

APPENDIX “A”

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL RAY KAPP, AKA Michael
Kapp,

Defendant-Appellant.

No. 21-10216

D.C. No. 2:11-cr-00739-SRB-1
District of Arizona,
Phoenix

ORDER

Before: FERNANDEZ, TASHIMA, and FRIEDLAND, Circuit Judges.

Appellee's motion (Docket Entry No. 12) to summarily affirm the district court's order denying appellant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard). Contrary to appellant's contentions, the district court did not rely on any clearly erroneous facts, and it took account of appellant's post-sentencing conduct in assessing the 18 U.S.C. § 3553(a) factors. The court did not abuse its discretion in concluding that, notwithstanding appellant's mitigating arguments, the § 3553(a) factors did not support compassionate release. *See United States v. Keller*, 2 F.4th 1278, 1281, 1284 (9th Cir. 2021).

AFFIRMED.

APPENDIX “B”

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

Michael Ray Kapp,

Defendant.

No. CR-11-00739-001-PHX-SRB

ORDER

Pending before the Court is Defendant Michael Ray Kapp's Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582. (Doc. 118) The Government has responded in opposition (Doc. 121) and a Reply in support of the Motion was filed. (Doc. 126) Defendant seeks compassionate release because he suffers from medical conditions that place him at "severely high-risk of serious health complications or death should he contract COVID-19." (Doc. 118 at p. 1) The Government agrees that Defendant has exhausted his administrative remedies. The Government argues that "because this defendant has received a COVID-19 vaccine and is fully inoculated against the disease" being overweight and having Hepatitis C no longer present an extraordinary and compelling reason for his compassionate release. (Doc. 21 at p. 1) The Government also

1 opposes release on the grounds that Defendant poses a danger to the community and that
2 the sentencing factors in 18 U.S.C. § 3553 (a) weigh against any sentence reduction.
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4 Federal district courts “may not modify a term of imprisonment once it has been
5 imposed” except in limited circumstances. 18 U.S.C. § 3582(c); *Dillon v. United States*,
6 560 U.S. 817, 824–25 (2010). Defendant seeks a sentence reduction pursuant to 18 U.S.C.
7 § 3582(c)(1)(A), as amended by the First Step Act. *See* First Step Act of 2018, Pub. L. No.
8 115-391, 132 Stat. 5194 (2018). Section 3582(c)(1)(A) provides that a court may reduce a
9 term of imprisonment if, after determining that the prisoner satisfied administrative
10 exhaustion requirements, (1) “extraordinary and compelling reasons” warrant a reduction,
11 (2) the reduction would be “consistent with any applicable policy statements issued by the
12 Sentencing Commission,” and (3) the applicable sentencing factors under 18 U.S.C.
13 § 3553(a) warrant a reduction. *Dillon*, 560 U.S. at 824; 18 U.S.C. § 3582(c)(1).
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17 Congress has not defined “extraordinary and compelling reasons” except to note
18 elsewhere that “rehabilitation . . . alone” does not suffice. *See* 28 U.S.C. § 994(t). Pursuant
19 to its delegated authority and before passage of the First Step Act, the Sentencing
20 Commission issued a policy statement defining “extraordinary and compelling reasons.”
21 U.S.S.G. § 1B1.13. Section 1B1.13 states that “extraordinary and compelling reasons”
22 include: (A) medical condition; (B) age; (C) family circumstances of the defendant; and
23 (D) “other reasons”—a catch-all provision permitting the BOP to determine that “reason[s]
24 other than, or in combination with, the reasons described in subdivisions (A) through (C),”
25 rise to the level of “extraordinary and compelling.” *Id.* § 1B1.13 cmt. n.1(A)–(D).
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1 The Ninth Circuit Court of Appeals has held that courts are not limited by U.S.S.G.
2 § 1B1.13 in determining what constitutes extraordinary and compelling reasons for
3 compassionate release and have discretion to consider reasons other than those enumerated
4 in U.S.S.G. § 1B1.13, Application Note 1. *United States v. Aruda*, 993 F.3d 797,802 (9th
5 Cir. 2021). In *Aruda*, the Court explained that the Sentencing Guidelines policy statement
6 may inform the court's discretion in deciding compassionate release motions. *Id.*
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9 **No Extraordinary and Compelling Reason Justifying Compassionate Release Has**
10 **Been Shown**

11 Defendant's medical records from December 2020, attached at Exhibit B to his
12 Motion, show that he suffers from chronic Hepatitis C, is obese, and had a confirmed case
13 of COVID 19. Defendant has received both doses of the Pfizer vaccine. (Doc. 123, Exhibit
14 A) He argues that he is still at risk of reinfection and, if reinfected, at risk of serious health
15 complications or death. In support Defendant cites to medical journal articles, the low
16 vaccination rates among prisoners and prison staff, and poor compliance within his facility
17 with COVID precautions. He also states that he continues to potentially face long-term
18 complications for his COVID illness and has not yet regained his sense of taste and smell
19 and continues to suffer from breathing problems.
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23 The Government argues that Defendant contracted COVID and did not experience
24 severe disease. It cites evidence that reinfection is rare and the combination of Defendant's
25 history of COVID infection and his fully vaccinated status show that he no longer presents
26 any extraordinary and compelling justification for compassionate release. The
27 Government also asserts that Defendant's arguments that he may face long-term
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1 complications from COVID that the prison system is not equipped to handle is speculative
2 and unsupported by any medical records that he continues to suffer complications from his
3 COVID infection. The medical records submitted with the Government's Response show
4 that Defendant was asymptomatic when diagnosed with COVID and at an exam in May of
5 this year denied the long-term complications he now claims. (Doc. 123, Ex. B and C).
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7 Based on the evidence of Defendant's apparent mild case of COVID despite his
8 medical risks of severe complications, of Defendant's denial at medical appointments of
9 loss of smell and taste and shortness of breath, of his vaccination status, and of the lack of
10 scientific evidence that he remains at serious risk of severe illness in the unlikely event of
11 reinfection, the Court finds that Defendant has failed to demonstrate an extraordinary and
12 compelling circumstance that justifies a sentence reduction.
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15 **18 U.S.C. § 3553(a) Factors Weigh Against a Sentence Reduction**
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17 Defendant was convicted of Possession with Intent to Distribute 50 Grams or More
18 of Methamphetamine and Possession of a Firearm in Furtherance of a Drug Trafficking
19 Crime pursuant to a plea agreement. He was sentenced on November 28, 2012 to 210
20 months in prison. In explaining the sentence that the sentencing judge characterized as
21 "very severe," he stated that methamphetamine trafficking was "particularly abhorrent"
22 because it is both devastating to those who are addicted and to those in their communities.
23 He characterized methamphetamine as "a very serious drug" and Defendant's crime as
24 "very serious." The sentencing judge also remarked that Defendant committed his crimes
25 a relatively short time after having served a long term of imprisonment. Commenting on
26 Defendant's age, he noted that Defendant was at an age where "the flame should be going
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1 out” but Defendant went right back to drug trafficking after serving his state sentence. The
2 sentencing judge also mentioned Defendant’s financial success from drug trafficking
3 evidenced by the kind and quantity of assets he had acquired which could not be explained
4 by lawful, gainful activity. He also stated that he considered both specific and general
5 deterrence in deciding on the 210 month sentence. (Doc. 92, Reporter’s Transcript of
6 Proceedings, pp. 67-69).
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9 The Presentence Investigation Report reflects that Defendant’s advisory Guideline
10 range was 262 to 327 months and the plea agreement had a 300 month sentencing cap.
11 Defendant qualified as a career offender because he had 2 prior drug trafficking
12 convictions. He also had 19 criminal history points. Defendant had 8 prior felony
13 convictions beginning in 1989 when Defendant was 21 years of age. He had been
14 unsuccessful on several grants of felony probation and had served multiple prison
15 sentences. Defendant’s reported legitimate employment was unverified.
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18 In arguing that the applicable § 3553(a) factors justify a sentence reduction
19 Defendant claims that the time he has already served is sufficient but not greater than
20 necessary to comply with those factors. He cites his good conduct release date of April
21 2026 and his eligibility for home detention in October 2025. He also notes that he has less
22 than 5 years to serve and has already served double the time of his last longest sentence of
23 4½ years. Defendant also states that he has taken advantage of many opportunities
24 presented to him in prison and has completed numerous programs. He is in a low-security
25 facility and has had only minor disciplinary infractions. Finally, he argues that at the age
26 of 53 he is an older offender and studies have shown older offenders less likely than
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1 younger offenders to recidivate upon release.

2 The Government argues that § 3553(a) factors weigh against release arguing that
3 Defendant presents a danger to the community because the facts of his crimes show he was
4 selling drugs out of his residence and was also found to be in possession of 16 firearms,
5 including 3 that were stolen and 2 without serial numbers, 2 police-issued Tasers, one of
6 which was stolen, 7 ballistic vests and thousands of rounds of ammunition. The
7 combination of drug trafficking and his arsenal of weapons make the inherently dangerous
8 crime of drug trafficking even more dangerous, the Government argues. The Government
9 also cites the Defendant's 22 years of criminal convictions prior to these offenses, that 4
10 of his 8 prior felony convictions were related to drug trafficking and that 3 of those drug
11 convictions also included weapons charges. Countering the Defendant's citation to
12 Defendant's longest prior sentence being 4½ years, the Government calculates Defendant's
13 total prior prison sentences at approximately 25 years. The Government also disputes
14 Defendant's claimed minor disciplinary record citing his 2017 possession of an opioid and
15 his 2021 hospitalization for suspected drug use. (Doc. 123 Exhibit D).

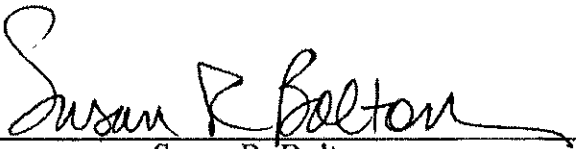
16 The Government urges that there is still a need to protect the public from further
17 crimes of the Defendant, that his release plan with a relative does not provide any assurance
18 that he will not continue to pose a danger to the community, and that Defendant's 9 prior
19 probation and parole violations also demonstrate that the Court should not trust Defendant
20 to abide by his release plan. The Government also argues that Defendant's proposal to
21 reside in Green Valley, Arizona does not establish any less likelihood of becoming
22 reinfected with COVID that his present housing because only 2 inmates are presently
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1 positive and 73.4% are fully vaccinated compared to the present statistics in Pima County.
2 Defendant disagrees stating that if released he will be able to fully implement the CDC
3 guidelines and quarantine away from infected or exposed individuals.
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5 The Court finds that the § 3553(a) factors do not weigh in favor of the Defendant's
6 release or a sentence reduction. Defendant had a history of drug trafficking and weapons
7 possession going back almost 20 years at the time of the crimes of conviction. He has
8 never complied with terms of probation or parole and committed these offenses fewer than
9 2 years after his release from prison for drug trafficking and weapons possession. It is
10 doubtful from his reported history that Defendant has ever had any sustained period of
11 legitimate employment and the list of programs he has participated in do not reflect the
12 acquisition of employment skills. Contrary to Defendant's position, this list shows
13 participation in various programs during 2013 through 2017 and no programs for the next
14 3½ years until Defendant enrolled in an Employment Essentials program in December
15 2020. His disciplinary history is fairly minor but there are concerns about his possible
16 continued use of illicit drugs. Other than the statistics about older individuals aging out of
17 crime, there is no reason to believe Defendant would not follow the pattern established
18 over a 20 year period of re-engaging in drug trafficking upon his release and thereby
19 endangering the community. Defendant's long-term history of weapons' possession also
20 demonstrates his likely continuing danger to the community. That he has a supportive
21 relative who will allow him to reside with her is not any assurance that Defendant will be
22 law abiding. Defendant's claim of a job upon release is unsupported by any evidence.
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1 IT IS ORDERED denying Defendant's Motion for Compassionate Release Pursuant
2 to 18 U.S.C. § 3582. (Doc. 118)
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4 Dated this 4th day of August, 2021.
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9 Susan R. Bolton
10 United States District Judge
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APPENDIX “C”

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America

v.

Michael Ray Kapp

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

No. CR 11-00739-001-PHX-FJM

Darius M. Nickerson (CJA)
Attorney for Defendant

USM#: 35317-308

THE DEFENDANT ENTERED A PLEA OF guilty on 3/27/2012 to Counts 1 and 3 of the Superseding Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSES: violating Title 21, U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii), Possession with Intent to Distribute 50 Grams or More of Methamphetamine, a Class A Felony offense, as charged in Count 1 of the Superseding Indictment; Title 18, U.S.C. § 924(c)(1)(A)(i), Possession of Firearm in Furtherance of a Drug Trafficking Crime, a Class A Felony offense, as charged in Count 3 of the Superseding Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **TWO HUNDRED TEN (210) MONTHS** on Counts 1 and 3, with credit for time served. This term consists of **ONE HUNDRED FIFTY (150) MONTHS** on Count 1 and **SIXTY (60) MONTHS** on Count 3, all such terms to run consecutively. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 3, such terms to run concurrently.

IT IS ORDERED that all remaining counts are dismissed on motion of the United States.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: waived RESTITUTION: N/A

The defendant shall pay a special assessment of \$200.00, which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay a total of \$200.00 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows: Balance is due in equal monthly installments of \$25.00 over a period of eight months to commence 60 days after the release from imprisonment to a term of supervised release.

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If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 3 of the Superseding Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS** on Counts 1 and 3, all such terms to run concurrently.

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

It is the order of the Court that, pursuant to General Order 12-13, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions, of particular importance, you shall not commit another federal, state or local crime during the term of supervision and the defendant shall abstain from the use of illicit substances:

- 1) You shall not commit another federal, state, or local crime during the term of supervision.
- 2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.
- 3) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 5) You shall support your dependents and meet other family responsibilities.
- 6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) You shall notify the probation officer at least ten days prior to any change of residence or employment.
- 8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.
- 9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. The use or possession of medicinal marijuana, even with a physician's written certification, is not permitted. Possession of controlled substances will result in mandatory revocation of your term of supervision.
- 10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.
- 11) You 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.
- 12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.
- 14) You 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.

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- 15) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.
- 16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.
- 17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);
- 18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.
- 19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- 20) If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.
2. You shall submit your person, property, house, residence, vehicle, papers, computers as defined in 18 U.S.C. 1030(e)(1), other electronic communications or data storage devices or media, or office, to a search conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
3. You shall provide the probation officer access to any requested financial information.
4. The defendant shall comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.
5. You shall abstain from all use of alcohol or alcoholic beverages.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

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IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons and recommends: that the defendant be placed in a federal institution in or as close to Tucson, Arizona as possible

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

Date of Imposition of Sentence: **Wednesday, November 28, 2012**

 Date 11/29/12

JAMES G. CARR, United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

United States Marshal By: _____
Deputy Marshal