

No. **21-8206**

ORIGINAL

SUPREME COURT OF THE UNITED STATES

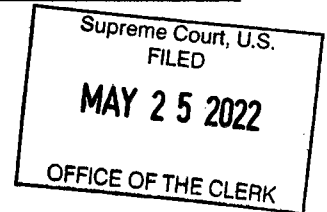
NOBLE L. BENNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

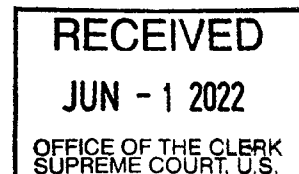
Respondent.



**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER IT WAS ERROR FOR THE EIGHTH CIRCUIT TO DENY BENNETT'S APPEAL WITHOUT AN OPPORTUNITY TO BE HEARD?
- II. WHETHER IT WAS ERROR FOR THE LOWER COURT(S) TO HOLD THAT APPRENDI DOES NOT PROVIDE A BASIS TO FIND EXTRAORDINARY AND COMPELLING REASONS TO GRANT RELIEF IN THID CASE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

BENNETT, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is unpublished and included in BENNETT's Appendix (Pet. App.) at A. The opinion of the district court's denial is unpublished and is included in Pet. App. at B.

JURISDICTION

On March 19, 2020, this Court entered an order automatically extending the time to file any petition for certiorari due on or after that day to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for certiorari, (In light of Covid-19). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment (1791) establishes the requirement that a trial for a major crime may commence only after an indictment has been handed down by a grand jury; protects individuals from double jeopardy, being tried and put in danger of being punished more than once for the same criminal act; prohibits punishment without due process of law, thus protecting individuals from being imprisoned without fair procedures; and provides that an accused person may not be compelled to reveal to the police, prosecutor, judge, or jury any information that might incriminate or be used against him or her in a court of law.

The Sixth Amendment (1791) provides several protections and rights to an individual accused of a crime. The accused has the right to a fair and speedy trial by a local and impartial jury. Likewise, a person has the right to a public trial. This

right protects defendants from secret proceedings that might encourage abuse of the justice system, and serves to keep the public informed. This amendment also guarantees a right to legal counsel if accused of a crime, guarantees that the accused may require witnesses to attend the trial and testify in the presence of the accused, and guarantees the accused a right to know the charges against them.

STATEMENT OF THE CASE

RELEVANT BACKGROUND:

In 1991, Bennett and several others were charged in a multi-count indictment that alleged various offenses involving the Jerry Lewis Organization (JLO), “a powerful criminal racketeering enterprise that for over ten years controlled a large percentage of the market for T’s and Blues (a heroin substitute), heroin, and cocaine in north St. Louis.” *United States v. Darden*, 70 F.3d 1507, 1516 (8th Cir. 1995). After a nine-month trial involving eight defendants, Bennett was convicted in June 1993 of one count of conducting an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). He was acquitted of conspiring to do the same in violation of § 1962(d). Based on his being held accountable for 213 kilograms of cocaine and two murders, Bennett was sentenced on September 24, 1993, to life imprisonment. In *Darden*, the Eighth Circuit Court of Appeals affirmed his conviction. *Id.* at 1517.

Bennett has filed several motions in this case to reduce his sentence, all of which have been denied. (See ECF 263, 289, 373.) His motion filed under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence was also denied. See *Bennett v. United States*, Case No. 4:97CV757 ERW (E.D. Mo.) (Memo. & Order, Jan. 8, 1999) (ECF 11).

Bennett is presently incarcerated at FMC Butner in North Carolina. He is 70 years old. Bennett has many serious health conditions, some of which are recognized by the Centers for Disease Control and Prevention (CDC) as making him more likely to become severely ill if he should contract COVID-19. He has grade M0, IIB, Gleason 7 prostate cancer for which he recently completed a two-month course of radiation treatment and is currently undergoing injection therapy with leuprolide acetate. He has stage 3 kidney disease with limited kidney function. He has degenerative disc disease with associated peripheral neuropathy and moderate to severe back pain for which he is managed by the Bureau of Prison’s pain management clinic. He has been temporarily assigned a wheelchair to use when traveling long distances. He also has hepatitis C, well-controlled hypertension, gastroesophageal reflux disease, hyperlipidemia, diabetes, and glaucoma. When he

was offered the COVID vaccine in February 2021, he declined out of concern of potential side effects with his cancer treatment. After consultation with his doctors, he received both doses of the Pfizer vaccine in April 2021.

SUMMARY OF THE ARGUMENT

Bennett is a 70-year-old African American man serving a life sentence imposed in 1993 after he was convicted of conducting an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). While not charged with or convicted of, Bennett was held accountable for 213 kilograms of cocaine and two murders, he was sentenced on September 24, 1993, to life imprisonment. Bennett seeks release under the First Step Act claiming that his serious health conditions - which include cancer, chronic kidney disease, hypertension, and diabetes - render him especially vulnerable to COVID-19.

The District Court agrees with Bennett's circumstances stating, "particularly his incarceration, health conditions, and age - generally make him more likely to become seriously ill if he were to contract COVID-19". But, reasoning that "however, adults 65 years old and older who are fully vaccinated have a 94% reduction in risk of COVID-19 hospitalizations".

That "Bennett's status as being fully vaccinated therefore mitigates his risk from COVID-19 to such an extent that COVID-19, in combination with his underlying conditions, no longer presents an extraordinary and compelling reason to grant compassionate release". *Id.*

Bennett also, argued that he would be subject to only a 20-year maximum sentence rather than life if he was sentenced today for the same offense of conviction, and that such disparity warrants a reduced sentence, and is extraordinary and compelling reasons to support compassionate release. See 18 U.S.C. § 3553(a)(6).

The District Court disagreed, noting in relevant part that "Apprendi held that it was a violation of a defendant's Sixth Amendment right to jury trial for a judge to make factual findings that had the effect of increasing a sentence beyond the statutory maximum for the crime of conviction".

"I presume he relies on 18 U.S.C. § 1963(a) for this assertion. That the murders used to enhance his sentence as relevant conduct were attributed to him by the district court and not the jury and thus were not proven beyond a reasonable doubt. Without consideration of these murders, Bennett contends he would only be subject to 20 years in prison. Apprendi does not apply retroactively". *Id.*

I. IT WAS ERROR FOR THE EIGHTH CIRCUIT TO DENY BENNETT’S APPEAL WITHOUT AN OPPORTUNITY TO BE HEARD

BENNETT is entitled to Due Process the relevant precedent—most notably the controlling authority demonstrates that as a matter of due process (based on particular exigencies), due process requires a post-seizure hearing in the court of appeals. Under the Mathews factors, the movants have a due process right to be heard because, as Mathews itself emphasized, “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). BENNETT was denied that right.

Although, Federal Rules of Appellate Procedure establishes the basis of expedited proceeding in appropriate cases, excepting any action affecting appellate Court jurisdiction, Local Rule 47(a) of the Court of Appeals for the Eighth Circuit should not work a trivialization of the importance briefing has to the proper resolution of any appeal. See, e.g., United States v. Stem, 835 F.2d 732 (10th Cir. 1987), where the Court en banc found that it was improper for a panel of the appellate court to rule summarily on the merits of a criminal appeal without a full briefing and appellate record. Id.] Thus, the Court of Appeals was required to state the specific reason for denying the appeal after BENNETT was given an opportunity to be heard.

Accordingly, because the eighth circuit denied BENNETT’S appeal without given him an opportunity to be heard. This Court should remand this case back to the circuit court to be heard on its merits.

II. IT WAS ERROR FOR THE LOWER COURT(S) TO HOLD THAT APPRENDI DOES NOT PROVIDE A BASIS TO FIND EXTRAORDINARY AND COMPELLING REASONS TO GRANT RELIEF IN THIS CASE

DISCUSSION

Based on BENNETT being held accountable for 213 kilograms of cocaine and two murders, Bennett was sentenced on September 24, 1993, to life imprisonment. **Notable, these crimes were not found by the jury.** As reasons for denying relief in this case the district court stated: “Bennett was part of a vast and violent drug conspiracy enterprise that spanned several years and involved numerous murders of law enforcement officials, government witnesses, and drug rivals. Bennett

himself was involved in two of the murders and was intimately involved in the drug- trafficking enterprise. Given this and other substantial evidence, there is no indication that the sentencing judge would have imposed something other than a life sentence but for the mandatory nature of the guidelines.” “If I were to grant compassionate release, it would be on Bennett’s serious medical conditions.”

This statement clearly overlooks the facts that **THE JURY FOUND BENNETT NOT GUILTY, ON COUNT TWO (2) OF BEING A MEMBER OF THE “JERRY LEWIS” ORGANIZATION.**

(i) SENTENCING DISPARITY

BENNETT is a defendant who was sentenced in an era prior to Booker, Apprendi, and its progeny. *Booker v. United States*, 543 U.S. 220 (2005). In 1993, BENNETT was exposed to and sentenced to an enhanced range of punishment resulting in a life sentence. The sentencing Court found that BENNETT was responsible for crimes that were not charged in his indictment, nor was it submitted to the jury for its determination, and ultimately no jury returned a verdict of guilty on any of the crimes based upon a burden of proof beyond a reasonable doubt. The District Court held BENNETT responsible for these uncharged offenses based upon its own determination by a preponderance of the evidence. If BENNETT were convicted today, he would only be subject to the 20-year statutory maximum relating to his conviction under 18 U.S.C. 1962. To this date, BENNETT has served over 30 years.

Although sentence reductions pursuant to the 2018 FSA are based on 18 U.S.C. § 3582(c)(1)(B), providing that "the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute," the Court's analysis in *Dillon* of whether *Booker* applies to sentence reductions under § 3528(c)(2) is nonetheless instructive in this case. In *Dillon*, the Court held that "proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." 560 U.S. at 828. The Court reasoned that this right is not implicated because § 3582(c)(2) confines the extent of the sentence reductions it authorizes — it requires the court to take the defendant's original sentence as a given and reduce it by substituting only the Sentencing Guidelines amendment that gave rise to the reduction proceeding. *Id.* at 827-28. The Court found that "[t]aking the original sentence as given, any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the

prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range," which is permissible under *Appendi*. *Id.* at 828, 828-29; see also *Fanfan*, 558 F.3d at 110 ("Given the narrow scope of sentence modification proceedings, there is no concern that a district court in such a proceeding will make factual findings that in turn will raise a defendant's sentence beyond the level justified by the facts established by a plea of guilty or a jury verdict.") (internal quotation marks and citations omitted).

The same is not true for sentence reductions pursuant to the 2018 FSA. Section 3582(c)(1)(B) does not establish procedures like those in § 3582(c)(2) that narrow the scope of the sentence reduction. Instead, because statutory minimum and maximum sentences under the 2010 FSA are keyed to drug weight, it is that fact that confines the extent of any sentence reduction in the first instance. Thus, relying on (here the first-degree murder conduct) attributed to defendants in their PSRs, rather than that charged in the indictment, affects more than the judge's discretion within a prescribed statutory range — it determines the prescribed range, and it may raise a defendant's sentence beyond the level otherwise justified by a guilty plea or jury verdict on the crime charged in the indictment. Therefore, it triggers the collective requirement of *Appendi* and *Alleyne* that facts that increase the penalty for a crime beyond the prescribed statutory maximums and minimums be charged in the indictment. "Accordingly, because the [murder] attributed to Pride in the PSR was not charged in his Indictment, I will not rely on it in this proceeding." See, *United States v. Pride*, No. 1:07CR00020-001, at *10-14 (W.D. Va. June 11, 2019); *United States v. Clark*, 97 Cr. 817 (DC), at *10-11 (S.D.N.Y. Mar. 18, 2021) ("shortening Mr. Clark's sentence does not undermine the seriousness of the offense, or fail to respect the law, provide just punishment, or adequately deter criminal conduct..., Mr. Clark's sentence was a product of the then-mandatory Sentencing Guidelines and under today's sentencing scheme, I would not have given him such a long and harsh sentence."); and *McCoy*, 981 F.3d at 286-87 (finding that non-retroactive changes to § 924(c) stacking can be an extraordinary and compelling reason); *Brooker*, 976 F.3d at 237-38 (concluding that district courts have broad discretion to determine what constitutes extraordinary and compelling reasons for release).

Authority to reduce minimum sentence on a Compassionate Release motion: Congress has spoken, and this time it has given trial judges broad authority – indeed it has imposed a statutory duty, upon a defendant's motion– to conduct an individualized review of the defendant's case for extraordinary and compelling

circumstances that call out for correction. See *United States v. Brooker*, 976 F.3d 228, 237-38 (2nd Cir., 2020) (holding that a court should consider “all possible reasons for compassionate release”, including the “injustice of [a defendant’s] lengthy sentence”). See e.g., *Lockerbie Bomber* that bomb Pan Am Flight 103 killing 270 people 189 of them Americans served only 8-years and was released. See, *United States v. Haynes*, 456 F. Supp. 3d 496 (2020).

It is undisputed that the express language of the First Step Act, which creates the courts’ ability to modify a past sentence based on extraordinary and compelling reasons, contains no express prohibition on granting compassionate release to inmates who are serving a mandatory minimum sentence. Furthermore, this Court and others have routinely granted compassionate release to inmates serving a mandatory minimum sentence and have declined to read such a prohibition into the statute. In *Brooker*, the Second Circuit reversed the lower court’s denial of the inmate’s compassionate release motion even though the inmate was serving a mandatory minimum sentence. 976 F.3d 228 (2nd Cir., 2020).

Shortening BENNETT’ sentence does not undermine the seriousness of the offense, or fail to respect the law, provide just punishment, or adequately deter criminal conduct. In sum, BENNETT’s sentence was a product of misinterpretation of the law and under today’s sentencing scheme, the Court would not have the authority to give him such a long and harsh sentence. Additionally, courts have found that compassionate release for defendants who have served the significant majority of their sentences does not undermine sentencing goals.

Additionally, defendants whose conduct is similar or worse than BENNETT’s who have committed murder, drug trafficking, racketeering, shootings, or even? terrorism offenses, routinely receive far less than life without parole sentences. BENNETT received longer sentences than each of the defendants: *United States v. Victor Alvarez*, 1:93-cr-00181(PKC) (defendant sentenced to 30 years for seditious conspiracy, in Violation of 18 U.S.C. § 2384, bombing conspiracy, in Violation of 18 U.S.C. § 371, attempted bombing, in Violation of 18 U.S.C. §§ 844(i) and 2, interstate BENNETT transportation of a firearm, in Violation of 18 U.S.C. §§ 924(b) and 2, and using and carrying a firearm in commission of a violent offense, in Violation of 18 U.S.C. §§ 924(c) and 2); *United States v. Todd Labarca*, 11- Cr-00012 (RMB) (defendant sentenced to 23 years for racketeering in Violation of 18 U.S.C. § 1962(c) based on predicate acts including conspiracy to murder Martin Bosshart, marijuana trafficking, ecstasy trafficking, extortion conspiracy, illegal

gambling business and conspiracy to commit assault in Violation of 18 U.S.C. § 1959(a)(6) relating to the murder of Martin Bosshart), United States v. James Diaz, 17-Cr-21 (JWP) (defendant sentenced to 18 years for narcotics conspiracy and 18 U.S.C. §§ 924(c) who participated in the conduct that resulted in the death of Jose Morales and the shooting of Edwin Romero on December 11, 2016 as part of the narcotics conspiracy); United States v. James Capers, 12- Cr-293 (JWP) (defendant member of a violent drug gang convicted of racketeering conspiracy, conspiracy to distribute narcotics and 18 U.S.C. §§ 924(j) received 42 year sentence conduct including murdering a victim while he was holding his one-year-old child); United States v. Jaquan Walters, 15 Cr. 644 (AJN), (defendant convicted of narcotics trafficking received 25 years for shooting and murdering victim over a marijuana debt); United States v. Peter, et al, 17-Cr-00054 (NRB) (defendants convicted of marijuana trafficking conspiracy and 18 U.S.C. §§ 924(c) and (j) received sentences of 23, 23 and 20 years for shooting and murdering a customer); Josnel Rodriguez (appeal is 17-3283cr) received 20 years from Judge Cote following 924(j) conviction for aiding and abetting murder at a cookout in the Bronx, Alvarado Dominguez (SDNY before Caproni) received well less than life for murder. Deandre Morrison in 18-cr-41 (DLC) received total of 318 months for narco conspiracy and RICO conspiracy and one of the predicates that he admitted to was murder. Terrill Staton in 15-cr-456 (NRB) received a total of 276 months for narco conspiracy and Hobbs Act robbery resulting in murder. Both SDNY. IN EDNY, Tyvon Bannister in 17- cr-116 (BMC) received a sentence of 30 years based on a plea in which gov't and defense agreed and court ultimately accepted, that appropriate sentence was 30 years. Involved execution style murder. In United States v. Gray, 2021 U.S. Dist. lexis 88855, Crim. No. CCB-95-364 (D. Maryland May 10, 2021), the Court resentenced the Defendant to TIME SERVED subsequent his Compassionate Release motion, where the Defendant, was serving a LIFE, sentence for a conviction of murder in aid of racketeering and possession of a firearm in relation to a crime of violence.

In United States v. Perez, No. 3:02CR7(JBA), 2021 U.S. Dist. LEXIS 41040, 2021 WL 837425, at *6 (D. Conn. March 4, 2021), the Court reduced defendant's sentence--involving murder--to TIME SERVED after serving 23 years.

In United States v. Tidwell, 476 F.Supp.3d 66 (E.D. Pa. 2020), the Court granted a compassionate release to a defendant who had been sentenced to life in a plea of guilty to a 23-count indictment, most relevant as concerns the case-at-bar, for

possession with intent to distribute 5 kilograms or more of cocaine and two (2) counts of murder, all in relation to a continuing criminal enterprise.

In *Brown v. United States*, 2020 U.S. Dist. LEXIS 238008 (D. Maryland Dec. 17, 2020), the Court granted TIME SERVED pursuant to the Defendant's motion brought under Compassionate Release, where the defendant was serving a life sentence plus 30 years for several drug related charges and a murder cross-reference.

In *United States v. Ramsay*, 2021 Dist. LEXIS 89741 (S.D.N.Y. May 11, 2021), the Court reduced Defendant's LIFE sentence to 360 months, where the defendant had been convicted of Murder in Aid of Racketeering for firing the shots that directly killed two innocent by-standers, and one of those victims were pregnant, thus the baby also died as a result.

In *United States v. Rodriguez*, 492 F.Supp.3d 306 (S.D.N.Y. 2020), the Court reduced the defendant's sentence from LIFE to 30 years, where the defendant ran a cocaine and heroin racketeering enterprise and was found guilty of having participated in the torture and murder of a government confidential informant. (Court considered letters from staff).

In *Babb v. United States*? 2021 U.S. Dist. LEXIS 105829 (Dist. Maryland June 4, 2021), the Defendant brought a motion in the spirit of the one now before the court, as one brought "based on compassionate release, under 18 * U.S.C. §3582(c)(1)(A)(i), due to 'extraordinary and compelling reasons' or, alternatively, under §404 of the First Step Act," *Id.* at LEXIS 1. The Defendant was serving a LIFE sentence plus months "for drug trafficking and related offenses," and a murder-cross reference, of which the Court reduced to 30 years. (Court considered letters from staff).

BENNETT's conduct is not materially different from the above cited defendants yet his sentence is far more severe; and BENNETT was not convicted of murder.

Conviction and Sentence:

In his motion, BENNETT argues, that his case presents extraordinary and compelling circumstances because his sentence "was a product of misinterpretation of the law and under today's sentencing scheme, the Court would not have

authority to give him such a long and harsh sentence (because BENNETT is not convicted of murder). The outcome of his case would clearly [be] different.” He identifies several defendants whose sentences for allegedly comparable crimes were far less than his.

A life sentence without the possibility of parole is substantial punishment. Moreover, it appears longer than at least some federal sentences imposed for murder.

For example, in *United States v. Antoine*, PWG-19-140, the defendant was involved in a drug trafficking organization in Baltimore and confessed to the intentional shooting and killing of an individual in relation to the drug conspiracy. He pleaded to one count of conspiracy to distribute controlled substances and one count of discharging a firearm resulting in death during and in relation to a drug trafficking crime. *Id.* Although Antoine was the shooter, Judge Grimm imposed a total sentence of 270 months (22.5 years).

As Judge Blake recently observed, the average federal sentence for murder has declined in recent years. See *United States v. Bryant*, 95-202-CCB-3, 2020 WL 2085471, at *5 n.8 (D. Md. Apr. 30, 2020) (“According to statistics released by the United States Sentencing Commission for fiscal year 2018, the national average sentence for murder was 291 months, and the Fourth Circuit average was 327 months.”) (citing *United States v. Redd*, 444 F. Supp. 3d 717, 728 (E.D. Va. 2020)); United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2018, Fourth Circuit, available at (<https://www.ussc.gov/sites/default/files/pdf/research-andpublications/federal-sentencing-statistics/state-district-circuit/2018/4c18.pdf>), *aff’d*, McCoy, 981 F.3d 271. Indeed, the trend has continued since the time Bryant was decided: data from the United States Sentencing Commission reflects that in fiscal year 2020, the national average sentence for murder was 255 months, and the Fourth Circuit average was 271 months. See United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2020, Fourth Circuit, available at <https://www.ussc.gov/sites/default/files/pdf/research-andpublications/federal-sentencing-statistics/state-district-circuit/2020/4c20.pdf>. In addition, BENNETT avers that he “is highly unlikely to reoffend or pose any threat to the community.” In particular, he notes that he “has been a mentor to his fellow inmates since he has been committed to the BOP”. Further, he states that he “has never been involved in any violent incidents during his time of incarceration”

and, moreover, he “has been actively participating in programs and seeking positive change in prison.” As a result, BENNETT avers that “he has gained pro social skills and positive energy.” Further, he contends that he is “ready to be a productive member of society.”

BENNETT also reports: “He has a very strong connection with his family and friends who are ready willing to help and assist him getting a job.”

To be sure, rehabilitation alone cannot justify compassionate release. See Davis, 2022 WL 127900, at *1; 28 U.S.C. § 994(t). But, without question, the Court may consider BENNETT’s post-sentencing conduct to determine whether he has been rehabilitated during his term of imprisonment. See *Pepper v. United States*, 562 U.S. 476, 492 (2011) (recognizing that a defendant’s post-sentencing conduct “provides the most-up-to-date picture of [a defendant’s] ‘history and characteristics’”) (quoting 18 U.S.C. § 3553(a)(1)).

These facts are in conflict with the intention of 18 U.S.C. § 3553(a). Notable, sentenced Pre-Booker, *infra.*, BENNETT was never given consideration of section 3553(a) factors.

(ii) BENNETT'S MEDICAL CONDITION:

While pending, and shortly after Bennett’s denial of compassionate release, factors that could not have been foreseen by the Court at the time of its opinion came to light. Bennett’s medical condition has worsened and that he now meets the conditions for compassionate release.

He is continuing to struggle aging medical problems. More importantly, and complicating his health condition, there is the potential impact of the coronavirus on our “overcrowded” prisons.

This Court has reasoned that inmate who are fully vaccinated have a 94% reduction in risk of COVID-19 hospitalizations. This noted because Bennett received both doses of the Pfizer vaccine. Then why is it necessary to take a “boost shot”. A fact not considered by this Court.

Bennett’s medical records which include cancer, chronic kidney disease, hypertension, and diabetes put him in a greater risk to die and it is clear that the delta variant is sweeping through the states fast and fully vaccinated people are not immune.

The CDC list of risk factors was most recently updated on March 29, 2021. See <https://www.cdc.gov/coronavirus/2019-ncov/need-extraprecautions/people-with-medical-conditions.html>. It reports a list of conditions that “can make you more likely to get severely ill from COVID-19.”

The World Health Organization declared COVID-19 a global pandemic on March 11, 2020. Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) is the cause of coronavirus disease 2019, commonly called COVID-19. See Naming the Coronavirus Disease and the Virus that Causes It, WORLD HEALTH ORG., <https://bit.ly/2UMC6uW> (last accessed June 15, 2020). It is not necessary to recount in detail the “unprecedented nature and impact” of it. That said, BENNETT must reiterate that the COVID-19 pandemic has been described as the worst public health crisis that the world has experienced since 1918. See *United States v. Hernandez*, 451 F. Supp. 3d 301, 305 (S.D.N.Y. 2020) (“The COVID-19 pandemic . . . presents a clear and present danger to free society for reasons that need no elaboration.”). Indeed, the pandemic “produced unparalleled and exceptional circumstances affecting every aspect of life as we have known it.” *Cameron v. Bouchard*, LVP-20-10949, 2020 WL 2569868, at *1 (E.D. Mich. May 21, 2020), vacated on other grounds, 815 Fed. App’x 978 (6th Cir. 2020). For a significant period of time, life as we have known it came to a halt. For quite some time, businesses and schools were shuttered or operated on a limited basis. This is because the virus is highly contagious. See Coronavirus Disease 2019 (COVID-19), How COVID-19 Spreads, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 2, 2020), <https://bit.ly/2XoiDDh>.

Many people who are stricken with the virus experience only mild or moderate symptoms. But, the virus can cause severe medical problems as well as death, especially for those in “high risk categories” *Antietam Battlefield KOA*, 461 F. Supp. 3d at 223 (citation omitted). As of January 14, 2022, COVID-19 has infected more than 64 million Americans and caused approximately 846,000 deaths in this country. See COVID-19 Dashboard, The Johns Hopkins Univ., <https://bit.ly/2WD4XU9> (last accessed Jan. 14, 2022).

In prior months, this country saw a reduction of COVID-19 cases. In the fall the trend became more favorable. See David Leonhardt, Covid-19 Cases Keep Falling, N.Y. TIMES, Oct. 27, 2021, <https://www.nytimes.com/2021/10/26/briefing/covid-cases-falling-delta.html> (“The number of new daily COVID-19 cases has plunged

since peaking on Sept. 1. Almost as encouraging as the magnitude of the decline is its breadth: Cases have been declining in every region.”). But, the spread of the Delta variant reversed this trend. See Apoorva Mandavilli, What to Know About Breakthrough Infections and the Delta Variant, N.Y. TIMES (Aug. 14, 2021), <https://www.nytimes.com/article/covid-breakthrough-delta-variant.html> (noting that, as of August 14, 2021 “[i]nfections have spiked to the highest levels in six months”).

Indeed, the Delta variant is thought to be more virulent and capable of causing more severe illness than were earlier strains of COVID-19. See Delta Variant: What We Know About the Science, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> (updated Aug. 6, 2021) (noting that the Delta variant is “more than [two times] as contagious as previous variants”); Jon Kamp & Brianna Abbott, Delta Variant Recedes Across the United States, WALL ST. J., Nov. 1, 2021, <https://www.wsj.com/articles/delta-surge-of-covid-19-recedesleaving-winter-challenge-ahead-11635672600> (“The Delta-fueled wave continues to take a serious toll, but the seven-day average in reported deaths has dropped to about 1,400 a day from daily averages above 2,000 in late September, Johns Hopkins data show.”). More recently, the emergence of the Omicron variant, around the world and in the United States, has sparked further cause for concern. Although much remains unknown about Omicron, including its severity and the relative effectiveness of vaccines against the variant, it is believed to be highly contagious. See Omicron Variant: What You Need to Know, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicronvariant.html> (last updated Dec. 13, 2021). Authorities warn that there remain reasons for caution, including relatively low levels of vaccination in some parts of the country, as well as the encroachment of colder weather and the holiday season, which will lead to an increase in the number of indoor gatherings. See Kamp & Abbott, *supra*. Of relevance here, the Centers for Disease Control and Prevention (“CDC”) has identified certain risk factors that may increase the chance of severe illness due to the virus. Those risk factors initially included age (over 65); lung disease; asthma; chronic kidney disease; serious heart disease; obesity; diabetes; liver disease; and a compromised immune system. See Coronavirus Disease 2019 (COVID-19), People Who Are at Risk for Severe Illness, CTRS. FOR DISEASE CONTROL & PREVENTION (May 14, 2020), <https://bit.ly/2WBcB16>.

The CDC has repeatedly revised its guidance as to medical conditions that pose a greater risk of severe illness due to COVID-19. Most recently in December 2021, it again updated its guidance to reflect the most available data. See People with Certain Medical Conditions, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 14, 2021), <https://bit.ly/38S4NfY>. According to the CDC, the factors that increase the risk include cancer; chronic kidney disease; chronic lung diseases, including COPD, asthma (moderate to severe), interstitial lung disease, cystic fibrosis, and pulmonary hypertension; dementia or other neurological conditions; diabetes (Type 1 and Type 2); Down syndrome; heart conditions, such as heart failure, coronary artery disease, cardiomyopathies, and hypertension; HIV; being immunocompromised; liver disease; obesity, where the body mass index (“BMI”) is 25 or higher; pregnancy; sickle cell disease; smoking; solid organ or blood stem cell transplant; stroke or cerebrovascular disease; mental health conditions, such as depression and schizophrenia spectrum disorders; substance use disorders; and tuberculosis. *Id.*

The CDC has also indicated that the risk for severe illness from COVID-19 increases with age, with older adults at highest risk. See Older Adults at Greater Risk of Requiring Hospitalization or Dying if Diagnosed with COVID-19, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 27, 2020), <https://bit.ly/3g1USZ1>. Furthermore, “[t]he risk of severe COVID19 increases as the number of underlying medical conditions increases in a person.” People with Certain Medical Conditions, *supra*. To stem the spread of the virus, people were urged to practice “social distancing” and to wear masks. See Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/3dPA8Ba> (last accessed December 9, 2020). However, social distancing is particularly difficult in the penal setting. Seth, 2020 WL 2571168, at *2; Senate Judiciary Hrg. Transcript on Incarceration during COVID-19, REV.COM (June 2, 2020) (Testimony of BOP Dir. Michael Carvajal at 47:00) (“Prisons by design are not made for social distancing. They are on [sic] the opposite made to contain people in one area.”).

Indeed, prisoners have little ability to isolate themselves from the threat posed by the coronavirus. *Id.*; see Cameron, 2020 WL 2569868, at *1; see also United States v. Mel, TDC-18-0571, 2020WL 2041674, at *3 (D. Md. Apr. 28, 2020) (“In light of the shared facilities, the difficulty of social distancing, and challenges relating to maintaining sanitation, the risk of infection and the spread of infection within prisons and detention facilities is particularly high.”). Prisoners usually “share

bathrooms, laundry and eating areas,” and are often “bunked in the same cell” with several others. Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020). And, they are not free to follow their own rules.

To illustrate, prisoners are not readily able to secure safety products on their own to protect themselves, such as masks and hand sanitizers, nor are they necessarily able to separate or distance themselves from others. See Kim Bellware, *Prisoners and Guards Agree About Federal Coronavirus Response: ‘We do Not Feel Safe,’* WASH. POST (Aug. 24, 2020) (reporting use of non-reusable masks for months and a lack of transparency around policies for personal protective equipment and testing). They do not get to decide where, when, or how to eat or sleep.

Consequently, correctional facilities are especially vulnerable to viral outbreaks and ill-suited to stem their spread. See *Coreas v. Bounds*, TDC-20-0780, 2020 WL 1663133, at *2 (D. Md. Apr. 3, 2020) (“Prisons, jails, and detention centers are especially vulnerable to outbreaks of COVID19.”); see also Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 16, 2021) (stating that the “cramped, often unsanitary settings of correctional institutions have been ideal for incubating and transmitting the disease).

Social distancing is often not an option.”); Letter of 3/25/20 to Governor Hogan from approximately 15 members of Johns Hopkins faculty at the Bloomberg School of Public Health, School of Nursing, and School of Medicine (explaining that the “close quarters of jails and prisons, the inability to employ effective social distancing measures, and the many high-contact surfaces within facilities, make transmission of COVID-19 more likely”); accord *Brown v. Plata*, 563 U.S. 493, 519-20 (2011) (referencing a medical expert’s description of the overcrowded California prison system as “breeding grounds for disease”) (citation omitted). On March 23, 2020, the CDC issued guidance for the operation of penal institutions to help prevent the spread of the virus. Seth, 2020 WL 2571168, at *2. Notably, the BOP implemented substantial measures to mitigate the risks to prisoners, to protect inmates from COVID-19, and to treat those who are infected. Indeed, as the Third Circuit recognized in *United States v. Raia*, 954 F.3d 594, 597 (3rd Cir. 2020), the BOP has made “extensive and professional efforts to curtail the virus’s spread.” 7 The New York Times reported in June 2020 that cases of COVID-19 “have soared in recent weeks” at jails and prisons across the country.

Timothy Williams et al., Coronavirus cases Rise Sharply in Prisons Even as They Plateau Nationwide, N.Y. TIMES (June 18, 2020), <https://nyti.ms/37JZgH2>; See Cases in Jails and Prisons, N.Y. TIMES (Oct. 29, 2020) (On October 29, 2020, the New York Times reported that, “[i]n American jails and prisons, more than 252,000 people have been infected and at least 1,450 inmates and correctional officers have died” from COVID-19.). On November 21, 2020, the New York Times reported that “U.S. correctional facilities are experiencing record spikes in coronavirus infections this fall. During the week of Nov. 17, there were 13,657 new coronavirus infections reported across the state and federal prison systems.” America Is Letting the Coronavirus Rage Through Prisons, N.Y. TIMES (Nov. 21, 2020), <https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html>. On April 16, 2021, the New York Times reported that at least 39% of prisoners are known to have been infected in federal facilities. Eddie Burkhalter et al., Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System, N.Y. TIMES (Apr. 10, 2021). And, according to the article, the actual count is most likely much higher “because of the dearth of testing.” *Id.* Nevertheless, with the passage of time, the outbreaks of COVID-19 have declined. The Department of Justice (“DOJ”) recognized the unique risks from COVID-19 experienced by inmates and employees of the BOP. The DOJ adopted the position that an inmate who presents with one of the risk factors identified by the CDC should be considered as having an “extraordinary and compelling reason” warranting a sentence reduction. See U.S.S.G. § 1B1.13 cmt. n.1(A)(ii)(I).

Former Attorney General William Barr issued a memorandum to Michael Carvajal, Director of the BOP, on March 26, 2020, instructing him to prioritize the use of home confinement for inmates at risk of complications from COVID-19. See *Hallinan v. Scarantino*, 20-HC-2088- FL, 2020 WL 3105094, at *8 (E.D. N.C. June 11, 2020). Then, on March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Pub. L. No. 116-136, 134 Stat. 281. In relevant part, the CARES Act authorized the Director of BOP to extend the permissible length of home confinement, subject to a finding of an emergency by the Attorney General. See Pub. L. No. 116-136, § 12003(b)(2). On April 3, 2020, Attorney General Barr issued another memorandum to Carvajal, finding “the requisite emergency” *Hallinan*, 2020 WL 3105094, at *9. Notably, the April 3 memorandum “had the effect of expanding the [BOP’s] authority to grant home confinement to any inmate” *Id.*

On May 8, 2020, two BOP officials, Andre Matevousian, then Acting Assistant Director of the Correctional Programs Division, and Hugh Hurwitz, then Assistant Director of the Reentry Services Division, issued a memorandum to implement the Attorney General's directives on the increased use of home confinement. The memorandum provided that the BOP was prioritizing the review of inmates for home confinement, as to inmates who have either served a certain portion of their sentence or who only have a short amount of time remaining on their sentence. Although there is currently no cure for the virus, medical treatments have continued to improve. And, significantly, we have seen the rollout of three vaccines for COVID-19 (Pfizer, Moderna, and Johnson & Johnson). Questions as to the efficacy of the Johnson & Johnson vaccine have been raised as to the Delta and Omicron variants. See J&J, Sinopharm, Sputnik V COVID-19 shots less effective against Omicron- study, REUTERS (Dec. 17, 2021), <https://www.reuters.com/business/healthcarepharmaceuticals/jj-sinopharm-sputnik-v-shots-weaker-against-omicron-study-shows-2021-12-17/>; Apoorva Mandavilli, J&J Vaccine May Be Less Effective Against Delta, Study Suggests, N.Y. TIMES, (July 20, 2021), <https://www.nytimes.com/2021/07/20/health/coronavirus-johnsonvaccine-delta.html>.

Initially, the vaccines were made available to health care workers, the elderly in nursing homes, and first responders. But, the criteria for eligibility has expanded considerably, and the vaccine is now approved for all persons five years of age and older. See Cheyenne Haslett, FDA Authorizes COVID-19 Vaccine for Kids 5-11, ABC NEWS, Oct. 29, 2021, <https://abcnews.go.com/Politics/fda-authorizes-covid-19-vaccine-kids11/story?id=80846188>. Approximately 72% of all persons twelve years of age and older are fully vaccinated. See How Vaccinations Are Going in Your County and State, N.Y. Times, <https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html> (last visited Jan. 14, 2022). And, 63% of the total U.S. population is fully vaccinated. See id. Moreover, about 77.1 million Americans have received a third or "booster" vaccine dose, which the CDC now recommends for all person's age 12 and older. See id.; COVID-19 Vaccine Booster Shots, CTRS. FOR DISEASE CONTROL, <https://www.cdc.gov/media/releases/2022/s0105-Booster-Shot.html> (last updated Jan. 5, 2022).

Given the vaccine rollout, the BOP published "COVID-19 Vaccine Guidance" on January 4, 2021 (version 7.0). COVID-19 Vaccine Guidance, Federal Bureau of

Prisons Clinical Guidance (Jan. 4, 2021), https://www.bop.gov/resources/pdfs/2021_covid19_vaccine.pdf. Administration of the COVID-19 vaccine (Pfizer and Moderna) will “align with [recommendations of] the Centers for Disease Control and Prevention.” Id. at 4. Its plan was for prisoners at heightened risk to receive priority for the vaccine. Id. at 6. The BOP reportedly received its first shipment of vaccines on December 16, 2020. Walter Pavlo, Federal Bureau of Prisons Starts Vaccination of Staff, Inmates Soon Thereafter, Forbes (Dec. 21, 2020), <https://www.forbes.com/sites/walterpavlo/2020/12/21/federal-bureau-of-prisons-starts-vaccination-of-staff-inmates-soon-thereafter/?sh=5683b99aa96f>. As of January 14, 2022, the BOP had 135,501 federal inmates and 36,000 staff. And, by that date, the BOP had administered 284,099 vaccine doses to staff and inmates. See <https://www.bop.gov/coronavirus/> (last accessed Jan. 14, 2022).

As of January 14, 2022, the BOP reported that 6,043 out of a total 135,427 federal inmates and 939 BOP staff out of some 36,000 staff members, currently test positive for COVID-19; 42,678 inmates and 9,027 staff have recovered from the virus; and 277 inmates and seven staff members have died from the virus. Id.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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