statutory maximum, the PSI concluded that the career offender provision called for a base offense level of 37 and a criminal history category of VI. *See* PSI at paragraph 56. Without the career offender finding, the adjusted offense level was 42 as that level was higher than the career offender level of 37. The level 42 was calculated by finding that the base offense level was 38, which was calculated based on the PSI concluding that the offense involved 1.5 kilograms or more or crack cocaine (PSI at paragraph 50). Thereafter, two levels were added because a dangerous weapon was possessed and two levels were added for obstruction of justice (PSI at paragraphs 51 and 54). Mr. Bell's criminal history was calculated to be a category V (PSI at 69). However, pursuant to 4B1.1 the criminal history category was raised from V to VI (PSI at paragraphs 56, 69 and 70). As a result, the sentencing guideline range was 360 months to life. PSI at paragraph 100. On July 15, 2005, the Court imposed a low end sentence of 360 months as to Counts one and two to run concurrently with each other. (DE 170).

On September 18, 2015, after an unsuccessful appeal, Mr. Bell, through counsel, filed a Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582 and Amendment 782 contending that the provisions of the Fair Sentencing Act should be applied to him and also demonstrating that he no longer qualified as a career offender as carrying a concealed firearm was no longer a crime of violence for career offender enhancement citing *United States v. Archer,* 531 F. 3d 1347 (11th Cir. 2008)(DE 328). The Court denied this motion (DE 331).

Thereafter, on March 15, 2019, undersigned counsel filed a Motion for Sentence Correction Pursuant to the First Step Act (DE 346). In that motion, Mr. Bell asserted that he was eligible for relief pursuant to Section 404 of the First Step Act in that his convictions were covered offenses and that the Court should reduce his sentence by applying the Fair Sentencing Act of 2010 (DE 356:6-13). Mr. Bell maintained that the applicable sentencing guideline range was now 324-405 months (DE 346:14). Bell noted that the Court had the discretion to reduce his sentence below that range and he requested a sentence of 292 months (DE 346:14). Ultimately, on April 26, 2019, the Court reduced Mr. Bell's sentence to 324 months or the bottom of the guidelines (as the Court had done previously) (DE 353). Thereafter, on July 20, 2020, Mr. Bell filed *Pro Se* Emergency Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A) COVID-19 Pandemic (DE 377). Mr. Bell now files this counseled motion for compassionate release.

COVID-19 and Anthony Bell's CDC Risk Factor

As related above, Mr. Bell was diagnosed in 2007 with Myasthenia Gravis (MG), which is defined as an autoimmune disease in which the neuromuscular junction functions abnormally resulting in episodes of muscle weakness. In Myasthenia Gravis, the immune system produces antibodies that attack the receptors that lie on the muscle side of the neuromuscular junction. The particular receptors damaged are those that receive the nerve signal by the action of acetyl-choline, a chemical substance that transmits the nerve impulse across the junction (a neuro-transmitter). Difficulty in speaking and swallowing and weakness of the arms

and legs are common. In severe bouts, people may become paralyzed and may also develop a life-threatening weakness of the muscles needed for breathing. *See Merck Manual,* Disorders of the Neuromuscular Junction, Myasthenia Gravis, pages 332-333) (Home Edition, 1997). In addition, Mr. Bell has been taking prednisone in large doses ranging from 5 mg to 80 mg daily since 2007, which can compromise the immune system, *See Merck Manual,* Disorders of Joints and Connective Tissue, pages 226-227 (Home Edition, 1997). This leaves Mr. Bell vulnerable and defenseless to the COVID-19 virus. If Mr. Bell contracts the virus there is a good chance he may not survive. Thus, Mr. Bell satisfies the "extraordinary and compelling reasons" standard under §3582(c)(1)(A)(i). As a result of the severe health risks that he now faces in prison, Mr. Bell requests that this Court reduce his term of imprisonment to time served and thereafter, to impose home confinement/house arrest/electronic monitoring/GPS monitoring as a condition of his previously imposed five year term of Supervised Release. Further, if released, Mr. Bell would reside with his sister Hope Demons who lives at 9107 County Road, Apartment 205 B, Wildwood, Fla., 34785. It is noteworthy that Hope is a registered nurse and Health Services Administrator at Promise Hospice in Coleman, Florida so Mr. Bell would clearly have a very stable and supportive home with which to reside In addition, Mr. Bell has other family members who will assist him in advance of employment and he would self-quarantine while on whatever period of home confinement the Court orders.

BOP Medical Records Document
Mr. Bell's Disease of Myasthenia Gravis

Mr. Bell is presently incarcerated at USP Florence. Importantly, BOP Medical records confirm that Mr. Bell was diagnosed with Myasthenia Gravis (MG) in 2007, was hospitalized twice, has been on daily prednisone since 2007 with dosages reaching 80 mg a day and is steroid dependent. Further, the BOP medical records indicate that Mr. Bell has had crisis complications from the MG where he has experienced severe muscle weakness with hypotension (low blood pressure) and respiratory depression. Further, the records reflect that he has suffered abdominal pain and vomiting from chronic steroid use and has experienced abnormal liver function (See medical records attached hereto as defense Exhibit A at pages 4, 12, 14, 17, 18, 33, 37, 40, 44, 54, 58 and 60). Moreover, as related by Mr. Bell in his *Pro Se* Motion for Compassionate Release he has struggled mightily with the effects of his condition. Three years into his sentence, he was hospitalized in the detention center facility due to ocular and bulbar complications from the MG, which also resulted in muscle weakness. Bulbar refers to the nerves at the top of the spinal cord which impact swallowing and speech. Further, he was hospitalized in February of 2010 with double vision, dysphagia—inability to swallow, muscular weakness and low blood pressure (DE-373:7). These hospitalizations are confirmed in the medical records attached hereto as defense Exhibit A.

These conditions, place Mr. Bell in the Center for Disease Control and Prevention's increased risk category for developing serious illness or dying if he were

to contract COVID-19. As outlined by the CDC, people who have an autoimmune disease and who are immuno-suppressed from medication are at a greater risk for severe illness as a result of the virus.[1] One can only imagine that the *combination* of these high-risk comorbidities such as an autoimmune disorder and immuno-suppression significantly increase the threat posed to Mr. Bell's' life as a result of COVID-19.

Mr. Bell's Request for Compassionate Release to the Warden

Mr. Bell has exhausted his administrative remedies. On May 15, 2020, Mr. Bell made a request for compassionate release to the Warden at USP Florence based on MG. (See request attached hereto as defense Exhibit B). Moreover, on July 22, 2020, Bell's request was denied by the Warden (See Warden's denial attached hereto as defense Exhibit C). As a result, Mr. Bell has exhausted his administrative remedies as required by 18 U.S.C. § 3582(c)(1)(A). On this point, it is noteworthy that both the Department of Justice and the Bureau of Prisons have reconsidered and changed their "official position" on exhaustion under § 3582(c)(1)(A) in light of amendments to that provision by the First Step Act. Specifically, given Congress' intent to expedite rather than delay compassionate release applications, both DOJ and BOP now assert that the correct reading of the current version of § 3582(c)(1)(A) is that:

A defendant can file a motion for compassionate release in district court 30

[1] CDC, People Who Are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

days after requesting relief from the Warden, even if the Warden denies the relief within 30 days. In fact, the Bureau of Prison's website says as much: "[U]nder the FSA, an inmate may now file a motion for compassionate release directly with the sentencing court 30 days after making a request to the BOP or after exhausting their administrative remedies." See BOP website at https://www.bop.gov/inmates/fsa/faq.jsp#fsa_compassionate_release (under First Step Act: Frequently Asked Questions, Fed. Bureau of Prisons (last accessed August 11, 2020).

COVID-19 and the Risk While Incarcerated in the Bureau of Prisons

As the Court is well aware, the national situation has rapidly devolved as the pandemic has spread over the past several months. 8,834,000 individuals in the United States have been infected with COVID-19; and 227,300 individuals in this country have died of the disease;[2] and the BOP is currently reporting that more than 19,000 inmates and staff have been infected.[3] Indeed, the situation inside of BOP facilities is dire even compared to the broader U.S., which now leads the world in COVID-19 cases: while the rate of infection within the U.S. is about 5 people per 1,000, the rate of infections within the BOP is more than *six times* that number.[4] As will be described in detail further below, "prisons are like tinderboxes for infectious

[2] *Cases of Coronavirus Disease (COVID-19) in the U.S.*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated August 5, 2020).

[3] *See* BOP Covid-19 Resource Page, https://www.bop.gov/coronavirus/. Once an inmate is determined to have recovered, the BOP removes that inmate from its list of positive cases. Thus, the numbers of positive cases and recovered cases on BOP's website have been combined here, to reflect the total number of BOP-reported infections.

[4] *See* Federal Defenders of New York, which updates this data daily at: https://federaldefendersny.org.

disease," *United States v. Rodriguez*, No. 2:03-CR-00271, 2020 WL 1627331, at *1 (E.D. Pa. Apr. 1, 2020), and BOP has been unable to contain outbreaks of COVID-19 once a conflagration of the illness begins within a given facility.

As amended by the First Step Act, the compassionate release statute allows courts to reduce sentences for "extraordinary and compelling" reasons. The coronavirus pandemic, which public health experts and policymakers agree is especially dangerous in the confines of prisons, in combination with Mr. Bell's high-risk medical condition, has created an extraordinary and compelling circumstance here. Mr. Bell therefore requests relief based on his unique susceptibility to contracting and dying from this fatal disease while incarcerated.

"[T]hese are not normal times," given the "the risk of exposure and death from the COVID-19 pandemic." *United States v. Gonzalez*, 2020 WL 1536155, at *1 (E.D. Wa. Mar. 31, 2020). Given the risk of serious illness or death for Mr. Bell if he contracts COVID-19, he respectfully requests that the Court reduce his term of imprisonment to allow him to better protect himself.

The Court Should Reduce Mr. Bell's Sentence Pursuant to the First Step Act Because Extraordinary and Compelling Reasons Warrant Reduction

Under the First Step Act of 2018, federal prisoners may now petition courts directly for reduction of their sentences pursuant to longstanding compassionate release provisions, and judges may grant such requests if "extraordinary and compelling reasons" warrant a reduction. *See* First Step Act of 2018, Section 603(b), Pub. L. 115-391, 132 Stat. 5194 (2018) (amending 18 U.S.C. § 3582(c)(1)(A)(i)). The

compassionate release statute provides:

> (1) in any case--
>
> > (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
> >
> > > (i) extraordinary and compelling reasons warrant such a reduction; . . .
> > >
> > > *****
> > >
> > > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A). Previously, courts could modify sentences under § 3582(c)(1)(A)(i) only upon motion of the BOP. Since the First Step Act was enacted, however, courts have granted relief under § 3582(c)(1)(A)(i) in numerous cases. Here, the Court has the authority to modify Mr. Bell's' sentence because, in light of the global COVID-19 pandemic, "extraordinary and compelling reasons" are now present. Further, the Court should reduce Mr. Bell's sentence because the § 3553(a) factors mitigate in favor of a reduction under these extraordinary circumstances.

A. The Court may reduce Mr. Bell's term of imprisonment based on its own determination of extraordinary and compelling reasons, which should include the impact of the COVID-19 pandemic.

This Court has authority to determine that the worsening global pandemic,

combined with the risks now directly posed to Mr. Bell as a result of his serious medical conditions, now presents an extraordinary and compelling basis for a sentence reduction.

As set forth above, sentencing courts have authority to reduce an otherwise final term of imprisonment for "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A)(i). When Congress first created compassionate release in 1984, Congress delegated to the Sentencing Commission authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied, and a list of specific examples." 28 U.S.C. § 994(t). The Guideline ultimately issued in exercise of that authority, U.S.S.G. § 1B1.13, provides examples of "extraordinary and compelling reasons" in the application notes, and these generally fall into four categories based on a defendant's (1) terminal illness; (2) debilitating physical or mental health condition; (3) advanced age and deteriorating health in combination with the amount of time served; or, (4) compelling family circumstances. U.S.S.G. § 1B1.13 *cmt.* 1(A)–(C). Importantly, however, the commentary also includes a fifth catch-all provision for "extraordinary and compelling reason *other than, or in combination with*, the reasons described in subdivisions (A) through (C)." U.S.S.G. § 1B1.13, *cmt.* 1(D) (emphasis added). The Commission's policy statement also provides that a sentence reduction for "extraordinary and compelling reasons" must be accompanied by a finding by the court that the person is "not a danger to the safety of any other person or to the community." U.S.S.G. § 1B1.13(2).

However, with the First Step Act of 2018, Congress expanded the use of compassionate release.[5] The First Step Act amended § 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release, removing the BOP's exclusive "gatekeeper" role in this process. Yet because "the U.S. Sentencing Commission guidance has not yet been updated to reflect the liberalization of the procedural requirements" after Congress passed the First Step Act in 2018, *see United States v. Gagne*, No. 3:18-CR-242, 2020 WL 1640152, *2 (D. Conn. Apr. 2, 2020), "[t]here is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act." *United States v. Beck*, 425 F.Supp.3d 573, 579 (M.D.N.C. June 28, 2019).

U.S.S.G. 1B1.13 and BOP Policy Statement 5050.50 are Inapplicable to Bell

Importantly, we now have Circuit precedent on the non-application of U.S.S.G. 1B1.13 here. In *United States v. Brooker,* 2020 WL 5739712 (2nd Cir. September 25, 2020), the Second Circuit held that "the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D) nor anything else in the now-outdated version of the Guideline limits the district court's discretion." *Id.* at 7. It is now clear that district courts have broad discretion to decide what constitute extraordinary and compelling reasons for a reduction-in-sentence under § 3582(c)(1)(A) and they are not bound by USSG 1B1.13

[5] *See* 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Sen. Benjamin L. Cardin, co-sponsor of First Step Act) ("The bill expands compassionate release. . . and expedites compassionate release applications.").

in making that determination. The Second Circuit took a careful look at §1B1.13 and held it could not be the "applicable policy statement" for motions brought by a defendant under the post-First Step Act § 3582(c)(1)(A). After all, §1B1.13 makes multiple references to BOP as the moving entity and in application note 4 expressly states that a "reduction under this policy statement may be granted only upon motion by the Director of the BOP." So, the Court in *Brooker* concluded, § 1B1.13 is the policy statement that applies to ***motions brought by the BOP***. *Id.* at 6-7 (emphasis added). Without a policy statement, the determination is left to the broad discretion of the district court. The only statutory limit for the district court is that rehabilitation *alone* is not an extraordinary and compelling reason. *Id.* at 8. The Court reversed the denial of the motion pursuant to 18 U.S.C. § 3582(c)(1)(A) where the district court ruled that a reduction for "I am rehabilitated and my sentence is too long" does not fit within §1B1.13. Moreover, the Court stated, "[N]or can we say that, as a matter of law, that a court would abuse its discretion by granting someone a compassionate release on this record." *Id.* at 8. The Court continued, "[I]n the instant case, Zullo does not rely solely on his (apparently extensive) rehabilitation. Zullo's age at the time of his crime and the sentencing court's statement's about the injustice of his lengthy sentence might perhaps weigh in favor of a sentence reduction." *Id.* at 8. Accordingly, rehabilitation combined with an excessively long sentence or any other reason ***could*** constitute an "extraordinary and compelling reason as the consideration of these factors and of their possible relevance, whether in isolation or combination, is best left to the sound discretion of the trial court in the

first instance." *Id.* at 9. Importantly, the Court noted that, "these arguments may also interact with the present coronavirus pandemic, which courts around the country, including in this circuit, have used as a justification for granting some sentence reduction motions. *Id.* at 9. Finally, *Brooker* is careful to explain that, although we call it compassionate release, this is a misnomer as the statute actually "speaks of sentence reductions." *Id.* at 8. Moreover, this holding has been recently adopted and confirmed by both the Sixth and Seventh Circuits. *United States v. Jones,* 2020 WL 6817488 (6th Cir. November 20, 2020); *United States v. Gunn,* 2020 WL 6813995 (7th Cir. November 20, 2020). As a result, and with there being no Eleventh Circuit case addressing the issue, it is clear that U.S.S.G. 1B1.13 and BOP policy statements including 5050.50 are inapplicable to the Court's decision here.

As a result, this Court can and should find that Mr. Bell's disease together with his work and educational history satisfy the extraordinary and compelling requirements of 18 U.S.C. § 3582(c)(1)(A).

Indeed, courts around the country are now finding that "extraordinary and compelling" reasons include the impact of the global pandemic on vulnerable defendants. Indeed, since the COVID-19 pandemic, many courts in this district, including this Court in *United States v. Little,* 18-60013-JIC, ECF No. 66 (S.D. Fla. September 4, 2020) have found extraordinary and compelling reasons warranting relief and release, where a defendant's preexisting conditions makes him or her more vulnerable to COVID-19, in combination with the increased risks of COVID-19 in prisons. *See, e.g.*, *United States v. Cuchet,* 95-6277-WPD, ECF No. 299 (S.D. July 20,

2020);*United States v. Larry Weems,* 18-cr-60185-BB, ECF No. 187 (S.D. Fla. August 7, 2020); *United States v. Feucht*, 11-cr-60025-DMM, ECF No. 53 (S.D. Fla. May 28, 2020); *United States v. Barcha*, 16-cr-20549-RNS, ECF No. 1498 (S.D. Fla. May 18, 2020); *United States v. Hollander*, 18-cr-80102-RLR, ECF No. 62, 63 (S.D. Fla. May 14, 2020); *United States v. Rico,* 19-cr-20375-DPG, ECF No. 51 (S.D. Fla. May 14, 2020); *United States v. Lima*, 16-cr-20088-RNS, ECF No. 137 (S.D. Fla. May 11, 2020); *United States v. Slavkovic*, 16-cr-20171-UU, ECF No. 1311 (S.D. Fla. May 8, 2020), 16-cr-20703-DPG, ECF No. 31 (S.D. Fla. May 11, 2020); *United States v. Barbuto,* 18-cr-80122-DMM, ECF No. 314 (Apr. 28, 2020); *United States v. Sanchez*, No. 95-CR-00421-MGC, ECF No. 290 (S.D. Fla. Apr. 27, 2020); *United States v. Suarez*, No. 18-cr-20175-MGC, ECF No. 180 (S.D. Fla. Apr. 20, 2020); *United States v. Platten*, No. 08-cr-80148-DMM (S.D. Fla. Apr. 17, 2020); *United States v. Minor,* No. 18-cr-80152-DMM, ECF No. 35 (Apr. 17, 2020); *United States v. Hope*, No. 90-cr-06108-KMW, ECF. No. 479 (S.D. Fla. Apr. 10, 2020); *United States v. Oreste*, No. 14-cr-20349-RNS, ECF. No. 200 (S.D. Fla. Apr. 6, 2020); *United States v. Dalia Hernandez*, No. 18-cr-20474-CMA, ECF No. 42 (S.D. Fla. Apr. 2, 2020); *see also United States v. Bartolo Hernandez*, No. 16-cr-20091-KMW, ECF No. 561 (S.D. Fla. Apr. 3, 2020) (granting compassionate release in light of COVID-19 and permitting release to home confinement so that defendant could care for elderly mother with significant medical issues).

These decisions granting compassionate release based on vulnerability to COVID-19 are by no means limited to the Southern District of Florida. Hundreds of courts nationwide have found the same.[6]

B. Mr. Bell's vulnerability to COVID-19 is an extraordinary and compelling reason for a reduction in sentence.

Mr. Bell has demonstrated "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3583(c)(1)(A)(i) for release. If he contracts COVID-19, his medical condition —put him at a heightened risk of life-threatening complications or death. As the World Health Organization explained in a recent report, "individuals at *highest risk* for severe disease and death include people aged over 60 years and those with underlying conditions such as hypertension, diabetes, cardiovascular disease, chronic respiratory disease and cancer."[7] The WHO report was accompanied by sobering statistics outlining the historical mortality rates in China for those who contracted COVID-19 with specific comorbidities. For those with diabetes, the fatality rate was 9.2 %; for those with hypertension, 8.4 %; for those with chronic respiratory disease, 8.0 %.[8] The CDC has likewise warned that COVID-19 is especially dangerous for individuals with ailments similar to Mr. Bell's.[9] Importantly, according to the CDC, people who are in an "immunocompromised state" may be at

---

[6] *See, e.g.*, the many cases cited in n.15–19.

[7] Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf (finding fatality rates for patients with Covid-19 and comorbid conditions to be: "13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer").

[8] *Id*.

[9] *See* CDC, *People Who Are at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

increased risk for severe illness from COVID-19." [10] Moreover, Doctors have recognized that being "immunocompromised" can be result in individuals having rare infections that people normally would not get and taking longer to fight off common infections.[11] As a result of the foregoing, Mr. Bell has established "extraordinary and compelling circumstances" warranting a reduction in his sentence.

Numerous court have granted compassionate relief based on this condition. In *United States v. Hill*, 2020 WL 2542725 (D. Conn May 19, 2020), the court rightly granted compassionate release to a defendant's because of his immunocompromised state. *See id.* at * 3 (characterizing prisons as "tinderboxes where the virus may spread rapidly once a single person is infected; stating that when the court sentenced the defendant it "did not intend to sentence him to a significant risk of lethal infection at a federal prison facility"). In addition, here in the Southern District of Florida in *United States v. Dalia Hernandez,* 18-20474-Altonaga, ECF DE-42, (S.D. Fla. April 2, 2020), Judge Altonaga granted an unopposed motion for compassionate release based on age and immuno-suppression. Ms. Hernandez who was 52, suffered from breast cancer and was subjected to chemotherapy and radiation which caused suppression of her immune system. *See, Hernandez,* Unopposed Motion for

10 CDC, Coronavirus Disease 2019 (COVID-19) *People with Certain Medical Conditions* (Updated Aug. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

11Sophie Vergnaud, *What Does it Mean to be Immunocompromised During COVID-19* (April 7. 2020), https://www.goodrx.com/blog/what-does-it-mean-to-be-immunocompromised-coronavirus-covid-19/ (last accessed Sept. 6, 2020).

Compassionate Release, ECF DE-41 at 2-3 and 9. Other courts have also granted compassionate release to defendants who were immuno-suppressed.[12] Moreover, studies have also found that patients with *multiple* comorbidities have "greater disease severity" and poorer outcomes.[13]

Many patients with pre-existing conditions who develop severe COVID-19 and do not die will still experience severe illness and require hospitalization. "Most people in the higher risk categories" who contract COVID-19 "will require more advanced support: positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation. Such care requires highly specialized equipment in limited supply as well as an entire team of care providers, including but not limited to 1:1 or 1:2 nurse to patient ratios, respiratory therapists and intensive care physicians." Declaration of Dr. Jonathan Louis Golob, Assistant Professor at University of Michigan School of Medicine, ¶ 6, attached as Exhibit A-1.[14] "For high risk patients

12 *United States v. Schneider*, No. 3:14-cr-30036-SEM-TSH-1, 2020 WL 2556354 (C.D. Ill. May 20, 2020); *United States v. Hill,* No. 3:19-cr-00038-JAM-1, 2020 WL 2542725 (D. Conn May 19, 2020); *United States v. Schafer,* No. 6:18-cr-06152-EAW-1, 2020 WL 2519726 (W.D. N.Y. May 18, 2020); *United States v. Handy*, No. 3:10-cr-00128-RNC-8, 2020 WL 2487371 (D. Conn. May 14, 2020); *United States v. Quintero*, No. 6:08-cr-06007-DGL-1, 2020 WL 2175171 (W.D. N.Y. May 6, 2020); *United States v. Peters,* No. 3:18-cr-00188-VAB-1, 2020 WL 2092617 (D. Conn. May 1, 2020); *United States v. Brown,* No. 4:05-cr-00227-RP-CFB-1, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020); *United States v. Robinson*, No. 3:18-cr-00597-RS-1, 2020 WL 1982872 (N.D. Cal. Apr. 27, 2020); *United States v. Park*, No. 1:16-cr-00473-RA-1, 2020 WL 1970603 (S.D. N.Y. Apr. 24, 2020); *United States v. Edwards*, No. 6:17-CR-00003, 2020 WL 1650406 (W.D. Va. Apr. 2, 2020); *United States v. Jepsen*, No. 3:19-CV-00073(VLB), 2020 WL 1640232 (D. Conn. Apr. 1, 2020); *United States v. Campagna*, No. 16 Cr. 78-01 (LGS), 2020 WL 1489829 (S.D. N.Y. Mar. 27, 2020)

13 *See, e.g.*, Wei-jie Guan, et al., Comorbidity and its impact on 1590 patients with COVID-19 in China: a nationwide analysis; *Eur. Respir. J.*, (May 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7098485/

14 This declaration was prepared in connection with a different case and is attached here for informational purposes.

who do not die from COVID-19, a prolonged recovery is expected to be required, including the need for extensive rehabilitation for profound deconditioning, loss of digits, neurological damage, and loss of respiratory capacity." *Id.* ¶ 4.[15] The CDC has reported that, during a study of COVID-19 patients conducted in March, "approximately 90 % of hospitalized patients identified through COVID-NET had one or more underlying conditions, the most common being obesity, hypertension, chronic lung disease, diabetes mellitus, and cardiovascular disease."

Under the framework of the guidelines, Mr. Bell's ability to "provide self-care" within his prison environment and to protect himself from COVID-19, in light of the threat posed by the virus while incarcerated and given his chronic, serious medical condition, is now "substantially diminished." These are "extraordinary and compelling" reasons for release. Indeed, as one court recently concluded, "[n]o rationale is more compelling or extraordinary." *United States v. Foster*, No. 1:14-cr-324-02, ECF No. 191, at 10 (M.D. Pa. Apr. 3, 2020).

In addition, courts nationwide have granted release based on CDC risk factors, when combined with the threat of COVID-19. For representative lists of cases, this includes numerous grants of compassionate release for individuals with individuals

[15] *See also* Ling Mao, et al., Neurologic Manifestations of Hospitalized Patients With Coronavirus Disease 2019 in Wuhan, China, *JAMA Neurol.*, (Apr. 10, 2020); https://jamanetwork.com/journals/jamaneurology/fullarticle/2764549.

with COPD[16] individuals with diabetes[17]; with hypertension[18]; individuals with asthma[19]; and individuals who suffer from obesity.[20]

---

[16] *See, e.g.*, *United States v. Rico,* 19-cr-20375-DPG, ECF No. 51 (S.D. Fla. May 14, 2020); *United States v. Howard*, 4:15-cr-00018-BR-2, 2020 WL 2200855 (E.D. N.C. May 6, 2020); *United States v. Harper*, 7:18-cr-00025-EKD-JCH-1, 2020 WL 2046381 (W.D. Va. Apr. 28, 2020); *United States v. Dillard*, 1:15-cr-170-SAB, Dkt. No. 71 (D. Idaho Apr. 27, 2020); *United States v. Coker*, 3:14-cr-00085-RLJ-DCP-20, 2020 WL 1877800 (E.D. Tenn. Apr. 15, 2020); *United States v. Miller*, 2:16-cr-20222-AJT-RSW-1, 2020 WL 1814084 (E.D. Mich. Apr. 9, 2020); *United States v. McCarthy*, 3:17-cr-00230-JCH-1, 2020 WL 1698732 (D. Conn. Apr. 8, 2020); *United States v. Gonzalez*, 2:18-cr- 00232-TOR-15, 2020 WL 1536155 (E.D. Wash. Mar. 31, 2020)

[17] *See, e.g.*, *United States v. Mattingly*, 6:15-cr-00005-NKM-JCH, 2020 WL 2499707 (W.D. Va. May 14, 2020); *United States v. Lopez*, 1:18-cr-02846-MV-1, 2020 WL 2489746 (D. N.M. May 14, 2020); *United States v. Barber*, 6:18-cr-00446-AA, 2020 WL 2404679 (D. Or. May 12, 2020); *United States v. Rivernider*, 3:10-cr-00222-RNC, 2020 WL 2393959 (D. Conn. May 12, 2020); *United States v. Hunt*, 2:18-cr-20037-DPH-DRG, 2020 WL 2395222 (E.D. Mich. May 12, 2020); *United States v. Ramirez*, 1:17-cr-10328-WGY, 2020 WL 2402858 (D. Mass. May 12, 2020); *United States v. Al-Jumail*, 2:12- cr-20272-DPH-LJM-3, 2020 WL 2395224 (E.D. Mich. May 12, 2020); *United States v. Simpson*, 3:11- cr-00832-SI-3, 2020 WL 2323055 (N.D. Cal. May 11, 2020); *United States v. Reddy*, 2:13-cr-20358- MFL-LJM-1, 2020 WL 2320093 (E.D. Mich. May 11, 2020); *United States v. Connell*, 18-cr-00281-RS- 1, 2020 WL 2315858 (N.D. Cal. May 8, 2020); *United States v. Amarrah*, 5:17-cr-20464-JEL-EAS-1, 2020 WL 2220008 (E.D. Mich. May 7, 2020); *United States v. Quintero*, 6:08-cr-06007-DGL-1, 2020 WL 2175171 (W.D. N.Y. May 6, 2020); *United States v. Howard*, 4:15-cr-00018-BR-2, 2020 WL 2200855 (E.D. N.C. May 6, 2020); *United States v. Pabon*, 2:17-cr-00165-AB-1, 2020 WL 2112265 (E.D. Penn. May 4, 2020); *United States v. Lacy*, 3:15-cr-30038-SEM-TSH-1, 2020 WL 2093363 (C.D. Ill. May 1, 2020); *United States v. Ardila*, 3:03-cr-00264-SRU-1, 2020 WL 2097736 (D. Conn. May 1, 2020); *United States v. Rivera*, 1:86-cr-01124-JFK-4, 2020 WL 2094094 (S.D. N.Y. May 1, 2020); *United States v. Pinkerton*, 15-CR-30045-3, 2020 WL 2083968 (C.D. Ill. Apr. 30, 2020); *United States v. Saad*, 2:16-cr-20197-DPH-MKM-1, 2020 WL 2065476 (E.D. Mich. Apr. 29, 2020); *United States v. Lucas*, 1:15-cr-00143-LJV-HKS-13, 2020 WL 2059735 (W.D.N.Y. Apr. 29, 2020); *United States v. Bertrand*, 3:00-cr-00012-LC-1, 2020 WL 2179387 (N.D. Fla. Apr. 29, 2020); *United States v. Musumeci*, 1:07-cr-00402-RMB-1, Dkt. No. 58 (S.D. N.Y. Apr. 28, 2020); *United States v. Sanchez*, 1:95-cr-00421-MGC-1, Dkt. No. 290 (S.D. Fla. Apr. 27, 2020); *United States v. Dillard*, 1:15-cr-170- SAB, Dkt. No. 71 (D. Idaho Apr. 27, 2020); *United States v. Coles*, 2:00-cr-20051-SEM-TSH-1, 2020 WL 1976296 (C.D. Ill. Apr. 24, 2020); *United States v. Tillman*, 1:07-cr-00197-PLM-1, 2020 WL 1950835 (W.D. Mich. Apr. 23, 2020); *United States v. Logan*, 1:12-cr-00307-LEK-1, Dkt. No. 179 (N.D. N.Y. Apr. 22, 2020); *United States v. Bess*, 16-CR-156, 2020 WL 1940809 (W.D.N.Y. Apr. 22, 2020); *United States v. Suarez*, 1:18-cr-20175-MGC-1, Dkt. No. 180 (S.D. Fla. Apr. 20, 2020); *United States v. Samy*, 2:16-cr-20610-AJT-DRG-1, 2020 WL 1888842 (E.D. Mich. Apr. 16, 2020); *United States v. Ben-Yhwh*, CR 15-00830 LEK, 2020 WL 1874125 (D. Haw. Apr. 13, 2020); *United States v. Burrill*, 17-CR-00491-RS-2, 2020 WL 1846788 (N.D. Cal. Apr. 10, 2020); *United States v. Trent*, 3:16- cr-00178-CRB-1, 2020 WL 1812242 (N.D. Cal. Apr. 9, 2020); *United States v. Hansen*, 1:07-cr- 00520-KAM-2, 2020 WL 1703672 (E.D. N.Y. Apr. 8, 2020); *United States v. Winckler*, 2:13-cr-00318- CB-1, 2020 WL 1666652 (W.D. Penn. Apr. 3, 2020); *United States v. Zukerman*, 1:16-cr-00194-AT-1, 2020 WL 1659880 (S.D. N.Y. Apr. 3, 2020); *United States v. Resnick*, 1:12-cr-00152-CM-3, 2020 WL 1651508 (S.D.N.Y. Apr. 2, 2020); *United States v. Colvin*, 3:19-cr-00179-JBA-1, 2020 WL 1613943 (D. Conn. Apr. 2, 2020); *United States v. Rodriguez*, 2:03-cr-00271-AB-1, 2020 WL 1627331 (E.D. Pa. Apr. 1, 2020); *United States v. Muniz*, 4:09-cr-00199-1, 2020 WL 1540325 (S.D. Tex. Mar. 31, 2020); *United States v. Harpine*, 6:91-cr-60156-MC-1, Dkt. No. 221 (D. Or. Mar. 27, 2020)

[18] *United States v. Handy*, 3:10-cr-00128-RNC-8, 2020 WL 2487371 (D. Conn. May 14, 2020); *United States v. Mattingly*, 6:15-cr-00005-NKM-JCH, 2020 WL 2499707 (W.D. Va. May 14, 2020); *United States v. Lopez*, 1:18-cr-02846-MV-1, 2020 WL 2489746 (D. N.M. May 14, 2020); *United States v. Gutman*, 1:19-cr-00069-RDB-2, 2020 WL 2467435 (D. Md. May 13, 2020); *United States v. Sedge*, 1:16-cr-00537-KAM, 2020 WL 2475071 (E.D. N.Y. May 13, 2020); *United States v. Barber*, 6:18-cr- 00446-AA, 2020 WL 2404679 (D. Or. May 12, 2020); *United States v. Rivernider*, 3:10-cr-00222- RNC, 2020 WL 2393959 (D. Conn. May 12, 2020); *United States v. Ramirez*, 1:17-cr-10328-WGY, 2020 WL 2402858 (D. Mass. May 12, 2020); *United States v. Ullings*, 1:10-cr-00406-MLB-1, 2020 WL 2394096 (N.D. Ga. May 12, 2020); *United States v. Valencia*, 1:15-cr-00163-AT-1, 2020 WL 2319323 (S.D. N.Y. May 11, 2020); *United States v. Foreman*, 3:19-cr-00062-VAB-1, 2020 WL 2315908 (D. Conn. May 11, 2020); *United States v. Reddy*, 2:13-cr-20358-MFL-LJM-1, 2020 WL 2320093 (E.D. Mich. May 11, 2020); *United States v. Pena*, 1:15-cr-00551-AJN-1, 2020 WL 2301199 (S.D. N.Y. May 8, 2020); *United States v. Connell*, 18-cr-00281-RS-1, 2020 WL 2315858 (N.D. Cal. May 8, 2020); *United States v. Vo*, 15-CR-00310-BLF-2, 2020 WL 2300101 (N.D. Cal. May 7, 2020); *United States v. Quintero*, 6:08-cr-06007-DGL-1, 2020 WL 2175171 (W.D. N.Y. May 6, 2020); *United States v. Reid*, 3:17-cr-001750-CRB-2, 2020 WL 2128855 (N.D. Cal. May 5, 2020); *United States v. Pabon*, 2:17-cr-00165-AB-1, 2020 WL 2112265 (E.D. Penn. May 4, 2020); *United States v. Guzman Soto*, 1:18-cr-10086-IT-1, 2020 WL 2104787 (D. Mass. May 1, 2020); *United States v. Etzel*, 6:17-CR-00001-AA, 2020 WL 2096423 (D. Or. May 1, 2020); *United States v. Lacy*, 3:15-cr-30038-SEM-TSH- 1, 2020 WL 2093363 (C.D. Ill. May 1, 2020); *United States v. Ardila*, 3:03-cr-00264-SRU-1, 2020 WL 2097736 (D. Conn. May 1, 2020); *United States v. Rivera*, 1:86-cr-01124-JFK-4, 2020 WL 2094094 (S.D. N.Y. May 1, 2020); *United States v. Pinkerton*, 15-CR-30045-3, 2020 WL 2083968 (C.D. Ill. Apr. 30, 2020); *United States v. Saad*, 2:16-cr-20197-DPH-MKM-1, 2020 WL 2065476 (E.D. Mich. Apr. 29, 2020); *United States v. Brown*, 4:05-cr-00227-RP-CFB-1, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020); *United States v. Bertrand*, 3:00-cr-00012-LC-1, 2020 WL 2179387 (N.D. Fla. Apr. 29, 2020); *United States v. Musumeci*, 1:07-cr-00402-RMB-1, Dkt. No. 58 (S.D. N.Y. Apr. 28, 2020); *United States v. Handy*, PJM 04-0559, 2020 WL 2041666 (D. Md. Apr. 28, 2020); *United States v. Harper*, 7:18-cr-00025-EKD-JCH-1, 2020 WL 2046381 (W.D. Va. Apr. 28, 2020); *United States v. Robinson*, 3:18-cr-00597-RS-1, 2020 WL 1982872 (N.D. Cal. Apr. 27, 2020); *United States v. Sanchez*, 1:95-cr- 00421-MGC-1, Dkt. No. 290 (S.D. Fla. Apr. 27, 2020); *United States v. Dillard*, 1:15-cr-170-SAB, Dkt. No. 71 (D. Idaho Apr. 27, 2020); *United States v. Williams*, 3:17-CR-121-(VAB); -1, 2020 WL 1974372 (D. Conn. Apr. 24, 2020); *United States v. Coles*, 2:00-cr-20051-SEM-TSH-1, 2020 WL 1976296 (C.D. Ill. Apr. 24, 2020); *United States v. Jackson*, 4:14-CR-00576, 2020 WL 1955402 (S.D. Tex. Apr. 23, 2020); *United States v. Logan*, 1:12-cr-00307-LEK-1, Dkt. No. 179 (N.D. N.Y. Apr. 22, 2020); *United States v. Bess*, 16-CR-156, 2020 WL 1940809 (W.D.N.Y. Apr. 22, 2020); *United States v. Curtis*, 1:03-cr-00533-BAH-1, 2020 WL 1935543 (D. D.C. Apr. 22, 2020); *United States v. Scparta*, 1:18-cr-00578-AJN-1, 2020 WL 1910481 (S.D.N.Y. Apr. 20, 2020); *United States v. Joling*, 6:15-cr- 00113-AA-1, 2020 WL 1903280 (D. Or. Apr. 17, 2020); *United States v. Gileno*, 3:19-cr-161-(VAB); - 1, 2020 WL 1904666 (D. Conn. Apr. 17, 2020); *United States v. Hammond*, 1:02-cr-00294-BAH-1, 2020 WL 1891980 (D. D.C. Apr. 16, 2020); *United States v. Samy*, 2:16-cr-20610-AJT-DRG-1, 2020 WL 1888842 (E.D. Mich. Apr. 16, 2020); *United States v. Ben-Yhwh*, CR 15-00830 LEK, 2020 WL 1874125 (D. Haw. Apr. 13, 2020); *United States v. Sawicz*, 1:08-cr-00287-ARR-1, 2020 WL 1815851 (E.D.N.Y. Apr. 10, 2020); *United States v. Burrill*, 17-CR-00491-RS-2, 2e (N.D. Cal. Apr. 10, 2020); *United States v. Miller*, 2:16-cr-20222-AJT-RSW-1, 2020 WL 1814084 (E.D. Mich. Apr. 9, 2020); *United States v. Hansen*, 1:07-cr-00520-KAM-2, 2020 WL 1703672 (E.D. N.Y. Apr. 8, 2020); *United States v. Gross*, 1:15-cr-00769-AJN-3, 2020 WL 1673244 (S.D. N.Y. Apr. 6, 2020); *United States v. Zukerman*, 1:16-cr-00194-AT-1, 2020 WL 1659880 (S.D. N.Y. Apr. 3, 2020); *United States v. Ghorbani*, 18-cr-255-PLF (D.D.C. Apr. 3, 2020); *United States v. Colvin*, 3:19-cr-00179-JBA-1, 2020 WL 1613943 (D. Conn. Apr. 2, 2020); *United States v. Rodriguez*, 2:03-cr-00271-AB-1, 2020 WL 1627331 (E.D. Penn. Apr. 1, 2020); *United States v. Muniz*, 4:09-cr-00199-1, 2020 WL 1540325 (S.D. Tex. Mar. 31, 2020); *United States v. Harpine*, 6:91-cr-60156-MC-1, Dkt. No. 221 (D. Or. Mar. 27, 2020)

[19] *United States v. Hunt*, 2:18-cr-20037-DPH-DRG, 2020 WL 2395222 (E.D. Mich. May 12, 2020);

C. The BOP is failing to adequately protect vulnerable inmates like Mr. Bell from COVID-19.

Even in the best of circumstances, jails and prisons are among the most dangerous places to be during an epidemic, as they create the ideal environment for

United States v. Simpson, 3:11-cr-00832-SI-3, 2020 WL 2323055 (N.D. Cal. May 11, 2020); *United States v. Amarrah*, 5:17-cr-20464-JEL-EAS-1, 2020 WL 2220008 (E.D. Mich. May 7, 2020); *United States v. Echevarria*, 3:17-cr-00044-MPS-1, 2020 WL 2113604 (May 4, 2020); *United States v. Ardila*, 3:03-cr-00264-SRU-1, 2020 WL 2097736 (D. Conn. May 1, 2020); *United States v. Brown*, 4:05-cr-00227-RP-CFB-1, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020); *United States v. Bertrand*, 3:00-cr-00012-LC-1, 2020 WL 2179387 (N.D. Fla. Apr. 29, 2020); *United States v. Handy*, PJM 04- 0559, 2020 WL 2041666 (D. Md. Apr. 28, 2020); *United States v. Harper*, 7:18-cr-00025-EKD-JCH-1, 2020 WL 2046381 (W.D. Va. Apr. 28, 2020); *United States v. Williams*, 3:17-CR-121-(VAB); -1, 2020 WL 1974372 (D. Conn. Apr. 24, 2020); *United States v. Gorai*, 2:18-cr-00220-JCM-CWH-1, 2020 WL 1975372 (D. Nev. Apr. 24, 2020); *United States v. Park*, 1:16-cr-00473-RA-1, 2020 WL 1970603 (S.D. N.Y. Apr. 24, 2020); *United States v. Tillman*, 1:07-cr-00197-PLM-1, 2020 WL 1950835 (W.D. Mich. Apr. 23, 2020); *United States v. Suarez*, 1:18-cr-20175-MGC-1, Dkt. No. 180 (S.D. Fla. Apr. 20, 2020); *United States v. Gileno*, 3:19-cr-161-(VAB); -1, 2020 WL 1904666 (D. Conn. Apr. 17, 2020); *United States v. Samy*, 2:16-cr-20610-AJT-DRG-1, 2020 WL 1888842 (E.D. Mich. Apr. 16, 2020); *United States v. Wen*, 6:17-CR-06173 EAW, 2020 WL 1845104 (W.D. N.Y. Apr. 13, 2020); *United States v. Smith*, 1:12-cr-00133-JFK-1, 2020 WL 1849748 (S.D.N.Y. Apr. 13, 2020); *United States v. Ben-Yhwh*, CR 15-00830 LEK, 2020 WL 1874125 (D. Haw. Apr. 13, 2020); *United States v. Tran*, 8:08-cr-00197-DOC-1, 2020 WL 1820520 (C.D. Cal. Apr. 10, 2020); *United States v. Burrill*, 17-CR-00491-RS-2, 2e (N.D. Cal. Apr. 10, 2020); *United States v. McCarthy*, 3:17-cr-00230-JCH-1, 2020 WL 1698732 (D. Conn. Apr. 8, 2020); *United States v. Ghorbani*, 18-cr-255-PLF (D.D.C. Apr. 3, 2020); *United States v. Hernandez*, 1:18-cr-00834-PAE-4, 2020 WL 1684062 (S.D. N.Y. Apr. 2, 2020); *United States v. Powell*, No. 1:94-cr-316-ESH, 2020 WL 1698194 (D.D.C. Mar. 28, 2020)

[20] *United States v. Handy*, 3:10-cr-00128-RNC-8, 2020 WL 2487371 (D. Conn. May 14, 2020); *United States v. Barber*, 6:18-cr-00446-AA, 2020 WL 2404679 (D. Or. May 12, 2020); *United States v. Hunt*, 2:18-cr-20037-DPH-DRG, 2020 WL 2395222 (E.D. Mich. May 12, 2020); *United States v. Ullings*, 1:10-cr-00406-MLB-1, 2020 WL 2394096 (N.D. Ga. May 12, 2020); *United States v. Foreman*, 3:19- cr-00062-VAB-1, 2020 WL 2315908 (D. Conn. May 11, 2020); *United States v. Jenkins*, 99-cr-00439- JLK-1, 2020 WL 2466911 (D. Co. May 8, 2020); *United States v. Quintero*, 6:08-cr-06007-DGL-1, 2020 WL 2175171 (W.D. N.Y. May 6, 2020); *United States v. Howard*, 4:15-cr-00018-BR-2, 2020 WL 2200855 (E.D. N.C. May 6, 2020); *United States v. Lacy*, 3:15-cr-30038-SEM-TSH-1, 2020 WL 2093363 (C.D. Ill. May 1, 2020); *United States v. Ardila*, 3:03-cr-00264-SRU-1, 2020 WL 2097736 (D. Conn. May 1, 2020); *United States v. Delgado*, 3:18-cr-00017-VAB, 2020 WL 2464685 (D. Conn. Apr. 30, 2020); *United States v. Dillard*, 1:15-cr-170-SAB, Dkt. No. 71 (D. Idaho Apr. 27, 2020); *United States v. Joling*, 6:15-cr-00113-AA-1, 2020 WL 1903280 (D. Or. Apr. 17, 2020); *United States v. Trent*, 3:16-cr-00178-CRB-1, 2020 WL 1812242 (N.D. Cal. Apr. 9, 2020); *United States v. Zukerman*, 1:16-cr-00194-AT-1, 2020 WL 1659880 (S.D. N.Y. Apr. 3, 2020).

transmission of contagious diseases.[21] *See* Declaration of Dr. Jaimie Meyer, Assistant Professor of Medicine at Yale School of Medicine, attached as Exhibit A-2 (explaining the particular risks of contagious diseases in prison both generally and for COVID-19).[22] As one district court recently noted, "prisons are like tinderboxes for infectious disease." *United States v. Rodriguez*, No. 2:03-CR-00271, 2020 WL 1627331, at *1 (E.D. Pa. Apr. 1, 2020). Yet despite BOP officials' best intent and efforts, BOP facilities have shown themselves to be *especially* unequipped to control the coronavirus.

a. COVID-19 is highly infectious, especially in prison environments, and contagious inmates are not easily identifiable.

First, COVID-19 has been extremely difficult to control because it is so highly contagious. The CDC advises that the coronavirus is "spread mainly from person-to-person . . . [b]etween people who are in close contact with one another . . . [t]hrough respiratory droplets produced when an infected person coughs or sneezes."[23] The droplets can land in the mouths or noses, or can be inhaled into the lungs, of people who are within about six feet of the infected person.[24] Prison officials are powerless

[21] Matthew J. Akiyama, *et al.*, Flattening the Curve for Incarcerated populations – COVID-19 in Jails and Prisons, NEW ENGLAND J. MED. (Apr. 2, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2005687 ("Therefore, we believe that we need to prepare now, by 'decarcerating,' or releasing, as many people as possible . . . . "); Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 8, 1047–55 (Oct. 15, 2007), https://doi.org/10.1086/521910.

[22] This declaration was prepared in connection with another case and is attached here for informational purposes.

[23] CDC, Coronavirus Disease 2019 (COVID-19), How It Spreads (Mar. 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html.

[24] *Id.*

to reduce breathing, coughing, sneezing, or movement in the cramped, shared spaces of prisons—the cell blocks, phone areas, showers, and dining halls that are all densely packed, even when a facility is locked down. In such environments, social distancing is impossible. Further, studies have shown that the coronavirus can survive from three hours to three days on various surfaces.[25] Yet soap and disinfectant is often in short supply in prisons, and hand sanitizer, an effective disinfectant recommended by the CDC to reduce transmission, is deemed forbidden "contraband" in BOP facilities because of its alcohol content.[26]

Further, those who are infected can spread the virus even if they are asymptomatic.[27] The CDC now warns that as many as 25 % of people infected with the virus have no symptoms and may be "unwitting spreaders."[28] As Dr. Jeffrey Shaman, an infectious disease expert at Columbia University explains: "The bottom line is that there are people out there shedding the virus who don't know that they're infected."[29]

---

[25] National Institute of Allergy and Infectious Diseases, *New coronavirus stable for hours on surfaces*, Mar. 17, 2020, https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces ("[S]cientists [from the National Institutes of Health, CDC, UCLA and Princeton University] found that [coronavirus] was detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel.").

[26] Keri Blakinger and Beth Schwarzapfel, *How Can Prisons Contain Coronavirus When Purell is Contraband?,* ABA J. (Mar. 13, 2020), https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus.

[27] Marco Cascella, *et al.*, Features, Evaluation and Treatment Coronavirus (COVID-19), National Center for Biotechnology Information ("NCBI"), Mar. 20, 2020, https://www.ncbi.nlm.nih.gov/books/NBK554776/#_ncbi_dlg_citbx_NBK554776; Jane Qiu, *Covert coronavirus infections could be seeding new outbreaks*, Nature (March 20, 2020), https://go.nature.com/3bxZeUd.

[28] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2020/03/31/ health/coronavirus-asymptomatic-transmission.html.

[29] *Id.*

Thus, BOP is unable to accurately identify who has coronavirus and who does not. As such, the agency can do little more than screen for symptomatic coronavirus carriers, mask and isolate any they find, and bar unnecessary visitors—which is precisely what they are doing.[30] Yet given the nature of COVID-19, this type of screening is woefully inadequate. Symptoms do not appear for "2–14 days after exposure," according to the CDC,[31] with a median incubation period of 5.1 days[32]—meaning that many inmates will remain in regular population almost a week before detection is even possible.[33] Alarmingly, recent reporting confirms that staff at the BOP facility at Oakdale were told to report to work, even if they had exposure to individuals who tested positive for COVID-19, as long as they were not symptomatic.[34]

b. The spread in BOP prisons already shows that BOP prisons cannot control the spread.

The best evidence that BOP cannot control the spread of coronavirus is that BOP *has not* controlled the spread of coronavirus. BOP first began issuing medical and screening guidance in January and February, and it instituted a nationwide

---

[30] *See BOP Implementing Modified Operations*, https://bit.ly/2XzmsFt.
[31] CDC, *Coronavirus Disease, Symptoms* (Feb. 29, 2020), https://bit.ly/3bumnqt.
[32] Stephen A. Lauer, Ph.D., *The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application*, Annals of Internal Med. (Mar. 10, 2020) (abstract), https://bit.ly/2XztWbU.
[33] *See generally* Pien Huang, *Can A Coronavirus Patient Who Isn't Showing Symptoms Infect Others?*, Nat'l Pub. Radio (Apr. 13, 2020), https://n.pr/2VoAirL. According to Shweta Bansal, Ph.D., an infectious disease expert at Georgetown University, the evidences shows "that SARS-CoV-2 has this ability to spread silently."
[34] Joseph Neff & Keri Blakinger, *Federal Prison Ageny "Put Staff in Harm's Way" of Coronavirus: Orders at Oakdale in Louisiana Help Explain COVID-19 Spread*, MARSHALL PROJECT, Apr. 3, 2020, https://www.themarshallproject.org/2020/04/03/federal-prisons-agency-put-staff-in-harm-s-way-of-coronavirus.

lockdown on March 24th. Yet BOP's self-reported numbers still establish a rapid rise of cases throughout the system. As of November 23, 2020, 123 facilities within the BOP system have current, active infections. System-wide, BOP has reported 19,000 inmates and staff infected.[35]

These numbers, as bad as they are, appear to drastically underreport what is actually happening. In at least one facility, BOP has declared all inmates presumptively infected, stopped testing altogether, and is refusing to release infection estimates.[36] In another, the president of the correctional officers union estimates inmate infection at 600% of BOP's public number.[37] One BOP employee recently told news reporters that "the Bureau is playing with these numbers . . . , if they don't test them and they don't get confirmed they don't have to be reported."[38] And BOP Public Information Supervisor Sue Allison, when asked whether the BOP's figures "could be relied upon as an accurate reflection of the number of inmates and staff that are infected, acknowledged that "reporting of cases while tied to positive cases, does not necessarily account for unconfirmed (non-tested) cases."[39]

---

[35] *Id.*

[36] Nicholas Chrastil, *Louisiana Federal Prison No Longer Testing Symptomatic Inmates for Coronavirus Due To 'Sustained Transmission,'* The Lens (Mar. 31, 2020), https://bit.ly/34Az7tf ("But the spokesperson said that the BOP would not be releasing the number of presumed positive cases, making it impossible to know how many prisoners at the facility have actually contracted the virus.").

[37] Staff report, *Elkton union president reports different COVID-19 stats than Federal Bureau of Prisons*, WKBN News, Lisbon Ohio (Apr. 9, 2020), https://bit.ly/2VtyPAv. The union president, Joseph Mayle, said management inside the prison gave "different numbers" than when the BOP reported just 10 cases: 67 positive or symptomatic and isolated, 44 hospitalized, 14 on ventilators, 12 staff infected, three dead. *Id.*

[38] Nicholas Chrastil, *Louisiana Federal Prison No Longer Testing Symptomatic Inmates for Coronavirus Due To 'Sustained Transmission,'* The Lens (Mar. 31, 2020), https://bit.ly/34Az7tf.

[39] Walter Pavlo, *Bureo of Prisons Underreporting COVID-19 Outbreaks in Prison*, FORBES (Apr. 1, 2020), https://www.forbes.com/sites/walterpavlo/2020/04/01/bureau-of-prisons-underreporting-outbreaks-in-prison/#268a97f7ba32.

As noted in *United States v. Esparza*, "testing inside prisons has been scant except for people who self-report symptoms—which means that statistics about the number of infections already in BOP facilities are largely meaningless." No. 1:07-CR-294, 2020 WL 1696084, *2 (D. Id. Apr. 7, 2020). *See also* Order at 5, *United States v. Caddo*, No. 3:18-cr-08341-JJT, ECF No. 174 (D. Ariz. Mar. 23, 2020) ("[I]t is unknowable whether BOP detainees or inmates have COVID-19 until they are tested, and BOP has not conducted many or any such tests because, like the rest of the country, BOP has very few or no actual COVID-19 test packets."). Critical here is the fact that Mr. Bell's' housing prevents social distancing and the ability to protect himself is almost non-existent.

Moreover, BOP fails to consistently follow its own pandemic policies. As cited above, staff that should be quarantined after exposure are not.[40] Prisons are failing to stock basic essentials like soap.[41] Indeed, the situation is so poor that a union representing 30,000 BOP employees filed an OSHA complaint alleging that federal prisoners are "proliferating the spread" of COVID-19 and citing "imminent danger" conditions at BOP facilities nationwide.[42] The complaint alleges the BOP has

---

[40] Joseph Neff & Keri Blakinger, *Federal Prison Ageny "Put Staff in Harm's Way" of Coronavirus: Orders at Oakdale in Louisiana Help Explain COVID-19 Spread*, MARSHALL PROJECT, Apr. 3, 2020, https://www.themarshallproject.org/2020/04/03/federal-prisons-agency-put-staff-in-harm-s-way-of-coronavirus.

[41] *See* Letter from Jerrold Nadler, Chair, House Judiciary Comm., to William Barr, Att. Gen., at 1 (Apr. 10, 2020) ("Reports from inside the Oakdale facility indicate that there is a continuing lack of availability of personal hygiene products and that general sanitation is lacking.") (citing Sadie Gurman et al., *Coronavirus Puts Prison Under Siege*, Wall Street Journal (Apr. 6, 2020) https://on.wsj.com/3a4TD6K.

[42] *See* OSHA complaint filed by Shane Fausey, president of Council of Prison Locals 33, on March 31, 2020, attached as Exhibit B. This complaint has been shared widely in the federal defense community.

directed staff members to return to work within 48 hours of being in close proximity to those with coronavirus or show symptoms of having the virus; authorized the movement of inmates with suspended or confirmed coronavirus cases to areas nationwide that did not have any known infections; failed to mitigate the spread of COVID-19 in facilities by using air filters or improving ventilation in other ways; failed to maintain social distancing guidelines for inmates and staff; and failed to provide necessary PPE to staff interacting with hospitalized inmates.[43]

Even despite their best efforts, BOP officials are powerless to stop the contagion. As an example, recently the government opposed a release motion for an inmate in Butner Medium I FCI, citing screening, visitation lockdown, social distancing, and other preventative BOP pandemic policies.[44] On March 24th, Butner had its first reported case. Later, nine inmates died, and almost 250 inmates and staff have been confirmed infected.[45] This dramatic swing shows just how quickly the virus can spread in any facility once it begins—and just how urgent requests such as Mr. Bell's are.

Presently, at USP Florence there are 10 inmates and 22 staff that are currently infected with the virus. Indeed, in addition to the experience at Butner above, the recent events at both FCI Miami and FCI Coleman Low demonstrate how quickly the contagion spreads where months ago FCI Coleman Low and FCI Miami

[43] *Id.*; *see also* Lia Russell, *Union warns of coronavirus exposure in federal prisons, VA facilities* (Apr. 7, 2020), https://bit.ly/3a5r3C9.
[44] *U.S. v. Rumley*, No. 08-cr-5 (W.D. Va., April 3, 2020) (ECF No. 185 at 4–7).
[45] BOP *Covid-19 Resource Page* https://www.bop.gov/coronavirus/.

had very limited cases. However, later in mid-August they grew to have the most (Coleman Low at 182 positive inmates, 21 staff) and third most (FCI Miami at 85 inmates and 30 staff) infections in the nation (FDC Miami is second at 87 inmates and 24 staff). It is not safe to wait and hope that the virus will not spike dramatically.

This is no idle concern—inmates have been catching the virus and dying while these motions are litigated. On April 1st, a district court in Northern Florida commuted a life sentence for a defendant named Andre Williams to time-served with 12-months home confinement, finding age and medical conditions created significant risk of "life threatening illness should he be exposed to COVID-19 while incarcerated." *United States v. Williams*, No. 04-cr-95, at *7 (N.D. Fla. Apr. 1, 2020) (ECF No. 91). Before the order granting release was filed, Mr. Williams caught coronavirus in FMC Butner. He died April 12th.[46]

Thus, the virus continues to spread, and despite well-intentioned BOP officials, the agency is ill equipped to confront one of the most infectious and deadly diseases of the last century.

D. Converting the remainder of Mr. Bell's sentence to home confinement is sufficient to accomplish the goals of sentencing.

When extraordinary and compelling reasons are established, the Court must then consider the relevant sentencing factors in § 3553(a) to determine whether a sentence reduction is warranted. 18 U.S.C. § 3582(c)(1)(A). Under the circumstances in this case, converting the remainder of Mr. Bell's sentence to home

[46] *See* BOP *Inmate Locator*, https://www.bop.gov/inmateloc/ (a search shows inmate Andre Williams died April 12, 2020).

confinement as a condition of supervised release, in combination with the time that he has already served in prison, is sufficient to satisfy the purposes of sentencing. Further, Mr. Bell does not pose a danger to the safety of any other person or the community.

a. The § 3553(a) factors support Mr. Bell's release in these extraordinary circumstances, and his continued incarceration is greater than necessary to accomplish the goals of sentencing.

As outlined below, the 3553(a) factors support Mr. Bell's release and demonstrate that Mr. Bell is not a danger to society. Mr. Bell has worked at the prison facility and engaged in educational and vocational training. Most importantly, Mr. Mills has engaged in an industrious, determined and long-term effort to prepare for and complete his GED. Moreover, Mr. Bell has worked in the prison system including working as an orderly, in food service, as a cook, in dining room detail, recreation detail, hobby detail, and in admission and orientation (See BOP work history attached hereto as defense Exhibit D). Moreover, he has taken educational classes to obtain his GED and taken and completed educational/vocational/self-improvement classes including English proficiency, computer classes, ace German, creative writing, legal research, legal writing, and parenting class, (See BOP educational transcript attached hereto as defense Exhibit E). Mr. Bell acknowledges that he has had multiple disciplinary reports. However, Mr. Bell has been housed at USPs where conditions are extremely difficult and he has struggled to adjust to these conditions. Moreover, as documented in the BOP medical records attached hereto as defense Exhibit A (pages 6, 15-19, 22, 24, 27-28,

33, 35, 46, 55, 57, 60, 73 and 75), Mr. Bell has been diagnosed with depression which has made his acclimation to harsh prison conditions difficult (See BOP disciplinary report attached hereto as defense Exhibit F). Importantly, and as expressed in his *Pro Se* Compassionate Release Motion, Mr. Bell has expressed great anguish for his past conduct with the prison psychologist, Dr. Kost, during anger management sessions and Mr. Bell discovered a long contempt for who he was. Mr. Bell is remorseful and has tremendous regret for what he has done and in the future desires to become a Nutrition Specialist for people with underlying health conditions (DE-373:21).

Finally, Mr. Bell has served 197 months (16 and one half years) of his 324 month sentence. However, this should not act as a bar to granting this motion as Mr. Bell has served 60 percent of his sentence and thus granting the motion would still reflect the seriousness of the crime and provide adequate punishment while recognizing the extraordinary times that our nation and (specifically here) inmates are experiencing during this unparalleled pandemic together Mr. Bell's serious medical condition. Indeed, it has been well said that "[T]hese are not normal times," given the "the risk of exposure and death from the COVID-19 pandemic." *United States v. Gonzalez*, 2020 WL 1536155, at *1 (E.D. Wa. Mar. 31, 2020).

Moreover, other courts have recognized this and granted motions where inmates had served similar or substantially less of their sentence than Mr. Bell. *United States v. Chopra,* 18-20668-Middlebrooks, (DE 606, 607)(S.D. Fla. June 8, 2020)("I agree that it is not typical to grant compassionate release to an individual

who has served such a short portion of his sentence. However, my choices in this matter are constrained by the BOP's decision not to grant Defendant a furlough. As I noted in my previous Order, "Furloughing Defendant appears to present the fairest option as it lessens the potentially lethal risk of Defendant contracting the COVID-19 virus, while still requiring Defendant to repay his debt to society by serving his full term of imprisonment." (DE 592). As this option is now unavailable, I have only two choices: to allow Defendant to stay in Lompoc and risk serious illness or death, or to grant him compassionate release. In making this decision, I am guided by a simple truth: I sentenced Defendant to 48 months imprisonment, not death or confinement under threat of serious illness. His crime does not justify exposing him to that level of risk."); *United States v. Vazquez-Torres,* 19-20342-Bloom, (DE-58)(S.D. Fla. July 10, 2020)(reducing a 24 month sentence to time served of 5 months); *United States v. Schumack,* 14-80081-Middlebrooks, (DE 894)(S.D. Fla. June 11, 2020)(reducing 144 month sentence to time served of 69 months). *United States v. Locke*, No. 18-cr-132, 2020 WL 3101016, at 1, 6 (W.D. Wash. June 11, 2020) (compassionately releasing a defendant who had "served no more than six months of his 62-month sentence"); *United States v. Brown*, Case No. 2:18-cr-360, Dkt. No. 35 (N.D. Ala. May 22, 2020) (granting compassionate release to defendant 11 months into 60 month sentence); *United States v. Ben Yhwh*, --- F. Supp. 3d ---, 2020 WL 1874125, at *2 (D. Hawaii Apr. 13, 2020) (granting compassionate release to defendant less than 13 months into 60 month sentence); *United States v. Delgado*, 2020 WL 2464685, at *1, *4 (D. Conn. Apr. 30, 2020) (granting compassionate release

to defendant 29 months into 120 month sentence); *United States v. Winston*, Case No. 1:13-cr-639-RDB, Dkt. No. 295 (D. Md. Apr. 28, 2020) (granting compassionate release to defendant 36 months into 120 month sentence).

As a result, the granting of this motion would provide adequate punishment and promote respect for the law and it would be consistent with the goals of the sentencing statute, 18 U.S.C. § 3553(a)(1).

CONCLUSION

"This is an unprecedented time in our nation's history, filled with uncertainty, fear, and anxiety," and it is in times like this that courts must exercise "compassion." *Castillo v. Barr, et al.*, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020). Under these extraordinary circumstances, Mr. Bell respectfully requests that the Court grant his request for compassionate release, and release him to home confinement/house arrest/GPS location monitoring as a condition of supervised release, with a special condition that he self-quarantine for 14 days, as instructed by the CDC for persons who have possibly been exposed to COVID-19.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: s/ ***Timothy Day***

Timothy Day
Assistant Federal Public Defender
Florida Bar No. 0360325
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301
(954) 640-7108
Timothy_Day@fd.org

CERTIFICATE OF SERVICE

I HEREBY certify that on **November 25, 2020**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: ***s/Timothy Day***
Timothy Day

A-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,

v.

ANTHONY BELL,

Defendant.
_____/

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTOIN FOR COMPASSIONATE RELEASE OR MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT FOR EXTRAORDINARY AND COMPELLING REASONS PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)

The United States of America, by and through the undersigned Assistant United States Attorney, hereby responds to defendant Anthony Bell's motion for compassionate release or modification of an imposed term of imprisonment for extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A) (DE 396). As an initial matter, the government notes that the motion violates Local Rule 7.1(c)(2), which provides that "[a]bsent prior permission of the Court, neither a motion and its incorporated memorandum of law nor the opposing memorandum of law shall exceed twenty (20) pages." The defendant's motion is in excess of 30 pages. Accordingly, the Court should disregard any pages of the motion submitted in violation of the Local Rule. *See e.g., United States v. Solomons*, 2007 WL 2904144, at *1 (S.D.Fl. October 3, 2007) ("As a result of these violations, this Court has disregarded any additional pages submitted in violation of the Local Rules."). In any event, this Court should deny the motion because the defendant has not met his burden of establishing that a sentence reduction is warranted under the

statute.

FACTUAL BACKGROUND

On April 11, 2005, the defendant was found guilty by a jury of Counts One and Two of a two-count Superseding Indictment that charged him with conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and possession with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (DE 64, 144). The Court sentenced him to 360 months of imprisonment to be followed by 5 years of supervised release (DE 170). On April 26, 2019, the Court reduced the defendant's term of imprisonment to 324 months of imprisonment based on the First Step Act of 2018 (DE 352, 353). He now moves under 18 U.S.C. § 3582(c) for a sentence reduction based on his medical conditions and the threat posed by the COVID-19 pandemic (DE 396).

I. BOP's Response to the COVID-19 Pandemic

As this Court is well aware, COVID-19 is an extremely dangerous illness that has caused many deaths in the United States in a short period of time and that has resulted in massive disruption to our society and economy. In response to the pandemic, BOP has taken significant measures to protect the health of the inmates in its charge.

BOP has explained that "maintaining safety and security of [BOP] institutions is [BOP's] highest priority." BOP, Updates to BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), available at https://www.bop.gov/resources/news/20200319_covid19_update.jsp. Indeed, BOP has had a Pandemic Influenza Plan in place since 2012. BOP Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012), available at

https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That protocol is lengthy and detailed, establishing a multi-phase framework requiring BOP facilities to begin preparations when there is first a "[s]uspected human outbreak overseas." *Id*. at i. The plan addresses social distancing, hygienic and cleaning protocols, and the quarantining and treatment of symptomatic inmates. Consistent with that plan, BOP began planning for potential coronavirus transmissions in January. At that time, the agency established a working group to develop policies in consultation with subject matter experts in the Centers for Disease Control.

On March 13, 2020, BOP began to modify its operations, in accordance with its Coronavirus (COVID-19) Action Plan ("Action Plan"), to minimize the risk of COVID-19 transmission into and inside its facilities. Since that time, BOP has repeatedly revised the Action Plan to address the crisis. BOP's operations are presently governed by Phase Ten of the Action Plan. The current modified operations plan requires that all inmates in every BOP institution be secured in their assigned cells/quarters, in order to stop any spread of the disease. Only limited group gathering is afforded, with attention to social distancing to the extent possible, to facilitate commissary, laundry, showers, telephone, and computer access. Further, BOP has severely limited the movement of inmates and detainees among its facilities. Though there will be exceptions for medical treatment and similar exigencies, this step as well will limit transmissions of the disease. Likewise, all official staff travel has been cancelled, as has most staff training.

All staff and inmates have been and will continue to be issued face masks and strongly encouraged to wear an appropriate face covering when in public areas when social distancing cannot be achieved. Every newly admitted inmate is screened for COVID-19 exposure risk factors and symptoms. Asymptomatic inmates with risk of exposure are placed in quarantine for

a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. In addition, in areas with sustained community transmission, all facility staff are screened for symptoms. Staff registering a temperature of 100.4 degrees Fahrenheit or higher are barred from the facility on that basis alone. A staff member with a stuffy or runny nose can be placed on leave by a medical officer. Contractor access to BOP facilities is restricted to only those performing essential services (*e.g.* medical or mental health care, religious, etc.) or those who perform necessary maintenance on essential systems. All volunteer visits are suspended absent authorization by the Deputy Director of BOP. Any contractor or volunteer who requires access will be screened for symptoms and risk factors. Social and legal visits were stopped as of March 13, 2020 and remain suspended to limit the number of people entering the facility. In order to ensure that familial relationships are maintained throughout this disruption, BOP has increased detainees' telephone allowance to 500 minutes per month. Tours of facilities are also suspended. Legal visits will be permitted on a case-by-case basis after the attorney has been screened for infection in accordance with the screening protocols for prison staff. Further details and updates of BOP's modified operations are available to the public on the BOP website at a regularly updated resource page: www.bop.gov/coronavirus/index.jsp.

In addition, in an effort to relieve the strain on BOP facilities and assist inmates who are most vulnerable to the disease and pose the least threat to the community, BOP is exercising greater authority to designate inmates for home confinement. On March 26, 2020, the Attorney General directed the Director of the BOP, upon considering the totality of the circumstances concerning each inmate, to prioritize the use of statutory authority to place prisoners in home

confinement. That authority includes the ability to place an inmate in home confinement during the last six months or 10% of a sentence, whichever is shorter, *see* 18 U.S.C. § 3624(c)(2), and to move to home confinement those elderly and terminally ill inmates specified in 34 U.S.C. § 60541(g). Congress has also acted to enhance BOP's flexibility to respond to the pandemic. Under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, enacted on March 27, 2020, BOP may "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement" if the Attorney General finds that emergency conditions will materially affect the functioning of BOP. Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (to be codified at 18 U.S.C. § 3621 note). On April 3, 2020, the Attorney General gave the Director of BOP the authority to exercise this discretion, beginning at the facilities that thus far have seen the greatest incidence of coronavirus transmission. The total number of inmates placed in home confinement from March 26, 2020 to the present (including inmates who have completed service of their sentence) is 19,592. *See* BOP COVID-19 Home Confinement Information, at www.bop.gov/coronavirus/.

Taken together, all of these measures are designed to mitigate sharply the risks of COVID-19 transmission in a BOP institution. BOP has pledged to continue monitoring the pandemic and to adjust its practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders. Unfortunately and inevitably, some inmates have become ill, and more likely will in the weeks ahead. But BOP must consider its concern for the health of its inmates and staff alongside other critical considerations. For example, notwithstanding the current pandemic crisis, BOP must carry out its charge to incarcerate sentenced criminals to protect the public. It must

consider the effect of a mass release on the safety and health of both the inmate population and the citizenry. It must marshal its resources to care for inmates in the most efficient and beneficial manner possible. It must assess release plans, which are essential to ensure that a defendant has a safe place to live and access to health care in these difficult times. And it must consider myriad other factors, including the availability of both transportation for inmates (at a time that interstate transportation services often used by released inmates are providing reduced service), and supervision of inmates once released (at a time that the Probation Office has necessarily cut back on home visits and supervision).

II. The Defendant's Conviction and Request for a Sentence Reduction

In June of 2004, law enforcement officers received information from multiple sources that crack cocaine was being sold out of 6330 Buchanan Street, Apartment A in Hollywood, Florida (PSI ¶ 4). On June 8, 2004, law enforcement successfully made an undercover purchase of crack cocaine from that residence through the use of a cooperating witness (CW) (PSI ¶ 5). Later that day, the defendant and Bruce Bell became aware that CW had assisted law enforcement in making the undercover purchase (*id*.). The following day, the defendant and Bruce Bell kidnapped CW at gun point, drove him to a secluded area of South Dade, and shot him in the chest, although he survived (*id*.).

Law enforcement made two additional controlled purchases of crack cocaine from the Buchanan Street apartment on August 12 and August 30, 2004 (*id*. at ¶ 7). On September 16, 2004, law enforcement executed a search warrant for the Buchanan Street apartment (*id*. at ¶ 9). Upon entry, officers observed the defendant and Bruce Bell in the kitchen and crack cocaine on the kitchen counter (*id.*). Both men proceeded to run to the back bedroom (*id*.). Before leaving

the kitchen, the Bruce Bell scooped up most of the crack cocaine and then threw the drugs onto the floor of the bedroom closet before he was restrained by law enforcement (*id*.). Also present in the apartment were Curtis Sheffield and a juvenile (*id*. at ¶¶ 9-10). After his arrest, Bruce Bell consented to a search of an additional residence located at 6205 Tyler Street in Hollywood, Florida (*id*. at ¶ 12). A search of that residence led to the recovery of crack cocaine and narcotics trafficking paraphernalia (*id*. at ¶ 12).

On October 13, 2004, Bruce Bell was arrested on the federal warrant issued in this case (*id*. at ¶ 16). At the time of the Bruce Bell's arrest, officers seized $6,000 in cash and multiple ounces of powder cocaine from his vehicle (*id*.). Bruce Bell gave consent for an additional search of the Tyler Street residence, which led to the recovery of multiple grams of crack cocaine (*id*. at ¶¶ 16-17). In total, law enforcement seized 91.49 grams of cocaine base and 201.9 grams of powder cocaine from the the Buchanan Street residence, the Tyler Street residence, and Bruce Bell's vehicle (DE 185:59-70).

On March 10, 2005, Sheffield pled guilty in this case (DE 102). That same day, the defendant called a law enforcement cooperating source from the Broward County Jail and indicated that he was prepared to kill Sheffield if he cooperated with the government (PSI ¶ 21). Sheffield eventually testified at trial regarding the scope of the drug trafficking operation and the defendant's role in it (PSI ¶¶ 23-24).

The defendant was charged with conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846 (Count 1), and possession with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (Count 2) (DE 64). On April 11, 2005, a jury in the Southern

District of Florida found the Defendant guilty of both counts (DE 144). According to the Presentence Investigation Report ("PSI"), the defendant was accountable for "more than 1.5 kilograms of crack cocaine a week . . . during the period of the conspiracy" (PSI ¶ 34), resulting in in a base offense level of 38 (PSI ¶ 50). The defendant received a 2-point enhancement for possessing a firearm, pursuant to USSG § 2D1.1(b)(1), and a 2-point enhancement for obstruction of justice, pursuant to USSG § 3C1.1, for a total offense level of 42 (PSI ¶¶ 51, 54-55). While the defendant was a career offender, his highest offense level under the Guidelines was achieved through the application of the Drug Quantity Table in Chapter Two (PSI ¶ 86). Based on a total offense level of 42 and a criminal history category VI, the guideline imprisonment range was 360 months to life (PSI ¶ 100).

On July 14, 2005, the Court sentenced the defendant to concurrent sentences of 360 months of incarceration as to Counts One and Two (DE 170). The Court stated that the severity of the sentence was "based on the defendant's extensive criminal history and the seriousness of the instant offense" (SOR pg.1). The Court later reduced the defendant's term of imprisonment to 324 months of imprisonment based on the First Step Act of 2018 (DE 352, 353).

On or about May 15, 2020, the defendant submitted his request for compassionate release to the warden of his institution of confinement (DE 396, Ex. 2). The warden denied that request on July 22, 2020 (DE 396, Ex. 3). The defendant filed a *pro se* motion for compassionate release on July 16, 2020 (DE 390). His counseled motion for compassionate release was then filed on November 25, 2020 (DE 396).

According to the Bureau of Prisons ("BOP") website, the defendant's currently scheduled release date is May 21, 2028. *See* www.bop.gov/inmateloc/.

LEGAL FRAMEWORK

Under 18 U.S.C. § 3582(c)(1)(A), this Court may, in certain circumstances, grant a defendant's motion to reduce his sentence. "[C]ompassionate release due to a medical condition is an extraordinary and rare event." *White v. United States*, 378 F.Supp.3d 784, 787 (W.D.Mo. 2019). The defendant "bears the burden of establishing that compassionate release is warranted." *United States v. Heromin*, 2019 WL 2411311, at *2 (M.D.Fl. 2019) (citing *United States v. Hamilton*, 715 F.3d 328, 327 (11th Cir. 2013), in which the court noted that a defendant bears the burden of establishing eligibility for a sentence reduction under Section 3582(c)(2)).

Before filing a motion for compassionate release, the defendant must first request that BOP file such a motion on his behalf. § 3582(c)(1)(A). A court may grant the defendant's own motion for a reduction in his sentence only if the motion was filed "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or after 30 days have passed "from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.* If that exhaustion requirement is met, a court may reduce the defendant's term of imprisonment "after considering the factors set forth in [18 U.S.C. § 3553(a)]" if the Court finds, as relevant here, that (i) "extraordinary and compelling reasons warrant such a reduction" and (ii) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i).

The Sentencing Commission has issued a policy statement addressing reduction of sentences under Section 3582(c)(1)(A) providing, as relevant here, that a court may reduce the term of imprisonment after considering the Section 3553(a) factors if the Court finds that (i) "extraordinary and compelling reasons warrant the reduction;" (ii) "the defendant is not a

danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g);" and (iii) "the reduction is consistent with this policy statement." USSG § 1B1.13.

The policy statement includes an application note that specifies the types of medical conditions that qualify as "extraordinary and compelling reasons." First, that standard is met if the defendant is "suffering from a terminal illness," such as "metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, [or] advanced dementia." USSG § 1B1.13, cmt. n.1(A)(i). Second, the standard is met if the defendant is:

> (I) suffering from a serious physical or medical condition,
> (II) suffering from a serious functional or cognitive impairment, or
> (III) experiencing deteriorating physical or mental health because of the aging process,
>
> that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

USSG § 1B1.13, cmt. n.1(A)(ii). The application note also sets forth conditions and characteristics that qualify as "extraordinary and compelling reasons" related to the defendant's age and family circumstances, USSG § 1B1.13, cmt. n.1(B)-(C), and recognizes the possibility that BOP could identify other grounds that amount to "extraordinary and compelling reasons." USSG § 1B1.13, cmt. n.1(D). The BOP has issued a regulation defining its own consideration of requests for compassionate release. *See* https://www.bop.gov/policy/progstat/5050_050_EN.pdf. This program statement sets forth in detail BOP's definition of the circumstances that may support a request for compassionate release, limited to the same bases identified by the Sentencing Commission: medical condition, age, and family circumstances.

The Sentencing Commission policy statement, which was last amended on November 1, 2018, refers only to motions filed by the BOP. Until the enactment of the First Step Act on

December 21, 2018, defendants could not file motions under Section 3582(c). Nonetheless, the First Step Act left unchanged the statutory command that any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." In *Dillon v. United States*, 560 U.S. 817 (2010), the Supreme Court made clear that the statutory requirement in Section 3582 that a court heed the restrictions stated by the Sentencing Commission is binding. *Dillon* concerned a motion for a reduction in sentence under Section 3582(c)(2), which allows for a sentence reduction upon the Commission's adoption of a retroactive guideline amendment lowering a guideline range "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" – language identical to that which appears in Section 3582(c)(1)(A) with respect to a court's consideration of a motion for compassionate release. The *Dillon* Court held that the Commission's pertinent policy statement concerning retroactive guideline amendments is binding, particularly its directive that a permissible sentence reduction is limited to the bottom of the revised guideline range, without application of the rule of *Booker*. *See Dillon*, 560 U.S. at 826. *Dillon* emphasized that a sentence reduction under Section 3582(c)(2) is not a resentencing proceeding but rather "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines" without any possibility of increase in a sentence. *Id.* at 828. The Court stressed the opening passage of 18 U.S.C. § 3582(c) – "The court may not modify a term of imprisonment once it has been imposed except that" – and the specific language of Section 3582(c)(2), which gives a court power to "reduce" a sentence, not increase it. For this and numerous other reasons – that the provision applies only to a limited class of prisoners, that Federal Rule of Criminal Procedure 43(b)(4) does not require the defendant's presence at any proceeding under Section

3582(c), and that Congress explicitly gave the Sentencing Commission a significant role in determining eligibility – *Dillon* held that the *Booker* rule is inapplicable and the Commission's relevant policy statement is controlling.

Every consideration identified in *Dillon* appears here. A motion for compassionate release rests on an act of Congressional lenity. It appears under the same prefatory language of Section 3582(c) ("The court may not modify a term of imprisonment once it has been imposed except that") and explicitly refers to an action to "reduce" a sentence. It applies only to a limited class of prisoners and does not warrant a full resentencing procedure. There is no basis for any conclusion other than that the statutory language is binding: a court may reduce a sentence based on "extraordinary and compelling reasons" only if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *See, e.g.*, *United States v. Mollica*, 2020 WL 1914956, at *4 (N.D.Ala. Apr. 20, 2020)("Multiple district courts within this Circuit that have addressed the issue have found that the policy statement, as written, remains in effect until the Sentencing Commission sees fit to change it."); *United States v. Lynn*, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) ("Section 994(a)(2)(C) leaves it to the Commission, not the judiciary, to determine what constitutes an appropriate use of the provision, and Section 3582(c)(1)(A) 'requires courts to abide by those policy statements.' *United States v. Colon*, 707 F.3d 1255, 1259 (11th Cir. 2013). If the policy statement needs tweaking in light of Section 603(b), that tweaking must be accomplished by the Commission, not by the courts."). Indeed, the Third, Fifth, and Tenth Circuits, in unpublished decisions, have all treated Section 1B1.13 as applicable to defendant-filed motions. *See United States v. Bell*, 823 Fed.Appx. 283, 284 (5th Cir. 2020) (per curiam); *United States v. Saldana*, 807 Fed.Appx. 816, 819–820 (10th Cir. 2020);

United States v. Doe, 2020 WL 6328203 *1 (3rd Cir. Oct. 29, 2020) (per curiam).

In his motion, the defendant advances the position that Section 1B1.13 does not apply to compassionate release motions filed by defendants and does not constrain the Court's discretion . . .." (DE 179). In support of this position, the defendant relies upon a decision by a panel of the Second Circuit Court of Appeals in *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020) (DE 179:7-9). Notably, the Second Circuit did not address the implications of *Dillon* in its opinion. Further, multiple district courts outside of the Second Circuit have declined to follow *Brooker*, as should this Court. *See United States v. Ueki*, 2020 WL 5984347, at *2 and n.2 (D. Hawaii, October 8, 2020) ("As this Court has explained, it is bound by the Commission's Commentary in U.S.S.G. § 1B1.13 regarding what constitutes an 'extraordinary and compelling' reason warranting a sentence reduction." "To the extent the Second Circuit has held to the contrary, *see United States v. Brooker*, 2020 WL 5739712 (2d Cir. Sept. 25, 2020), this Court does not agree."); *United States v. Brummett*, 2020 WL 6120457 at *2 (E.D. Ky., October 16, 2020); *United States v. Anderson*, 2020 WL 6142243, at *3 (S.D.Miss. October 19, 2020).

While the Seventh Circuit's decision in *United States v. Gunn*, 2020 WL 6813995 (7th Cir. November 20, 2020) agreed with *Brooker* that Section 1B1.13 does not apply to compassionate release motions filed by defendants, it noted that courts do not have unfettered discretion when considering such motions. To the contrary, "[t]he statute itself sets the standard: only 'extraordinary and compelling reasons' justify the release of a prisoner who is outside the scope of § 3582(c)(1)(A)(ii). The substantive aspects of the Sentencing Commission's analysis in § 1B1.13 and its Application Notes provide a working definition of 'extraordinary and compelling reasons'; a judge who strikes off on a different path risks an appellate holding that

judicial discretion has been abused. In this way the Commission's analysis can guide discretion without being conclusive." 2020 WL 6813995, at *2.

The Sixth Circuit's opinion in *United States v. Jones*, 2020 WL 6817488 (6th Cir. November 20, 2020) also ostensibly followed the Second Circuit's *Brooker* decision. However, as noted by Senior Circuit Judge Deborah L. Cook in her concurring opinion, the court in *Jones* was not required to determine the applicability of Section 1B1.13 to compassionate release motions filed by defendants in order to resolve the case. 2020 WL 6817488, at *13. To the contrary, because the district court assumed that the defendant had established extraordinary and compelling circumstances in support of compassionate release but then denied the motion based on the Section 3553(a) factors, the Sixth Circuit's finding that this was not an abuse of discretion was all that was needed to affirm the court below. *Id.*

ARGUMENTS

I. The Defendant Has Satisfied the Exhaustion Requirement.

The defendant submitted his request for compassionate release to the Warden of his institution of confinement on May 15, 2020 (DE 396-2). Because more than 30 days have elapsed since the Warden received that request, the exhaustion requirement of Section 3582(c)(1)(A) has been satisfied.

II. Defendant Has Not Identified "Extraordinary and Compelling Reasons" for a Sentence Reduction.

As explained above, under the relevant provision of Section 3582(c), a court can grant a sentence reduction only if it determines that "extraordinary and compelling reasons" justify the reduction and that "such a reduction is consistent with applicable policy statements issued by the

Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i). The Sentencing Commission's policy statement defines "extraordinary and compelling reasons" to include, as relevant here, certain categories of medical conditions. USSG § 1B1.13, cmt. n.1(A). To state a cognizable basis for a sentence reduction based on a medical condition, a defendant must establish that his condition falls within one of those specified categories, which include, as relevant here, (i) any terminal illness, and (ii) any "serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." USSG § 1B1.13, cmt. n.1(A). If a defendant's medical condition does not fall within one of the categories specified in the application note (and no other part of the application note applies), his motion must be denied.

Here, as reflected in the defendant's medical records (DE 396-1), the defendant does not suffer from a terminal illness. Nor do any of his medical conditions substantially diminish his ability "to provide self-care within the environment of a correctional facility." USSG 1B1.13, cmt. n.1(A)(ii). With respect to the COVID-19 pandemic, which poses a general threat to every non-immune person, the mere existence of that pandemic does not fall into either of the medical categories set forth in Comment Note 1(A) and therefore could not alone provide a basis for a sentence reduction. The categories encompass specific serious medical conditions afflicting an individual inmate, not generalized threats to the entire population. "[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." *United States v. Raia*, 954 F.3d 594, 597 (3rd Cir. 2020). To classify COVID-19 as an extraordinary and compelling reason would not only be inconsistent with the text of the statute and the policy statement, but would be detrimental to

BOP's organized and comprehensive anti-COVID-19 regimens, could result in the scattershot treatment of inmates, and would undercut the strict criteria BOP employs to determine individual inmates' eligibility for sentence reductions and home confinement.

That does not mean, however, that COVID-19 is irrelevant to a court's analysis of a motion under Section 3582(c)(1)(A). The CDC has identified two categories of medical risk factors affecting the likelihood of severe outcomes from COVID-19.[1] First, the CDC presents a list of conditions that, according to current data, definitively entail a greater risk of severe illness. During the current COVID-19 pandemic, an inmate who presents one of the risk factors on that list, as confirmed by medical records, and who is not expected to recover from that condition, presents an extraordinary and compelling reason allowing compassionate release under the statute and guideline policy statement, even if that condition in ordinary times would not allow compassionate release. Second, CDC guidance currently presents a list of conditions that "might" increase the risk of severe illness. The CDC advises that with regard to conditions on the second list: "COVID-19 is a new disease. Currently there are limited data and information about the impact of underlying medical conditions and whether they increase the risk for severe illness from COVID-19." Given the lack of data and certainty regarding this second group of conditions, an individual with one or more of these conditions does not present an "extraordinary and compelling reason" under the compassionate release statute and U.S.S.G. § 1B1.13.

The defendant argues that he is at increased risk from COVID-19 because he takes immunosuppressive medication in order to treat Myasthenia Gravis, an autoimmune

[1] *See* Centers for Disease Control, *At Risk for Severe Illness*, available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html.

neuromuscular disease. The CDC lists an immunocompromised state from immune deficiencies or the use of immune weakening medicines only on the second list of conditions that "might" increase the risk of severe illness.[2] Given the lack of evidence that the defendant's weakened immune system will actually increase his risk of becoming seriously ill from COVID-19, he has not satisfied his burden of establishing an "extraordinary and compelling reason" for compassionate release.

III. The Defendant Still Poses a Significant Danger to the Safety of the Community and the Section 3553(a) Factors Strongly Weigh Against His Release.

Under the applicable policy statement, this Court must deny a sentence reduction unless it determines the defendant "is not a danger to the safety of any other person or to the community." USSG § 1B1.13(2). Additionally, this Court must consider the Section 3553(a) factors, as "applicable," as part of its analysis. *See* § 3582(c)(1)(A); *United States v. Chambliss*, 948 F.3d 691, 694 (5th Cir. 2020). In this case, even if the defendant could establish that the combination of his medical condition and the COVID-19 pandemic constitutes extraordinary and compelling reasons in favor of granting compassionate release, the Court should nonetheless deny the defendant's motion because he has failed to demonstrate that he is not a danger to the safety of the community or otherwise merits release under the Section 3553(a) factors.

The defendant's criminal history includes multiple violent crimes and firearm offenses, including burglary of an occupied dwelling, armed robbery, aggravated battery and resisting arrest (PSI ¶¶ 59, 60, 62, 64, 65). Furthermore, in connection with the narcotics trafficking

---

[2] The only source of a weakened immune system listed by the CDC as definitively increasing the risk of severe illness from COVID-19 is a solid organ transplant. There is no evidence that the defendant ever had a solid organ transplant.

conspiracy that led to his conviction in this case, the defendant and his co-defendant kidnapped an individual they accused of being a government informant, drove him to a secluded section of the Florida Turnpike near Cutler Ridge, shot the supposed informant in the chest, and left him for dead (although the victim survived) (PSI ¶5). *See United States v. Belle*, 2020 WL 2129412 (D.Conn. May 5, 2020) (notwithstanding asthma, compassionate release denied due to history of violence and firearms offenses); *United States v. Miranda*, 2020 WL 2124604 (D.Conn. May 5, 2020) (notwithstanding diabetes, compassionate release denied in light of history of drug crimes and threatened violence). The defendant's disciplinary history while in prison, which includes sanctions for possessing a dangerous weapon (Report Number 3392369, Sanctioned Incident Date April 26, 2020), threatening bodily harm (Report Number 3040331, Sanctioned Incident Date 10/2/2017), possessing a dangerous weapon (Report Number 2657262, Sanctioned Incident Date 12/2/2014), fighting with another person (Report Number 2553701, Sanctioned Incident Date 11/6/2013), and assaulting without serious injury (Report Number 2481760, Sanctioned Incident Date 8/18/2013), further demonstrates the continuing danger the defendant poses to the community. *See also United States v. Frazier*, 554 Fed. Appx. 842, 846 (11th Cir. 2014) (noting with approval that defendant's six infractions while incarcerated, including possession of narcotics and refusal to obey orders, went to history and characteristics of defendant and demonstrated disrespect for the law and a continued need for deterrence); *United States v. Williams,* 557 F.3d 1254, 1256 (11th Cir. 2009)(permitting consideration of post-sentence conduct in § 3582(c)(2) proceeding). In denying the defendant's motion to reconsider the denial of his First Step Act motion for a sentence reduction, this Court noted that "[g]iven Defendant's lengthy criminal history . . . a sentence reduction would be inappropriate in this case" (DE 401).

Accordingly, there is no basis for this Court to find that the defendant is not a danger to the safety of any other person or the community. *See United States v. Belle*, 2020 WL 2129412 (D.Conn. May 5, 2020) (notwithstanding asthma, compassionate release denied due to history of violence and firearms offenses); *United States v. Miranda*, 2020 WL 2124604 (D.Conn. May 5, 2020) (notwithstanding diabetes, compassionate release denied in light of history of drug crimes and threatened violence).

Moreover, the Section 3553(a) factors militating against a sentence reduction outweigh the defendant's asserted medical concerns related to COVID-19. The defendant stands convicted of a significant narcotics trafficking conspiracy that involved the distribution of "more than 1.5 kilograms of crack cocaine a week . . . during the period of the conspiracy" (PSI ¶ 34), which ran from June 2004 through October 13, 2004 (DE 64). The defendant has only served approximately 60% half of his sentence, and his scheduled release date is nearly 8 years away. These facts weigh against granting his motion. *See United States v. Steinger*, 2020 WL 1865989 (S.D.Fla. Apr. 14, 2020) (request, if granted, would result in a 12-year reduction of sentence, which the court finds to be inappropriate given the severity of his offenses, involving an $800 million fraud with 30,000 victims); *United States v. Moskop*, 2020 WL 1862636 (S.D.Ill. Apr. 14, 2020) (72-year-old inmate "has suffered or suffers from various acute and chronic conditions including depression, high blood pressure, high cholesterol, an enlarged prostate, hearing loss, kidney disease, bleeding on the brain, and mental deterioration," but has served less than half of a 240-month sentence for serious fraud, and is at no particular enhanced risk from COVID-19); *United States v. Daugerdas*, 2020 WL 2097653 (S.D.N.Y. May 1, 2020) (the defendant suffers from type 2 diabetes, obesity, hypertension, and high cholesterol, but he has served only 37% of

a 180-month sentence for the largest tax shelter fraud in U.S. history; release is denied, but the court recommends that BOP consider a furlough).

CONCLUSION

WHEREFORE, the Government respectfully requests that this Court deny the defendant's motion for compassionate release.

Respectfully submitted,

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

By: */s/ Sean Paul Cronin*
Sean Paul Cronin
Assistant United States Attorney
Court No.A5500940
99 N.E. 4th Street, Suite 400
Miami, FL 33132
Tel# (305) 961-9194
Fax: (305) 530-6168
Sean.P.Cronin@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 31, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Sean Paul Cronin
Sean Paul Cronin
Assistant United States Attorney

A-12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY BELL,

Defendant.
_____/

ANTHONY BELL'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR COMPASSIONATE RELEASE

Anthony Bell, through undersigned counsel, respectfully files this Reply to Government's Response in Opposition to Defendant's Motion for Compassionate Release (DE 402) filed December 31, 2020 and in support thereof states the following:

The government concedes that Mr. Bell has satisfied the exhaustion requirement of 18 U.S.C. § 3582(c)(1)(A)(DE 402:14). However, the government contends that Mr. Bell's motion should be denied for two reasons—that Mr. Bell "has not established extraordinary and compelling reasons for a reduction" (DE-402:16-17) and that "the 18 U.S.C. § 3553(a) factors do not support the reduction because he is a danger to the community" (DE 402:16-20). The government is wrong on both.

Mr. Bell suffers from Myasthenia Gravis (MG) a very serious auto-immune disorder which can cause paralysis to the muscles surrounding the lungs. Further he has taken prednisone which make him immuno-suppressed. Both of these conditions

put Mr. Bell at an extreme risk of death if exposed to COVID-19, thus establishing "extraordinary and compelling reasons" for release. Moreover, Mr. Bell has a solid release plan with a stable family residence which counsel has confirmed and which will be detailed below. Mr. Bell will address each of the government's arguments in turn. However, first Mr. Bell will respond and refute the government's erroneous claim that Mr. Bell must meet the prerequisites of U.S.S.G. 1B1.13 relying on *Dillon v. United States,* 560 U.S. 817 (2010) and relying on **unpublished, non-binding, non-precedential** cases construing *Dillon* in spite of the fact that there are **published decisions** from four circuits rejecting the government's claim—the Second, Fourth, Sixth and Seventh—and there are not any published cases from any Circuit supporting their claim on the issue, including the Eleventh Circuit.

The Government's Claim that Mr. Bell Must Meet the Criteria of 1B1.13 is Wrong and Contrary to Decisions by the Second, Fourth, Sixth, and Seventh Circuit Courts of Appeal, holding that §1B1.13 is Neither "Binding" nor "Applicable" to First Step Motions for Compassionate Release filed by Defendants with the Court

Contrary to the government's assertion (DE 402:10-16), U.S.S.G. 1B1.13 is not binding on this Court. As related in his motion for release (DE 396:12-16) the First Step Act allows courts independently to determine what constitute "extraordinary and compelling" circumstances in the context of compassionate release motions.

As related in his motion for release (summarized here), in *United States v. Brooker,* 2020 WL 5739712 (2nd Cir. September 25, 2020), the Second Circuit held that "the First Step Act freed district courts to consider the full slate of extraordinary

and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D) nor anything else in the now-outdated version of the Guideline limits the district court's discretion." *Id.* at 7. It is now clear that district courts have broad discretion to decide what constitute extraordinary and compelling reasons for a reduction-in-sentence under § 3582(c)(1)(A) and they are not bound by U.S.S.G. § 1B1.13 in making that determination. The Second Circuit took a careful look at §1B1.13 and held it could not be the "applicable policy statement" for motions brought by a defendant under the post-First Step Act § 3582(c)(1)(A). After all, §1B1.13 makes multiple references to BOP as the moving entity and in application note 4 expressly states that a "reduction under this policy statement may be granted only upon motion by the Director of the BOP." So, the Court in *Brooker* concluded, § 1B1.13 is the policy statement that applies to ***motions brought by the BOP***. *Id.* at 6-7 (emphasis added). Without a policy statement, the determination is left to the broad discretion of the district court. The only statutory limit for the district court is that rehabilitation *alone* is not an extraordinary and compelling reason. *Id.* at 8.

Again as related by Bell in his motion for release the Second Circuit has been joined by three other circuits—the Sixth, Seventh and most recently the Fourth in finding U.S.S.G. § 1B1.13 not binding on district courts (DE 396:12-16).

In *United States v. Jones*, the Sixth Circuit held "that U.S.S.G. § 1B1.13 is not an 'applicable' policy statement when an imprisoned person files a motion for

compassionate release." --- F.3d ---, 2020 WL 6817488, at *6 (6th Cir. Nov. 20, 2020). In reaching this holding, the Sixth Circuit addressed *Dillon v. United States,* 560 U.S. 817 (2010), but contrary to the government's assertion (DE 402:11-14), the Sixth Circuit determined that "the passage of the First Step Act rendered § 1B1.13 'inapplicable' to cases where an imprisoned person files a motion for compassionate release." *Id.* at *7. With inmate-initiated compassionate release motions, "federal judges . . . have full discretion to define 'extraordinary and compelling' without consulting the policy statement § 1B1.13." *Id.* at *9.

The Seventh Circuit has also reached the same conclusion. *United States v. Gunn*, --- F.3d ---, 2020 WL 6813995, at *2 (7th Cir. Nov. 20, 2020) (finding the "Sentencing Commission has not yet issued a policy statement 'applicable' to Gunn's [compassionate release] request"). It explained, "Until…§ 1B1.13 is amended, . . .the Guidelines Manual lacks an 'applicable' policy statement covering prisoner-initiated applications for compassionate release." *Id.*

And most recently, and **subsequent** to the filing of Bell's motion, in *United States v. McCoy,*--- F.3d ---, No. 20-6821, 22, 2020 WL 7050097 at *8 (4th Cir. Dec. 2, 020) the Fourth Circuit held that, "[A]s of now, there is no Sentencing Commission policy statement 'applicable' to the defendants' compassionate release motions, which means that district courts need not conform under 3582(c)(1)(A)'s consistency requirement, to 1B1.13 in determining whether there exist 'extraordinary and compelling reasons' for a sentencing reduction." Thus, the Fourth Circuit joined the

three federal circuits referenced above in finding that the First Step Act permits courts independently to determine what circumstances constitute "extraordinary and compelling reasons" in the context of compassionate release motions. Factually, the Fourth Circuit affirmed the district courts' sentence reduction of "stacked" sentences pursuant to 18 U.S.C. § 924(c), based on the previous 32 year mandatory sentence being of "incredible length" and the fact that McCoy was a teenager with no relevant criminal history at the time of his offenses, making the recidivist penalties of "stacked sentences particularly inappropriate. *Id.* at *4. Therefore, this Court, as explained by four separate circuit courts of appeal, is not "bound" by § 1B1.13. In addition, numerous court in the Southern District of Florida agree. *United States v. Cubero,* Case No. 12-20071-CR-SEITZ, ECF DE 104:4 (S.D. Fla. Feb. 3, 2021); *United States v. Cano,* Case No. 95-481-CR-ALTONAGA, ECF DE 965 (S.D. Fla. Dec. 16, 2020); *United States v. Campbell,* Case No. 91-6093-CR-BLOOM, ECF DE 183 (S.D. Fla. Jan. 6, 2021); *United States v. Currington,* Case No. 12-20115-CR-COOKE ECF DE 645 (S.D. Fla. July 7, 2020); *United States v. Hope,* Case No. 90-60108-CR-WILLIAMS ECF DE 479 (S.D. Fla. April 10, 2020).

As a result of the foregoing, the government is legally wrong in claiming that Mr. Bell must meet the prerequisites of U.S.S.G. § 1B1.13 relying on *Dillon v. United States,* 560 U.S. 817 (2010) and in relying on two district court decisions and three *unpublished* circuit opinions construing *Dillon* and a pre First Step Act Eleventh Circuit case, *United States v. Colon,* 707 F. 3d. 1255 (11th Cir. 2013)(DE 181:12-14)

that did not address the issue here and is not on point. This in spite of the fact that there are **published decisions** from four circuits—the Second, Fourth, Sixth and Seventh—that have rejected the government's claim and there are no Circuits with published cases supporting their claim, including the Eleventh Circuit.

Not only does the government erroneously claim that the Court's decision is constrained by 1B1.13, they base almost the entirety of their claim that Bell has failed to demonstrate "extraordinary and compelling" reasons for release on this misguided notion (DE 402:15-17). To that end, they contend that Bell has failed to establish that he suffers from a "terminal illness" or a "serious physical or medical condition…that substantially diminishes his ability to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover" quoting 1B1.13 cmt. n. 1(A)(DE 402:15). The government continues and erroneously claims that "[I]f a defendants medical condition does not fall within one of these categories specified in the application note (and no other part of the application note applies), ***his motion must be denied***." (DE 402:15-16)(emphasis added). This is incorrect as it directly quotes the outdated criteria of 1B1.13 (DE 402:15). Thus, the government's claim here must be rejected.

Nonetheless, as will be explained below ***Mr. Bell even satisfies the non-binding criteria of 1B1.13. n. 1(A)(ii)(I)*** in that the disease of Myasthenia Gravis is a serious medical condition that substantially diminishes the ability of Mr. Bell to provide self-care within the environment of a correctional facility and from which he

is not expected to recover as Myasthenia Gravis is lifelong and incurable.

The Government is Mistaken that Mr. Bell has not Established Extraordinary and Compelling Reasons Warranting a Reduction

The government states that Mr. Bell has not "identified" extraordinary and compelling reasons for a sentence reduction (DE 402:14). This is incorrect. First, the government misses the point by referring only to the fact that Mr. Bell may be at risk from COVID-19, "because he takes immunosuppressive medication in order to treat Myasthenia Gravis, an autoimmune neuromuscular disease" and that the CDC lists an immunocompromised state as "only on the second list of conditions that 'might' increase the risk of severe illness" and "given the lack of evidence that the defendant's weakened immune system will actually increase his risk of becoming seriously from COVID-19, he has not satisfied his burden of establishing an 'extraordinary and compelling reason' for compassionate release" (DE 402:16-17). The government fails to address the risk posed to Mr. Bell from COVID-19 because he suffers from the disease of Myasthenia Gravis itself, separate and apart from the issues of immune-suppression that are an additional consequence/risk associated with MG. This avoidance by the government is especially telling in light of Mr. Bell's reliance on MG in his compassionate release motion where he stated that Myasthenia Gravis is "an autoimmune disease in which the neuromuscular junction functions abnormally resulting in episodes of muscle weakness. In Myasthenia Gravis, the immune system produces antibodies that attack the receptors that lie on the muscle side of the

neuromuscular junction. The particular receptors damaged are those that receive the nerve signal by the action of acetyl-choline, a chemical substance that transmits the nerve impulse across the junction (a neuro-transmitter). Difficulty in speaking and swallowing and weakness of the arms and legs are common. In severe bouts, people may become paralyzed and may also develop a life-threatening weakness of the muscles needed for breathing. *See Merck Manual,* Disorders of the Neuromuscular Junction, Myasthenia Gravis, pages 332-333) (Home Edition, 1997)"(DE 396:4). To this fact based argument, the government was silent. Not a word about how an individual suffering from MG could potentially die from COVID-19 because of paralysis to the muscles needed for breathing.

In response to the government's pleading, counsel retained Dr. Meredith Bock, a neurologist, to review Mr. Bell's medical records and give an opinion as to the potential risks to Mr. Bell in prison posed by COVID-19 in light of him suffering from Myasthenia Gravis. Dr. Bock's evaluation is attached hereto as defense exhibit G and in it she notes that, "Mr. Bell was diagnosed with myasthenia gravis in 2007 and has required chronic immunosuppressive therapy with prednisone. He has been on doses as high as 80 mg daily and is currently maintained on a dose of 10-15 mg daily. He has required two hospitalizations due to myasthenic crisis causing muscle weakness and respiratory difficulty (in 2007 and 2011). At least one of his prior cases was severe enough to cause hemodynamic instability, including hypotension and respiratory depression. He has tried multiple times to wean off prednisone, but has been unable

to do so due to the return of muscle weakness. He therefore has been in a state of immunosuppression since 2007 and will likely continue to require lifelong immunosuppression." Dr. Bock then continues in her report and addresses Mr. Bell's risk if he contracted COVID-19 in light of myasthenia gravis and his associated immuno-suppressed condition. She specifically addresses the risk in light of the CDC risk factors and writes, "[M]r. Bell has myasthenia gravis, which renders him highly likely to suffer serious complication or death were he to contract COVID-19. He is at high risk for two reasons. Firstly, the most recent CDC guidelines state that people of any age with certain medical conditions are likely to be at increased risk for severe illness from COVID-19. Immunocompromise from use of corticosteroids, according to the CDC, is a condition that might put people at risk for severe illness from COVID-19. Secondly, myasthenia gravis is a condition causing fluctuating diffuse muscle weakness, including weakness of the respiratory muscles. The most serious complication of myasthenia gravis is myasthenic crisis, which can be triggered by any viral infection. In fact, the most frequent trigger of myasthenic crisis is infection. In my experience on the inpatient neurology unit, I have seen respiratory infections from less virulent agents than COVID-19 cause life-threatening respiratory failure in patients with myasthenia gravis. If Mr. Bell were to contract COVID-19, he would be a very high risk of respiratory muscle weakness and subsequent hypercarbic respiratory failure. Myasthenic crisis can often lead to the need for longer term ventilation, multiorgan failure and death. In fact, I would put him at extremely high

risk of serious illness or even death if he were to contract COVID-19." Dr. Bock's curriculum vitae is attached hereto as defense exhibit H. .

Dr. Bock concludes her evaluation noting that myasthenia gravis is a condition without a cure that leads to a lifelong elevated risk of severe respiratory complications from any viral illness. Finally, she opines that Mr. Bell is at a high risk of life threatening respiratory weakness and "if he were to contract a viral infection, I worry about his ability to survive his prison sentence. Mr. Bell is at extremely high risk of adverse outcomes, including death, if he contracts COVID-19."

Indeed, based on Dr. Bock's evaluation Mr. Bell even satisfies the non-binding criteria of 1B1.13, Application note 1 which provides in part:

> (A)Medical Condition of the Defendant—(i)The defendant is suffering from a terminal illness…(ii) The defendant is—(I)suffering from a serious physical or medical condition, (II)suffering from a serious functional or cognitive impairment, or (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
>
> (B) Age of the defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (D) Other Reasons----As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling other than, or in combination with, the reasons described in subdivisions (A) through (C).

Here, as detailed by Dr. Bock, Mr. Bell is suffering from a serious medical condition that is lifelong and incurable and should be contact COVID-19, can result in life-threatening respiratory failure leading to the need for longer term ventilation, multiorgan failure and death. As a result, Anthony Bell has even met the non-binding Sentencing Guidelines Commission's criteria for the establishment of the "extraordinary and compelling reasons" requirement of 18 U.S.C. 3582(c)(1)(A).

Mr. Bell is Not a Danger to the Community and Converting the Remainder of Mr. Bell's Sentence to House Arrest/Home Confinement/Electronic Monitoring is Sufficient to Accomplish the Goals of Sentencing

The government claims that Mr. Bell ***still*** poses a significant danger to the community and that the 18 U.S.C. 3553 factors weigh against his release (DE 402:17). The government bases this claim on three contentions, namely the facts of Mr. Bell's case, his prior record and his disciplinary record in prison (DE 402:17-19). As to the facts of the instant case, Mr. Bell acknowledges that they are a potential cause for concern. However, those facts occurred over 16 years ago in 2004 when Mr. Bell was 23. As shown in his compassionate release motion and as expounded upon below, Mr. Bell is not the same person he was and there is good evidence to demonstrate that he is not presently a danger to the community and that reducing the rest of his sentence to time served and supervised release with electronic monitoring/house arrest is consistent with the factors in 3553(a).

Regarding his prior record, the government states that, [T]he defendant's criminal history includes multiple violent crimes and firearm offenses, including

burglary of an occupied dwelling, armed robbery, aggravated battery and resisting arrest" citing the PSI at paragraphs 59, 60, 62, 64, and 65. But this is not accurate. The PSI and specifically those paragraphs demonstrate that Mr. Bell ***does not have*** any such convictions for burglary of an occupied dwelling, aggravated battery or armed robbery. Moreover, the aggravated assault at paragraph 59 was an offense involving a juvenile proceeding when Mr. Bell was 14 wherein he was treated as a juvenile and given a period of juvenile community control which was ultimately successfully terminated (See PSI at paragraph 59). Mr. Bell's felony convictions are for two cases of carrying a concealed firearm, grand theft and aggravated fleeing and eluding. The charge of aggravated assault on a police officer was nolle prossed (See PSI at paragraphs 62, 64, and 65). In fact, the Court classified Mr. Bell as a career offender based on the carrying concealed firearm convictions to which counsel objected (See Addendum to PSI 2). Ultimately, Mr. Bell was correct as the Eleventh Circuit's opinion in *United States v. Gilbert,* 138 F.3d 1371 (11th Cir. 1998) classifying carrying a concealed firearm as a crime of violence for career offender enhancement was overturned in *United Stated v. Archer,* 531 F. 3d 1347 (11th Cri. 2008) and thus ultimately the designation of Mr. Bell as a career offender was and is incorrect. Based on the foregoing, the government's description of Mr. Bell's prior criminal history, which is factually inaccurate, is legally wrong because this factor does not weigh against his release.

In their Response, the government is critical of Mr. Bell's disciplinary record in prison claiming it shows he is a continuing danger to the community (DE 402:18). But a closer inspection shows that this is not the case. First, Mr. Bell is housed at USP Florence. He is not at a minimum or medium security correctional facility. Life at a USP is a struggle to survive and to survive you must defend yourself. But even in this incredibly dangerous environment, Mr. Bell has undertaken a path of self-improvement. As outlined in his motion for release, Mr. Bell has worked at the prison facility and engaged in educational and vocational training. Most importantly, Mr. Bell has engaged in an industrious, determined and long-term effort to prepare for and complete his GED. Moreover, Mr. Bell has worked in the prison system including working as an orderly, in food service, as a cook, in dining room detail, recreation detail, hobby detail, and in admission and orientation (See BOP work history attached to the motion for compassionate release as defense Exhibit D). Moreover, he has taken educational classes to obtain his GED and taken and completed educational/vocational/self-improvement classes including English proficiency, computer classes, ace German, creative writing, legal research, legal writing, and parenting class, (See BOP educational transcript attached to the motion for compassionate release as defense Exhibit E). Mr. Bell acknowledges that he has had multiple disciplinary reports. However, again Mr. Bell has been housed at USPs where conditions are extremely difficult and he has struggled to adjust to these conditions. *See also, United States v. Walker,* Case No. 07-60238-COHN, ECF 58:6

(S.D. Fla. Feb. 24, 2020)(Court must view prison disciplinary records with caution mindful that prisoners are afforded minimal due process rights in disciplinary proceedings citing *Smith v. Deemer,* 641 Fed. Appx. 865, 868 (11th Cir. 2016). Moreover, as documented in the BOP medical records attached to the compassionate release motion as defense Exhibit A (pages 6, 15-19, 22, 24, 27-28, 33, 35, 46, 55, 57, 60, 73 and 75), Mr. Bell has been diagnosed with depression which has made his acclimation to harsh prison conditions difficult (Mr. Bell attached his BOP disciplinary report attached to the motion for release as defense Exhibit F). Importantly, and as expressed in his *Pro Se* Compassionate Release Motion, Mr. Bell has expressed great anguish for his past conduct with the prison psychologist, Dr. Kost, during anger management sessions and Mr. Bell discovered a long contempt for who he was. Mr. Bell is remorseful and has tremendous regret for what he has done and in the future desires to become a Nutrition Specialist for people with underlying health conditions (DE-373:21)(DE 396:30-31). Based on the foregoing, Mr. Bell has demonstrated that he is not the man he was in 2004 and that the facts of the case 16 years ago do not demonstrate that he is presently a danger to the community such that his motion for release to house arrest/home confinement/electronic monitoring should be denied.

Mr. Bell has a Solid Release Plan

Moreover and importantly, Mr. Bell has a stable residence awaiting him with a reliable family member who will support and encourage him while on an extended term of supervised release and house arrest. As indicated in his motion for release (DE 396:16-17), Mr. Bell can live with his sister Hope Demons. Counsel has spoken with Ms. Demons and has confirmed the following. She owns her single family residence located at 9107 County Rd., 205B, Wildwood, Fl. 34785. This is a three bedroom, two bath home in which Ms. Demons has resided since 2006. Ms. Demons is a Registered Nurse who is employed as the Director of Case Management at Select Specialty Hospice in Wildwood. Ms. Demons has communicated to counsel that she fully supports Mr. Bell and will assist him financially, emotionally, spiritually and in any way needed to facilitate Anthony's successful transition to supervised release. It is also noteworthy that Mr. Bell would be living in Wildwood Fl. and not Broward County where the instant offense occurred.

Mr. Bell has Served 16 Years in Prison Which Term Meets the Goal of the Sentencing Statute to Reflect the Seriousness of the Offense, to Promote Respect for the Law and to Provide Just Punishment for the Offense

The government claims that Mr. Bell has "only served" approximately 60 % of his sentence and that this factor weighs against granting his motion (DE 402:19). But this is wrong. Mr. Bell has served those 16 years in the harsh conditions of a USP which as noted above consists of a daily struggle to survive. Moreover, Mr. Bell has done this with a serious medical condition and has also suffered with the significant

documented mental health issue of depression. In addition, the standard set forth by the BOP for full service of a sentence, which includes regulatory gain time, results in the typical inmate serving 85 % of their total sentence. Thus, 60 % is not a windfall in any way and would be consistent with the requirement of 18 U.S.C. 3553(a) that the sentence be sufficient but not greater to meet the goals of the statute and to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment while recognizing the extraordinary times that our nation and (specifically here) inmates are experiencing during this unparalleled pandemic. Indeed, it has been well said that "[T]hese are not normal times," given the "the risk of exposure and death from the COVID-19 pandemic." *United States v. Gonzalez*, 2020 WL 1536155, at *1 (E.D. Wa. Mar. 31, 2020).

Moreover, as related in his motion for release (DE 396:31-32) other courts have recognized this and granted motions where inmates had served similar or substantially less of their sentence than Mr. Bell. *United States v. Chopra,* 18-20668-Middlebrooks, (DE 606, 607)(S.D. Fla. June 8, 2020)("I agree that it is not typical to grant compassionate release to an individual who has served such a short portion of his sentence…[I]n making this decision, I am guided by a simple truth: I sentenced Defendant to 48 months imprisonment, not death or confinement under threat of serious illness."); *United States v. Vazquez-Torres,* 19-20342-Bloom, (DE-58)(S.D. Fla. July 10, 2020)(reducing a 24 month sentence to time served of 5 months); *United States v. Schumack,* 14-80081-Middlebrooks, (DE 894)(S.D. Fla. June 11,

2020)(reducing 144 month sentence to time served of 69 months). *United States v. Locke*, No. 18-cr-132, 2020 WL 3101016, at 1, 6 (W.D. Wash. June 11, 2020) (compassionately releasing a defendant who had "served no more than six months of his 62-month sentence"); *United States v. Brown*, Case No. 2:18-cr-360, Dkt. No. 35 (N.D. Ala. May 22, 2020) (granting compassionate release to defendant 11 months into 60 month sentence); *United States v. Ben Yhwh*, --- F. Supp. 3d ---, 2020 WL 1874125, at *2 (D. Hawaii Apr. 13, 2020) (granting compassionate release to defendant less than 13 months into 60 month sentence); *United States v. Delgado*, 2020 WL 2464685, at *1, *4 (D. Conn. Apr. 30, 2020) (granting compassionate release to defendant 29 months into 120 month sentence); *United States v. Winston*, Case No. 1:13-cr-639-RDB, Dkt. No. 295 (D. Md. Apr. 28, 2020) (granting compassionate release to defendant 36 months into 120 month sentence).

As a result, the granting of this motion would provide adequate punishment and promote respect for the law and it would be consistent with the goals of the sentencing statute, 18 U.S.C. § 3553(a)(1).

The BOP Cannot Properly Care for Mr. Bell Should He Contract COVID-19

The BOP is not able to provide the care necessary to Mr. Bell to survive should he contract COVID-19. In his motion for release, Bell detailed the BOP's inability to protect him (DE 396:8,16,22-28). *See also, United States v. Little,* Case. No. 18-60013-COHN, ECF 66:5-7 (S.D. Fla. Sept. 4, 2020). It is noteworthy that in their response

the government does not contend otherwise. The government merely outlines what the BOP has done and what they pledge to do. However, the government does not claim that Mr. Bell is not in danger from his continued incarceration due to his medical condition and COVID-19 (DE 402:2-6). And clearly Mr. Bell is in danger should he contract the coronavirus.

Conclusion

In conclusion, based on the foregoing, Mr. Bell has established "extraordinary and compelling reasons" warranting a reduction under 18 U.S.C. 3582(c)(1)(A) and even satisfies the Sentencing Commission's criteria for those reasons pursuant to U.S.S.G. 1B1.13 n. 1(A)(ii)(I). Moreover, granting the motion is consistent with the factors outlined in 18 U.S.C. § 3553(a). Accordingly, Mr. Bell respectfully requests that the Court grant his motion for compassionate release, and release him to house arrest/home confinement/electronic monitoring (consistent with the specifics of his release plan) for the remainder of the time he would have served in prison as a condition of supervised release, and with a special condition that he self-quarantine for 14 days, as instructed by the CDC for persons who have possibly been exposed to COVID-19.

Respectfully Submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: */s/ **Timothy M. Day***
Timothy M. Day
Assistant Federal Public Defender
Florida Bar No. 0360325
One East Broward Boulevard, Suite 100
Ft. Lauderdale, Florida 33301
Tel: 954-640-7108
E-Mail Address: timothy_day@fd.org

CERTIFICATE OF SERVICE

I HEREBY certify that on February 4, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/*Timothy M. Day*
Timothy M. Day

Meredith Bock, MD
1635 Divisadero St.
San Francisco, CA 94115

January 26, 2021

Medical Evaluation regarding Anthony Bell (DOB 5/4/81, Age 39)

Introduction

My name is Dr. Meredith Bock and I am a board certified academic neurologist. I have been retained by Attorney Timothy Day to provide a medical evaluation of inmate Mr. Bell. To perform this evaluation, I reviewed the medical records of Mr. Bell as provided to me by Attorney Timothy Day. These records included: Bureau of Prisons' medical records from 2013 to 2020. In the following report, I will render my opinion of the nature of Mr. Bell's neurologic problems. will then discuss the nature and seriousness of his current problems. I will discuss whether I believe that these neurologic problems place him at higher risk of developing complications or dying from COVID-19, were he to contract it. I will also address whether these problems constitute terminal conditions or serious conditions from which Mr. Bell is not expected to recover.

Neurologic Problems Identified

Mr. Bell was diagnosed with myasthenia gravis in 2007 and has required chronic immunosuppressive therapy with prednisone. He has been on doses as high as 80 mg daily and is currently maintained on a dose of 10-15 mg daily. He has required two hospitalizations due to myasthenic crisis causing muscle weakness and respiratory difficulty (in 2007 and 2011). At least one of his prior crises was severe enough to cause hemodynamic instability, including hypotension and respiratory depression. He has tried multiple times to wean off prednisone, but has been unable to do so due to return of muscle weakness. He therefore has been in a state of immunosuppression since 2007 and will likely continue to require lifelong immunosuppression.

Current Medications for Neurologic Problems

Prednisone 10 mg daily

COVID-19 Related Conditions

Mr. Bell has myasthenia gravis, which renders him highly likely to suffer serious complication or death were he to contract Covid-19. He is at high risk for two reasons. Firstly, the most recent CDC guidelines state that people of any age with certain medical conditions are likely to be at increased risk for severe illness from COVID-19. Immunocompromise from use of corticosteroids, according to the CDC, is a condition that might put people at risk for severe illness from COVID-19.[1] Secondly, myasthenia gravis is a condition causing fluctuating diffuse muscle weakness, including weakness of the respiratory muscles. The most serious complication of myasthenia gravis is myasthenic crisis, which importantly can be triggered by any viral

[1] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

infection.[2] In fact, the most frequent trigger of myasthenic crisis is infection.[3] In my experience on the inpatient neurology unit, I have seen respiratory infections from less virulent agents than COVID-19 cause life-threatening respiratory failure in patients with myasthenia gravis. If Mr. Bell were to contract COVID-19, he would be at very high risk of respiratory muscle weakness and subsequent hypercarbic respiratory failure. Myasthenic crisis can often lead to the need for longer term ventilation, multiorgan failure, and death.[4] In fact, I would put him at extremely high risk of serious illness or even death if here were to contract COVID-19.

Serious or Unresolved Medical Conditions from which Mr. Bell is Not Expected to Recover

Mr. Bell has myasthenia gravis, which is a condition currently without a cure. This is a lifelong diagnosis requiring lifelong immunosuppression and leading to a chronically elevated risk for severe respiratory complications from any viral illness.

Conclusions

Mr. Bell is a 40-year-old man with myasthenia gravis. Given his immunocompromised status and high risk of life-threatening respiratory weakness if he were to contract a viral infection, I worry about his ability to survive his prison sentence. Mr. Bell is at extremely high risk of adverse outcomes, including death, if he contracts COVID-19.

Respectfully submitted,

Meredith Bock, MD

---

[2] Bedlack RS, Sanders DB. On the concept of myasthenic crisis. J Clin Neuromuscul Dis. 2002 Sep;4(1):40-2. doi: 10.1097/00131402-200209000-00009.

[3] Gummi RR, Kukulka NA, Deroche CB, Govindarajan R. Factors associated with acute exacerbations of myasthenia gravis. Muscle Nerve. 2019 Dec;60(6):693-699. doi: 10.1002/mus.26689. Epub 2019 Sep 10.

[4] Neumann B, Angstwurm K, Mergenthaler P, Kohler S, Schönenberger S, Bösel J, Neumann U, Vidal A, Huttner HB, Gerner ST, Thieme A, Steinbrecher A, Dunkel J, Roth C, Schneider H, Schimmel E, Fuhrer H, Fahrendorf C, Alberty A, Zinke J, Meisel A, Dohmen C, Stetefeld HR; German Myasthenic Crisis Study Group. Myasthenic crisis demanding mechanical ventilation: A multicenter analysis of 250 cases. Neurology. 2020 Jan 21;94(3):e299-e313. doi: 10.1212/WNL.0000000000008688. Epub 2019 Dec 4. Erratum in: Neurology. 2020 Apr 21;94(16):724. Schneider, Haucke [corrected to Schneider, Hauke].

MEREDITH A. BOCK

Identifying Data

Name: Meredith A. Bock, MD
Email: Meredith.Bock@ucsf.edu
Phone: 818-648-6941

Academic History

Universities

2006-2010 Bachelor of Arts*, summa cum laude*. Princeton University, Princeton, NJ
2011-2016 MD with Distinction, *AOA.* University of California, San Francisco School of Medicine, San Francisco, CA

Residency Training

2016-2017 Internal Medicine Internship, University of California, San Francisco, San Francisco, CA
2017-2020 Neurology Residency, University of California, San Francisco, San Francisco, CA
2019-2020 Neurology Clinic Chief Resident, University of California, San Francisco, San Francisco, CA

Fellowship Training

2020-present Movement Disorders Fellowship, University of California San Francisco, San Francisco, CA

Clinical Research Experience

2019-present

Center for Population Brain Health, San Francisco VA Medical Center, CA
Mentor: Kristine Yaffe, MD
Role: Co-investigator
Projects:

- Investigate apathy as a predictor of dementia in a population-based sample of community dwelling older adults. Responsibilities: Designed project, performed data analysis, drafted and edited manuscript. Status: Manuscript published in *Neurology*.
- Evaluate cognitive and functional trajectories in the pre-clinical and clinical phase of Parkinson's disease in a population-based sample of older adults from the MrOS/SOF cohorts. Responsibilities: Design project, perform data analysis, draft and edit manuscript. Status: Analysis proposal approved, planning analysis.

2019-present

UCSF Movement Disorder and Neuromodulation Center, San Francisco, CA
Mentors: Caroline Tanner, MD PhD, Ethan Brown, MD, Maya Katz, MD
Role: Co-investigator
Projects:

- Evaluate determinants of quality of life and economic burden in a large, online cohort of patients with Parkinson's Disease. Responsibilities: Design project, perform data cleaning and validation, perform data analysis, draft and edit manuscript. Status: Analysis ongoing, initial findings presented at the Neuropalliative Care Summit and as Top Abstract at the Movement Disorders Society Annual Meeting.
- Secondary component analysis of PCORI-funded randomized clinical trial evaluating the impact of a palliative care intervention in Parkinson's disease. Responsibilities: Design project, coordinate with primary study statistician to perform data analysis, draft and edit manuscript. Status: Analysis ongoing.

2014-2015

UCSF Amyotrophic Lateral Sclerosis Center, San Francisco, CA
Mentor: Catherine Lomen-Hoerth, MD PhD
Role: Clinical and Translational Research Pathway Yearlong Fellow
Project Focus: Investigated progression of cognitive-behavioral changes in patients with ALS and their impact on patient- and caregiver-reported outcomes
Responsibilities: Developed study aims, designed research protocol, wrote IRB-approved application, collected and managed data, performed data analysis, drafted and edited two first author manuscripts published in peer-reviewed journals.

2012

UCSF Global Health Institute, Kisumu, Kenya
Mentor: Hilary Wolf, MD
Role: Summer Research Fellow
Project Focus: Explored qualitative reasons for loss to follow-up among HIV-positive adolescents as perceived by health care workers in Kisumu, Kenya
Responsibilities: Organized focus groups and recruited participants, coded transcripts, analyzed qualitative data using grounded theory to inform development of community-based intervention.

2010-2011

UCSF Breast Care Center, San Francisco, CA
Mentor: Michelle Melisko, MD
Role: Princeton Alumnicorps Fellow
Project Focus: Assessed impact of online health questionnaires on symptom management and health behaviors reporting for breast cancer survivors

- Responsibilities: Recruited patients, managed data, and coordinated data analysis for clinical trials. Drafted and published one first-author manuscript in a peer-reviewed journal and made recommendations to NIH-funded practice group to improve online health questionnaire based on patient feedback and extensive testing.

Grants

2019-2020	UCSF Neurology Flexible Residency Clinical Research Grant
2014-2015	UCSF Medical School Clinical and Translational Research Fellowship Yearlong Award
2012	UCSF Dean's Summer Research Fellowship

Selected Awards & Achievements

2020	**Movement Disorders Society Top Abstract Selection:** for the best original research presented during the 2020 MDS Virtual Congress
2020	**Alzheimer's Association Award for Young Scientists:** honorable mention for excellence in research on Alzheimer's and related disorders
2020	**San Francisco Neurological Society Resident Scholarship** for outstanding leadership and generous spirit as a dedicated clinician, awarded to one graduating neurology resident selected by co-residents and neurology program directors
2016	**UCSF Medical School Dean's Prize Finalist** for excellence in independent scholarly work Election to **Alpha Omega Alpha Honor Medical Society**
2010	**Gruppo Esponenti Italiani Award** for outstanding undergraduate senior thesis **Asher Hinds Prize** for outstanding undergraduate senior thesis in European Cultural Studies
2009	**Greater NY Chamber of Commerce Prize** for outstanding junior undergraduate independent work **Book Prize** for excellence in undergraduate coursework in the humanities
2006-2010	**Robert C. Byrd Scholarship** for academic excellence

Peer-Reviewed Publications

Bock M, Bahorik A, Brenowitz W, Yaffe K (2020). Apathy and Risk of Probable Incident Dementia among Community-Dwelling Older Adults. *Neurology*. Dec 15;95(24): e3280-e3287.

Bock, M (2020).The Ideal Intern**.** *N Engl J Med.* Sep 10;383(11):1006-1007.

Olney NT, Ong E, Goh SM, Bajorek L, Dever R, Staffaroni AM, Cobigo Y, **Bock M**, et al (2020). Clinical and volumetric changes with increasing functional impairment in familial frontotemporal lobar degeneration. *Alzheimers Dement*. Jan;16(1):49-59.

Bock M, Duong Y, Kim A, Murphy J, Lomen-Hoerth C (2017). Progression and Effect of Cognitive-Behavioral Changes in Patients with Amyotrophic Lateral Sclerosis. *Neurology Clinical Practice*. December; 7(6): 488-498.

Bock M, Duong Y, Kim A, Murphy J, Lomen-Hoerth C (2016). Cognitive-Behavioral Changes in Amyotrophic Lateral Sclerosis: Screening Prevalence and Impact on Patients and Caregivers. *Amyotrophic Lateral Sclerosis and Frontotemporal Dementia*. July-Aug; 17(5-6): 366-73.

Bock M, Garcia HH, Chin-Hong P, Baxi SM (2015). Under seize: Neurocysticercosis in an immigrant woman and review of a growing neglected disease. *BMJ Case Reports*. Dec 18.

Wheelock A, **Bock M**, Martin E, Hwang J, Ernest ML, Rugo H, Esserman L, Melisko M (2015). SIS.NET: A Randomized Controlled Trial Evaluating a Web-based System for Symptom Management after Breast Cancer. *Cancer*. Mar 15; 121(6): 893-9.

Wolf H, Halpern-Felsher, B, Bukusi E, **Bock M**, Agot K, Cohen C, Auerswald C. (2013) Reasons for Lost to Follow-up Among HIV-Positive Youth in Kisumu, Kenya: Implications for Achieving Health Equity. *Journal of Adolescent Health.* Feb; 52(2): S5-S6.

Bock M, Moore D, Hwang J, Shumay D, Lawson L, Hamolsky D, Esserman L, Rugo H, Chien AJ, Park J, Munster P, Melisko M. (2012). The impact of an electronic health questionnaire on symptom management and behavior reporting for breast cancer survivors. *Breast Cancer Res Treat*. Aug; 134(3): 1327-35.

Platform Presentations and Panels

Bock M, Brown E, Tanner C. Determinants of quality of life in a large, online cohort of patients with Parkinson's Disease. *Selected for a virtual oral presentation as a Top Abstract in the "Update on Recent Clinical Trials" session and as a Guided Poster Tour in the "Quality of Life/Caregiver Burden in Movement Disorders" session at the Movement Disorders Society Virtual Congress, September 2020.*

"Future Directions in Neuroscience." Invited panelist. *Princeton Faculty-Alumni Forum, May 2020.*

Bock M, Brown E, Tanner C. Determinants of quality of life in a large, online cohort of patients with Parkinson's Disease. *Virtual oral presentation at the Neuropalliative Care Summit, April 2020.*

Poster Presentations

Bock M, Kaup AR, Yaffe K. Apathy is Associated with Risk of Incident Dementia among Community-Dwelling Older Adults. *Virtual poster presentation at the American Academy of Neurology Annual Meeting 2020.*

Bock M, Kaup AR, Yaffe K. Apathy is Associated with Risk of Incident Dementia among Community-Dwelling Older Adults. *Poster presentation at Alzheimer's Association International Conference 2019*.

Bock M, Duong Y, Kim A, Murphy J, Lomen-Hoerth C. Cognitive-Behavioral Changes in Amyotrophic Lateral Sclerosis: Prevalence, Progression, and Impact on Patients and Caregivers. *Poster presentation at the American Academy of Neurology Annual Meeting 2015 and Translational Science Meeting 2015.*

Bock M, Duong Y, Kim A, Murphy J, Lomen-Hoerth C. Cognitive-Behavioral Changes in Amyotrophic Lateral Sclerosis: Prevalence and Impact on Patient- and Caregiver-Reported Outcomes. *Poster presentation at the Northeast ALS Consortium Annual Meeting 2014 and California ALS Research Summit 2014.*

Bock M, Wolf H Halpern-Felsher B, Bukusi E, Agot K, Cohen C, Auerswald C. Perspectives of Community Healthcare Workers on Loss to Follow-Up among HIV-Infected Adolescents in Kisumu, Kenya. *Poster presentation at UC Global Health Day 2013 and Medical Student Research Symposium 2013.*

Melisko M, **Bock M**, Moore D, Hamolsky D, Shumay D, Ernest M, Mendelsohn M, Lawson L, Orlando H, Rugo H, Chien A, Park J, Moasser M, Munster P, Goga A, Essserman L. Comparison of patient reported symptoms and health behaviors to clinician documentation among breast cancer patients in follow-up care. *Poster presentation at the American Society of Clinical Oncology 2011*.

Clinical Research Methods Training

2019	UCSF Training in Clinical Research Program Epidemiologic Methods Course (EPI 203)
2014-2015	UCSF Training in Clinical Research Program Coursework in Designing Clinical Research (EPI 202), Introduction to Statistical Computing (EPI 212), and Biostatistical Methods (BIOSTAT 200)

Quality Improvement Work

2019-2020

Clinic Chief Resident
Evaluated the scope and education priorities of resident continuity clinics, worked with faculty to improve the clinic experience for providers and patients, assisted in the incorporation of new telehealth technology for resident use, and addressed quality improvement issues throughout the year.

UCSF Neurology Residency Quality Improvement Project, Co-leader
Collaborated with four co-residents, faculty mentors, and the Graduate Medical Education Quality Improvement Committee to design and implement a project to promote the utilization of smoking cessation resources for neurology inpatients. Measured the efficacy of the intervention with pre-specified metrics in the electronic medical record. Provided quarterly updates to the GME QI Committee and presented results at the virtual UCSF Health Improvement Summit.

2018-2019

UCSF Neurology Residency Quality Improvement Project, Co-leader
Collaborated with two co-residents, faculty mentors, and the Graduate Medical Education Quality Improvement Committee to design and implement a project to promote resident wellness through a bundle intervention. Measured the efficacy of the intervention with validated scales assessing resident burnout, self-compassion, and resilience. Provided quarterly updates to the GME QI Committee and presented results at the UCSF Health Improvement Summit.

Committee Service

2018-2020

UCSF GME Well-Being Committee, Invited Resident Representative
Served on the Health Systems Subcommittee with a team of residents and faculty to perform a needs assessment, author a report on the state of physician well-being, and develop targeted recommendations to present to the medical center. Currently in work group to develop recommendations for faculty training.

2018-2020

UCSF Neurology Residency Recruitment Committee, Recruitment Chief
One of three residents invited to attend all interview events, evaluate resident applicants, and participate in rank list discussions with seven faculty members.

2015

UCSF Distinction in Teaching Awards Committee, Invited Medical Student Representative
One of two medical students invited to review submissions and participate in multidisciplinary committee to confer UCSF teaching awards.

Clinical Education and Curriculum Development

2019-2020

UCSF Neurology Residency Three Site Clinic Conference, Facilitator
Identified high-yield outpatient case presentations, coordinated faculty discussants, and facilitated discussions of monthly educational conferences for residents and medical students.

UCSF Neurology Resident Handbook, Co-editor
Updated and edited the Movement Disorders and Spinal Cord chapters in the written curriculum for neurology residents.

2019

Bock, M. A Tale of Two -Itises: A Clinical Case Presentation. **Oral presentation at the UCSF Neurology Residency Didactics** to an audience of residents, medical students, and attendings. 12/4/19.

Bock, M. The Diagnosis and Treatment of Early Parkinson's Disease: A Clinical Case Presentation. **Oral presentation at the UCSF Neurology Residency Didactics** to an audience of residents, medical students, and attendings. 4/17/19.

2018

Bock M. Under Seize: A Case Report. **Oral presentation at the SF Veterans Affairs Neuroradiology Conference** to an audience of attendings and residents. 4/20/18.

Bock M. First AED: Treatment Outcomes in Patients with Epilepsy. **Oral presentation at the UCSF Neurohospitalist Journal Club** to an audience of medical students, residents, nurses, and attendings. 3/26/18.

Bock M. DEFUSion of Late Embolectomy into Clinical Practice: Results of the DEFUSE-3 Trial. **Oral presentation at the UCSF Neurovascular Journal Club** to an audience of medical students, residents, and attendings. 1/29/18.

2017

Bock M. Visual Aura in Migraine and Epilepsy. **Oral presentation at the UCSF Headache Center Journal Club** to an audience of residents and attendings. 8/23/17.

2014-2015

UCSF Bridges Curriculum Core Inquiry Committee, Invited Student Representative
Served on multidisciplinary committee to develop the UCSF Bridges inquiry curriculum, intended to promote independent thinking, methodological approaches to uncertainty, and inquiry as a habit of mind in preclinical and clinical years of medical school.

UCSF Bridges Curriculum Deep Explore Committee, Invited Student Representative
Served on multidisciplinary committee to develop organizational structure, requirements, and support structures for independent scholarly projects in the UCSF Bridges curriculum.

UCSF Dean's Office, Tutor
Served as tutor to assist a first year medical student engage and learn the material in the Brain, Mind, and Behavior Block.

UCSF Foundations of Patient Care, Small Group Facilitator
Facilitated series of 8 small groups teaching physical exam skills to first year medical students.

Professional Organizations

2020-current Movement Disorders Society (MDS)
2017-current American Academy of Neurology (AAN)

Mentorship Experience

2016-current

Princeton AlumniCorps, Mentor
Advise recent Princeton graduates interested in academic medicine about the medical school application process and productivity in a clinical research environment. Mentees: Prihatha Narasimmaraj (2016-2017), Yash Huigol (2017-2018), Saumya Umashankar (2018-2019), Ebun Olunuga (2020-present).

2014

UCSF Premedical Undergraduate Program, Mentor
Mentored a premedical undergraduate enrolled in the UCSF Premedical Undergraduate Program to promote interest in scientific research and provided direction and feedback on mentee's independent project.

2011-2012

UCSF Medlink Program, Mentor
Facilitated 4 sessions covering information on health sciences and college applications for high school students underrepresented in medicine, assisted mentees with college applications.

A-13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60275-CR-COHN

UNITED STATES OF AMERICA,

v.

ANTHONY BELL,

Defendant.
_____/

OMNIBUS ORDER

THIS CAUSE is before the Court upon Defendant Anthony Bell's *pro se* Emergency Motion for Compassionate Release [DE 377], Defendant's counseled Motion for Compassionate Release [DE 396] (collectively, the "Motions") and Defendant's unopposed Motions for Permission to Exceed Page Limit [DE 408 & 412.] The Court has considered the Motions, the Government's Response [DE 402], Defendant's Reply [DE 410], and the record in this case, and is otherwise advised in the premises.

As an initial matter, the Court will **GRANT** Defendant's unopposed Motions for Permission to Exceed Page Limit [DE 408 & 412] and will consider Defendant's Motions and Reply in their entirety. For the reasons set forth below, however, the Motions [DE 377 & 396] will be **DENIED**.

On April 11, 2005, a jury found Defendant guilty of Counts One and Two of a two-count Superseding Indictment. DE 144. Count One charged Defendant with conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and Count Two charged Defendant with possession

with the intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). DE 64. As Counts One and Two each involved 50 or more grams of crack cocaine, they triggered the then-applicable ten-year statutory mandatory minimum and life maximum under 21 U.S.C. § 841(b)(1)(A). The Presentence Investigation Report ("PSI") found that, with respect to Count One, the offense involved 1.5 kilograms or more of crack cocaine. This resulted in a base offense level of 38. Thereafter, two levels were added because a dangerous weapon was possessed, and two levels were added for obstruction of justice. Defendant's criminal history was calculated to be a category V. However, because Defendant was found to be a career offender, his criminal history category was raised to category VI pursuant to U.S.S.G. § 4B1.1. Based on a total offense level of 42 and a criminal history category VI, the guidelines imprisonment range was 360 months to life.

On July 15, 2005, the Court imposed a low end sentence of 360 months as to Counts One and Two to run concurrently with each other. DE 170. On April 26, 2019, the Court granted Defendant's motion for reduction of sentence pursuant to the First Step Act of 2018 and reduced Defendant's sentence to 324 months – the low end of the guidelines based on the modified statutory penalties applicable under the Fair Sentencing Act. DE 352. Defendant is now 39 years old and is scheduled to be released from custody in 2028. In his Motions, Defendant seeks compassionate release due to the COVID-19 pandemic and his underlying medical condition.

The Court is very mindful of the serious and unique threat that the COVID-19 pandemic poses to persons currently incarcerated, who are unable to practice the social distancing measures advised by the Centers for Disease Control. Under 18 U.S.C. §

3582(c), as amended by the First Step Act of 2018, courts may grant compassionate release upon finding "extraordinary and compelling reasons" that are "consistent with applicable policy statements issued by the [United States] Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The relevant policy statement issued by the Sentencing Commission is found in U.S.S.G. § 1B1.13. It explains in its commentary that extraordinary and compelling reasons can exist based on the defendant's medical condition, age, or family circumstances. Id. § 1B1.13 Application Note 1(A)-(C).[1] With respect to the medical condition of the defendant, eligibility for a reduction is conferred on defendants "suffering from a terminal illness" or "a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." Id. § 1B1.13 Application Note 1(A)(i)-(ii).

Courts may only grant a defendant's motion under 18 U.S.C. § 3582(c)(1)(a), however, "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." Defendant submitted a request for compassionate release to the warden of his facility over 30 days ago, see DE 396-2, so his Motions are now ripe for review. Defendant's Motions, however, fail to establish that Defendant "is not a danger to the safety of any

[1] The application note also provides a fourth catch-all category that confers eligibility for a sentence reduction on defendants where, "***[a]s determined by the Director of the Bureau of Prisons***, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." Id. § 1B1.13 Application Note 1(D) (emphasis added).

other person or to the community" and that the sentencing factors set forth in 18 U.S.C. § 3553(a) support a reduction. See U.S.S.G. § 1B1.13.

First, with respect to the "extraordinary and compelling reasons" requirement, if a defendant has a chronic medical condition that has been identified by the Centers for Disease Control and Prevention ("CDC") as increasing his or her risk of becoming seriously ill from COVID-19, that condition may qualify as a "serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility," even if that condition would not have satisfied this standard absent the risk of COVID-19. Defendant suffers from Myasthenia Gravis (MG), an autoimmune neuromuscular disease. The medication he takes for this condition suppresses his immune system and the condition itself can cause weakness of the respiratory muscles. Viral infection can trigger a serious complication of MG. Defense counsel retained Dr. Meredith Bock, a neurologist, to review Defendant's medical records and she opines that he "is at extremely high risk of adverse outcomes, including death, if he contracts COVID-19." DE 410-1 at 2. Accordingly, the Court finds that Defendant's MG qualifies as a "serious physical or medical condition" as defined in the Sentencing Commission's policy statement found in U.S.S.G. § 1B1.13.

But that is not the end of the inquiry. In order to reduce Defendant's term of imprisonment, the Court must find that he "is not a danger to the safety of any other person or to the community" and that the sentencing factors set forth in 18 U.S.C. § 3553(a) support a reduction. See U.S.S.G. § 1B1.13. Because of Defendant's violent conduct committed in connection with the narcotics trafficking conspiracy that led to his

conviction in this case, the Court is unable to make either of these findings. Defendant and his co-defendant kidnapped an individual they accused of being a government informant, drove him to a secluded area, shot him in the chest and left him for dead (although he survived). PSI ¶ 5. Considering, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), the Court finds that a reduction of Defendant's sentence by seven years would not promote the interests of justice but would minimize the severity of Defendant's conduct. Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. Defendant Anthony Bell's Motions for Permission to Exceed Page Limit [DE 408 & 412] are **GRANTED**; and

2. Defendant's Motions for Compassionate Release [DE 377 & 396] are **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 8th day of February, 2021.

JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF