No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILBERT McKREITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Richard C. Klugh
40 N.W. 3rd Street, PH 1
Miami, Florida 33128
Tel. 305-536-1191
rklugh@klughlaw.com
Counsel for Petitioner

QUESTION PRESENTED

Do district courts have authority to grant compassionate release under 18 U.S.C. 3582(c)(1)(A), as amended by the First Step Act of 2018, based on a compelling showing by the defendant that the sentence originally imposed is excessive under current law or instead must district courts await specific approval from the Sentencing Commission to exercise such jurisdiction?

INTERESTED PARTIES

The caption contains the names of all of the parties interested in the proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

PETITION FOR WRIT OF CERTIORARI

Wilbert McKreith respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number No. 20-10450 on April 11, 2022.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished and available at 2022 WL 1073217, is contained in the Appendix (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:

U.S. Const. amend. V (due process clause):

> No person shall be ... shall ... be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 3582(c)(1)(A)

> (c) Modification of an imposed term of imprisonment. – The court may not modify a term of imprisonment once it has been imposed except that–
>
> > (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; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
> > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

U.S.S.G. § 1B1.13

> Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)
>
> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that–
>
> > (1)(A) Extraordinary and compelling reasons warrant the reduction; or

> (B) The defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
>
> (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. § 3142(g); and
>
> (3) The reduction is consistent with this policy statement.

STATEMENT

This case presents a question of legal importance concerning the scope of the humane sentencing change made to the federal compassionate release provision, 18 U.S.C. 3582 (c)(1)(A), by the First Step Act of 2018. The First Step Act amended that provision to eliminate the requirement that the Bureau of Prisons (BOP) file a motion in order for a court to grant a sentence reduction on compassionate release grounds. As amended, the compassionate release provision now allows a district court to grant a sentence reduction and order immediate release upon motion of a federal prisoner if the court finds both that the defendant's circumstances are "extraordinary and compelling" and that the sentence reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582 (c)(1)(A).

Contrary to the decision of *eight* other courts of appeals that addressed the compassionate relief question presented, the Eleventh Circuit has held that a sentencing guideline policy statement drafted to address compassionate release motions filed by the BOP, under a version of the statute that was amended by the First Step Act, bars relief on any grounds other than those stated by the Sentencing Commission. Unlike the Eleventh Circuit, the eight other Circuits reasoned both that

the policy statement, by its very terms, applies only to motions filed by the BOP Director and that the Sentencing Commission was not contemplating imposing any limitation on defendant-filed motions in the 2007 policy statement.

Because of this harsh disparity in the availability of compassionate release sentence reductions, only district courts in the three states that make up the Eleventh Circuit are barred from granting relief on compelling grounds other than those listed in the policy statement. And on the basis of the Eleventh Circuit's restrictive interpretation of the statute, the district court denied petitioner's compassionate release motion and the denial was affirmed by the court of appeals:

> We explained in [*United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 583 (2021)] that district courts are limited to the medical condition-, age-, and family-related circumstances in application notes 1(A), (B), and (C) in guideline section 1B1.13 because application note 1(D) allows only the Bureau of Prisons—not the district court—to come up with other reasons for compassionate release. 996 F.3d at 1248. McKreith argued in his motion for compassionate release that the district court could consider the non-retroactive amendment of section 924(c)(1)(C) as an extraordinary and compelling circumstance under application note 1(D)'s catchall provision. But, under *Bryant*, the district court couldn't depart from the limited circumstances in application notes 1(A), (B), and (C). *Id.*; *see also United States v. Giron*, 15 F.4th 1343, 1347 (11th Cir. 2021) (explaining that district courts are "precluded . . . from finding extraordinary and compelling reasons within the catch[]all provision beyond those specified by the Sentencing Commission in [s]ection 1B1.13"). Thus, the district court did not abuse its discretion by recognizing that its authority to reduce McKreith's sentence was limited to those circumstances.

App. 7.

The court of appeals related the relevant procedural history:

> [Petitioner] was convicted of twelve counts: seven counts of bank robbery, in violation of 18 U.S.C. section 2113(a); two counts of possession of a firearm as a

felon, in violation of 18 U.S.C. section 922(g)(1); and three counts of use of a firearm during a bank robbery, in violation of 18 U.S.C. section 924(c)(1)(A).

When McKreith was sentenced in 2003, section 924(c)(1)(C)(i) provided a mandatory minimum sentence of twenty-five years' imprisonment "[i]n the case of a second or sub-sequent conviction" under section 924(c). 18 U.S.C. § 924(c)(1)(C)(i) (2003). The mandatory minimum applied to "second (and third, and fourth, and so on) [section] 924(c) convictions within a single prosecution," resulting in "stacked" sentences. *United States v. Smith*, 967 F.3d 1196, 1210 (11th Cir. 2020). Because McKreith had a prior conviction from 1991 for use of a fire-arm during a bank robbery, his section 924(c) convictions in this case were second or subsequent convictions.

McKreith was sentenced to ninety-two and a half years in prison: seventeen and a half years for the seven section 2113(a) counts and ten years for the two section 922(g) counts, all running concurrently; and twenty-five years for each of the three section 924(c) counts, with each running consecutively to the other two and to the other counts. McKreith appealed his convictions and sentence, and we affirmed. *See United States v. McKreith*, 140 F. App'x 112 (11th Cir. 2005).

In 2018, Congress amended section 924(c)(1)(C)'s stacked-sentence provision through the First Step Act. *See* 18 U.S.C. § 924(c)(1)(C) (2018). After the amendment, the stacked-sentence provision no longer applied "to multiple [section] 924(c) convictions . . . resulting from a single prosecution." *Smith*, 967 F.3d at 1210. But the First Step Act's amendment to the stacked-sentence provision wasn't retroactive. *Id.* at 1210–13.

In 2019, McKreith moved for compassionate release under 18 U.S.C. section 3582(c)(1)(A). He argued that the non-retroactive amendment of section 924(c)(1)(C)'s stacking provision "create[d] an extraordinary and compelling reason" to reduce his sentence to time served. He also sought compassionate release because of his age.

The district court denied the motion because McKreith "fail[ed] to demonstrate extraordinary and compelling reasons for compassionate release," he was only sixty-one years old, and he had not served enough of his sentence.

App. 2–4 (footnote omitted).

REASONS FOR GRANTING THE PETITION

Review is needed to resolve the circuit conflict that was created by the Eleventh Circuit's limitation on the jurisdiction of district courts to grant compassionate release. The Eleventh Circuit's interpretation of the statute gives the district courts authority to grant defense compassionate release motions premised on compelling reasons other than those applicable to BOP-filed motions only when and if the Sentencing Commission decides to draft a policy statement for such motions. That interpretation is contrary to the plain language of the statute, which does not delegate such authority to the agency but merely grants the agency authority to provide policy guidance on the matter if it so chooses.

The Eleventh Circuit's misinterpretation of the statutory grant of authority has grave consequences for many federal prisoners, including petitioner. Nine courts of appeals have now addressed the question presented, and there is no reason to wait for the issue to percolate any further. Nor is there any basis to wait indefinitely to see if the Sentencing Commission will choose to issue a policy statement concerning defendant-filed motions.

Compassionate release motions are available to every defendant serving a federal custodial sentence, but under the decision below, defendants in Florida, Georgia, and Alabama will be denied relief even when a district court concludes that reasons for granting relief are extraordinary and compelling. In enacting the First Step Act, Congress expressly denied the BOP Director the role that the Eleventh Circuit ascribes to the Sentencing Commission's 2007 policy statement: that a district

court has no authority to grant a sentence reduction for extraordinary and compelling reasons unless the BOP has already determined that such reasons warrant a reduction.

Before the First Step Act, a defendant was eligible for compassionate release only if the BOP Director found a defendant's grounds for compassionate release to be extraordinary and compelling and the Director then filed a motion for release on the defendant's behalf. But the BOP Director rarely filed such motions, and few people in federal prison received compassionate release, effectively negating any meaningful post-sentencing safety valve.

For that reason, Congress removed the BOP Director's ability unilaterally to decide when a defendant's circumstances are sufficiently compelling to trigger the authority for a sentence reduction on compassionate release grounds. Now, a court may consider a sentence reduction as long as the defendant files a motion. And after the First Step Act, a court may grant compassionate release even if the BOP Director disagrees that a defendant's grounds are extraordinary and compelling. That statutory history, combined with the textual changes to the compassionate release provision, evidences Congress's intent for courts to assume the role that the BOP previously held as adjudicator of compassionate release requests and to grant relief on the full array of grounds reasonably encompassed by the statutory text, at least absent an inconsistency with a policy statement should the Commission decide to issue one.

The practical result of the court of appeals' decision is to countermand Congress's efforts to grant district courts the authority to determine when sentence reductions on compassionate release

grounds are warranted. Only the Court can resolve the conflict over this question of statutory interpretation. And the Court should not wait for the Sentencing Commission to act because it is not required to act and no question is actually presented to the Commission as in cases differing regarding the interpretation of guideline or policy statement provisions. The Court should therefore grant review to resolve the conflict over this question of exceptional importance.

A. The Stark Impact of the Conflict

The court of appeals' decision conflicts with the decisions of every other circuit to decide the question whether the district court's statutory authority is controlled by a policy statement that was never meant to govern defendant-filed motions under the First Step Act. The Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have explained this clearly. *See United States v. Brooker*, 976 F.3d 228, 235 (2d Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109–11 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 356 (D.C. Cir. 2021).

B. The Decision Below Is Incorrect

The court of appeals' decision is manifestly incorrect. In holding that a Sentencing Commission policy statement relevant only to BOP-filed motions applies to defendant-filed motions

only made permissible by a subsequent statutory amendment intended to divest the BOP of its prior authority, the decision below disregards the reasons why Congress enacted the First Step Act in the first place.

1. The flawed analysis by the Eleventh Circuit treated the issue as a guideline question rather than first and foremost a statutory question. The relevant question here is whether use of such a policy statement to limit jurisdiction is warranted by the statute.

As the D.C. Circuit explained, "[i]t plainly is not." *Long*, 997 F.3d at 359. In 2007, consistent with prevailing law at the time, the Commission conditioned sentence reductions under the compassionate release provision on the BOP's filing of a motion. The policy statement does not address defendant-filed motions at all, and it in fact emphasized that it did not confer any rights upon defendants. Only by "tak[ing] an eraser to the words that say the opposite" could the majority hold that the policy statement applied to defendant-filed motions. *Long*, 997 F.3d at 359.

The policy statement's language requiring the BOP to file a motion was in fact operative language that implemented Congress's command as it existed at the time the policy statement was issued. "To dismiss these words as inert preface is to ignore a direct textual instruction and central statutory feature of the compassionate release scheme prior to the First Step Act." *Long*, 997 F.3d at 358.

The Sentencing Commission has authority to promulgate a new policy statement, and it could use that authority to guide a court's discretion in ruling on defendant-filed motions. *See* 28 U.S.C.

§ 994(t). But unless and until it does so, there is no policy statement that applies to such motions. *See Gunn*, 980 F.3d at 1180. Under the compassionate release provision, a court may provide a sentence reduction as long as it is "consistent with" "applicable"—not all—policy statements. "Any decision is 'consistent with' a nonexistent policy statement"; "'consistent with' differs from 'authorized by.'" *Id.*

2. The entire thrust of Congress's amendments to the compassionate release provision was, as the Department of Justice's Office of Inspector General concluded, that BOP had failed as the gatekeeper of the federal compassionate release program. Congress responded by empowering courts to determine when a defendant has presented extraordinary and compelling circumstances, even when BOP disagrees. In light of Congress's intent to divest BOP of full control over the compassionate release process and to promote the role of the courts in that process, it defies congressional authority to interpret the First Step Act to effectively to revoke a district court's authority to determine when a defendant's circumstances warrant relief.

A recent decision by this Court adds support to the statutory interpretation argued for by petitioner in this case. In *Concepcion v. United States*, No. 20-1650, 2022 WL 2295029, at *4 (U.S. June 27, 2022), the Court held that the First Step Act, Pub. L. 115–391, § 404(b), 132 Stat. 5222, allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the reduced drug penalties under Section 2 of the Fair Sentencing Act. Addressing the purpose of the First Step Act, this Court explained:

> It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained.

Id.; *see also id*. at *7 ("Federal courts historically have exercised this broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence."); *id*. at *8 ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.").

The Court's reasoning regarding sentence-reduction provisions pertaining to the Fair Sentencing Act should be deemed applicable also when a district court considers compassionate release motions. *Concepcion* makes plain that the only limitation on valid considerations are those in the Constitution or that Congress has expressly set forth. This textualist reading of the First Step Act should carry forward to compassionate release motions filed by defendants.

C. The Question Presented Is Exceptionally Important

The question presented in this case is one of substantial legal and practical importance, and immediate review is warranted to ensure that federal prisoners across the Nation can properly invoke

the First Step Act as Congress envisioned. The Court need not and should not wait for the Sentencing Commission to promulgate a new policy statement.

1. The question presented is exceptionally important. Any defendant serving a custodial federal sentence can file a motion for a sentence reduction under the compassionate release provision. In terms of sheer numbers alone, district courts within the Eleventh Circuit represent a sizable proportion of the total defendants sentenced each year. *See* U.S. Sentencing Commission, 2020 Annual Report and Sourcebook of Federal Sentencing Statistics tbl. 1 < tinyurl.com/2020reportandsourcebook> (stating that, in 2020, 4,970 out of 64,565 defendants were sentenced by district courts within the Eleventh Circuit); *see also* U.S. Sentencing Commission, First Step Act of 2018 Resentencing Provisions Retroactivity Data Report tbl. 3 (2021) < tinyurl.com/firststepactretro> (showing that 14% of sentence reductions granted under the First Step Act were within the Eleventh Circuit).

By holding that the Sentencing Commission's 2007 policy statement is applicable to all motions under the compassionate release provision, the decision below binds all federal district courts within the Eleventh Circuit in deciding such motions. The practical result is that the policy statement prevents courts from granting relief to those with unusually long sentences and other circumstances warranting release, such as in petitioner's case. *See*, *e.g.*, *United States v. Maumau*, Crim. No. 08-758, 2020 WL 806121, at *5 (D. Utah Feb. 18, 2020) (determining that the defendant's "age, the length of sentence imposed, and the fact that he would not receive the same

sentence if the crime occurred today all represent extraordinary and compelling grounds" supporting a sentence reduction), aff'd, 993 F.3d 821 (10th Cir. 2021); *United States v. Clausen*, Crim. No. 00-291, 2020 WL 4260795, at *7 (E.D. Pa. July 24, 2020) (determining that the stacking of charges under Section 924(c) resulting in a 213-year sentence, in addition to other factors, constituted extraordinary and compelling circumstances supporting a sentence reduction).

2. The question presented is not a Sentencing Guidelines issue under *Braxton v. United States*, 500 U.S. 344 (1991). This Court has primarily applied *Braxton* to deny review in cases involving interpretive conflicts arising from the Sentencing Guidelines. *See*, *e.g.*, *Longoria v. United States*, 141 S. Ct. 978 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari); *cf. Buford v. United States*, 532 U.S. 59, 66 (2001) (stating that "Congress intended [the] Sentencing Commission to play [a] primary role in resolving conflicts over interpretation of [the] Guidelines"). That approach is consistent with *Braxton*'s reasoning, which emphasized that the Sentencing Commission's statutory duty to "periodically * * * review and revise" the Guidelines entitled the Commission to a first pass at resolving interpretive conflicts over its own Guidelines. 28 U.S.C. § 994(o). Because the question presented here deals with the interpretation of a statute—a question that the Sentencing Commission cannot decide—*Braxton* is no bar to review.

The need for judicial resolution of the statutory meaning is clear. There is no basis for the government to opine that the Commission will proceed to create an applicable policy statement. In

1984, Congress instructed the Commission to create a policy statement for the compassionate release program, but the Commission failed to do so until 2006, with the policy statement taking effect in 2007. *See Jones*, 980 F.3d at 1104. Absent action from this Court, a similar delay could occur here, leaving federal prisoners in the Eleventh Circuit to languish for decades without the relief Congress intended to provide to them through the First Step Act.

This Court's intervention is needed to resolve the conflict on an important question of statutory interpretation. As a result of the decision below, there will continue to be intolerable disparities—and defendants who live out their lives in prison when their sentencing judges would have freed them if permitted to act in accordance with the statute's grant of authority.

The Court should grant certiorari to end the unwarranted and unsupportable disparity in the application of compassion where compelling reasons support sentence reduction.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

RICHARD C. KLUGH, ESQ.
Counsel for Petitioner

Miami, Florida
July 2022

APPENDIX

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-10450

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILBERT MCKREITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:01-cr-06095-DMM-1

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Wilbert McKreith appeals the district court's denial of his motion for compassionate release. After oral argument and a thorough review of the record and the briefs, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

McKreith robbed ten banks between 1999 and 2001 and was convicted of twelve counts: seven counts of bank robbery, in violation of 18 U.S.C. section 2113(a); two counts of possession of a firearm as a felon, in violation of 18 U.S.C. section 922(g)(1); and three counts of use of a firearm during a bank robbery, in violation of 18 U.S.C. section 924(c)(1)(A).

When McKreith was sentenced in 2003, section 924(c)(1)(C)(i) provided a mandatory minimum sentence of twenty-five years' imprisonment "[i]n the case of a second or subsequent conviction" under section 924(c). 18 U.S.C. § 924(c)(1)(C)(i) (2003). The mandatory minimum applied to "second (and third, and fourth, and so on) [section] 924(c) convictions within a single prosecution," resulting in "stacked" sentences. *United States v. Smith*, 967 F.3d 1196, 1210 (11th Cir. 2020). Because McKreith had a prior conviction from 1991 for use of a firearm during a bank robbery, his section 924(c) convictions in this case were second or subsequent convictions.

McKreith was sentenced to ninety-two and a half years in prison: seventeen and a half years for the seven section 2113(a)

counts and ten years for the two section 922(g) counts, all running concurrently; and twenty-five years for each of the three section 924(c) counts, with each running consecutively to the other two and to the other counts. McKreith appealed his convictions and sentence, and we affirmed. *See United States v. McKreith*, 140 F. App'x 112 (11th Cir. 2005).

In 2018, Congress amended section 924(c)(1)(C)'s stacked-sentence provision through the First Step Act. *See* 18 U.S.C. § 924(c)(1)(C) (2018). After the amendment, the stacked-sentence provision no longer applied "to multiple [section] 924(c) convictions . . . resulting from a single prosecution." *Smith*, 967 F.3d at 1210. But the First Step Act's amendment to the stacked-sentence provision wasn't retroactive. *Id.* at 1210–13.

In 2019, McKreith moved for compassionate release under 18 U.S.C. section 3582(c)(1)(A). He argued that the non-retroactive amendment of section 924(c)(1)(C)'s stacking provision "create[d] an extraordinary and compelling reason" to reduce his sentence to time served. He also sought compassionate release because of his age.

The district court denied the motion because McKreith "fail[ed] to demonstrate extraordinary and compelling reasons for compassionate release," he was only sixty-one years old,[1] and he

[1] McKreith said that sixty years old was "the required age . . . warrant[ing] compassionate release consideration," but this is wrong. The policy statement in guideline section 1B1.13(1)(B) applies only to defendants seventy years or

had not served enough of his sentence. The district court explained that it had "review[ed] [McKreith]'s motion, the [g]overnment's response[,] and the U.S. Probation[']s [a]nalysis."

After we appointed counsel for McKreith on appeal, the parties told us that they had not received the probation analysis that the district court mentioned in its order. The parties jointly moved for a limited remand for the district court to clarify "whether [it] *actually relied on new information*" in the analysis, and for the parties to "respond to any *new* information." We granted the joint motion and remanded the case "on a limited basis for further proceedings as outlined in the motion."

The district court then gave the parties the probation analysis and asked them to address it. In response, McKreith argued that the probation analysis had been drafted prior to decisions from other courts of appeals holding that district courts could consider "any" extraordinary and compelling reason for release in a compassionate release proceeding. McKreith also gave a new ground for compassionate release: "his susceptibility to [COVID-19]" and the "harshness" of prison conditions during the pandemic. The government responded that McKreith's new health ground was outside the scope of the limited remand.

---

older, U.S.S.G. § 1B1.13(1)(B)(i), and application note 1(B) applies only to defendants sixty-five years or older, *id.* § 1B1.13 cmt. n.1(B)(i). On appeal, McKreith does not argue that the district court erred in denying his motion based on his age.

The district court entered an order clarifying that it "did not rely on" the probation analysis when it denied McKreith's motion for compassionate release. It explained its typical process for deciding compassionate release motions: it "order[ed] a response from both the government and probation," and "[i]f they differed, [it] would appoint counsel, disclose the conflict, and set the matter for hearing." The district court said that it did not believe that it ever relied on new information from probation, but if it had done so, it "would have disclosed that information to counsel." The district court also explained that "the nature of the offense and history of violence weighed heavily against [McKreith's] release" and that, even if our limited remand allowed it to consider McKreith's new health claim, its "decision remain[ed] unchanged."

STANDARD OF REVIEW

We review the district court's denial of a motion for compassionate release for an abuse of discretion. *See 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, follows improper procedures," makes "clearly erroneous" factual findings, or "commits a clear error of judgment." *Id.* at 911–12 (quoting *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019), and citing *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005)).

DISCUSSION

"District courts may modify a prison sentence after it is imposed only as authorized by statute or rule." *United States v.*

Denson, 963 F.3d 1080, 1086 (11th Cir. 2020); *see also* 18 U.S.C. § 3582(c)(1)(B) (providing that a district court "may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute" or by rule 35). Under section 3582(c)(1)(A)'s "plain text," a "district court may reduce a term of imprisonment" if (1) "the [section] 3553(a) sentencing factors favor doing so," (2) "there are 'extraordinary and compelling reasons' for doing so," and (3) "doing so wouldn't endanger any person or the community within the meaning of [guideline section] 1B1.13's policy statement." *United States v. Tinker*, 14 F.4th 1234, 1237 (11th Cir. 2021).

Application note 1 to guideline section 1B1.13 defines "extraordinary and compelling reasons." U.S.S.G. § 1B1.13 cmt. n.1; *see also United States v. Bryant*, 996 F.3d 1243, 1248 (11th Cir. 2021) ("[Guideline section] 1B1.13 is an applicable policy statement for all [s]ection 3582(c)(1)(A) motions . . . ."). In his motion for compassionate release, McKreith contended that the non-retroactive amendment of section 924(c)(1)(C) was "an extraordinary and compelling reason" under section 3582(c)(1)(A)(i) and application note 1(D).

McKreith argues on appeal that the district court abused its discretion in denying his motion in three ways. First, he asserts that the district court had an improperly limited view of its authority to reduce sentences under application note 1(D) in guideline section 1B1.13. Second, McKreith maintains that the district court did not properly consider the section 3553(a) factors. And third, he

contends that the district court followed improper procedures when it considered the probation analysis.

As to McKreith's first argument, he now concedes that it is foreclosed by *Bryant*. We explained in *Bryant* that district courts are limited to the medical condition-, age-, and family-related circumstances in application notes 1(A), (B), and (C) in guideline section 1B1.13 because application note 1(D) allows only the Bureau of Prisons—not the district court—to come up with other reasons for compassionate release. 996 F.3d at 1248. McKreith argued in his motion for compassionate release that the district court could consider the non-retroactive amendment of section 924(c)(1)(C) as an extraordinary and compelling circumstance under application note 1(D)'s catchall provision. But, under *Bryant*, the district court couldn't depart from the limited circumstances in application notes 1(A), (B), and (C). *Id.*; *see also United States v. Giron*, 15 F.4th 1343, 1347 (11th Cir. 2021) (explaining that district courts are "precluded . . . from finding extraordinary and compelling reasons within the catch[]all provision beyond those specified by the Sentencing Commission in [s]ection 1B1.13"). Thus, the district court did not abuse its discretion by recognizing that its authority to reduce McKreith's sentence was limited to those circumstances.

As to McKreith's second argument, he maintains that the district court did not consider the section 3553(a) factors. Although a district court may not grant a motion for compassionate release unless it first "consider[s] the factors set forth in section 3553(a) to the extent that they are applicable," 18 U.S.C. § 3582(c)(1)(A), the

district court did not grant McKreith's motion. Rather, it denied McKreith's motion because of the lack of extraordinary and compelling reasons. Thus, the district court didn't need to consider the section 3553(a) factors. *See Tinker*, 14 F.4th at 1237–38 ("Under [section] 3582(c)(1)(A), the court must find that all necessary conditions are satisfied before it grants a reduction. Because all three conditions—i.e., support in the [section] 3553(a) factors, extraordinary and compelling reasons, and adherence to [section] 1B1.13's policy statement—are necessary, the absence of even one would foreclose a sentence reduction."); *Giron*, 15 F.4th at 1348 ("The plain language of [section 3582(c)(1)(A)] means that compassionate release is permissible only if all three findings are made . . . . If any one of the necessary findings cannot be made, then compassionate release is not permissible.").

Finally, as to McKreith's third argument, he contends that the district court abused its discretion when it relied on the probation analysis to deny his motion for compassionate release.

Under *United States v. Jules*, 595 F.3d 1239, 1245 (11th Cir. 2010), "each party" "in a [section] 3582(c)(2) proceeding" "must be given notice of and an opportunity to contest new information relied on by the district court." But the district court "need not permit re-litigation of any information available at the original sentencing." *Id.* "Nor is either party entitled to any response when the court does not intend to *rely* on new information." *Id.*

Here, the district court said that it "did not rely on" any new information from the probation analysis. McKreith gives us no

good reason to doubt the district court's clarification and we can find none. As *Bryant* makes clear, nothing in the probation analysis could have made the non-retroactive amendment of section 924(c)(1)(C) an extraordinary and compelling circumstance.

In any event, even if the district court did rely on the probation analysis, which it didn't, McKreith had the opportunity to review the analysis and to rebut it. After hearing McKreith's new health claim, the district court explained that it would still deny his motion. Thus, any error in considering the probation analysis would have been harmless. *See Giron*, 15 F.4th at 1349 n.4 (explaining that an error is harmless when "the district court would have imposed the same sentence without the error" (quotation omitted)).

McKreith maintains that we should issue a full remand because the district court "did not address any of the new information" in the probation analysis and did not address his response "to that information." But the purpose of the limited remand—a limited remand McKreith jointly sought with the government—was merely for the district court to clarify "whether [it] *actually relied on new information*" in the analysis, and for the parties to "respond to any *new* information." The district court's answer to the jointly sought limited remand was unequivocal: it didn't rely on any new information and didn't rely on the probation analysis.

The district court also explained what its ruling would be if it could consider McKreith's new health ground raised in his response. If the limited remand allowed it to consider this new claim,

the district court said, its decision to deny compassionate release "remain[ed] unchanged." Thus, a full remand is unnecessary because the district court answered the question posed by the limited remand, and it addressed what its ruling would be even if its discretion was broader than the limited remand.

Because the district court did not abuse its discretion when it denied McKreith's motion for compassionate release, we affirm.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-06095-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILBERT MCKREITH,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR COMPASSIONATE RELEASE

THIS CAUSE comes before the Court upon the Defendant's Motion for Compassionate Release Pursuant to Title 18 U.S.C. Section 3582(c)(1)(A) (**D.E. 227**). Defendant petitioned the Bureau of Prisons for compassionate release and that petition was denied by Acting Warden Bennett indicating that "The nature and circumstances of your offense include the use of a firearm during a bank robbery. You have a supervised release violation in which you were found guilty of Armed Bank Robbery. Your institutional adjustment is considered average. Your disciplinary history includes nine acts of violence, two incidents involving the possession of a weapon, and several other prohibited acts. … your request is denied."

Pursuant to 18 U.S.C. § 3582(c)(1)(A), the Court may grant a reduction after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable, if it finds that (i) extraordinary and compelling reasons exists; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the Defendant is not a danger to the

safety of any other person or the community, as provided under section 3142(g). The Defendant fails to demonstrate extraordinary and compelling reasons for compassionate release. The Defendant is 61 years old and has not yet served two-thirds of his sentence. After reviewing the Defendant's motion, the Government's response (D.E. 231) and the U.S. Probations Analysis, it is

ORDERED AND ADJUDGED that Defendant's Motion for Compassionate Release Pursuant to Title 18 U.S.C. Section 3582(c)(1)(A) (**D.E. 227**) is hereby **DENIED.**

DONE AND ORDERED at West Palm Beach, Florida this 14 day of January, 2020.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 01-06095-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILBERT MCKREITH,
Defendant(s).
_____/

ORDER ON LIMITED REMAND

THIS CAUSE comes before the Court on a limited remand for further proceedings with jurisdiction of the appeal retained by the Eleventh Circuit. After remand, I disclosed the probation memorandum to the parties and appointed counsel for Mr. McKreith. I requested the parties respond to the memorandum which they did (D.E. 245 and 246) and the Defendant replied (D.E. 247).

The parties disagree as to the scope of the remand. The Government argues that remand is limited to an opportunity to allow the parties to respond to any new information contained within probation's analysis. The Defendant believes the remand to allow broader input and consideration.

In denying Mr. McKreith's *pro se* Motion for Compassionate Relief, I did not rely on probation's analysis. My practice early in the deluge of *pro se* compassionate release and First Step motions was to order a response from both the government and probation. If they differed, I would appoint counsel, disclose the conflict, and set the matter for hearing. If I intended to rely on new information in a probation memorandum, and I don't believe this has ever happened, I would have disclosed that information to counsel.

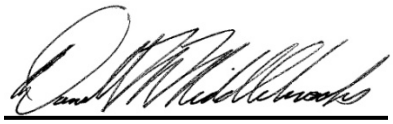
In his motion for compassionate release (D.E. 227), Mr. McKreith relied upon his age, rehabilitation, family circumstances, and the length of his sentence resulting from the § 924(c) stacking requirements.

In response, the Government argued that the Defendant had not identified extraordinary and compelling reasons for release, that the prior statutorily required consecutive sentencing requirements of § 924(c) which were prospectively removed in the First Step Act was not a basis for relief, and that consideration of the § 3553 factors weighed against release (D.E. 231).

I denied relief, admittedly without much explanation. I did not believe Mr. McKreith had demonstrated compelling and extraordinary reasons for release. In the absence of significant health concerns, I have been reluctant to address the § 924(c) stacking issue thus far because Congress chose not to make its elimination retroactive. In my opinion, assuming that I have it, discretion would be untethered from anything other than disagreement with a lengthy sentence which was required by then existing law. In this case the nature of the offense and history of violence weighed heavily against release.

In the response filed by Mr. McKreith's counsel after remand he identifies health conditions which I did not previously consider. If the remand permits consideration of these issues, however, my decision remains unchanged.

DONE AND ORDERED at West Palm Beach, Florida this 26th day of April, 2021.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record

United States District Court

Southern District of Florida

FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

WILBERT MCKREITH

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 01-6095-CR-FERGUSON(JAG)(s)

Counsel For Defendant: John Howes, Esq.
Counsel For The United States: Bertha R. Mitrani, Esq.
Court Reporter: Anita LaRocca

The defendant was found guilty on Counts 2,3,4,5,6,7,8,10,11,12 of the Superceding Indictment. ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. § 2113(a)	Bank Robbery	May 18, 2000	2
18 U.S.C. § 2113(a)	Bank Robbery	October 19, 2000	3
18 U.S.C. § 2113(a)	Bank Robbery	November 24, 2000	4
18 U.S.C. § 2113(a)	Bank Robbery	December 5, 2000	5
18 U.S.C. § 2113(a)	Bank Robbery	January 23, 2001	6
18 U.S.C. § 2113(a)	Bank Robbery	February 13, 2001	7
18 U.S.C. § 2113(a)	Bank Robbery	March 1, 2001	8
18 U.S.C. § 924(c)(1)(A)	Use of a Firearm During a Bank Robbery	October 19, 2000	10
18 U.S.C. § 924(c)(1)(A)	Use of a Firearm During a Bank Robbery	November 24, 2000	11
18 U.S.C. § 924(c)(1)(A)	Use of a Firearm During a Bank Robbery	December 5, 2000	12

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.

The defendant has been found not guilty on counts Counts 1 and 9.

IT IS FURTHER ORDERED that the defendant shall 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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

151/89

Defendant's Soc. Sec. No. 094-54-8132
Defendant's Date of Birth: September 17, 1958
Deft's U.S. Marshal No.: 14398-050

Defendant's Mailing Address:
FEDERAL DETENTION CENTER
Miami, Florida 33132

Date of Imposition of Sentence:
February 28, 2003

JOSE A. GONZALEZ JR.
United States District Judge

February 28, 2003

DEFENDANT: WILBERT MCKREITH
CASE NUMBER: 01-6095-CR-FERGUSON(JAG)(s)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **210 Months as to counts 2 through 8, and each count shall run concurrent with each other; 300 Months as to Counts 10, 11, and 12 each count to run consecutive to each other and consecutive to counts 2 through 8.**

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: WILBERT MCKREITH
CASE NUMBER: 01-6095-CR-FERGUSON(JAG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) Years as to counts 2 through 8; and Five (5) years as to counts 10 through 12. Each count shall run concurrent 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 illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

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.

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 shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the 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: WILBERT MCKREITH
CASE NUMBER: 01-6095-CR-FERGUSON(JAG)

SPECIAL CONDITIONS OF SUPERVISION

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

The defendant shall participate in an approved inpatient/outpatient mental health treatment program, as directed by the U.S. Probation Office. 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.

DEFENDANT: WILBERT MCKREITH
CASE NUMBER: 01-6095-CR-FERGUSON(JAG)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$1000.00		**$83,697.00**

It is further ordered that the defendant shall pay restitution in the amount of $ 83,697.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
CLERK OF COURTS ATTN: FINANCIAL SECTION 301 NORTH MIAMI AVENUE MIAMI, FL 33128-778	$83,697.00	$83,697.00	

*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: WILBERT MCKREITH
CASE NUMBER: 01-6095-CR-FERGUSON(JAG)

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **$1000.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of 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, unless otherwise directed by the court, the probation officer, or the United States attorney.

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.

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.