Appendix

APPENDIX

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2022 WL 1561485
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Orville TUCKER, Defendant-Appellant.

No. 21-12071
|
Non-Argument Calendar
|
Filed: 05/18/2022

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:97-cr-00447-WPD-1

Attorneys and Law Firms

U.S. Attorney Service, Andrea G. Hoffman, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.

Brenda Greenberg Bryn, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL, for Defendant-Appellant.

Before Jordan, Newsom, and Lagoa, Circuit Judges.

Opinion

PER CURIAM:

***1** Orville Tucker appeals the district court's order denying his motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). Tucker argues that the district court erred when it determined that it could not consider Congress's 2018 amendment to 18 U.S.C. § 924(c) as an extraordinary and compelling reason for a reduced sentence and, thus, denied his motion. Additionally, Tucker argues that the district court erred as a matter of law and abused its discretion when it denied him relief without considering his 18 U.S.C. § 3553(a) arguments, and that the district court's order is incapable of meaningful appellate review. For the following reasons, we affirm.

I.

We review *de novo* a district court's determination about a defendant's eligibility for a sentence reduction pursuant to 18 U.S.C. § 3582(c). *United States v. Bryant*, 996 F.3d 1243, 1251 (11th Cir.), *cert. denied*, 142 S. Ct. 583 (2021). However, we review a district court's denial of a prisoner's § 3582(c)(1)(A) motion under an abuse of discretion standard. *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Id.*

In the context of compassionate release, the statute requires exhaustion of remedies and otherwise provides that:

> the court, upon motion of the Director of the Bureau of Prisons [("BOP")], or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the BOP 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 ... after considering the factors set forth in section 3553(a) to the extent that they are applicable if it finds that ... extraordinary and compelling reasons warrant such a reduction ....

§ 3582(c)(1)(A)(i).

Section 3582(c)(1)(A) also requires that any reduction be consistent with applicable policy statements issued by the Sentencing Commission. U.S. Sentencing Guidelines § 1B1.13 provides the applicable policy statement for § 3582(c)(1)(A). The application notes to U.S.S.G. § 1B1.13 list four categories of extraordinary and compelling reasons: (A) the defendant's medical condition, (B) his age, (C) his family circumstances, and (D) other reasons. U.S.S.G. § 1B1.13 cmt. n.1. Subsection D serves as a catch-all provision, providing that a prisoner may be eligible for relief if, as determined by the Director of the BOP, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions

(A) through (C). *Id.* The policy statement in § 1B1.13 explicitly states that it implements 28 U.S.C. § 994(t), which requires the Commission to develop general policy statements regarding the appropriate use of the sentence modification provisions outlined in § 3582(c). *See* U.S.S.G, § 1B1.13; *Bryant*, 996 F.3d at 1255.

***2** In *United States v. Bravo*, 203 F.3d 778, 782 (11th Cir. 2000), we held that § 3582(c) does not grant the court jurisdiction to consider extraneous resentencing issues such as an Eighth Amendment claim. The district court granted Bravo's motion for a sentence reduction under § 3582(c)(2) to take advantage of the retroactive change in the Sentencing Guidelines in U.S.S.G. § 2D1.1. *Id.* at 780. But the court denied his request for a downward departure in his sentence because of an extraordinary medical condition and to apply the safety valve, stating that it lacked jurisdiction to consider those issues. *Id.* On appeal, we explained that a sentence adjustment under § 3582(c)(2) does not constitute a *de novo* resentencing, and thus, a district court's discretion is cabined in the context of a § 3582(c) sentencing reconsideration. *Id.* at 781.

In *Bryant*, we held that the Commission's definition of extraordinary and compelling reasons that permit a district court to reduce an incarcerated defendant's sentence are binding upon the court. 996 F.3d at 1262–63. We explained that Application Note 1(D), which allows the Director of the BOP to determine extraordinary and compelling reasons to reduce a defendant's sentence that fall outside the scope of the reasons in subdivisions (A) through (C), does not conflict with § 3582(c)(1)(A). *Id.* at 1263. Therefore, we explained, defendants may file § 3582(c)(1)(A) motions, but district courts must still follow the extraordinary and compelling reasons as determined by the BOP and may not independently determine what extraordinary and compelling reasons exist for reducing a defendant's sentence. *Id.* at 1264.

And, under the prior panel precedent rule, we are bound by prior published decisions that have not been overruled by the Supreme Court or us sitting *en banc. United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012).

Tucker's argument that there was not an applicable policy statement constraining the district court's discretion to grant a sentence reduction under § 3582(c)(1)(A) fails and is foreclosed by prior panel precedent. The district court did not err when it found that it could not consider Congress's 2018 amendment to 18 U.S.C. § 924(c) when it analyzed whether Tucker showed extraordinary and compelling reasons for a sentence reduction under § 3582(c)(1)(A). Accordingly, the district court did not abuse its discretion when it denied Tucker's motion for a reduced sentence.

II.

In *Bryant*, we concluded that the policy statement in U.S.S.G. § 1B1.13 applies to all motions filed under § 3582(c)(1)(A), including those filed by prisoners, and thus, district courts may not reduce a sentence under § 3582(c)(1)(A) unless a reduction would be consistent with § 1B1.13. 996 F.3d at 1262. We also held that district courts do not have the discretion under the catch-all provision to develop other reasons outside of those listed in § 1B1.13 that might justify a reduction in a defendant's sentence. *Id.* at 1263–65.

If a district court finds that a defendant has extraordinary and compelling reasons to warrant a sentence reduction, it may reduce his term of imprisonment after considering the factors outlined in 18 U.S.C. § 3553(a). 18 U.S.C. § 3582(c)(1)(A)(i). Among other factors, the § 3553(a) factors include the nature and circumstances of the defendant's offense, the need to afford adequate deterrence to criminal conduct, respect for the rule of law, and the need to protect the public from further crimes of the defendant.

A district court abuses its discretion when it (1) disregards relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors. *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). A district court commits a clear error of judgment when it considers the proper factors but balances them unreasonably. *Id.* While consideration of the § 3553(a) factors is mandatory, the weight given to each factor is at the district court's discretion. *United States v. Kuhlman*, 711 F.3d 1321, 1327 (11th Cir. 2013). However, the court need not explicitly discuss each factor it is required to consider. *Id.* at 1326.

***3** Additionally, we have held that because support in the § 3553(a) factors, extraordinary and compelling reasons, and adherence to U.S.S.G. § 1B1.13's policy statement must be satisfied to grant a defendant a reduced sentence, the absence of one condition forecloses a sentence reduction. *United States v. Tinker*, 14 F.4th 1234, 1238 (11th Cir. 2021). Indeed, if the district court finds that one of the compassionate release

conditions was not satisfied, it is not an abuse of discretion for the district court to skip the assessment of another condition. *Id.* And nothing on the face of § 3582(c)(1)(A) requires a court to conduct the compassionate release analysis in any particular order. *See id.*

Here, the district court was not required to address the § 3553(a) factors because it determined that Tucker did not present an extraordinary and compelling reason for a reduced sentence. However, the court did address the § 3553(a) factors and, in doing so, did not abuse its discretion because it did not give significant weight to an improper or irrelevant factor, did not commit a clear error of judgment when it considered the proper factors, and did not disregard relevant factors that were due significant weight. Finally, the district court provided an adequate basis for our appellate review.

* * * *

Accordingly, the district court did not abuse its discretion when it denied Tucker's motion for a reduced sentence. We therefore affirm.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 1561485

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

97-0447 CR – MARCUS

MAGISTRATE JUDGE BANDSTRA

UNITED STATES OF AMERICA)
)
v.)
)
)
ORVILLE TUCKER)
_____)

CASE NO._____

18 USC 2119
18 USC 1951(a)
18 USC 924(c)
18 USC 922(g)(1)
18 USC 2

INDICTMENT

The Grand Jury charges that:

At all times material to this indictment, the KFC restaurant, 16215 N.E. 125th Avenue, North Miami Beach, Florida, and the Chicken Plus Restaurant, 13300 West Dixie Highway, North Miami, Florida, were engaged in the commercial activity of selling food and other products to the public, a business that affects interstate commerce.

COUNT I.

From on or about June 23, 1996, through on or about July 9, 1996, in Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

1
(6C

did knowingly and willfully combine, conspire, confederate and agree with others known and unknown to the grand jury to obstruct, delay, and affect commerce and the movement of United States currency in commerce by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendant conspired to unlawfully take and obtain United States currency belonging to the KFC restaurant , 16215 N.E. 15th Avenue, North Miami Beach, Florida, and the Chicken Plus Restaurant, 13300 West Dixie Highway, North Miami, Florida, from the person, presence, and custody of employees at these establishments, against the will of the employees, by means of actual and threatened force and violence to their persons; in violation of Title 18, United States Code, Section 1951(a).

COUNT II

On or about June 23, 1996, at North Miami Beach, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles, commodities and United States currency in commerce by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendant did unlawfully take and obtain property consisting of United States currency belonging to the KFC restaurant, located at 16215 N.E. 15th Avenue, North Miami Beach, Florida, from the person, presence and custody of Rameka Brown and Carol McKnight, employees of the KFC Restaurant ,

against their will, by means of actual and threatened force and violence to their persons; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT III

On or about June 23, 1996, at North Miami Beach, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

did knowingly use and carry a firearm, that is, a .357 Ruger revolver, during and in relation to a crime of violence which is a felony prosecutable in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count II of this indictment; all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT IV

On or about July 9, 1996, at North Miami, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles , commodities and United States currency in commerce by robbery, as the terms "commerce" and " robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendant did unlawfully take and obtain property consisting of United States currency belonging to the Chicken Plus Restaurant, located at 13300 West Dixie Highway, North Miami, Florida, from the person, presence and custody of Ahmed Osman and Mansour Nazari, employees of the Chicken Plus Restaurant, against their will, by means of actual and threatened force and violence to their persons; in violation of Title 18, United States Code, Sections1951(a) and 2.

COUNT V

On or about July 9, 1996, at North Miami, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

did knowingly use and carry a firearm, that is, a .357 Ruger revolver, during and in relation to a crime of violence which is a felony prosecutable in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count IV of this indictment; all in violation of Title 18, United States Code, Sections 924 (c) and 2.

COUNT VI

On or about July 12, 1996, at Miami, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

with intent to cause death and serious bodily harm, did knowingly take from the person and presence of Marie Bienaime, a motor vehicle, that is, a 1990 Acura Integra, that had been transported, shipped, and received in interstate commerce; in violation of Title 18, United States Code, Sections 2119 and 2.

COUNT VII

On or about July 12, 1996, at Miami, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

did knowingly use and carry a firearm, that is, a .357 Ruger revolver, during and in relation to a crime of violence which is a felony prosecutable in a court of the United States, that is, a violation of Title

18, United States Code, Section 2119, as set forth in Count VI of this Indictment; all in violation of Title 18, United States Code, Sections 924 (c) and 2.

COUNT VIII

On or about June 23, 1996, at North Miami Beach, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

having been previously convicted on or about October 30, 1995, in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County , Florida, of a crime punishable by imprisonment for a term exceeding one year, that is, burglary, did knowingly possess a firearm in and affecting commerce, that is, a .357 Ruger revolver; in violation of Title 18, United States Code, Section 922(g)(1).

COUNT IX

On or about July 9, 1996, at North Miami, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

having been previously convicted on or about October 30, 1995, in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, of a crime punishable by imprisonment for a term exceeding one year, that is, burglary, did knowingly possess a firearm in and affecting commerce, that is, a .357 Ruger revolver; in violation of Title 18, United States Code, Section 922 (g)(1).

COUNT X

On or about July 12, 1996, at Miami, Dade County, in the Southern District of Florida, the defendant,

ORVILLE TUCKER,

having been previously convicted on or about October 30, 1995, in the Circuit Court of the Eleventh Judicia Circuit, in and for Dade County, Florida, of a crime punishable by imprisonment for a term exceeding one year, that is, burglary, did knowingly possess a firearm in and affecting commerce, that is, a .357 Ruger revolver; in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL

FOREPERSON

WILLIAM A. KEEFER
UNITED STATES ATTORNEY

JEANNE M. MULLENHOFF
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

ORVILLE TUCKER

Court Division: (Select One)

X Miami ___ Key West
___ FTL ___ WPB ___ FTP

CASE NO. 97-0447 CR-MARCUS

CERTIFICATE OF TRIAL ATTORNEY*

MAGISTRATE JUDGE BANDSTRA

Related Case Information:
SUPERSEDING Yes ___ No X
New Defendant(s) Yes ___ No X
Number of New Defendants ___
Total number of counts ___

I do hereby certify that:

FILED by ___ D.C.
MAG. SEC.
JUN 05 1997
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA.

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

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

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

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

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

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

6. Has this case been previously filed in this District Court? (Yes or No) no ___
If yes:

Judge: ___ Case No. ___
(Attach copy of dispositive order)

7. Has a complaint been filed in this matter? (Yes or No) YES
If yes:

Magistrate Case No. ___
Related Miscellaneous numbers: 9603472
Defendant(s) in federal custody as of ___
Defendant(s) in state custody as of N/A
Rule 20 from the N/A District of ___

8. This case originated in the U.S. Attorney's office prior to August 16, 1985
(Yes or No) No

Joanne M. Mullenhoff

JEANNE M. MULLENHOFF
ASSISTANT UNITED STATES ATTORNEY
COURT NO. A550044

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

97-0447 CR - MARCUS

Defendant Name: Orville Tucker **Case No.**

MAGISTRATE JUDGE BANDSTRA

Count #: I

18 U.S.C. 1951(a) - Conspiracy to obstruct interstate commerce by robbery and 18 U.S.C. Section 2.

***Max. Penalty: Twenty year imprisonment; $250,000.00 fine**

==========

Count #: II

18 U.S.C. 1951(a) - Obstruction of interstate commerce by robbery and 18 U.S.C. Section 2.

***Max. Penalty: Twenty years imprisonment, $250,000.00 fine**

==========

Count #: III

18 U.S.C. 924(c)-Use of firearm in commission of violent crime and 18 U.S.C. Section 2.

***Max. Penalty: Five years consecutive; $250,000.00 fine**

==========

Count #: IV

18 U.S.C. 1951(a) - Obstruction of interstate commerce by robbery and U.S.C. Section 2.

***Max. Penalty: Twenty year imprisonment; $250,000.00 fine**

Count #:V

18 U.S.C. 924(c) - Use of firearm in commission of violent crime and and 18 U.S.C. Section 2.

***Max. Penalty: Twenty years consecutive imprisonment; $250,000.00 fine**

==========

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

97-0447 CR – MARCUS

Defendant Name: Orville Tucker Case No. MAGISTRATE JUDGE BANDSTRA

Count #: VI

18 U.S.C. Section 2119 - Taking of a motor vehicle by force and violence or intimidation and 18 U.S.C. Section 2.

***Max. Penalty: Fifteen year imprisonment; $250,000.00 fine**

==========

Count #: VII

18 U.S.C. Section 942(c) Use of firearm in commission of violent crime and and 18 U.S.C. Section 2.

***Max. Penalty: Twenty years consecutive imprisonment, $250,000.00 fine**

==========

Count #: VIII

18 U.S.C. 922(g)(1) -Possession of firearm by a convicted felon.

***Max. Penalty: Ten years imprisonment; $250,000.00 fine**

==========

Count #: IX

18 U.S.C. 922(g)(1) -Possession of firearm by a convicted felon.

***Max. Penalty: Ten years imprisonment; $250,000.00 fine**

==========

Count #: X

18 U.S.C. 922(g)(1) -Possession of firearm by a convicted felon.

***Max. Penalty: Ten years imprisonment; $250,000.00 fine**

==========

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

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AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

United States District Court

Southern District of Florida

UNITED STATES OF AMERICA
v.
ORVILLE TUCKER

JUDGMENT IN A CRIMINAL CASE

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

Case Number: **1:97CR00447-001**

Jeanne Baker, AFPD/Jeanne Mullenhoff, AUSA

Defendant's Attorney

FILED by A.S.G. D.C.
JUL 28 1998
CARLOS JUENKF
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) **1, 2, 3, 6 and 7 of the indictment.** after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1951 (a)	Conspiracy to commit robbery.	07/09/1996	1
18 U.S.C. § 1951 (a)	Robbery.	06/23/1996	2
18 U.S.C. § 924 (c)	Using or carrying a firearm during and in relation to a crime of violence.	06/23/1996	3

See Additional Counts of Conviction - Page 2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) **4, 5, 8, 9 and 10** are dismissed on the motion of the United States.

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.

Defendant's Soc. Sec. No.: **591-76-5523**
Defendant's Date of Birth: **09/27/1976**
Defendant's USM No.: **50259-004**
Defendant's Residence Address:
1675 NE 150th Street
Miami FL 33181

Defendant's Mailing Address:
FDC Miami
33 NE 4th Street
Miami FL 33132

07/24/1998
Date of Imposition of Judgment

Signature of Judicial Officer

ALAN S. GOLD
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

07/28/1998
Date

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DEFENDANT: **ORVILLE TUCKER**

CASE NUMBER: **1:97CR00447-001**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2119	Motor vehicle theft/ carjacking.	07/12/1996	6
18 U.S.C. § 924 (c)	Using or carrying a firearm during and in relation to a crime of violence.	07/12/1996	7

DEFENDANT: **ORVILLE TUCKER**

CASE NUMBER: **1:97CR00447-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **510 month(s)**.

See Additional Imprisonment Terms - Page 4

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant be designated to a facility in South Florida.

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

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____ .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

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: **ORVILLE TUCKER**

CASE NUMBER: **1:97CR00447-001**

ADDITIONAL IMPRISONMENT TERMS

This term consists of terms of 210 months on each of counts one and two, a term of 60 months on count three, a term of 180 months on count six, and 240 months on count seven. The terms of imprisonment imposed in counts one, two and six shall run concurrently with each other. The term of imprisonment imposed in count three shall run consecutively to the terms of imprisonment imposed in counts one, two and six. The term of imprisonment in count seven shall run consecutively to the terms of imprisonment imposed in counts one, two, three and six.

It is further ordered that the defendant shall make full restitution to the victims in this case. The Court finds that the following victims have suffered compensable loss:

1) Marie Bienaime
Amount: $60.00

2) Kentucky Fried Chicken
16215 NE 15th Street
Miami FL 33160
Amount: $150.00

The restitution shall be made payable to the U.S. COURTS and addressed to: U.S. Clerk's Office, Attention: Financial Section, 301 North Miami Avenue, Room 150, Miami, Florida, 33128. Who will then forward the restitution payments to the aforementioned victims. Restitution is payable immediately. The U.S. Bureau of Prisons, the U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

DEFENDANT: **ORVILLE TUCKER**

CASE NUMBER: **1:97CR00447-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 year(s)** .

This term consists of three years as to each of counts one, two, three, six and seven, all to run concurrently.

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

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, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

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 (if indicated below).

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 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 ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
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 of the probation officer;
11) the defendant shall notify the probation officer within seventy-two 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: ORVILLE TUCKER

CASE NUMBER: 1:97CR00447-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 500.00	$	$ 210.00

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____ .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____ . An Amended Judgment in a Criminal Case will be entered after such a determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Marie Bienaime	$60.00	$60.00	
Kentucky Fried Chicken	$150.00	$150.00	
Totals:	$ 210.00	$ 210.00	

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

DEFENDANT: **ORVILLE TUCKER**

CASE NUMBER: **1:97CR00447-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____ ; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

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

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

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

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 penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: **ORVILLE TUCKER**

CASE NUMBER: **1:97CR00447-001**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: **32**

Criminal History Category: **VI**

Imprisonment Range: **210 to 240 months.**

Supervised Release Range: **2 to 3 years.**

Fine Range: $ 17,500.00 to $ 175,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 210.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

A sentence at the low end of the guideline range will provide sufficient deterrence and punishment.

OR

☒ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following specific reason(s):

Two counts for 924(c) convictions. The first is 60 months and the second is 240 months for a total of 300 months consecutive to any other sentence.

A-4

United States District Court
Southern District of Florida

United States of America - Plaintiff

V. Case NO. 97-447-CR-Gold

Orville Tucker - Defendant

Motion To Reduce Sentence
Pursuant To 18 U.S.C. 3582(c)(1)(A)(i)
with Supporting Memorandum of law

Comes Now Before the Court Defendant Orville Tucker (Pro-Se) For Consideration For Modification of term of Imprisonment pursuant to 3582(c)(1)(A)(i).....

Back Ground

In 1997, Defendant Orville Tucker was Charged with Conspiracy to Commite Hobbs Act Robbery, Hobbs Act Robbery and Carjacking. Additionally Mr Tucker was Charged and Convicted of possessing a gun in Connection with the Hobbs Act Conspiracy and Hobbs Act Robbery And Car Jacking offenses. Mr. Tucker was Sentenced to

510 months or 42 years, Consisting of 240 months for the Conspiracy, Robbery and Carjacking and 25 years For His Carrying A Gun during these Crimes, The then-Applicable Mandatory Sentence imposed Under 18 U.S.C. 924(c). Mr. Tucker began Serving that Sentence in March of 1998 At Age 19 and Now, At 44 years old, he Has Served over 23 years of that Sentence, with Good time Credits, He will BE Released From Prison in 2035 At Age 59 Serving Almost 38 years.

Standard of Review

Mr. Tucker Moves to Reduce His SENTENCE Based on the Formerly Incarcerated Re-Entry Society Transformed Safely Transitioning Every person Act of 2018 (The first Step Act) which Amended portions of Section 3582. The Relevant portion of these Amendments provides that:

The Court May not Modify a term of imprisonment Once it Has Been imposed that——

(i) In Any Case--

(A) The Court, Upon Motion of the Director of the "BOP" or upon Motion of the Defendant After the Defendant Has fully Exhausted All Administrative Rights to Appeal A Failure of the "BOP" To

Bring A Motion on the Defendants 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 Orginal term of Imprisonment), After Considering the Factors Set Forth in Section 3553(A) to the Extent that they Are Applicable, if it finds that. . . .

(i). Extraordinary And Compelling Reasons Warrant Such A Reduction;
And that Such A Reduction is Consistent with Applicable policy Statements issued By the Sentencing Commission 18 U.S.C. 3582(c)(1)(A)(i).

The First Step Act Also Amended portions of Section 924(c) which Now provides that the Mandatory Minimum terms Applicable to Subsequent Convictions (The stacking provisions) Are Only Applicable After A prior Conviction Under this Subsection Has become Final. 18 U.S.C. 924(c)(1). It is Undisputed that those Amendments were not made Retroactive.

(1). Exhaustion OF Administrative Remedies:

Under the First Step Act, A defendant must Exhaust Administrative Remendies Before Moving to Reduce their Sentence in the District Court. (18 U.S.C. 3582(c)(1)(A). On November 1 2020, Mr Tucker Submitted A Request For a Reduction in His Sentence to the warden. (Exhibit 1). He was Recently informed the warden Rejected his Request. (Exhibit 2). Mr. Tucker Has Exhausted his Administrative Remedies. (18 U.S.C. 3582(c)(1)(A); (see Also United States v. Rodriguez F. Supp. 3d, 2019 WL 6311388, at *5 (N.D. California 2019).

2). Extraordinary And Compelling Reasons And Policy Statements:

Once A Defendant Has Exhausted Administrative Remedies, A Court May Grant A Motion to Reduce if it Finds that "Extraordinary And Compelling Reasons Warrant" A Reduction And if the Reduction is Consistent with Applicable policy Statements issued By the Sentencing Commission. 18 U.S.C. 3582(c)(1)(A)(i). Congress Has not Defined what Consitutes Extraordinary And Compelling Expect to State that Rehabilitation of the Defendant Alone" will not Meet the Standard. (see Rodriguez F. Supp 3d at 2019 WL 6311388, at 6 (Quoting 28 U.S.C. 994(t)) Section 994(t) Directs that the Sentencing Commission, In promuguting General policy statements Relating to Section 3582(c)(1)(A) shall Describe what Should Be Considered Extraordinary And Compelling Reason.

The Relevant Policy Statement is Located in United States Sentencing Guidelines Section 1B1.13, which sets out Four Extraordinary And Compelling Reasons" that Warrants a Sentencing Reduction. The First Three Reasons pertain to Medical Condition of the Defendant, Age of the Defendant, And Family Circumstances. (U.S.S.G. 1B1.13, app Note (1)(A)-(C)). The Fourth is A "catch-All" provision entitled other Reasons, which provides that As determined by the Director of the "BOP," there Exists in the Defendants Case an Extraordinary and Compelling Reason other than, or in Combination with, the Reasons Described in Subdivisions (A) through (C) Id. app Note 1(D) (Subdivision D).

Mr. Tucker Argues that the Court Should Find that the First Step Act's Amendments to Section 924(c)'s Stacking Provisions Fall within Subdivision (D) And warrant A Reduction of his Sentence.

The Sentencing Commission Has Not yet "Harmonized its policy Statements with the Amendments of the First Step Act, which Now permits Courts to grant Motions For Compassionate Release. (see Rodriguez F. Supp 3d at 2019 WL 6311388 at 7 (Quoting U.S. v. Brown, 411 F. Supp. 3d 446 (S.D. Iowa 2019). This has Resulted in a Split of Authority About whether Courts Are Bound to follow the terms of Section 1B1.13 as

Currently Drafted. The Court Should Conclude the Split in Authority About whether A District Court may Apply Subdivision (D) without input From the Director of the "BOP" Raises A Substantial Issue.

Defendant Contends that In United States v. Cantu, the Court Determined that District Courts Could apply Subdivision (D) Even where the "BOP Director" Had Not Made A Finding that a Reduction was warranted Under that provision. (See F.Supp 3d. 2019 WL 2498923, at 3-5 (S.D. Tex. 2019). The Cantu Court Reasoned, in part, that Congress Can override Existing policy statements by statute And Determined that the First Step Act's Amendments Demostrated that the existing policy Statement No longer Complied with the Congressional Mandate that the policy statement Must provide Guidance on the Appropriate Use of Sentencing Modification provision Under Section 3582. Id at F.3d at, 2019 WL 2498923, At 4. (See Also Rodriguez, F.Supp, 3d at, 2019 WL 6311388, at 7.) This Court Should Follow the growing Number of District Courts that Have Concluded that, in the Absence of Applicable policy statements, Courts Can determine whether Extraordinary and Compelling Reasons other than those Delinated in (section 1B1.13), app note 1(A)-(C) warrant Compassionate Release.

The Court Should also find the Reasoning of Cases Such as Cantu And Rodriguez Persuasive And, like the Rodriguez

Court Concludes that it Could, And would Apply Subdivision (D) to Determine Whether Any Extraordinary And Compelling Reasons other than those delineated in the other Subdivision warrant A Reduction in Mr. Tucker's Sentence. (See Rodriquez, F.Supp. 3d at, 2019 WL 6311388, at 7.

3). The Amendments to the Stacking Provisions Are Basis to Grant this Motion:

Mr. Tucker Relies on Several out of Circuit Authories in which Courts have Granted Motions Filed by Defendants who like Tucker were Sentenced to Lengthy terms of imprisonment pursuant to Section 924(c)'s Stacking provisions. (See U.S. O'Bryan No. 96-10076-03-JTM, 2020 U.S. District Lexis 29747, 2020 WL 8699475 (D. Kan. Feb 21, 2020). (Also See United States v. Maumau, No. 08-cr-00758-TC-1, 2020 U.S. District Lexis 28392, 2020 WL 806121 (Feb. 18, 2020). Recently, A District Court in the Eastern District Court in the Eastern District of Virginia also Concluded the Amendments to the stacking provisions were Extraordinary and Compelling Reasons that warranted A Sentence Reduction Under the First Step Act. United States V. Redd, No 97-cr-000006-AJT, 2020 U.S. Dist. Lexis 45977, 2020 WL 1248493 at 5-6 (E.D. VA. Mar 16 2020).

Further, Mr. Tucker Argues the Court Should Reduce Each of the stacked Sentences From Twenty (Years (20) imprisonment to five years, which would Result in His Release.

(a). Reduction in the defendant's Sentence is wonranted by Extra-Ordinary and Compelling Reasons, Specifically the injustice of Facing A term of Incancenation twenty (20) years longer than Congress Now Deems Warranted, For the Crimes Committed.

Accordingly, when the Court Considers the Record presented By Mr. Tucker Regarding His Rehabilitation Efforts in Combination with the Amendments to Section 924(c) Stacking provisions, This Court Should Conclude he Has Demostnated Extraondinary and Compelling Reasons to Reduce his Sentence on one of the 924(c) Counts.

Finally, The Application Notes Also provides that the Defendant Must Not pose A Danger to the safety of Any other person or to the Community. (See United States Sentencing Guidelines 1B1.13, app note 2 (citing U.S.S.G. 1B1.13(1)(B)(2). The Court Should Conclude that the defendant (Mr. Tucker) Does not poses A Risk to the safety of Any person or to the Community based on the Reasons stated Herein Above.

Respectfully Submitted

Name:

Certificate of Service

I Hereby Swear and Declare Under the penalty of perjury That I Mailed A Copy of the Foregoing to the party Enclosed Below, By and through United States Postal Service Certified Mail#

United States District Court
Address: 400 North Miami Ave
City Miami State FLA Zip code 33128

Respectfully Submitted
Name: Orville Tucker
Date November 1, 2020

c/c.....

Proposed Release Plan

In Support of Motion For Sentence Reduction Under 18 U.S.C. 3582(c)(1)(A)

This information will Assit the United States Probation office to prepare for my Release if this Motion is Granted....

A). Housing And Employment:

Provide Full Address where you intend to Reside if you Are Released From prison: Eugennie Tucker (Sister) 557 Cleaveland Ave. Bridgeport, CT 06605

Provide the Name and Phone Number of the property Owner or Renter of the Address where you will Reside if you Are Released From Prison: Miss Eugennie Tucker (203) 522-0902

Provide the Names, Ages, And Relationship to you of Any other Resident living at the Above listed Addressed: (Son) Tyler And Tuney And Michael (Husband)

IF you Have Employment Secured, provide the Name and Address of your Employee and Describe your Job Duties: (Not at this Time)

List Any Additional Housing or Employement Resources Available to you. I'm A Song writer And Recording Artist....

United States Penitentiary Thomson
Inmate Request for Compassionate Release/RIS Consideration Form

TO: Warden Rivers / RIS Coordinator	DATE: Nov. 1 2020
INMATE NAME: Orville Tucker,	REGISTER NO: 50259-004
SIGNATURE: Orville Tucker	UNIT: F-Block 235

Instructions: In order to be considered for Compassionate Release/RIS, you must complete this form and send it to the RIS Coordinator. The information will be used to determine if your request meets the minimum guidelines for consideration, as referenced in the Program Statement 5050.50, Compassionate Release/Reduction in Sentence.

1. Check the category you are requesting Compassionate Release/RIS Consideration: (only one per request)

- ☐ Request based on Terminal Medical Condition
- ☐ Request based on Debilitated Medical Condition
- ☐ Request based on Law for Elderly inmates - non medical (70 years or older served 30 years of sentence)
- ☐ Request based on Elderly Inmates over 65 with Medical Conditions who have served more than 50% of sentence
- ☐ Request based on inmates age 65 or older who have served the greater of 10 years or 75% of the term of imprisonment to which the inmate was sentenced
- ☐ Request based on Death or Incapacitation of the Family Member Caregiver where you are the only caregiver for your minor child
- ☐ Request based on Incapacitation of a Spouse or Registered Partner where you are the only available caretaker

2. Explain the extraordinary or compelling circumstances which could not have been foreseen at the time of your sentencing you believe warrant Compassionate Release consideration. Continue on back, if necessary.

In December 2018, Congress Enacted "The First Step" Act of 2018, Pubic L NO. 115-391, 132 Stat. 5194 (The First Step Act). Under the First Step Act, the Mandatory Minimum Sentences For Convictions Under 18 U.S.C. 924(c) Were Reduced for Sentences imposed After the passage of the First Step Act, Had Mr. Tucker Been Sentenced Under these Reduced Sentence penalties, he would have Received a Sentence Much less then 4/2 years (510 months), with Respect to His (2) 924(c) Convictions.

3. Submit your proposed Release Plans and continue on back, if necessary. The information should include the following detailed information:
   1. Address and phone number of where you plan to live.
   2. Your family supports in the community.
   3. How you plan to cover your medical expenses and support yourself.
   4. Where continued health treatment and services will be received.

C.C.C

TOMCR * INMATE EDUCATION DATA * 11-16-2020
PAGE 001 * TRANSCRIPT * 15:06:07

REGISTER NO: 50259-004 NAME..: TUCKER FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: TOM-THOMSON ADMIN USP

EDUCATION INFORMATION

FACL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
TOM	ESL HAS	ENGLISH PROFICIENT	01-03-1999 1440	CURRENT
TOM	GED SAT	GED PROGRESS SATISFACTORY	11-30-2005 0542	CURRENT
TOM	GED XN	EXEMPT GED NON-PROMOTABLE	11-02-2015 1233	CURRENT

EDUCATION COURSES

SUB-FACL	DESCRIPTION	START DATE	STOP DATE	EVNT	AC	LV	HRS
TOM SMU	ACE SMU KING ARTHUR HISTORY	10-20-2020	10-23-2020	P	C	P	12
TOM SMU	ACE SMU ANGER MANAGEMENT	10-14-2020	10-19-2020	P	C	P	8
TOM SMU	ACE MANAGING CREDIT WISELY	10-07-2020	10-09-2020	P	C	P	10
TOM SMU	ACE SMU PERSONAL DEVELOPMENT	10-02-2020	10-07-2020	P	C	P	14
TOM SMU	ACE MOST INFLUENCIAL CHAR LIT	09-24-2020	10-01-2020	P	W	V	0
MCR	VT TOOLS AM/POWER AND HAND	08-06-2020	08-13-2020	P	C	E	12
MCR	SELF STUDY STRETCHING	07-16-2020	07-22-2020	P	C	P	10
MCR	EATING RIGHT TUES/SAT 7:00 PM	01-24-2018	04-22-2018	P	W	V	0
LEW SMU	PGED IN-CELL STUDY/SPECIAL MGT	07-06-2016	05-01-2017	P	W	I	260
LEW SMU	SMU ACE ROUND E	01-06-2017	02-11-2017	P	C	P	20
LEW SMU	RADIO SMU PARENTING E RPP6	01-03-2017	02-10-2017	P	C	P	5
LEW SMU	SMU RADIO WELLNESS ROUND C	10-04-2016	01-06-2017	P	C	P	9
LEW SMU	ACTIVITY PACKET ROUND C	10-04-2016	01-06-2017	P	C	P	6
LEW SMU	SMU ACE ROUND D	11-08-2016	12-14-2016	P	C	P	20
LEW SMU	RADIO SMU PARENTING C RPP6	08-09-2016	10-19-2016	P	C	P	5
LEW SMU	SMU ACE ROUND C	08-26-2016	10-15-2016	P	C	P	20
LEW SMU	SMU RADIO WELLNESS ROUND B	07-25-2016	10-04-2016	P	C	P	9
LEW SMU	ACTIVITY PACKET ROUND B	07-25-2016	10-04-2016	P	C	P	6
LEW SMU	RADIO SMU PARENTING A RPP6	04-05-2016	06-17-2016	P	C	P	5
LEW SMU	ACTIVITY PACKET RDA	04-19-2016	06-09-2016	P	C	P	6
LEW SMU	SMU RADIO WELLNESS ROUND A	04-19-2016	06-07-2016	P	C	P	9
LEW SMU	SMU ACE ROUND A	04-18-2016	05-24-2016	P	C	P	20
LEW SMU	RADIO SMU PARENTING L RPP6	02-23-2016	03-29-2016	P	C	P	5
LEW SMU	ACTIVITY PACKET ROUND L	03-14-2016	04-12-2016	P	C	P	6
LEW SMU	SMU RADIO WELLNESS ROUND L	03-14-2016	04-12-2016	P	C	P	9
LEW SMU	SMU ACE ROUND L	03-03-2016	04-12-2016	P	C	P	20
LEW SMU	SMU RADIO WELLNESS ROUND K	02-09-2016	02-10-2016	P	C	P	9
LEW SMU	ACTIVITY PACKET ROUND K	02-09-2016	02-10-2016	P	C	P	6
LEW SMU	SMU ACE ROUND K	01-25-2016	01-28-2016	P	C	P	20
LEW SMU	RADIO SMU PARENTING K RPP6	01-22-2016	01-22-2016	P	C	P	5
VIP	RIVERS OF THE U.S. PART 2	08-04-2015	08-18-2015	P	C	P	10
VIP	RPP FCC AIDS AWARENESS (C1)	11-12-2014	11-12-2014	P	C	P	1
COP	MANAGING MY LIFE	04-08-2014	07-04-2014	P	C	P	20
COP	RPP HEALTH/NUTRITION #1	04-16-2014	04-16-2014	P	C	P	1
POL	STUDENTS IN SHU 0 SCHOOL HRS	09-14-2010	02-13-2014	P	W	I	72
POL	1 USP FITNESS ASSESSMENT	10-07-2013	11-15-2013	P	C	P	3
POL	USP LEATHER CLASS	02-27-2013	05-27-2013	P	C	P	24
POL	USP WALK/RUN CLUB	03-15-2012	11-14-2012	P	C	P	1
POL	ACE AMER GOV	01-04-2011	04-08-2011	P	C	P	8

G0002 MORE PAGES TO FOLLOW . . .

TOMCR * INMATE EDUCATION DATA * 11-16-2020
PAGE 002 * TRANSCRIPT * 15:06:07

REGISTER NO: 50259-004 NAME..: TUCKER FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: TOM-THOMSON ADMIN USP

EDUCATION COURSES

SUB-FACL	DESCRIPTION	START DATE	STOP DATE	EVNT	AC	LV	HRS
POL	FINANCIAL PLANNING 6:30-8:30	01-03-2011	04-08-2011	P	C	P	7
POL	PGED 4 E M-F 12:30-2:00	05-12-2010	09-14-2010	C	W	I	0
POL	PGEDA2B PRE GED M-F 9:00	12-21-2009	05-12-2010	P	W	I	0
FLP STPD	BEGINNING WELLNESS	07-07-2009	09-15-2009	P	C	P	40
FLP STPD	BEGINNING CROCHET	07-07-2009	09-15-2009	P	C	P	40
FLP STPD	GED DELTA B	09-11-2008	08-25-2009	P	W	I	342
FLP STPD	ADVANCED CROCHET	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	ADVANCED ART	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	BEG GUITAR CLASS	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	ADVANCED WELLNESS	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	BEGINNING CROCHET	09-30-2008	12-09-2008	P	C	P	40
FLP STPD	BEG GUITAR CLASS	09-30-2008	12-09-2008	P	C	P	40
FLP STPD	INTERMEDIATE WELLNESS	09-30-2008	12-09-2008	P	C	P	40
FLP STPD	INTERMEDIATE ART	09-30-2008	12-09-2008	P	C	P	40
FLM	GED PROGRAM	06-09-2005	08-28-2008	P	W	I	1544
FLM	SCIENCE WARS	07-03-2008	08-28-2008	P	W	I	24
FLM	GED PROGRAM	07-01-2003	09-30-2004	P	W	V	410
FLM	THE AFRICANS	03-05-2003	05-06-2003	P	C	P	27
FLM	GED PROGRAM	04-03-2002	12-04-2002	P	W	V	304
FLM	WORLD PHILOSOPHY	01-10-2002	04-03-2002	P	C	P	36
FLM	GED PROGRAM	01-12-2001	02-12-2001	P	W	V	38
FLM	GED PROGRAM	04-04-2000	10-12-2000	P	W	V	266
LVN	2:00-3:00 GED CLASS-CRUM	08-02-1999	03-30-2000	P	W	I	21
FLP	PM GED CLASS 2:00 - 3:15	12-07-1998	04-01-1999	P	W	I	11

HIGH TEST SCORES

TEST	SUBTEST	SCORE	TEST DATE	TEST FACL	FORM	STATE
ABLE	LANGUAGE	6.2	10-22-1998	FLP	E	
	NUMBER OPR	3.9	10-22-1998	FLP	E	
	PROB SOLV	6.2	10-22-1998	FLP	E	
	READ COMP	8.5	04-15-2002	FLM	F	
	SPELLING	7.5	04-15-2002	FLM	F	
	VOCABULARY	10.0	04-15-2002	FLM	F	
GED PRAC	AVERAGE	390.0	04-30-2017	LEW	FAIL	PA
	LANG PROF	0.0	04-30-2017	LEW	PD	PA
	LIT/ARTS	410.0	04-30-2017	LEW	PD	PA
	MATH	230.0	04-30-2017	LEW	PD	PA
	SCIENCE	400.0	04-30-2017	LEW	PD	PA
	SOC STUDY	520.0	04-30-2017	LEW	PD	PA
	STATE HIST	0.0	04-30-2017	LEW	PD	PA
	WRITING	390.0	04-30-2017	LEW	PD	PA
TABE M	BATTERY	5.1	12-16-2015	LEW	M	
	LANGUAGE	4.0	12-16-2015	LEW	M	
	MATH APPL	6.2	12-16-2015	LEW	M	
	MATH COMP	3.4	12-16-2015	LEW	M	

G0002 MORE PAGES TO FOLLOW . . .

TOMCR * INMATE EDUCATION DATA * 11-16-2020
PAGE 003 OF 003 * TRANSCRIPT * 15:06:07

REGISTER NO: 50259-004 NAME..: TUCKER FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: TOM-THOMSON ADMIN USP

HIGH TEST SCORES

TEST	SUBTEST	SCORE	TEST DATE	TEST FACL	FORM	STATE
TABE M	READING	6.6	12-16-2015	LEW	M	
	TOTAL MATH	4.7	12-16-2015	LEW	M	

G0000 TRANSACTION SUCCESSFULLY COMPLETED

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323

Dept. of Justice / Federal Bureau of Prisons

Team Date: 09-21-2020

Plan is for inmate: TUCKER, ORVILLE 50259-004

Facility:	TOM THOMSON ADMIN USP	Proj. Rel. Date:	06-24-2035
Name:	TUCKER, ORVILLE	Proj. Rel. Mthd:	GCT REL
Register No.:	50259-004	DNA Status:	POL03036 / 10-19-2010
Age:	43		
Date of Birth:	09-27-1976		

Detainers

Detaining Agency	Remarks
ICE	DEPORTATION - JAMAICA

Pending Charges

10/13/2013
(Age 35)
Driving While
Revoked (M)
Municipal Court,
Kirkwood, MO;
Docket No.:
T013190182-8
Pending charge.

10/16/2013
(Age 35)
Fraudulently
Attempting to Obtain
Controlled Substance -
Hydrocodone (F)
Circuit Court,
Madison County,
MO;
Docket No.:
13MD-CR00425
Pending charge.
10/23/2013
(Age 35)
No Seat Belt (M) Circuit Court,
Iron County, MO;
Docket No.:
700951329
Pending charge.

10/23/2013
(Age 35)
Driving While
Revoked (M)
Circuit Court,
Iron County, MO;
Docket No.:
13IR-CR00346
Pending charge.

11/25/2013
(Age 35)
Ct. 1: Unlawful Use of
a Weapon (F)
Ct. 2: Unlawful
Possession of a
Weapon (F)
Ct. 3: Resisting Arrest
(F)
Ct. 4: Tampering 1st
Degree (F)
Circuit Court,
Madison County,
MO;
Docket No.:
13MD-CR00437
Pending charges.

11/25/2013
(Age 35)

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323

Dept. of Justice / Federal Bureau of Prisons

Team Date: 09-21-2020

Plan is for inmate: TUCKER, ORVILLE 50259-004

Assault 3rd Degree (M) Circuit Court,
Madison County,
MO;
Docket No.:
13MD-CR00445
Pending charge.

07/12/2014
(Age 36)
Property Damage 1st
Degree (F)
Circuit Court,
Franklin County, MO;
Docket No.:
14AB-CR01803
Pending charg

Current Work Assignments

Facl	Assignment	Description	Start
TOM	UNASSGN	UNASSIGNED INMATE	09-01-2020

Current Education Information

Facl	Assignment	Description	Start
TOM	ESL HAS	ENGLISH PROFICIENT	01-03-1999
TOM	GED SAT	GED PROGRESS SATISFACTORY	11-30-2005
TOM	GED XN	EXEMPT GED NON-PROMOTABLE	11-02-2015

Education Courses

SubFacl	Action	Description	Start	Stop
MCR	C	VT TOOLS AM/POWER AND HAND	08-06-2020	08-13-2020
MCR	C	SELF STUDY STRETCHING	07-16-2020	07-22-2020
MCR	W	EATING RIGHT TUES/SAT 7:00 PM	01-24-2018	04-22-2018
LEW SMU	W	PGED IN-CELL STUDY/SPECIAL MGT	07-06-2016	05-01-2017
LEW SMU	C	SMU ACE ROUND E	01-06-2017	02-11-2017
LEW SMU	C	RADIO SMU PARENTING E RPP6	01-03-2017	02-10-2017
LEW SMU	C	SMU RADIO WELLNESS ROUND C	10-04-2016	01-06-2017
LEW SMU	C	ACTIVITY PACKET ROUND C	10-04-2016	01-06-2017
LEW SMU	C	SMU ACE ROUND D	11-08-2016	12-14-2016
LEW SMU	C	RADIO SMU PARENTING C RPP6	08-09-2016	10-19-2016
LEW SMU	C	SMU ACE ROUND C	08-26-2016	10-15-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND B	07-25-2016	10-04-2016
LEW SMU	C	ACTIVITY PACKET ROUND B	07-25-2016	10-04-2016
LEW SMU	C	RADIO SMU PARENTING A RPP6	04-05-2016	06-17-2016
LEW SMU	C	ACTIVITY PACKET RDA	04-19-2016	06-09-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND A	04-19-2016	06-07-2016
LEW SMU	C	SMU ACE ROUND A	04-18-2016	05-24-2016
LEW SMU	C	RADIO SMU PARENTING L RPP6	02-23-2016	03-29-2016
LEW SMU	C	ACTIVITY PACKET ROUND L	03-14-2016	04-12-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND L	03-14-2016	04-12-2016
LEW SMU	C	SMU ACE ROUND L	03-03-2016	04-12-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND K	02-09-2016	02-10-2016
LEW SMU	C	ACTIVITY PACKET ROUND K	02-09-2016	02-10-2016
LEW SMU	C	SMU ACE ROUND K	01-25-2016	01-28-2016
LEW SMU	C	RADIO SMU PARENTING K RPP6	01-22-2016	01-22-2016
VIP	C	RIVERS OF THE U.S. PART 2	08-04-2015	08-18-2015
VIP	C	RPP FCC AIDS AWARENESS (C1)	11-12-2014	11-12-2014
COP	C	MANAGING MY LIFE	04-08-2014	07-04-2014
COP	C	RPP HEALTH/NUTRITION #1	04-16-2014	04-16-2014
POL	W	STUDENTS IN SHU 0 SCHOOL HRS	09-14-2010	02-13-2014
POL	C	1 USP FITNESS ASSESSMENT	10-07-2013	11-15-2013
POL	C	USP LEATHER CLASS	02-27-2013	05-27-2013

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323

Dept. of Justice / Federal Bureau of Prisons

Team Date: 09-21-2020

Plan is for inmate: TUCKER, ORVILLE 50259-004

SubFacl	Action	Description	Start	Stop
POL	C	USP WALK/RUN CLUB	03-15-2012	11-14-2012
POL	C	ACE AMER GOV	01-04-2011	04-08-2011
POL	C	FINANCIAL PLANNING 6:30-8:30	01-03-2011	04-08-2011
POL	W	PGED 4 E M-F 12:30-2:00	05-12-2010	09-14-2010
POL	W	PGEDA2B PRE GED M-F 9:00	12-21-2009	05-12-2010
FLP STPD	C	BEGINNING WELLNESS	07-07-2009	09-15-2009
FLP STPD	C	BEGINNING CROCHET	07-07-2009	09-15-2009
FLP STPD	W	GED DELTA B	09-11-2008	08-25-2009
FLP STPD	C	ADVANCED CROCHET	01-16-2009	04-01-2009
FLP STPD	C	ADVANCED ART	01-16-2009	04-01-2009
FLP STPD	C	BEG GUITAR CLASS	01-16-2009	04-01-2009
FLP STPD	C	ADVANCED WELLNESS	01-16-2009	04-01-2009
FLP STPD	C	BEGINNING CROCHET	09-30-2008	12-09-2008
FLP STPD	C	BEG GUITAR CLASS	09-30-2008	12-09-2008
FLP STPD	C	INTERMEDIATE WELLNESS	09-30-2008	12-09-2008
FLP STPD	C	INTERMEDIATE ART	09-30-2008	12-09-2008
FLM	W	GED PROGRAM	06-09-2005	08-28-2008
FLM	W	SCIENCE WARS	07-03-2008	08-28-2008
FLM	W	GED PROGRAM	07-01-2003	09-30-2004
FLM	C	THE AFRICANS	03-05-2003	05-06-2003
FLM	W	GED PROGRAM	04-03-2002	12-04-2002
FLM	C	WORLD PHILOSOPHY	01-10-2002	04-03-2002
FLM	W	GED PROGRAM	01-12-2001	02-12-2001
FLM	W	GED PROGRAM	04-04-2000	10-12-2000
LVN	W	2:00-3:00 GED CLASS-CRUM	08-02-1999	03-30-2000
FLP	W	PM GED CLASS 2:00 - 3:15	12-07-1998	04-01-1999

Discipline History (Last 6 months)

Hearing Date	Prohibited Acts

*** NO INCIDENT REPORTS FOUND IN LAST 6 MONTHS ***

Current Care Assignments

Assignment	Description	Start
CARE1	HEALTHY OR SIMPLE CHRONIC CARE	07-08-2020
CARE1-MH	CARE1-MENTAL HEALTH	06-22-2010

Current Medical Duty Status Assignments

Assignment	Description	Start
C19-T NEG	COVID-19 TEST-RESULTS NEGATIVE	09-18-2020
LOWER BUNK	LOWER BUNK REQUIRED	07-08-2020
REG DUTY	NO MEDICAL RESTR--REGULAR DUTY	07-08-2020
YES F/S	CLEARED FOR FOOD SERVICE	07-08-2020

Current Drug Assignments

Assignment	Description	Start
ED NONE	DRUG EDUCATION NONE	03-18-2014
NR COMP	NRES DRUG TMT/COMPLETE	04-23-2009

FRP Details

Most Recent Payment Plan

FRP Assignment: **COMPLT** **FINANC RESP-COMPLETED** **Start: 04-02-2019**

Inmate Decision: **AGREED** **$35.00** Frequency: **SINGLE**

Payments past 6 months: **$0.00** Obligation Balance: **$0.00**

Financial Obligations

No.	Type	Amount	Balance	Payable	Status
1	ASSMT	$500.00	$500.00	IMMEDIATE	EXPIRED

*** NO ADJUSTMENTS MADE IN LAST 6 MONTHS ***

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323

Dept. of Justice / Federal Bureau of Prisons

Team Date: 09-21-2020

Plan is for inmate: TUCKER, ORVILLE 50259-004

Most Recent Payment Plan

No.	Type	Amount	Balance	Payable	Status
2	REST NV	$210.00	$0.00	IMMEDIATE	COMPLETEDZ

** NO ADJUSTMENTS MADE IN LAST 6 MONTHS **

Payment Details

Trust Fund Deposits - Past 6 months: $370.00 Payments commensurate ? N/A

New Payment Plan: ** No data **

Progress since last review

Started SMU Program 9-1-2020.
Initial Program Review at USP Thomson.
Inmate was reviewed utilizing the PREA Intake Objective Screening Instrument (P5324.12, Attachment A) during their initial Program Review at USP Thomson, and no additional or relevant information regarding PREA concerns were identified since the intake screening.

Next Program Review Goals

Maintain clear conduct and complete at least 2 ACE courses in SMU Level 1 to progress to SMU Level 2 on 3-1-2021.

Long Term Goals

Maintain clear conduct, participate in programming, and complete SMU Program in June 2021.

RRC/HC Placement

No.
Management decision - Will review 17-19 months from PRD..
Consideration has been given for Five Factor Review (Second Chance Act):
- Facility Resources : Resources available in area
- Offense : Nature of offense raises concerns
- Prisoner : No GED
- Court Statement : No statement
- Sentencing Commission : No statement

Comments

** No notes entered **

TOMA3 * INMATE EDUCATION DATA * 09-04-2020
PAGE 001 * TRANSCRIPT * 12:55:55

REGISTER NO: 50259-004 NAME..: TUCKER FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: TOM-THOMSON ADMIN USP

---------- EDUCATION INFORMATION ----------

FACL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
TOM	ESL HAS	ENGLISH PROFICIENT	01-03-1999 1440	CURRENT
[redacted]			11-30-2005 0542	CURRENT
			11-02-2015 1233	CURRENT

---------- EDUCATION COURSES ----------

SUB-FACL	DESCRIPTION	START DATE	STOP DATE	EVNT	AC	LV	HRS
MCR	VT TOOLS AM/POWER AND HAND	08-06-2020	08-13-2020	P	C	E	12
MCR	SELF STUDY STRETCHING	07-16-2020	07-22-2020	P	C	P	10
MCR	EATING RIGHT TUES/SAT 7:00 PM	01-24-2018	04-22-2018	P	W	V	0
LEW SMU	PGED IN-CELL STUDY/SPECIAL MGT	07-06-2016	05-01-2017	P	W	I	260
LEW SMU	SMU ACE ROUND E	01-06-2017	02-11-2017	P	C	P	20
LEW SMU	RADIO SMU PARENTING E RPP6	01-03-2017	02-10-2017	P	C	P	5
LEW SMU	SMU RADIO WELLNESS ROUND C	10-04-2016	01-06-2017	P	C	P	9
LEW SMU	ACTIVITY PACKET ROUND C	10-04-2016	01-06-2017	P	C	P	6
LEW SMU	SMU ACE ROUND D	11-08-2016	12-14-2016	P	C	P	20
LEW SMU	RADIO SMU PARENTING C RPP6	08-09-2016	10-19-2016	P	C	P	5
LEW SMU	SMU ACE ROUND C	08-26-2016	10-15-2016	P	C	P	20
LEW SMU	SMU RADIO WELLNESS ROUND B	07-25-2016	10-04-2016	P	C	P	9
LEW SMU	ACTIVITY PACKET ROUND B	07-25-2016	10-04-2016	P	C	P	6
LEW SMU	RADIO SMU PARENTING A RPP6	04-05-2016	06-17-2016	P	C	P	5
LEW SMU	ACTIVITY PACKET RDA	04-19-2016	06-09-2016	P	C	P	6
LEW SMU	SMU RADIO WELLNESS ROUND A	04-19-2016	06-07-2016	P	C	P	9
LEW SMU	SMU ACE ROUND A	04-18-2016	05-24-2016	P	C	P	20
LEW SMU	RADIO SMU PARENTING L RPP6	02-23-2016	03-29-2016	P	C	P	5
LEW SMU	ACTIVITY PACKET ROUND L	03-14-2016	04-12-2016	P	C	P	6
LEW SMU	SMU RADIO WELLNESS ROUND L	03-14-2016	04-12-2016	P	C	P	9
LEW SMU	SMU ACE ROUND L	03-03-2016	04-12-2016	P	C	P	20
LEW SMU	SMU RADIO WELLNESS ROUND K	02-09-2016	02-10-2016	P	C	P	9
LEW SMU	ACTIVITY PACKET ROUND K	02-09-2016	02-10-2016	P	C	P	6
LEW SMU	SMU ACE ROUND K	01-25-2016	01-28-2016	P	C	P	20
LEW SMU	RADIO SMU PARENTING K RPP6	01-22-2016	01-22-2016	P	C	P	5
VIP	RIVERS OF THE U.S. PART 2	08-04-2015	08-18-2015	P	C	P	10
VIP	RPP FCC AIDS AWARENESS (C1)	11-12-2014	11-12-2014	P	C	P	1
COP	MANAGING MY LIFE	04-08-2014	07-04-2014	P	C	P	20
COP	RPP HEALTH/NUTRITION #1	04-16-2014	04-16-2014	P	C	P	1
POL	STUDENTS IN SHU 0 SCHOOL HRS	09-14-2010	02-13-2014	P	W	I	72
POL	1 USP FITNESS ASSESSMENT	10-07-2013	11-15-2013	P	C	P	3
POL	USP LEATHER CLASS	02-27-2013	05-27-2013	P	C	P	24
POL	USP WALK/RUN CLUB	03-15-2012	11-14-2012	P	C	P	1
POL	ACE AMER GOV	01-04-2011	04-08-2011	P	C	P	8
POL	FINANCIAL PLANNING 6:30-8:30	01-03-2011	04-08-2011	P	C	P	7
POL	PGED 4 E M-F 12:30-2:00	05-12-2010	09-14-2010	C	W	I	0
POL	PGEDA2B PRE GED M-F 9:00	12-21-2009	05-12-2010	P	W	I	0
FLP STPD	BEGINNING WELLNESS	07-07-2009	09-15-2009	P	C	P	40
FLP STPD	BEGINNING CROCHET	07-07-2009	09-15-2009	P	C	P	40

G0002 MORE PAGES TO FOLLOW . . .

TOMA3 * INMATE EDUCATION DATA * 09-04-2020
PAGE 002 OF 002 * TRANSCRIPT * 12:55:55

REGISTER NO: 50259-004 NAME..: TUCKER FUNC: PRT
FORMAT.....: TRANSCRIPT RSP OF: TOM-THOMSON ADMIN USP

EDUCATION COURSES

SUB-FACL	DESCRIPTION	START DATE	STOP DATE	EVNT	AC	LV	HRS
FLP STPD	GED DELTA B	09-11-2008	08-25-2009	P	W	I	342
FLP STPD	ADVANCED CROCHET	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	ADVANCED ART	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	BEG GUITAR CLASS	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	ADVANCED WELLNESS	01-16-2009	04-01-2009	P	C	P	40
FLP STPD	BEGINNING CROCHET	09-30-2008	12-09-2008	P	C	P	40
FLP STPD	BEG GUITAR CLASS	09-30-2008	12-09-2008	P	C	P	40
FLP STPD	INTERMEDIATE WELLNESS	09-30-2008	12-09-2008	P	C	P	40
FLP STPD	INTERMEDIATE ART	09-30-2008	12-09-2008	P	C	P	40
FLM	GED PROGRAM	06-09-2005	08-28-2008	P	W	I	1544
FLM	SCIENCE WARS	07-03-2008	08-28-2008	P	W	I	24
FLM	GED PROGRAM	07-01-2003	09-30-2004	P	W	V	410
FLM	THE AFRICANS	03-05-2003	05-06-2003	P	C	P	27
FLM	GED PROGRAM	04-03-2002	12-04-2002	P	W	V	304
FLM	WORLD PHILOSOPHY	01-10-2002	04-03-2002	P	C	P	36
FLM	GED PROGRAM	01-12-2001	02-12-2001	P	W	V	38
FLM	GED PROGRAM	04-04-2000	10-12-2000	P	W	V	266
LVN	2:00-3:00 GED CLASS-CRUM	08-02-1999	03-30-2000	P	W	I	21
FLP	PM GED CLASS 2:00 - 3:15	12-07-1998	04-01-1999	P	W	I	11

HIGH TEST SCORES

TEST	SUBTEST	SCORE	TEST DATE	TEST FACL	FORM	STATE
ABLE	LANGUAGE	6.2	10-22-1998	FLP	E	
	NUMBER OPR	3.9	10-22-1998	FLP	E	
	PROB SOLV	6.2	10-22-1998	FLP	E	
	READ COMP	8.5	04-15-2002	FLM	F	
	SPELLING	7.5	04-15-2002	FLM	F	
	VOCABULARY	10.0	04-15-2002	FLM	F	
GED PRAC	AVERAGE	390.0	04-30-2017	LEW	FAIL	PA
	LANG PROF	0.0	04-30-2017	LEW	PD	PA
	LIT/ARTS	410.0	04-30-2017	LEW	PD	PA
	MATH	230.0	04-30-2017	LEW	PD	PA
	SCIENCE	400.0	04-30-2017	LEW	PD	PA
	SOC STUDY	520.0	04-30-2017	LEW	PD	PA
	STATE HIST	0.0	04-30-2017	LEW	PD	PA
	WRITING	390.0	04-30-2017	LEW	PD	PA
TABE M	BATTERY	5.1	12-16-2015	LEW	M	
	LANGUAGE	4.0	12-16-2015	LEW	M	
	MATH APPL	6.2	12-16-2015	LEW	M	
	MATH COMP	3.4	12-16-2015	LEW	M	
	READING	6.6	12-16-2015	LEW	M	
	TOTAL MATH	4.7	12-16-2015	LEW	M	

G0000 TRANSACTION SUCCESSFULLY COMPLETED

U.S. Department of Justice
Federal Bureau of Prisons

UNITED STATES PENITENTIARY
THOMSON

EDUCATION DEPARTMENT

November 20, 2020

INMATE REQUEST TO STAFF

From Education Staff Member: K. Smith

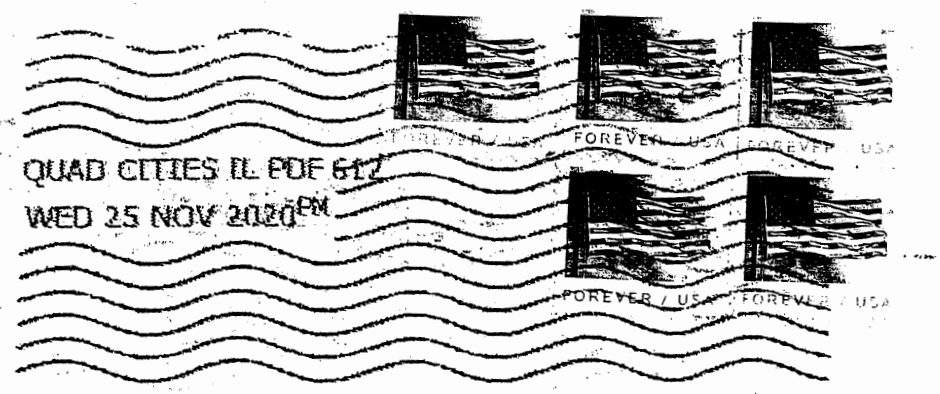
To: Inmate Tucker #50259-004

The legal copies you requested were received on November 16th. Twenty pages of materials with two copies of each totals to $6.00.

If you have additional questions concerning your education, submit a new cop-out addressed to Education Department.

[redacted]

Mr. Orville Tucker #50259-004
United States Penitentary
P.O. Box 1002
Thomson, IL 61285



United States District Court
Southern District of Florida
c/o Office of the Clerk / Room 8N09
400 North Miami Avenue
Miami, FLA 33128

AUSP Thomson
Received in CSC
FEDERAL BUREAU OF PRISONS
POST OFFICE BOX 1002
THOMSON, IL 61285
The enclosed letter was processed through special
mailing procedures. The letter has neither been
inspected if the writer raises a question or
this facility has jurisdiction, you may wish
for further information or
correspondence for
the enclosed

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 97-CR-00447-UU

UNITED STATES OF AMERICA

V.

ORVILLE TUCKER,

Defendant.
_____/

GOVERNMENT'S RESPONSE IN OPPOSITION TO TUCKER'S MOTION FOR COMPASSIONATE RELEASE UNDER 18 U.S.C. § 3582(c).

Defendant Tucker has filed a motion asking this Court to reduce his sentence and arguing that (1) "extraordinary and compelling reasons" warrant his release under the compassionate release provision of 18 U.S.C. § 3582(c), and (2) his sentences were stacked under 18 U.S.C § 924(c), which would not be possible for a defendant sentenced today following the First Step Act. (CRDE 140:8).[1] The government respectfully opposes Tucker's motion and recommends this Court deny the motion without prejudice for Tucker's failure to exhaust administrative remedies. Should the Court reach the merits, it should deny the motion with prejudice because Tucker has not met his "extraordinary and compelling" burden for reduction of sentence under § 3582(c)(1)(A) and the § 924(c) provision in § 403 of the First Step Act of 2018 does not apply retroactively.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 14, 1998, a jury in this district convicted Tucker of conspiracy to commit robbery and substantive robbery of a Kentucky Fried Chicken restaurant, in violation of 18 U.S.C.

[1] The government will refer to documents in the underlying criminal case as "CRDE," followed by the appropriate docket entry number and the corresponding page number assigned by the electronic docketing system.

§ 1951(a) (Counts 1 and 2 respectively); using and carrying a firearm during the commission of the robbery, in violation of 18 U.S.C. § 924(c) (Count 3); carjacking, in violation of 18 U.S.C. § 2119 (Count 6); and using and carrying a firearm during the commission of the carjacking, in violation of 18 U.S.C. § 924(c) (Counts 7). (CRDE 1, CRDE 61, CRDE 93).

In anticipation of sentencing, the United States Probation Office prepared a Pre-Sentence Investigation Report ("PSI") that grouped Tucker's convictions, assigning Count 1 conspiracy and Count 2 robbery to Group One, and Count 6 carjacking to Group Two. (PSI ¶¶ 16-33). Tucker received a subtotal adjusted offense level of 22 for Group One (PSI ¶ 21), an adjusted offense level of 24 for Group Two (PSI ¶ 27), and a multi-count adjusted offense level of 26 (PSI ¶ 30), for a total offense level of 32 due to his career offender enhancement (PSI ¶ 33). The PSI noted a maximum 20-year term imprisonment for Counts 1 and 2 each, a required five-year consecutive term imprisonment as to Count 3 (the first Section 924(c) conviction), a maximum 15-year term imprisonment for Count 6, and a 20-year required sentence for Count 7 (the second Section 924(c) conviction) to run consecutively to any other term of imprisonment imposed. (PSI ¶ 86). Further, the PSI noted eleven prior criminal offenses, ranging from burglary and grand theft to battery on a law enforcement officer[2] (PSI ¶¶ 39-43); and established an advisory guideline range of 210 to 262 months of imprisonment, based on the total offense level of 32 and a criminal history category

[2] During his sentencing, Tucker claimed he had been convicted of resisting arrest without violence in state court case No.95-10458, rather than the resisting arrest with violence and battery on a law enforcement officer noted on his PSI. The sentencing court rejected that assertion and found the PSI was accurate on noting the battery on a law enforcement officer offense. (Transcript of July 24, 1998 Sentencing Hearing at 185-187) ("battery on a law enforcement officer […] is a crime of violence under the Sentencing Guidelines."). Further, the sentencing court denied Tucker's motion for a downward departure, finding that his history of recidivism, escalating crimes of violence, lenient sentencing for past crimes, and lack of remorse all militated against a downward departure. (*Id*. at 218).

VI. (PSI ¶87). Tucker objected to the PSI, specifically to paragraphs 3-5, 7, 11, 14, 19, 21, 30, and 32, and asked for a downward adjustment to a total offense level of 29. (CRDE 78).

On July 28, 1998, the court sentenced Tucker to 210 months imprisonment on each of Counts 1 and 2 to run concurrently with 180 months on Count 6, a mandatory 60-month consecutive sentence on Count 3, and a mandatory 240-month consecutive sentence on Count 7; for a total term of imprisonment of 510 months, followed by a three-year term of supervised release. (CRDE 93). Tucker appealed; however, the Eleventh Circuit affirmed the convictions and sentences. (CRDE 95, CRDE 110).

In May 28, 2001, Tucker filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255, raising numerous challenges (CRDE 115), but, the § 2255 motion was denied (CRDE 116). Over a decade later, in 2016, Tucker sought leave to file a successive § 2255 motion based on *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015),[3] challenging his § 924(c) convictions and his sentence under the mandatory career offender guideline.[4] (CRDE 128). The Eleventh Circuit denied the successive § 2255 motion.[5] (CRDE 129). On March 9, 2020, Tucker filed his third § 2255 motion (CRDE 134), without seeking leave to file from the Eleventh Circuit, and in turn, the motion was dismissed (CRDE 136).

On December 3, 2020, Tucker filed this instant compassionate release motion, mainly arguing that the First Step Act's amendments to § 924(c) fall within the fourth category of the United States

[3] Holding the residual clause of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague and that imposing an increased sentence under that provision violates due process; *See also Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (holding that *Johnson* announced a new substantive rule that applies retroactively to ACCA cases on collateral review).

[4] Civil case number 16-CV-21050-UU.

[5] Case No. 16- 12335 *In re Orville Tucker v. United States of America*

Sentencing Guidelines Manual (U.S.S.G.) § 1B1.13, which states, in part:

> The Application Note for section 1B1.13 describes four categories of circumstances that may present "extraordinary and compelling reasons":
>
> […]
>
> D) Other Reasons. As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. § 1B1.13, cmt. n.1

Tucker argues the aforementioned "'catch-all' provision warrants a sentence reduction" in his case. (CRDE 140, CRDE 142). In support of his motion, Tucker proposes to reside at his sister's home. *Id*.

Tucker is 44 years old, and a search of the Bureau of Prisons (BOP) database (conducted on December 8, 2020) revealed his projected release date is June 24, 2035. *See* BOP, Find an Inmate, *available at* https://www.bop.gov/inmateloc/.

II. ARGUMENT

On the sole basis of failing to exhaust his administrative remedies, this Court should deny Tucker's motion without prejudice. If the Court should reach the merits of his motion, then denying the motion with prejudice would be justified because Tucker has not identified "extraordinary and compelling reasons" supporting a sentence reduction and the relevant § 3553(a) factors strongly weigh against his release. In addition, this Court lacks statutory authority to grant sentence reduction under § 924(c) because that statute does not apply retroactively.

A. This Court Should Deny Tucker's Motion Without Prejudice Because He Has Not Exhausted Administrative Remedies.

Tucker has failed to exhaust his administrative remedies, and governing precedent does not excuse this requirement. A court "may not modify a term of imprisonment once it has been

imposed." 18 U.S.C. § 3582(c); *see Teague v. Lane*, 489 U.S. 288, 309 (1989) (holding finality is an important attribute of criminal judgments, and one "essential to the operation of our criminal justice system."); *Dillon v. United States*, 560 U.S. 817, 824–25 (2010) ("[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment and may not be modified by a district court except in limited circumstances").

This mandate is only excepted under three circumstances: (i) upon a motion for reduction in sentence under § 3582(c)(1)(A), such as that presented by Tucker; (ii) "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," § 3582(c)(1)(B); and (iii) where the defendant was sentenced "based on" a retroactively lowered sentencing range, § 3582(c)(2). Only the first exception is applicable here.

Generally, § 3582(c)(1)(A) requires a request for sentence reduction be presented first to BOP for its consideration; and only after 30 days have passed, or the defendant has exhausted all administrative rights to appeal, may the defendant move for a sentence reduction in court. The exhaustion requirement of § 3582(c)(1)(A) is a mandatory claim-processing rule and must be enforced by the Court, if properly raised by a party. *See Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (holding that Fed. R. Crim. P. 33, which permits a defendant to move for a new trial within 14 days of the verdict, is a nonjurisdictional but mandatory claim-processing rule); *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (stating that if the 30-day period has not lapsed, then the statute "presents a glaring roadblock foreclosing compassionate release at this point").

In other words, this statutory exhaustion requirement is explicitly mandatory – may not be excused on grounds such as futility[6] – and it continues to serve an important function during the present COVID-19 pandemic. *See, e.g.*, *Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016) (rejecting a judicially created "special circumstances" exception to a statutory exhaustion requirement); *United States v. Zamor*, 460 F. Supp. 3d 1314, 1316 (S.D. Fla. 2020) (denying defendant's request for compassionate release because defendant did not wait 30 days after submitting a request with the warden and did not exhaust administrative remedies); *United States v. Barberree*, 8:09-CR-266-T-33MAP, 2020 WL 2097886 (M.D. Fla. May 1, 2020) (denying defendant's motion for compassionate release because defendant failed to exhaust his administrative remedies).

In this instant case, Tucker contends he submitted an administrative application to his warden; however, the application attached to his motion is an incomplete Inmate Request for Compassionate Release application and does not confirm submission to his warden. (CRDE 140:11). Specifically, the purported application attached is a one-pager, dated November 1, 2020, with no requested relief on question 1 and no answer to question 3. *Id*. Moreover, Tucker fails to provide proof that the request was actually sent to the Warden and thereafter denied. In preparing the Government's response, the undersigned contacted BOP seeking copies of Tucker's sentence reduction request, and BOP attorneys confirmed there is no record of Tucker requesting

[6] A few district courts have excused the § 3582 exhaustion requirement as futile during the present pandemic, but there is no "futility" exception, and in those specific circumstances, the defendant had a matter of days left to serve on the sentence. *See United States v. Colvin*, 451 F. Supp. 3d 237, 240–42 (D. Conn. 2020) (finding exhaustion futile because inmate had 11 days left on her sentence); *see also United States v. Perez*, 451 F. Supp. 3d 288, 291–93 (S.D.N.Y. 2020) (finding exhaustion futile because inmate had less than 21 days left on his sentence and demonstrated an "undisputed fragile health, combined with the high risk of contracting COVID-19"). Moreover, *Perez* incorrectly relied on precedent addressing a judicially created—as opposed to statutorily created—exhaustion requirement. *See id.* at *2 These considerations are not present here.

compassionate relief from his facility, USP Thomson. Suffice to say, Tucker has jumped the gun here and filed this motion before he has "fully exhaust[ed] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on [his] behalf." 18 U.S.C. § 3582(c)(1)(A).

Additionally, Tucker is silent on whether the exhaustion requirement would be futile, rendering it unnecessary and subject to waiver. First, while Congress indisputably acted in the First Step Act to expand the availability of compassionate release, it expressly imposed on inmates the requirement of initial resort to administrative remedies. Through that process, BOP completes a diligent and thorough review, with considerable expertise concerning both the inmate and the conditions of confinement, both of which are of value to the parties and Court. *See* 28 C.F.R. § 571.62(a); BOP Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), *available at* https://www.bop.gov/policy/progstat/5050_050_EN.pdf. Secondly, with a projected release date of June 24, 2035,[7] Tucker has considerable time left to serve on his sentence – unlike the rare district court cases decided on futility grounds because the defendants had less than 30 days left on their sentence. Given these facts, Tucker cannot demonstrate the futility of pursuing administrative remedies to excuse his failure to exhaust administrative remedies.

Accordingly, Tucker's motion should be denied without prejudice to refiling once he has exhausted administrative remedies.

[7] *See* BOP, Find an Inmate, *available at* https://www.bop.gov/inmateloc/.

B. Should The Court Reach the Merits, It Should Still Deny the Motion Because Tucker Has Failed to Present Any "Extraordinary and Compelling Reasons" Warranting a Sentence Reduction Under § 3582(C).

Tucker Fails to meet extraordinary and compelling Reasons

Tucker argues he should be released because he was sentenced for multiple "stacked" § 924(c) offenses; and because such a sentence would no longer be possible following the First Step Act, he qualifies for compassionate release. (CRDE 140:8). Particularly, Tucker argues the First Step Act's amendments to § 924(c) fall within Subdivision D of U.S.S.G. § 1B1.13,[8] and the court has discretion to grant extraordinary and compelling reasons under that provision.

Tucker's argument is meritless.[9] *See* U.S.S.G. § 1B1.13, cmt. n.1; *see also United States v. Green*, 764 F.3d 1352, 1356 (11th Cir. 2014) (holding the Defendant bears the burden of showing he is eligible for a sentence reduction). This legal issue, regarding whether a Court has authority on its own to identify "extraordinary and compelling circumstances" apart from those described in the guideline policy statement, has recently divided courts in other compassionate release contexts. The government respectfully asserts that a court has no such authority. *See United States v.*

[8] Subdivision D states:

> The Application Note for section 1B1.13 describes four categories of circumstances that may present "extraordinary and compelling reasons":
>
> […]
>
> Other Reasons. As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. § 1B1.13, cmt. n.1

[9] Notwithstanding, Tucker does not assert or provide documentation demonstrating that he suffers from a terminal illness or that his medical conditions substantially diminish his ability to provide self-care. U.S.S.G. § 1B1.13, cmt. n.1(A). The government obtained Tucker's medical records (filed under seal as Exhibit 1 in this response) and provided for the Court's convenience.

Willingham, 15-60079-CR-Cohn, 2019 WL 6733028 (S.D. Ga. Dec. 10, 2019); *United States v. Foots*, 17-CR-20184-Altonaga, CRDE 237.

First, Congress explicitly did not apply § 403(a) retroactively to sentences imposed prior to December 21, 2018. *See United States v. Smith*, 967 F.3d 1196, 1211–13 (11th Cir. 2020) (holding defendant's sentence was imposed when district court entered sentence, and thus First Step Act did not apply retroactively). In Tucker's case, he was sentenced on July 28, 1998, over 20 years prior to § 403(a)'s passage. (CRDE 95). Significantly, Tucker concedes "it is undisputed that [the § 924(c)] amendments were not made retroactive." (CRDE 140:3).

Next and importantly, an intervening change in statutory penalties, such as that of § 403(a), is not an "extraordinary and compelling reason" for sentence reduction. *See United States v. Berry*, 701 F.3d 374, 377 (11th Cir. 2012) (rejecting claim that a statutory change served as a basis for an 18 U.S.C. § 3582(c) sentence reduction); *United States v. Saldana*, 807 F. App'x 816, 819–20 (10th Cir. 2020) (holding that a district court lacks jurisdiction to grant a motion for compassionate release on the basis of a post-sentencing development in case law).

While the First Step Act allows prisoners to now file motions for compassionate release on their own behalf, this amended procedural mechanism does not change the substantive standard and meaning of "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i). *See United States v. Ebbers*, 432 F. Supp. 3d 421, 427 (S.D.N.Y. Jan. 8, 2020) ("The First Step Act did not revise the substantive criteria for compassionate release …. Congress in fact only expanded access to the courts; it did not change the standard."). Hence, the authority to describe "extraordinary and compelling reasons", including the criteria to be applied and a list of specific examples, continues to rest exclusively with the Sentencing Commission. 28 U.S.C. § 994(t); *see also* § 994(a)(2) (directing Commission to determine the "appropriate use" of § 3582(c)); *United States v. Mollica*,

No. 2:14-cr-329, 2020 WL 1914956, at *4 (N.D. Ala. Apr. 20, 2020) ("The current language of [section] 3582(c)(1)(A), even after amendment […], states that a sentence reduction must be consistent with applicable policy statements issued by the Sentencing Commission. [U]ntil Congress changes the requirement to adhere to the policy statement or the Sentencing Commission changes the policy statement itself, this court agrees with our sister courts and finds that Subsection D requires a finding of extraordinary circumstances by the BOP and continues to bind the court.").

Indeed, courts in this circuit have concluded "applying the policy statement, including subdivision D, to motions filed by defendants — just as the Court applies section 1B1.13 to motions filed by the BOP — is sound absent an authoritative indication to the contrary." *See Foots*, 17-CR-20184-Altonaga at 9. Notably, the court in *Willingham* found the cases that have concluded otherwise

> rest upon a faulty premise that the First Step Act somehow rendered the Sentencing Commission's policy statement an inappropriate expression of policy. This interpretation . . . contravenes express Congressional intent that the Sentencing Commission, not the judiciary, determine what constitutes an appropriate use of the "compassionate release" provision. *See* 28 U.S.C. § 944(t). Indeed, [section] 3582(c)(1)(A) as amended by the First Step Act *still* requires courts to abide by policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1)(A). Accordingly, this Court will follow the policy statement in U.S.S.G. [section] 1B1.13 and deny Willingham's motion because she does not meet the specific examples of extraordinary and compelling reasons and the Director of the BOP has not determined that circumstances outside these examples exist to afford her relief.

See 2019 WL 6733028, at *2.

In his motion, Tucker cites to a number of cases in support of his argument, including *United States v. Cantu*, 423 F. Supp. 3d 345 (S.D. Tex. 2019) (holding the provision requiring that sentence reductions for "extraordinary and compelling reasons" be consistent with the Sentencing Commission's policy statements "no longer fits with the statute."); *United States v. Rodriguez*, 424

F. Supp. 3d 674 (N.D. Cal. 2019) (holding BOP's mishandling of inmate's medical care did not constitute extraordinary and compelling reason for granting compassionate release.),[10] *United States v. Redd*, 444 F. Supp. 3d 717 (E.D. Va. 2020) (finding the defendant was "statistically unlikely to recidivate", "his limited prior criminal history did not involve violence", "his conduct during his more than 20 years in prison [was] overwhelmingly positive and reflective of substantial rehabilitation", and he "exceed[ed] his supervisor's expectations across most, if not all, areas of work); and *United States v. O'Bryan*, 96-10076-03-JTM, 2020 WL 869475 (D. Kan. Feb. 21, 2020) (finding the defendant showed rehabilitation progress and favorable behavior).

The government respectfully submits Tucker's cited cases incorrectly interpreted the First Step Act's impact on § 3582(c)(1)(A). *See Willingham*, 2019 WL 6733028, at *2. Additionally, those cases hinged on the defendant's disciplinary records and the § 3553(a) factors, or their remaining sentence length of less than a year; and as such, they fail to support Tucker's argument, given his extensive disciplinary record and his potential danger to the community.

Accordingly, Tucker assertions do not constitute an extraordinary and compelling reason to warrant compassionate release.

The § 3553(a) factors strongly weigh against Tucker's release

Assuming Tucker met the "extraordinary and compelling" threshold, the government opposes sentence reduction given the potential danger to the community under 18 U.S.C. § 3142(g), the seriousness of his criminal history, and the factors set forth in 18 U.S.C. § 3553(a). Those § 3553(a) factors include (1) Tucker's sentence relative to the nature and seriousness of his

[10] Contrary to Tucker's assertions, the *Rodriguez* court did not grant compassionate release under Subdivision D, and instead, accepted the government's arrangements for Rodriguez to transfer to a Residential Reentry Center. 424 F. Supp. 3d at 675-676

offense; (2) his personal history and characteristics; (3) the need for a sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) the need to afford adequate deterrence; (5) the need to protect the public from further crimes of the defendant; (6) the need to provide rehabilitative services; (7) the applicable guideline sentence; and (8) the need to avoid unwarranted sentencing disparities among defendants with similar records found guilty of similar conduct. *See* 18 U.S.C. § 3553(a)(1)-(6); *United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020) ([c]ompassionate release is discretionary, not mandatory, and c[an] be refused after weighing the sentencing factors of 18 U.S.C. [section] 3553(a)).

Here, Tucker's early release would seriously undermine community safety. His offense conduct involved separate counts of robbery, carjacking, and two § 924(c) offenses. Congress allocated a stiff penalty (even after the First Step Act) for violations of the § 924(c) statute precisely because of the seriousness and dangerousness of the offense. The government obtained Tucker's disciplinary records (filed under seal as Exhibit 2 in this response),[11] which show Tucker's extensive and violent history during incarceration. (*See generally* Exh. 2). Notably, he received repeated sanctions for possession of a dangerous weapon, assault, fist fights, and possession of intoxicants. *Id*. As recently as March 2020, he was sanctioned for possession of a dangerous weapon, displaying his continued threat to safety. *Id*. It is also significant that Tucker's medical records outlined his "tendency of violent outburst." (*See generally* Exh. 1).

[11] Exhibit 2 is concurrently filed with the government's under seal motion.

Tucker's disciplinary record suggests he has not been able to follow prison rules while incarcerated. Moreover, his serious criminal history and behavior evince a high risk of him reoffending and posing a continued threat to the public.

Consequently, the section 3553 factors strongly weigh against his release.

III. CONCLUSION

For the forgoing reasons, Tucker's Motion for Compassionate Release should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 16, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and delivered the document by United States Mail to *pro se* movant Orville Tucker, Reg. No.: 50259-004, USP THOMSON - U.S. Penitentiary - Inmate Legal Mail, Po Box 1002 Thomson, IL 61285.

s/ Francesse Lucius Cheron
Francesse Lucius Cheron
Assistant United States Attorney

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-CR-00447-UU

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORVILLE TUCKER,

Defendant.
_____/

REPLY TO THE GOVERNMENT'S RESPONSE TO MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)

The defendant, Orville Tucker, through undersigned counsel, respectfully replies to the government's response in opposition (DE 143) to his motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (DE 140), as follows:

I. In a defense-filed motion pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) after the First Step Act, the Court has authority to independently determine whether there are "extraordinary and compelling reasons" for a sentence reduction

For over three decades, Congress only permitted the district courts to entertain a motion for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i) for "extraordinary and compelling reasons," upon motion by the Director of the Bureau of Prisons. In Section 603(b) of the First Step Act of 2018, however, Congress – for the first time – authorized defense-filed motions to be made directly to the court, so long as a prior request has been made to the Warden of the institution, and 30 days have lapsed since the motion was submitted. As amended, § 3582(c) now states:

> 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 lapse of 30 days from the receipt of such a request by the warden of the defendant's facility*, . . . may reduce a defendant's term of imprisonment . . . after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent they are applicable, if it finds that
>
> > (i) extraordinary and compelling reasons warrant such a reduction . . .
>
> and the reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Notably, the language highlighted above – added by Section 603(b) – has completely changed the process by which § 3582(c)(1)(A) compassionate release occurs in a crucial way. Specifically, instead of depending upon the BOP Director to determine an extraordinary circumstance and move for release, district courts may now consider a defendant's own motion to be resentenced, *irrespective of the BOP's position*. And that quite significant change, eliminating the BOP as "gatekeeper" to such motions, has in turn called into question the "applicability" of the pre-existing policy statement in U.S.S.G. § 1B1.13 – written by the Commission pursuant to 18 U.S.C. § 994(t), and specifically directed to reductions in the term of imprisonment under 18 U.S.C. § 3582(c)(1)(A) "upon motion by the Director of the Bureau of Prisons."

Consistent with the prior statutory scheme which conferred absolute authority on the BOP, the current version of § 1B1.13, states:

> *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 … if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable, the court determines that –
>
> (1)(a) Extraordinary and compelling reasons warrant the reduction …
>
> (2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

(Emphasis added).

In the commentary to § 1B1.13, the Commission articulated several categories of factors (relating to a defendant's medical condition, age, and family circumstances) as *per se* "extraordinary and compelling reasons" for release. § 1B1.13, comment n. 1(A)-(C). The Commission also added a final catchall category in application note 1(D) for "an extraordinary and compelling reason other than, or in combination with the reasons described in subdivisions (A) through (C)" "[*a*]*s determined by the Director of the Bureau of Prisons*." Finally, although there can be no doubt from the above that this policy statement applies *only* to motions brought by the Director of the Bureau of Prisons, in Application Note 4, entitled "Motion by the Director of the Bureau of Prisons," the Commission made that irrefutably clear by reiterating that "[a] reduction under this policy statement may be granted *only upon motion by the Director of the Bureau of Prisons*." § 1B1.13, comment. N. 4 (emphasis added).

Due to the absence of a quorum at the U.S. Sentencing Commission, neither the body of § 1B1.13 nor these accompanying application notes have been amended since passage of the First Step Act. And, as a result, the current version of § 1B1.13

mandates the precise mode of deference to the BOP in evaluating compassionate release requests, that Congress expressly and intentionally rejected by enacting Section 603(b) of the First Step Act. *See United States v. Brown*, 411 F. Supp.3d 446, 449 (S.D. Iowa Oct. 8, 2019) ("Congress knew that the BOP rarely granted compassionate release petitions, and the purpose of the FSA was to allow defendants to file motions in district courts directly even after the BOP Director denies their petition").

In such circumstances, the government erroneously contends that this Court remains bound by § 1B1.13 in determining whether Mr. Tucker has set forth "extraordinary and compelling reasons" for a sentence reduction, and "lacks statutory authority" to "*on its own* identify 'extraordinary and compelling circumstances'" for a sentence reduction "apart from those described in the guideline policy statement." DE 143: 4, 8 (asserting "that a court has no such authority"). As of this writing, every circuit court of appeals to have considered the "applicable policy statement" language in § 3582(c)(1)(A) in a precedential decision, has concluded that § 1B1.13 remains an "applicable policy statement" after the First Step Act ***only*** for *BOP-initiated* compassionate release motions. In the uniform view of these courts, there is ***no*** "*applicable* policy statement" constraining the court's discretion at this time for *defense-filed* motions.

As explained first by the Second Circuit in *United States v. Brooker*, 976 F.3d 228 (2nd Cir. Sept. 25, 2020), there is no "*applicable* policy statement" cabining the Court's discretion at this time because § 1B1.13 contains "clearly outdated" language

requiring judicial deference to the Director of the BOP. *Id.* at 235 (emphasis added). Since such deference is "precisely the requirement that the First Step Act expressly removed," § 1B1.13 "cannot be fully applicable." *Id.* Indeed, the Second Circuit explained:

> [T]he First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that than an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court's discretion.

Id. at 237.

Until there is a quorum at the Commission to amend the policy statement and make it consistent with the First Step Act, the Second Circuit held, there is no "applicable" Guideline policy statement for defense-filed motions under 18 U.S.C. § 3582(c)(1)(A). Although the Second Circuit read § 1B1.13 and its commentary as "surviving" the First Step Act, it clarified that this policy statement applies at this time "only to those motions that the BOP has made." *Id.* at 236.

The Second Circuit's reasoning, notably, has now been embraced by three other circuits. In *United States v. Jones*, 980 F.3d 1098 (6th Cir. Nov. 20, 2020), the Sixth Circuit expressly joined "the majority of district courts and the Second Circuit in holding that the passage of the First Step Act rendered § 1B1.13 'inapplicable' to cases where an imprisoned person files a motion for compassionate release." *Id.* at 1109; *see id.* at 1108 (§ 1B1.13 "is not an 'applicable' policy statement when an imprisoned person files a motion for compassionate release.") Until the Commission "updates § 1B1.13 to reflect the First Step Act," the Sixth Circuit held, "district courts have full

discretion in the interim to determine whether an 'extraordinary and compelling' reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion." *Id.* at 1109.

On the same day that the Sixth Circuit decided *Jones*, the Seventh Circuit issued a similar decision in *United States v. Gunn*, 980 F.3d 1178 (7th Cir. Nov. 20, 2020). *See id.* at 1181 (agreeing that until § 1B1.13 is amended, "the Guidelines Manual lacks an 'applicable policy statement covering prisoner-initiated applications for compassionate release. District judges must operate under the statutory criteria – "extraordinary and compelling reasons" – subject to deferential appellate review.")

Most recently, in *United States v. McCoy*, 981 F.3d 271 (4th Cir. Dec. 2, 2020), the Fourth Circuit agreed with the Second, Sixth, and Seventh Circuits "and the emerging consensus in the district courts" that as amended, § 3582(c)(1)(A) "authorize[s] courts to make their own independent assessments of 'extraordinary and compelling reasons'" at this time – "not because § 1B1.13 is inconsistent with the First Step Act, but because § 1B1.13 is not an 'applicable' policy statement at all." *Id.* at 281, 284. "When a defendant exercises his new right to move for compassionate release on his own behalf," the Fourth Circuit held, "§3582(c)(1)(A)'s consistency requirement does not constrain the discretion of district courts" because "there currently exists no 'applicable policy statement.'" *Id.* at 281; *id.* at 282 ("by its plain terms," § 1B1.13 does not apply to defendant-filed motions under § 3582(c)(1)(A)).

Notably, the government's Response in Opposition here was filed *after* these four uniformly-reasoned and very persuasive decisions. And tellingly, the Court does

not acknowledge a single one of these decisions. Hoping the Court will ignore the true state of the law at this juncture, the government argues that two early cases from this district rendered *before* any of the Circuit Courts had weighed in -- *United States v. Willingham*, No. 16-CR-60079-COHN (S.D. Aug. 5, 2020),[1] and *United States v. Foots*, 1-CR-20184-ALTONAGA, DE 237 (S.D. Fla. 2021) (agreeing with the reasoning in *Willingham*) – are persuasive. But they are ***not***. Both decisions were wrongly reasoned, and now stand as outliers against the overwhelming weight of authority.

In *Willingham*, Judge Cohn found that he lacked "jurisdiction" under § 3582(c)(1)(A) to consider any asserted "extraordinary and compelling reason" for release that was inconsistent with those recognized by the Commission in § 1B1.13. However, as argued in Mr. Willingham's brief challenging that ruling on appeal, Eleventh Circuit Case No. 20-13727, the term "jurisdiction" properly refers only to subject matter jurisdiction over the case, which the district court clearly had in *Willingham* pursuant to 18 U.S.C. § 3231.

Moreover, not only has the Supreme Court repeatedly distinguished true jurisdictional rules from non-jurisdictional claims processing rules, *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (a statutory restriction is "jurisdictional" only when Congress "clearly states" that it is), but indeed, several circuit courts have found that other language in § 3582(c), such as the exhaustion requirement added by

[1] The government misstates, at DE 143:9, that the *Willingham* decision by Judge Cohn was rendered on December 10, 2019 in the Southern District of Georgia. It also misstates the year in the Case No. for *Foots*.

Section 603 of the First Step Act, is *not* jurisdictional. *See United States v. Alam*, 960 F.3d 831, 833 (6th Cir. 2020) ("'[i]t's usually a mistake" to treat a statutory limit on our power as a statutory limit on our subject-matter jurisdiction.'")(citation omitted); *United States v. Gunn*, 980 F.3d 1178, 1179 (7th Cir. 2020); *United States v. Franco*, 973 F.3d 465, 467-68 (5th Cir. 2020) (holding that jurisdictional rules "limit the circumstances in which Article III courts may exercise judicial power," while non-jurisdictional claims processing rules "seek to promote the orderly progress of litigation;" noting that "nothing in the text of [§ 3582(c)(1)(A)] are jurisdictional;" agreeing with the Sixth Circuit in *Alam* because "the language neither 'speak[s] in jurisdictional terms' nor 'refer[]s in any way to the jurisdiction' of the courts'"); *see also United States v. Hart*, ___ F.3d ___, 2020 WL 7485692, at *3-4 (3rd Cir. Dec. 21, 2020) (holding that the restrictions on relief authorized by another section of the First Step Act, namely § 404, are non-jurisdictional; and importantly, § 404(c)'s "parent statute," the "similarly-phrased" 18 U.S.C. § 3582(c), which states that "court[s] may not modify a term of imprisonment once it has been imposed" except under limited conditions, are likewise "not jurisdictional; agreeing with the conclusions of the Fifth Circuit in *Franco* that the procedural requirements in § 3582(c)(1)(A) are not jurisdictional, as well as *United States v. Taylor*, 778 F.3d 667, 670-71 (7th Cir. 2015) which held that the limits on relief in § 3582(c)(2) are likewise not jurisdictional).

To the extent Judge Cohn may have mistakenly used the term "jurisdiction" in *Willingham* to suggest, simply, that he had no "statutory authority" to reduce Mr. Willingham's sentence based on a reason not included in § 1B1.13, that conclusion

was in error for the reasons thereafter explained by the courts in *Brooker*, *Jones*, *Gunn*, and *McCoy* – cases he had no opportunity to consider.

Judge Altonaga's decision in *Foots* – which expressly followed *Willingham* at DE 237:9 – was likewise rendered without the benefit of *Brooker*, *Jones*, *Gunn*, and *McCoy*. But what makes *Foots* particularly unpersuasive at this time, and the government's continued reliance on *Foots* truly inexplicable, is that Judge Altonaga thereafter *did* have an opportunity to consider *Brooker*, *Jones*, *Gunn*, and *McCoy* in a later case. And in *United States v. Cano*, No. 95-cr-00481-ALTONAGA, DE 965 (S.D. Fla. Dec. 16, 2020), she reversed herself on this very issue.

Notably, in *Cano*, Judge Altonaga recognized that these four, uniform circuit court decisions now "reflect 'the emerging consensus in the district courts.'" *Cano*, DE 965:4 (citing *McCoy*, 981 F.3d at 284). And convinced by the reasoning of the majority of district courts and these four circuit courts, she specifically found in *Cano* that indeed, there is currently no "applicable policy statement," and that without one "***district courts are 'empowered to consider any extraordinary and compelling reason for release that a defendant might raise.***" DE 965:6 (citing *Brooker*, 976 F.3d at 230) (emphasis added).

It is Judge Altonaga's view in *Cano*, not her earlier, now-reversed view in *Foots*, that should be persuasive to the Court at this time. Notably, Judge Boom has recently embraced that view as well in *United States v. Campbell*, No. 91-CR-06093-BLOOM, DE 183 (Jan. 6, 2021). Indeed, after considering the decisions in *Brooker*, *Jones*, *Gunn*, and *McCoy*, Judge Bloom concluded in *Campbell* that in considering

whether the defendant had shown extraordinary and compelling reasons for release, she was "not bound [by the] Sentencing Guidelines policy statement." DE 183:8-9.

The decisions in *Brooker*, *Jones, Gunn*, and *McCoy* – as well as the recent decisions in *Cano* and *Campbell*– undercut the government's suggestion that dictates by the Commission in its pre-First Step Act version of § 1B1.13 are "binding" in a defense-filed compassionate release proceeding at this time. At the present time, district courts have broad discretion, unfettered by USSG §1B1.13, to determine whether extraordinary and compelling reasons presented by a defendant warrant a reduction in sentence.

As Judge Cooke and Judge Williams both rightly found well before any of the courts of appeals weighed in, the Commission's pre-existing policy statements do *not* define or limit the universe of what may constitute "other" compelling and extraordinary reasons for a defendant-initiated compassionate release motion after the First Step Act. *See United States v. Curington*, Case No. 12-20115-cr-MGC, DE 645 (S.D. Fla. July 7, 2020) (recognizing that the district court's authority to reduce a sentence upon a finding of extraordinary and compelling reasons is not constrained by the judgment of the BOP director); *United States v. Hope*, Case No. 90-60108-cr-KMW, DE 479 (S.D. Fla. Apr. 10, 2020) (agreeing with the "majority of the district courts" that district courts indeed now have the authority to reduce a sentence "upon the court's independent finding of extraordinary or compelling reasons").

Notably, in so finding in *Hope*, Judge Williams cited as support two district court decisions granting compassionate release to defendants on the precise grounds

Mr. Tucker has raised here: the disparately harsh penalties faced by § 924(c) offenders before the First Step Act. *See Hope*, DE 479: 3-5 (citing with approval *United States v. Young*, 458 F.Supp.3d 838 (M.D. Tenn. Mar. 4, 2020) which had in turn cited with approval, *United States v. Maumau*, 2020 WL 806121, at*2 (D. Utah Feb. 18, 2020)).

For the following reasons, the Court should reject the government's unfounded non-exhaustion claim. It should proceed to the merits of Mr. Tucker's argument. And it should conclude – for the reasons stated not only in *Young* and *Maumau*, but by many other district courts and the Fourth Circuit in *McCoy* as well – that Mr. Tucker has indeed demonstrated an extraordinary and compelling reason for a sentence reduction at this time.

II. Mr. Tucker exhausted his administrative remedies in the precise manner Congress contemplated in the amended § 3582(c)1)(A)

The government mistakenly argues that Mr. Tucker's motion should be dismissed without prejudice to allow him to exhaust his administrative remedies. (DE 143:5-7). That position is ill-founded and should be rejected. For the reasons detailed below, Mr. Tucker has *already* exhausted all necessary administrative remedies consistent with § 3582(c)(1)(A). No further action on his part is required, and the Court should proceed to the merits of his motion at this time. There is no legal or logical reason to dismiss and require him to re-exhaust.

As a threshold matter, the government does *not* dispute that Mr. Tucker followed the proper procedures at USP Thomson for exhausting his administrative remedies. There is no dispute that he used the appropriate Department of

Justice/USP Thomson form for his compassionate release/sentence reduction request. Indeed, DE 140:11 is entitled "Inmate Request for Compassionate Release/RIS [Reduction in Sentence] Consideration Form." Nor does the government dispute that Mr. Tucker signed and dated that form, as indicated, on Nov. 1, 2020. Instead, the government claims that: (1) the form Mr. Tucker signed and dated on Nov. 1, 2020 (DE 140:11) is an "incomplete" application for compassionate release since he did not answer questions 1 or 3 on that form; and (2) Mr. Tucker additionally "fail[ed] to provide proof that the request was actually sent to the Warden and thereafter denied." According to the government, BOP attorneys advised that they had "no record" of Tucker requesting compassionate release. (DE 143: 14).

For the reasons below, neither point has any relevance under § 3582(c)(1)(A).

First, § 3582(c)(1)(A) does not make "proof of denial" a prerequisite for exhaustion under § 3582(c)(1)(A). Quite to the contrary, as the government has conceded in other cases, given Congress' clear intent in the First Step Act to expedite rather than delay compassionate release applications, there is a 30 day wait-or-lapse period in the statute. When the 30-day period has run – irrespective of whether the defendant has received an answer from the Warden during that period – his motion is ripe for judicial consideration. *See United States v. Andrew Woodson*, Case No. 13-CR-291780-ALTONAGA, DE 402 (S.D.Fla. June 5, 2020) ("A defendant can file a motion for compassionate release in district court 30 days after requesting relief from the Warden, even if the Warden denies the relief within 30 days. In fact, the Bureau of Prison's website says as much: "[U]nder the FSA, an inmate may now file a motion

for compassionate release directly with the sentencing court 30 days after making a request to the BOP or after exhausting their administrative remedies.")

Second, Mr. Tucker plainly did everything in his power to "make a request to the BOP" over 30 days ago. As Mr. Tucker has explained to counsel, on the date noted on his form, he filled it out and addressed it to then-Warden Rivers as well as the RIS Coordinator, just as the form instructs. *See* DE 140:11 ("Instructions"). He then placed the form in the Institution Mail, which he reasonably believed – from past experience, and particularly during a 23/7 lockdown at Thomson due to the COVID pandemic – would be the quickest way to get the request to the Warden/RIS Coordinator. We have that same belief and trust whenever we place mail in a U.S. Postal Service mailbox. So long as the mail is properly addressed, as Mr. Tucker's form was here, any failure to deliver or "receive" the mail is plainly the postal service's fault, not the sender's.

For that reason, courts have generally used the date of submission, according to an inmate, over the date of receipt indicated by the BOP, as the relevant date triggering the 30-day wait-or-lapse period. *See United States v. Feucht*, No. 11-CR-60025-MIDDLEBROOKS, DE 53:3-4 (S.D. Fla. May 28, 2020) (finding that "the 30-day period should be measured from the date on which a prisoner submits his or her request to the BOP, not the date the request is received by the Warden. In making that determination, I am guided by the 'prisoner mailbox rule,' which provides that a *pro se* prisoner's legal submission is considered filed on the date it is delivered to prisoner authorities for mailing, rather than the date it is received by the Court;"

agreeing with the Eleventh Circuit in *Garvey v. Vaughn*, 993 F.2d 776, 780 (11th Cir. 1993), that prisoners cannot "'utilize a private express carrier, and they cannot place a telephone call to ascertain whether a document mailed for filing arrived;'" citing as support for applying the same rule under § 3582(c)(1)(A), *United States v. Resnick*, 2020 WL 1651508, at *6 (S.D.N.Y. Apr. 2, 2020) (noting that "[i]nmates are not typically handed the keys of the warden's office so they can place their applications for compassionate release on the warden's desk")).

For many of the same reasons, courts have rightly credited a defendant's statement of having submitted a request through proper institutional channels, over the BOP's claim of having "no record" of such a submittal. *See, e.g., United States v. Trent*, No. 16-CR-00178-CRB-1, 2020 WL 1812214, at *1 (N.D. Cal. Apr. 9, 2020) (rejecting the government's argument that Trent failed to exhaust his administrative remedies because it "relies entirely on the BOP's representation that it cannot confirm that Trent submitted an earlier request for compassionate release. Trent represents that he did submit such a request. Confronted with the conflicting evidence, the Court credits Trent's representation, which is based on direct knowledge rather than failure to confirm the existence of a filing from over a month ago.") (internal citations omitted); *United States v. Galaz*, ___ F. Supp.3d ___ , 2020 WL 4569125 (S.D. Calif. Aug. 7, 2020) (following *Trent*; crediting defendant's statement that she submitted a request to the Warden at FMC Carswell "via prison mailbox," notwithstanding the absence of any response from the Warden; finding exhaustion met when over 120 days had elapsed since the date defendant sent her

request through the prison mailbox); *see also United States v. Tran*, No. CR 08-00197-DOC, 2020 WL 1820520, at *1 (C.D. Cal. Apr. 10, 2020) (crediting defendant's assertion that he spoke to the Warden personally and the Warden refused to accept compassionate release request).

Third, the government's "incompleteness" claim is baseless under § 3582(c)(1)(A). The first question on the form states: "Check the category you are requesting Compassionate Release/RIS Consideration." But notably, ***none*** of the listed categories covered the specific "extraordinary and compelling" circumstance Mr. Tucker thereafter detailed in Question 2 – namely, the disparity and severity of his stacked § 924(c) sentences, compared to the much reduced sentences that would be imposed for the identical crimes after the First Step Act's amendment to § 924(c). Since this unforeseen-at-sentencing, extremely compelling circumstance warranting a reduction, as detailed in response to Question 2, did *not* fall within ***any*** of the categories listed in Question 1, Mr. Tucker rightly left Question 1 on the form blank. A question can hardly be deemed "incomplete" when none of the choices provided are applicable, and there is no box to check indicating "other reasons" or "none of the above."

The government is also incorrect in asserting that Mr. Tucker's failure to provide a release plan in response to Question 3 means that he failed to properly exhaust. That argument as well has no basis in § 3582(c)(1)(A). In *United States v. Randall*, No. 17-CR-60178-BLOOM, DE 74 (S.D. Fla. Nov. 2, 2020), where the government raised a similar objection, Judge Bloom rejected it – agreeing with the

defense that not only did the government fail to cite any legal authority for its position, but indeed, the release plan requirement was simply a matter of BOP policy and "the Court is not bound by BOP policy." DE 74:7 (noting that the "release-plan requirement is set forth in 28 C.F. R. section 571.61(a), which states that "a request for a motion under . . . 3582(c)(1)(A) shall be submitted to the Warden," and include[s] (1) the extraordinary or compelling circumstances warranting consideration, and (2) the proposed release plan"). Judge Bloom rightly concluded that "the regulation speaks to the requirements for a request to the warden, but it does not otherwise speak to an inmate's ability to file a motion for compassionate release before the Court." *Id.*

Finally, by email dated January 14, 2022 to the Assistant Warden at USP Thomson, as well as Mr. Tucker's unit manager, case manager, and counselor (Exhibit 1 hereto), undersigned counsel cured any possible issue as to "incompleteness" or the Warden's prior non-receipt of Mr. Tucker's form. For indeed, in that email, counsel resubmitted Mr. Tucker's original November 1, 2020 form, together with his handwritten description of his release plan at DE 140:10 (explaining that upon release he would live with his sister Eugennie Tucker and her family at 557 Cleaveland Ave., Bridgeport, CT 06605). *See* Exhibit 2, sent as an attachment to Exhibit 1. In the body of the email, undersigned counsel inquired whether in fact the November 1st form had been received by *anyone* at USP Thomson. If not, counsel asked that Exhibit 2 (the November 1st form + Mr. Tucker's release

plan) be considered a new request by Mr. Tucker, which would start a new 30-day wait or lapse period beginning on that date.

Notably, in *United States v. Schumack*, 2020 WL 4333526 (S.D. Fla. June 11, 2020), Judge Middlebrooks found that a letter written by the defendant's daughter, which did not even "specifically utilize the phrase 'compassionate release'" was sufficient to start the 30-day exhaustion period, and that through that letter, the defendant had "appropriately exhausted administrative remedies." *Id.* at *2. If that letter qualified as exhaustion in *Schumack*, then certainly counsel's resubmission of the proper form + a release plan, by email to the institution on Mr. Tucker's behalf, sufficed here.

There can be no doubt now that the Warden at Thomson[2] received counsel's email with the now-supplemented form. For indeed the next day, January 15th, undersigned counsel received an email response back from the institution stating:

> We have received your request regarding inmate Tucker, Orville Reg. No. 50259-004. The RIS ["reduction in sentence"] is currently being processed.

(Exhibit 3).

[2] At the time Mr. Tucker filled out the November 1st form, the USP Thomason Warden was Mr. Rivers. Upon information and believe, at some point very soon thereafter Warden Rivers was replaced by Acting Warden Joiner – to whom the undersigned directed the January 14th email. It is unclear whether Acting Warden Joiner currently remains in charge, or a new Warden has taken over. Undersigned counsel has sought clarification on these points from the BOP Regional Counsel but has not received a response. It is possible that that Mr. Tucker's November 1st request may have fallen through the cracks at USP Thomson because of the changeover in the Warden's office during this time period.

Counsel contacted the institution again on January 22nd asking if a decision had yet been reached on the request, and received a response yesterday – January 25th – stating that the request

> is being processed in due course. As of this writing, a final determination by the Warden has not yet been made. Please feel free to reach out to us again next week to determine the status of your client's request.

(Exhibit 3).

If the Court treats the January 14th, now-supplemented request emailed to and received by the Warden at USP Thompson as the operative request, the 30 day wait-or-lapse period will run on **February 13th**, and the Court may issue an order on the merits of Mr. Tucker's motion – without any concern as to exhaustion – after that date. Undersigned counsel fully expects the Warden's response to be a denial since the "extraordinary and compelling reasons" for a sentence reduction articulated by Mr. Tucker do not fall within the categories detailed on the USP Thomson form, those categories derive from BOP Program Statement 5050.50, and the form indicates that this Program Statement sets the "minimum guidelines for consideration." However, if a formal decisions by the Warden is received before February 13th, undersigned counsel will advise the Court.

Again, the Court need *not* await a formal denial to consider the merits of Mr. Tucker's motion at this time. In analogous cases where the 30-day period has run without ***any*** response from the warden, courts in this district have rightly declared a government non-exhaustion claim moot. *See United States v. Burkes*, Case No. 18-cr-80113-ROSENBERG, DE 71:3 (S.D. Fla. Oct. 21, 2020) (finding that although the

defendant sought compassionate release from the court before the 30 day period had run, by the time the court granted compassionate release 48 days had passed since the defendant's submission of his request to the warden; thus, any possible non-exhaustion issue was "now moot."). In *Burkes*, Judge Rosenberg was rightly "unpersuaded by the Government's argument that it must make Mr. Burkes re-submit his release request to the Warden and renew his Motion with this Court yet again, especially given that the Government provide[d] no binding case precedent to that effect," and "the prison staff at FDC Miami informed Mr. Burkes on September 11, 2020 that he unequivocally did not qualify for early release." *Id.*

There can be no doubt here as well that in the view of USP Thomson – as reflected on its compassionate release form – and in the view of the BOP generally as reflected in Program Statement 5050.50 (which is the basis for the limited categories in Question 1 on the form), the disparity and severity of stacked § 924(c) sentences prior to the amendments made by Section 403 of the First Step Act, "unequivocally" will *not* qualify an inmate for a BOP sentence reduction recommendation. With or without a proposed release plan, the result will be no different since the BOP is precluded by its own regulations from recommending a sentence reduction on the grounds Mr. Tucker articulated.

Of course, for the reasons set forth in Part I above, the BOP's internal policy requiring the denial of any request to file a motion on the grounds put forth by Mr. Tucker, is neither binding nor persuasive in this proceeding. Indeed, as indicated in Part III *infra*, irrespective of the BOP's unwavering position in this regard, multiple

courts have now found "extraordinary and compelling reasons" for a sentence reduction for offenders in precisely Mr. Tucker's circumstances. The Court should so find here as well.

III. The severity and disparity of stacked § 924(c) sentences imposed prior to the First Step Act, compared to sentences for the same § 924(c) crimes after Congress' clarifying amendment to § 924(c)(1)(C) in Section 403 of the Act, is an "extraordinary and compelling reason" for a sentencing reduction at this time.

Pursuant to 18 U.S.C. § 924(c)(1)(C), as interpreted and applied by the courts when he was sentenced, Mr. Tucker received a consecutive 5 year term (to his 240 month Guideline sentence) for his first § 924(c) conviction in this case (Count 3), and a ***consecutive 25 years*** on top of that for his second § 924(c) conviction (Count 7). Recently, however, by enacting Section 403 of the First Step Act, Congress made clear that the courts had been misapplying the stacking provision in § 924(c) for years. In Section 403, which Congress notably entitled "Clarification of Section 924(c) of Title 18, United States Code," Congress clarified its original intent as to proper application of stacking, by amending § 924(c)(1)(C)(i) to ensure that the 25-year consecutive term for a successive § 924(c) offense did not apply *unless* the defendant had a final § 924(c) conviction at the time of the instant offense. *See* First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5222, § 403; 18 U.S.C. § 924(c)(1)(C) (West 2019) (striking the "second or subsequent conviction under this subsection" language in § 942(c)(1)(C)(i) and replacing it with "violation of this subsection that occurs after a prior conviction under this subsection has become final"). Pursuant to this clarifying amendment, district courts may now impose a consecutive 25-year mandatory term ***only*** for a

recidivist violation of § 924(c) – that is, if a defendant had a final § 924(c) judgment from a prior case, not simply a conviction on a second § 924(c) in the current one, as here.

In his *pro se* § 3582(c)(1)(A) motion, Mr. Tucker noted that several courts had found that defendants like he with stacked § 924(c) sentences in the same case now had "extraordinary and compelling" reasons under § 3582(c)(1)(A) for a sentence reduction – given the severity and disparity of such sentences vis-à-vis the sentences imposed on offenders convicted for identical conduct today. *See* DE 140 (citing *United States v. Maumau*, 2020 WL 806121, at*2 (D. Utah Feb. 18, 2020); *United States v. O'Bryan*, 2020 WL 86947 (D. Kan. Feb. 21, 2020); *United States v. Redd*, 444 F. Supp.3d 717, 723 (E. D. Va. Mar. 16, 2020)).

In its Response, the government has ***only*** disputed the conclusion of these courts that they had the authority to determine "extraordinary and compelling reasons," unfettered by § 1B1.13. *See* DE 143:10-11. The government has ***not*** disputed – because it cannot – that ***if*** indeed the Court ***has the authority*** to independently assess whether a defendant has proffered extraordinary and compelling reasons for a reduction at this time, then the courts in *Maumau*, *O'Bryan*, and *Redd* made a compelling case for why having to serve a sentence that Congress has declared unduly harsh, not within its original intent, and so far above what any of these offenders would receive under the amended version of § 924(c)(1)(C) today, is an extraordinary and compelling reason to reduce these pre-FSA offenders sentences. *See United States v. Maumau*, 2020 WL 806121, at *7 (D. Utah Feb. 18, 2020) (finding

that the defendant's young age at the time of sentencing, the length of the mandatory sentence imposed, and the fact that if sentenced today, he would not be subject to this type of sentence, together were "extraordinary and compelling reasons" for a sentence reduction); *O'Bryan*, 2020 WL 869475, at *2 (following *Maumau*; noting that the government had not disputed the defendant's calculation of the "radically different sentence he would have received if he were subject to the FSA," and although his crimes were serious "they would be appropriately punished by 60 months on each § 924(c) offense," which would mean that the defendant had already served "well in excess" of the sentence that would be imposed today); *Redd*, 444 F. Supp.3d at 723 & n. 9 (finding that the "gross disparity" between the sentence Mr. Redd received and the one he would have received after the First Step Act was an extraordinary and compelling reason for a sentence reduction, since that disparity was "the result of Congress' conclusion that sentences like Mr. Redd's are unfair and unnecessary, in effect, a legislative rejection of the need to impose sentences under § 924(c), as originally enacted, as well as a legislative declaration of what level of punishment is adequate;" also noting with significance that the stacked § 924(c) terms resulted in a sentence decades longer than federal offenses like murder, kidnapping, and manslaughter).

The government also conveniently ignores that the three cases cited by Mr. Tucker were only the tip of the iceberg – a sliver of the actual legal landscape on this issue at this time. Notably, as of this writing, a huge and steadily increasing number of courts have found that "extraordinary and compelling" reasons indeed exist for a

sentence reduction due to both the severity and disparity of pre-First Step Act stacked § 924(c) sentences. *See, e.g., United States v. Young*, 458 F.Supp.3d 838 (M.D. Tenn. Mar. 4, 2020); *United States v. Wade*, 2020 WL 1864906 (C.D. Cal. Apr. 13, 2020); *United States v. Decator*, 452 F. Supp.3d 320, 326 (D. Md. Apr. 6, 2020); *United States v. Haynes*, 456 F. Supp.3d 496, 514-16 (E.D. N.Y. Apr. 22, 2020); *United States v. Marks*, 2020 WL 1908911, at *7 (W.D.N.Y. Apr. 20, 2020); *United States v. McPherson*, 454 F.Sup.3d 1049 (W.D. Wash. Apr. 14, 2020); *United States v. Bryant*, 2020 WL 2085471, at *5 (D. Md. Apr. 30, 2020); *United States v. Scott*, 2020 WL 2467425, at *5 (D. Md. May 13, 2020); *United States v. Arey*, 461 F. Supp.3d 343, 349-350 (W.D. Va. May 13, 2020) (holding that while the COVID pandemic standing alone does not present an extraordinary and compelling reason for a sentence reduction, the "dramatic change to § 924(c) sentences," and the fact that the defendant would "likely receive a dramatically lower sentence than the one he is currently serving constitutes an 'extraordinary and compelling' reason"); *United States v. Lott*, 2020 WL 3058093, at *3 (S.D. Calif. June 8, 2020); *United States v. Quinn*, 467 F. Supp.3d 824, 826-27 (N.D. Cal. June 17, 2020); *United States v. Jones*, ___ F.3d ___, 2020 WL 5359636, at *6-8 (N.D. Calif. Aug. 27, 2020); *United States v. Urkevich*, 2019 WL 6037391, at *2-44 (D. Neb. Nov. 14, 2019) (finding that a sentence reduction was warranted by the "injustice" of facing a term of incarceration decades "longer than Congress now deems warranted for the crimes committed"); *United States v. Gaines*, 2020 WL 7641201, at *2 (W. D. Wash. Dec. 23, 2020) (concluding that "both (i) the 'draconian' nature of the now obsolete jurisprudence concerning the 'stacking' of

mandatory minimums," and "(ii) the substantial disparity between Gaines's sentence and the prison terms that similarly-situated defendants would receive under the current version of § 924(c), constitute 'extraordinary and compelling reasons' justifying a reduction in sentence"); *United States v. Nafkha*, 2021 WL 83268, at *5 (D. Utah Jan. 11, 2021) (noting with significance that "[w]hen Congress first created the path to compassionate release as part of the Sentencing Reform Act of 1984, . . . the accompanying Senate Report indicated that sentence modifications would be appropriate in "cases . . . of an unusually long sentence.")

Finally, since the government has chosen to disregard ***all four*** circuit court of appeals decisions that uniformly hold there is no "applicable policy statement" constraining the Court's discretion at this time, it also ignores that the Fourth Circuit's decision in *McCoy* upheld a district court's grant of compassionate release under § 3582(c)(1)(A)(i) to three defendants with decades of stacked § 924(c) sentences, just like Mr. Tucker. *McCoy* is directly on point and highly persuasive on the precise substantive claim Mr. Tucker has raised here.

Indeed, the three defendants in *McCoy*, like Mr. Tucker, argued that both the severity and disparity of their pre-FSA stacked § 924(c) sentences, compared with the sentences imposed for the identical crimes today were "extraordinary and compelling" reasons for a sentence reduction under § 3582(c)(1)(A)(i). *Id.* at 278. And the Fourth Circuit agreed. *See* 981 F.3d 271 at 286 (finding that it was permissible for a district court to treat as "extraordinary and compelling reasons" the severity of these

defendants' sentences, and the disparity between those sentences and those provided for by the First Step Act).

McCoy is persuasive not only because of the similarity of the claim, but also because the Fourth Circuit squarely rejected the government's suggestion at DE 143:9 (and the stated view in *Willingham*) that granting such a reduction would impermissibly give Section 403 of the First Step Act retroactive effect. *Id.* To the contrary, the *McCoy* court explained:

> The fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under § 3582(c)(1)(A)(i). As multiple district courts have explained, there is a significant difference between automatic vacatur and resentencing of an entire class of sentences, . . . and allowing for the provision of individual relief in the most grievous cases.

Id. (citing cases). According to the Fourth Circuit, the individualized determination by the district courts in the cases before it were not "tantamount to wholesale retroactive application of the First Step Act amendments to § 924(c)." *Id.* at 288.

Finally, the Fourth Circuit also rejected one of the policy argument advanced as support for the holding in *Willingham*: namely, that granting relief under § 3582(c)(1)(A)(i) on a claim based upon the change in the law governing § 924(c) cases would undermine the important goal of finality of judgments. *Id.* at 288. On that point, the Fourth Circuit explained that "[w]hile the finality of sentences is an important principle, § 3582(c)(1)(a) 'represents Congress' judgment that the generic interest in finality must give way in certain individual cases,' and authorizes judges to implement that judgment." *Id.* (citation omitted).

In light of the many cogently-reasoned district court decisions above, and the Fourth Circuit's recent decision in *McCoy,* the Court should find here as well that the severity and disparity of Mr. Tucker's stacked § 924(c) sentences, compared with the total sentence he would have received for those counts today, is indeed an "extraordinary and compelling reason" for a sentence reduction at this time.

IV. Considering all of the relevant 18 U.S.C. § 3553(a) factors, a sentence reduction is warranted for Mr. Tucker.

In the final portion of its Response, the government "assumes" that Mr. Tucker "may" meet "the 'extraordinary and compelling threshold," but still opposes ***any reduction*** for him given the seriousness of his offense, the seriousness of his criminal history, and the purported danger he poses to the community based upon his disciplinary record. (DE 143:12-13). That position is not well-taken.

As a threshold matter, in the many cases where § 924(c) stacking has been the basis for a § 3582(c)(1)(A) sentence reduction, courts have been presented with the same – and equally if not more serious – underlying offenses. And indeed, in the related COVID/compassionate release context, courts in this district have routinely released offenders with underlying § 924(c) offenses, and/or who were involved in indisputably violent conduct, and who had prior records qualifying them as Career Offenders.[3] The "seriousness of the offense" alone, even with Mr. Tucker's criminal

[3] *See United States v. Wooton*, Case No. 04-CR-20487-COOKE, DE 603 (S.D. Fla. Sept. 2, 2020) (granting release to "large scale drug trafficker" convicted of Hobbs Act robbery, possession of a firearm in in furtherance of drug trafficking, who was present during the kidnapping and assaulting one of his coconspirators and his 3 year old goddaughter, at which time firearms were brandished); *see Wooton*, DE 599 and DE 600 (describing underlying offense, and parties' competing arguments on danger to community); *United States v. Rice*, Case No. 90-CR-768-SEITZ, DE 421 (S.D. Fla.

history is hardly a reason to deny release here. There is nothing unique about the nature of the offense, or Mr. Tucker's prior history, that would warrant treating him differently than similarly-situated § 924(c) offenders with harsh, stacked sentences.

In this respect the government improperly ignores § 3553(a)(6): "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." As Mr. Tucker has rightly pointed out, due to the amendment to the stacking procedures in § 924(c) in the First Step Act, were he convicted of the exact same conduct today, he would face a much reduced sentence on his § 924(c) counts – a total of 14 years (7 years on Count 3 + 7 years on Count 7) rather than the total term of 25 years (5 years on Count 3 + 20 years on Count 7), previously imposed. [4]

As other courts have found when faced with claims just like Mr. Tucker's, what deserves significant weight under § 3553(a) is the sentence Congress currently

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June 8, 2020) (granting release to defendant who was involved "in a wide-reaching drug enterprise," in which he was *using* a firearm during a drug trafficking offense, and using a deadly weapon (an automobile) to assault a federal agent); *United States v. Lewis*, Case No. 10-CR-60292-MIDDLEBROOKS, DE 280 (S.D. Fla. July 20, 2020) (granting release to defendant convicted of a kidnapping (in which he held the victim captive for almost a month), and a § 924(c) offense that involved brandishing; rejecting government's argument that compassionate release should be denied due to the serious nature of the offense and the defendant's ability to reoffend once released; noting that upon release defendant would be monitored by probation officers "which will lessen the likelihood that he will reoffend"); *United States v. Jaen*, Case No. 91-CR-0081-MORENO, DE 505 (S. D. Fla. July 6, 2020) (granting release to defendant previously sentenced to life for conspiracy to import and distribute 600 kilograms of cocaine and assaulting a federal officer, with a history of recidivism).

[4] After Mr. Tucker was sentenced, Congress raised the minimum terms for a § 924(c) offense with brandishing from 5 to 7 years, and the mandatory term for a successive § 924(c) crime from 20 to 25 years. Compare § 924(c)(1)(C) with PSI, ¶ 86 (statutory penalties under § 924(c)(1) in in 1998 were 5 and 20 years).

believes is "sufficient but not greater than necessary" to further all of the goals of sentencing, including the need of a sentence to reflect "the seriousness of the offense, to promote respect for the law, and to provide for just punishment for the offense." § 3553(a). *See Jones*, ___ F. Supp.3d ___, 2020 WL 5359636, at *7 (citing and agreeing with *Quinn*, ___ F. Supp.3d at ____, 2020 WL 3275736, at *3, that the defendant "long ago completed a sentence which Congress . . . consider[s] sufficient and proportionate to his misconduct;" the defendant was 22 when he began serving the sentence and has spent more than half his life in prison. Under these conditions, Mr. Jones's continued incarceration is unjust').

With nothing more than this 11-year reduction in his mandatory § 924(c) sentence to adjust for the disparity, Mr. Tucker should be ***released now or very soon***. Cutting 11 years off his current release date of June 24, 2035, and considering the additional sentence reduction he would receive from gain time accrued, would place him at or close to the conclusion of his total term of imprisonment imminently. And notably, that estimation does not even take into account the other sea changes in the law that have occurred with respect to the Guidelines. Such changes are "relevant" under both § 3553(a)(6), and § 3553(a)(4), here. Notably, ere Mr. Tucker sentenced today he would face not only a lesser § 924(c) sentence, but a lesser Guideline range as well. There are several reasons why.

First, when Judge Gold sentenced Mr. Tucker to serve a total term of ***510 months (42.5 years) imprisonment*** in 1998, the Guidelines were mandatory. Courts had little discretion to impose a sentence outside the Guideline range. But

then there was a huge sea change in the law in 2005 when the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), making the Guidelines advisory. Released from the few narrow grounds on which departures were "encouraged" previously, *Booker* gave discretion back to the district courts and permitted defendants to seek variances on all sorts of grounds, even from the Chapter 4 Career Offender range. That was not a possibility at Mr. Tucker's 1998 sentencing. Indeed, as was the consistent approach at the time, the court sentenced him with the then-mandatory Career Offender range, to a term of 240 months concurrent on Counts 1, 2, and 6 here. (PSI, ¶¶ 26, 33, 48, 87; DE 93). In *Jones*, the district court expressly joined "the growing majority of courts in holding that the 'sea changes' in sentencing law wrought by [both] *Booker* and the FSA," "weigh strongly in favor of reducing [the defendant's sentence;" citing *Haynes*, __- F. Supp.3d. at ___, 2020 WL 1941478, at *15). The Court should so find here as well.

And notably, there were other sea changes in the law beyond *Booker* that would favorably impact Mr. Tucker if sentenced today. Starting in 2013, the Supreme Court decided a series of decisions – *Moncrieffe v. Holder*, 569 U.S. 84 (2013); then *Descamps v. United States*, 570 U.S. 254 (2013); and ultimately, *Mathis v. United States*, 136 S.Ct. 2243 (2016)— which together clarified proper application of the categorical approach. Pursuant to this trilogy of decisions, it became clear to the Eleventh Circuit that "as a categorical matter," Florida burglary – which could be committed by entering the curtilage of a home, rather than the home itself – was ***not*** an ACCA violent felony. In The Eleventh Circuit so held, reversing decades of law in which

defendants like Mr. Tucker had faced harsh ACCA terms predicated upon Florida burglaries. *United States v. Esprit*, 841 F.3d 1235, 1241 (11th Cir. 2016).

Soon thereafter, the U.S. Sentencing Commission amended the Guidelines to delete "burglary of a dwelling" as an enumerated "crime of violence" for purposes of the Career Offender provision. U.S.S.G., Amend. 798 (effective Aug. 2016). And indeed, without the counting of his prior Florida burglaries as *either* an ACCA *or* Career Offender predicate, Mr. Tucker would not have a sufficient number of prior "crimes of violence" to qualify as either an Armed Career Criminal or Career Offender today. Today, he would face a maximum of 10 years on Count 7 (his § 922(g) count) rather than the minimum ACCA term of 180 months Judge Gold imposed in 1998. And without any countable burglaries, he would now have only 1 (not 2) qualifying Career Offender predicates (resisting an officer with violence). Without the Chapter 4 Career Offender enhancement, his total offense level for Counts 1, 2, and 6 (Hobbs Act conspiracy, Hobbs Act robbery, and carjacking) today would be a 26 rather than 32. And his Criminal History Category would be V instead of VI. At an offense level 26, and Criminal History Category V, he would face an advisory guideline range today of 110-137 months imprisonment, rather than the 210-262 months he faced for Counts 1, 2, and 3 in 1998. (PSI, ¶¶ 26, 33, 48, 87).

And what that means is that his Guideline sentence on Counts 1, 3, and 6 would likely be ***cut in half***.

That a defendant with stacked § 924(c)s, would no longer be deemed a Career Offender, is an important factor other courts have rightly considered under § 3553(a).

See United States v. Harris, 2020 WL 7828771 (D. Md. Dec. 30, 2020) (finding significant under § 3553(a) that the defendant, like Mr. Tucker here, was erroneously deemed a Career Offender previously based upon burglary convictions which no longer qualify as predicates).

Based upon these many changes in the law that would apply if Mr. Tucker were sentenced today – for the exact same crimes, with his exact criminal history – he has likely greatly overserved the sentence that would ever be imposed today. For that reason, his request for outright release from custody is certainly well-founded. As other courts in this district have held in granting COVID-related compassionate release motions, to the extent there is any concern about recidivism, that "will be addressed through [the defendant's] term of supervised release." *Burkes*, DE 71:8.

In *Burkes*, Judge Rosenberg imposed a 365-day term of home confinement as an additional condition of supervised release. Other courts in this district have likewise imposed periods of home confinement as a condition of supervised release, even quite lengthy ones, to assuage any concerns about recidivism. As Judge Middlebrooks has rightly recognized, home confinement is itself "a form of punishment." *United States v. Potts*, No. 06-80070-cr-DMM, DE 1342:12 (S.D. Fla. Sept. 14, 2020). And indeed, as this Court rightly recognized in *United States v. Minsal*, Case No. 18-20597-cr-UNGARO, DE 46:6 (S.D. Fla. Aug. 5, 2020), "[t]he strict terms of [a] lengthy supervised release adequately express the seriousness of the offense, deter criminal conduct, and protect the public."

But admittedly, outright "release" together with additional conditions of supervised release, are *not* the only remedies available to the Court under § 3582(c)(1)(A). The government has emphasized Mr. Tucker's disciplinary history and problems with rule-following – arguing that these are grounds to deny him any relief at all. While the undersigned cannot justify his conduct, or dispute the facts underlying each write-up – Mr. Tucker has owned up to his responsibility. And it is important to place his disciplinary record in context. He was sent to one of the roughest USPs in the country when he was only 21 years old. And he has been moved since to Leavenworth, and McCreary, both of which are truly dangerous places. In these USPs, gangs rule and non-gang inmates fear for their lives. As a young, slight man only 5'4" in height, weighing 145 pounds, Mr. Tucker was terrified being thrust into these "gangland" facilities, populated by "lifers" whose whole purpose is to cause trouble. Indisputably, Mr. Tucker did on some occasions keep a sharp piece of plastic or other makeshift weapon on his person or in his mattress. But to be clear: he never attacked anyone with such implements; he kept them near simply for his own self-protection should he be attacked.

And indeed, while he most definitely had rule-following incidents early on in his incarceration, that type of "insolence" has tapered off markedly as he has grown older and matured. He is in his 40s now, and his records suggest that he is on a much more positive trajectory. After getting out of McCreary and entering Thomson, he has not had a single incident with a cellmate, another inmate, or anyone on the staff. This shows that Mr. Tucker has gained the ability to conform his conduct to the

institution's rules, and become a rule-abiding inmate. And notably, despite his disciplinary problems at prior institutions, throughout everything he still managed to devote himself to study, taking many courses, and working towards his GED. Unlike most inmates in these rough USPs, Mr. Tucker has always seen a positive future for himself and he has engaged in self-improvement constantly to that aim. He clearly has found productive ways to deal with his lengthy incarceration. And importantly, through it all, he has maintained a close relationship with his mother, sister, and son – even after being incarcerated for more than 20 years.

Other courts have granted sentence reductions to offenders with the same type of disciplinary writeups at issue here. *See United States v. James*, 03-21013-CR-HUCK, DE 164 & 174 (S. D. Fla. Oct. 7, 2020) (granting release to a defendant with multiple disciplinary infractions over the course of 16 years including testing positive for THC, being insolent to a staff members, and twice possessing a "hazardous tool," even though the last "hazardous tool" incident occurred in April 2019); *United States v. King*, No. 15-CR-50050-JLV, DE 63 (D. S.D. Oct. 20, 2020) (reducing sentence to time served for defendant with writeups for insolence, possessing an unauthorized item, failing to be in his cell at call time, and fighting with another inmate in 2017); *United States v. Hayes*, NO. 10-CR-00912-DCN, DE 97 (D. S.C. Aug. 27, 2020) (reducing sentence to time served for defendant with two prior disciplinary infractions for threatening BOP staff, the last one occurring only 18 months prior); *United States v. Marks*, 455 F. Supp.3d 17, at *8 (W.D.N.Y. Apr. 20, 2020) (finding that the defendant with stacked § 924(c) convictions would not pose a danger if

released despite disciplinary infractions involving fighting other inmates on 3 separate occasions, and being found guilty of "bribing a staff member" thereafter).

Notably, in *United States v. Jefferson*, 00-CR-00437-EGS, DE 113 (D. D.C. Oct. 28, 2020), another § 924(c) stacking grant, the defendant had 18 disciplinary infractions including for fighting, with one fighting incident that same year. He argued – and the court agreed – that it is "indisputable that [the defendant's] infractions occurred *in a dangerous and violent environment that is incomparable to life outside of prison*." The court in *Jefferson* noted that the conditions it would impose on the defendant upon release, including a period of home confinement with electronic monitoring, would "ensure the safety of the community." The Court should so find here as well.

If the Court has concerns about Mr. Tucker's disciplinary history prior to his arrival at USP Thomson, the answer is not to deny him any relief for his harsh, and now-clearly-disparate stacked § 924(c) sentence. The answer is to reduce that inequity substantially, but not completely – require him to serve several more years in jail, but not the full 14 remaining at this time.

As the court rightly explained in *Maumau*, "notwithstanding the colloquial references" to § 3582(c)(1)(A) motions as motions for "compassionate release," the court need not actually reduce a sentence to time served to effectuate the defendant's immediate release. "Rather, a downward adjustment may be made even if it results in [the defendant's] continued incarceration." *Id.* at *8 (citing *Urkevich*, 2019 WL 6037391 at *4 (noting that the court has the power under § 3582(c)(1)(A) to simply

reduce, although not end, a sentence; noting that "[a] reduction in the sentence at this juncture will help Urkevich and the Bureau of Prisons plan for his ultimate release").

In *Maumau*, after finding "extraordinary and compelling reasons" for a significant sentence reduction due to the severity and disparity of pre-First Step Act stacked § 924(c) sentences, the court set the case for a hearing so that the parties could present their positions as to what type of reduction "would be an appropriate sentence" for the defendant in light of the § 3553(a) factors. Other courts have dealt with such cases similarly. *See Gaines*, 2020 WL 7641201, at *2 (noting that "[i]n providing Gaines a remedy under § 3582(c)(1)9A), the Court is not required to immediately release him, but rather may adjust his sentence downward, resulting in his continued incarceration for a period of time;" citing as support *Maumau*, 2020 WL 80612, at *8 (where the court ultimately reduced the sentence from 240 to 192 months); *Lott*, 2020 WL 3058093, at *3 (where the court reduced the sentence from 240 to 192 months); and *Arey*, 461 F. Supp.3d at 352 (eliminating the "stacking" § 924(c) sentences, resulting in a decrease from 895 to 390 months); setting a hearing for Gaines, "at which the parties may present arguments regarding the appropriate sentence reduction, considering the relevant § 3553(a) factors").

At the very least, the Court should set this matter for a hearing to determine the appropriate reduction for Mr. Tucker here.

WHEREFORE, the defendant, Orville Tucker, respectfully requests that the Court grant his request for a sentence reduction.

Respectfully submitted,

MICHAEL CARUSO
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CERTIFICATE OF SERVICE

I HEREBY certify that on January 28, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Brenda G. Bryn*
Brenda G. Bryn

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-CR-00447-UU

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORVILLE TUCKER,

Defendant.
_____/

NOTICE OF CORRECTION AND CLARIFICATION OF DE 152

The Defendant, Orville Tucker, through undersigned counsel, files this notice to correct two inaccurate statements in the just-filed Reply, DE 152, and to also clarify that Mr. Tucker has by now overserved the reduced Guideline and statutory terms that would govern his exact crimes and criminal history today.

1. Count 7 is the second § 924(c) count, for which Mr. Tucker received a harsh and now-disparate consecutive 20 year term; it is *not* a § 922(g)/ACCA count. At one point toward the end of the Reply, namely, in the discussion on pages 29-30, counsel misstated that Mr. Tucker's Count 7 conviction and sentence were for violating 18 U.S.C. § 922(g). As should be clear from the rest of the Reply, Count 7 is the second § 924(c) count for which Mr. Tucker received a consecutive term of 20 years under the pre-First Step Act version of § 924(c) – the precise sentence he is challenging as unduly harsh and disparate to the sentence that would be imposed for the same conduct today. There is *no* § 922(g)/ACCA count here.

2. The predicate used for Mr. Tucker's Career Offender sentence was battery on a law enforcement officer (BOLEO), *not* resisting with violence; since BOLEO does not categorically qualify as a crime of violence under current law, Mr. Tucker has *no* qualifying Career Offender predicates. At page 30, counsel stated that Mr. Tucker had a prior conviction for resisting an officer with violence (relying on the PSI, ¶ 44). Counsel had not been able to check the 1998 sentencing transcripts, which are listed at DE 105, 106, and 107, because apparently – due to the age of this case – were never scanned. The transcripts are not accessible through PACER at those docket entry numbers.

After counsel filed the Reply she checked back through other proceedings, and located an excerpt of DE 106 (the May 29, 1998 transcript) as an attachment to Mr. Tucker's § 2255 motion filed in 2016. (DE 128). Upon review of that excerpt from the May 29, 1998 sentencing (DE 128-1), counsel realized that Judge Gold determined on that date that there had in fact been a clerical error on one of the state documents. He decisively found that in Florida Case No. 95-10458, Mr. Tucker was convicted of battery on a law enforcement officer (BOLEO), *not* resisting with violence. That made no legal difference in his view, since under the law at the time BOLEO was a crime of violence qualifying Mr. Tucker as a Career Offender. (DE 128:4-16).

Notably, however, the law has now changed significantly on that point. Indeed, not only because of the intervening decisions in *Moncrieffe*, *Descamps*, and *Mathis* which clarified the categorical approach, but also because of the decisions in *Curtis*

Johnson v. United States, 559 U.S. 133 (2010) (battery by touching does not meet the elements clause) and *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) (eliminating the ACCA residual clause as an alternative pathway to enhancement), as well as the Sentencing Commission's ensuing elimination of the residual clause in § 4B1.2 through Amendment 798, it is now undisputed that Florida BOLEO does *not* categorically qualify as a "crime of violence." Indeed, starting in 2018, with the Solicitor General's concession to the Supreme Court in *Franklin v. United States*, No. 17-8401, the government has now candidly conceded before all levels of the federal courts, that in light of these many intervening changes in the law, Florida BOLEO does not categorically qualify as either a "violent felony" or a "crime of violence" within the identical elements clauses of the ACCA and Guidelines. *See Franklin*, Memorandum of the United states at 5 (July 6, 2018) (concession by the Solicitor General that because "touching or striking" is not further divisible and "'touching or striking' battery does not categorically require the use of violent force, petitioner's battery conviction does not qualify as a violent felony under the ACCA's elements clause").

Undoubtedly, Mr. Tucker would ***not*** qualify as a Career Offender *even if* his 1995 conviction ***were*** for resisting with violence, as indeed, none of his prior burglary convictions now qualify as Career Offender predicates, and an offender needs 2 prior "crimes of violence" to be sentenced as a Career Offender. Nonetheless, as both a factual and legal matter, it is important to be clear for the weighing of the § 3553(a)

factors here, that Mr. Tucker *does not even have 1 still-qualifying Career Offender predicate. He has* ***no*** *qualifying Career Offender predicates*. He is no longer a Career Offender.

3. Mr. Tucker has overserved the minimum Guideline and statutory sentence that both the Commission and Congress today deem sufficient for his same crimes, and criminal history. At page 31 of the Reply, counsel stated without elaboration that Mr. Tucker "has likely greatly overserved the sentence that would ever be imposed today." To elaborate now: while it may be impossible to know what exact sentence would be imposed on Mr. Tucker today, it is definitely possible to know – and say with certainty – that Mr. Tucker has by now overserved the minimum Guideline and statutory terms that both the Commission and Congress deem sufficient to punish his exact conduct, taking into account his exact criminal history.

Indeed, we know that the minimum total sentence he would receive under the advisory Guidelines (without a variance) and under the revised § 924(c) scheme today would be 278, rather than 510 months imprisonment. Specifically, without any still-qualifying "crimes of violence" within the elements clause, Mr. Tucker would indisputably be resentenced on Counts 1, 2, and 6 today *without* the Career Offender enhancement. As noted in the Reply at 30-31, without the Career Offender enhancement, Mr. Tucker would today have a combined offense level of 26 on Counts 1, 2, and 6. (PSI, ¶30). And, at a Criminal History of V rather than VI (PSI, ¶ 48), he

would face an advisory Guideline range today of 110-137 months imprisonment.

Notably, when Judge Gold sentenced Mr. Tucker under the mandatory Guidelines in 1998, he imposed sentence on Counts 1 and 2 at the bottom of the then-applicable Career Offender Guideline range (210 months imprisonment). Although the 210-262 month Career Offender range covered Count 6 as well, Judge Gold could not impose a bottom-of-the-Guideline sentence on Count 6 because there is a 15-year statutory maximum in 18 U.S.C. § 2119(1). Accordingly, Judge Gold imposed 180 months on Count 6, concurrent with the 210 month terms on Counts 1 and 2.

At this time, the bottom of the now-advisory Guideline range for Mr. Tucker is half of what it was in 1998: 110 rather than 210 months. And indeed, were the Court to resentence Mr. Tucker as Judge Gold did in 1998, to the bottom of the Guideline range on Counts 1, 2, and 6, and minimum mandatories on the § 924(c) counts, Mr. Tucker would receive a 110 month sentence on Counts 1, 2, and 6, followed by a consecutive 14 years (168 months) on Counts 3 and 7. Together, that would result in a total term of ***278 months (23 years, 2 months) imprisonment***. And by now, Mr. Tucker has ***overserved*** 23 years and 2 months.

Indeed, as indicated by the PSI, Mr. Tucker has been in custody continuously since his July 17, 1996 arrest. PSI p. 2[1]. What that means is that as of this writing,

[1] Mr. Tucker was first taken into state custody for the offenses here, and he remained in state custody from July 17, 1996 until June 11, 1997. On June 11, 1997, he was writted into federal custody and thereafter the state charges for robbery carjacking, and gun possession were *nolle prossed*. PSI ¶¶ 66-68. Upon information and belief, in circumstances like these where no sentence has been imposed for the same charges

he has actually served a total of ***23 years, 6 months, and 17 days***. Thus, he has not merely fully served – but in fact, ***overserved*** – the sentence that both Congress and the Commission now deem "sufficient but not greater than necessary to comply with the purposes of sentencing" in 18 U.S.C. § 3553(a)(2). And since the Court must consider that overarching directive in § 3553(a) in order to properly weigh the relevant factors, it should weigh very strongly now that had Mr. Tucker been sentenced to 278 months imprisonment in 1998, regardless of his disciplinary history the BOP would have released him from USP Thomson, he would have finished his time in a half-way house, and at this moment he would be on supervised release.

For the reasons stated in the Reply, and those further clarified here as well, a reduced term of 278 months imprisonment is a reasoned and equitable sentence that will avoid unwarranted disparities between Mr. Tucker and defendants convicted of similar conduct with similar records.

Respectfully submitted,

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by the state, the BOP credits the time he served in state custody toward the federal sentence.

CERTIFICATE OF SERVICE

I HEREBY certify that on February 3, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Brenda G. Bryn
Brenda G. Bryn

A-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-CR-00447-UU

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORVILLE TUCKER,

Defendant.
_____/

NOTICE OF FILING UPDATED INDIVIDUALIZED NEEDS PLAN – BOP PROGRAM REVIEW AS OF 3.15.2021

The Defendant, Orville Tucker, hereby files his most current Individualized Needs Plan – Program Review, which was updated by the BOP on 3.15.2021, as support for his pending motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(1)(A).

This updated Program Review should replace the outdated Program Review as of 9.21.2020, which Mr. Tucker filed on December 4, 2020 as an attachment to his *pro se* motion to reduce sentence. (DE 140:15-18). Of particular relevance to the question now before the Court of whether a reduction in sentence is consistent with the 18 U.S.C. § 3553(a) factors, in its updated Program Review for Mr. Tucker the BOP has:

(1) deleted all of the "pending charges" erroneously listed on the first page of its 9.21.2020 Program Review (DE 140:15);

(2) included the several additional courses that Mr. Tucker has

completed since the 9.21.2020 review; and

(3) recognized that Mr. Tucker has had *no incident reports for the last 6 months*;[1] and that he progressed to SMU Level 2 on 3/1/2021 because he has "*maintained clear conduct*."

This updated information supports Mr. Tucker's argument that his sentence should be reduced pursuant to § 3582(c)(1)(A) at this time. For the reasons previously stated in DE 152 and DE 155, he has now overserved the term of imprisonment that would rightfully be imposed under both 18 U.S.C. § 924(c) as amended by the First Step Act and the advisory Guidelines in effect today, as a non-Career Offender under current law. And indeed, his positive disciplinary record over the last year and continued efforts to rehabilitate himself through education confirms that a reduction of his current sentence to time served plus imposition of a period of home confinement as a condition of supervised release would be consistent with all of the relevant 18 U.S.C. § 3553(a) factors at this time.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

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[1] Mr. Tucker has actually maintained a perfect disciplinary record for over a year now.

CERTIFICATE OF SERVICE

I HEREBY certify that on March 24, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Brenda G. Bryn
Brenda G. Bryn

2-30

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323
Dept. of Justice / Federal Bureau of Prisons
Team Date: 03-15-2021
Plan is for inmate: TUCKER, ORVILLE 50259-004

Facility:	TOM THOMSON ADMIN USP	Proj. Rel. Date:	06-24-2035
Name:	TUCKER, ORVILLE	Proj. Rel. Mthd:	GCT REL
Register No.:	50259-004	DNA Status:	POL03036 / 10-19-2010
Age:	44		
Date of Birth:	[redacted]		

Detainers

Detaining Agency	Remarks
ICE	DEPORTATION - JAMAICA

Current Work Assignments

Facl	Assignment	Description	Start
TOM	A&O COMPLT	A&O COMPLETE	09-26-2020
TOM	SMU-UNASSG	SMU UNASSIGNED	10-11-2020

Current Education Information

Facl	Assignment	Description	Start
TOM	ESL HAS	ENGLISH PROFICIENT	01-03-1999
TOM	GED SAT	GED PROGRESS SATISFACTORY	11-30-2005
TOM	GED XN	EXEMPT GED NON-PROMOTABLE	11-02-2015

Education Courses

SubFacl	Action	Description	Start	Stop
TOM		ACE PROBLEM SOLVING & DECISION	03-03-2021	CURRENT
TOM SMU	C	REC F- STRESS, PAINT, TAKRAW	12-07-2020	12-28-2020
TOM SMU	C	REC E - PHYSI, PAINT, HANDBALL	11-09-2020	11-30-2020
TOM SMU	C	ACE SMU KING ARTHUR HISTORY	10-20-2020	10-23-2020
TOM SMU	C	ACE SMU ANGER MANAGEMENT	10-14-2020	10-19-2020
TOM SMU	C	ACE MANAGING CREDIT WISELY	10-07-2020	10-09-2020
TOM SMU	C	ACE SMU PERSONAL DEVELOPMENT	10-02-2020	10-07-2020
TOM SMU	W	ACE MOST INFLUENCIAL CHAR LIT	09-24-2020	10-01-2020
MCR	C	VT TOOLS AM/POWER AND HAND	08-06-2020	08-13-2020
MCR	C	SELF STUDY STRETCHING	07-16-2020	07-22-2020
MCR	W	EATING RIGHT TUES/SAT 7:00 PM	01-24-2018	04-22-2018
LEW SMU	W	PGED IN-CELL STUDY/SPECIAL MGT	07-06-2016	05-01-2017
LEW SMU	C	SMU ACE ROUND E	01-06-2017	02-11-2017
LEW SMU	C	RADIO SMU PARENTING E RPP6	01-03-2017	02-10-2017
LEW SMU	C	SMU RADIO WELLNESS ROUND C	10-04-2016	01-06-2017
LEW SMU	C	ACTIVITY PACKET ROUND C	10-04-2016	01-06-2017
LEW SMU	C	SMU ACE ROUND D	11-08-2016	12-14-2016
LEW SMU	C	RADIO SMU PARENTING C RPP6	08-09-2016	10-19-2016
LEW SMU	C	SMU ACE ROUND C	08-26-2016	10-15-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND B	07-25-2016	10-04-2016
LEW SMU	C	ACTIVITY PACKET ROUND B	07-25-2016	10-04-2016
LEW SMU	C	RADIO SMU PARENTING A RPP6	04-05-2016	06-17-2016
LEW SMU	C	ACTIVITY PACKET RDA	04-19-2016	06-09-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND A	04-19-2016	06-07-2016
LEW SMU	C	SMU ACE ROUND A	04-18-2016	05-24-2016
LEW SMU	C	RADIO SMU PARENTING L RPP6	02-23-2016	03-29-2016
LEW SMU	C	ACTIVITY PACKET ROUND L	03-14-2016	04-12-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND L	03-14-2016	04-12-2016
LEW SMU	C	SMU ACE ROUND L	03-03-2016	04-12-2016
LEW SMU	C	SMU RADIO WELLNESS ROUND K	02-09-2016	02-10-2016
LEW SMU	C	ACTIVITY PACKET ROUND K	02-09-2016	02-10-2016
LEW SMU	C	SMU ACE ROUND K	01-25-2016	01-28-2016
LEW SMU	C	RADIO SMU PARENTING K RPP6	01-22-2016	01-22-2016
VIP	C	RIVERS OF THE U.S. PART 2	08-04-2015	08-18-2015
VIP	C	RPP FCC AIDS AWARENESS (C1)	11-12-2014	11-12-2014

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323

Dept. of Justice / Federal Bureau of Prisons

Team Date: 03-15-2021

Plan is for inmate: TUCKER, ORVILLE 50259-004

SubFacl	Action	Description	Start	Stop
COP	C	MANAGING MY LIFE	04-08-2014	07-04-2014
COP	C	RPP HEALTH/NUTRITION #1	04-16-2014	04-16-2014
POL	W	STUDENTS IN SHU 0 SCHOOL HRS	09-14-2010	02-13-2014
POL	C	1 USP FITNESS ASSESSMENT	10-07-2013	11-15-2013
POL	C	USP LEATHER CLASS	02-27-2013	05-27-2013
POL	C	USP WALK/RUN CLUB	03-15-2012	11-14-2012
POL	C	ACE AMER GOV	01-04-2011	04-08-2011
POL	C	FINANCIAL PLANNING 6:30-8:30	01-03-2011	04-08-2011
POL	W	PGED 4 E M-F 12:30-2:00	05-12-2010	09-14-2010
POL	W	PGEDA2B PRE GED M-F 9:00	12-21-2009	05-12-2010
FLP STPD	C	BEGINNING WELLNESS	07-07-2009	09-15-2009
FLP STPD	C	BEGINNING CROCHET	07-07-2009	09-15-2009
FLP STPD	W	GED DELTA B	09-11-2008	08-25-2009
FLP STPD	C	ADVANCED CROCHET	01-16-2009	04-01-2009
FLP STPD	C	ADVANCED ART	01-16-2009	04-01-2009
FLP STPD	C	BEG GUITAR CLASS	01-16-2009	04-01-2009
FLP STPD	C	ADVANCED WELLNESS	01-16-2009	04-01-2009
FLP STPD	C	BEGINNING CROCHET	09-30-2008	12-09-2008
FLP STPD	C	BEG GUITAR CLASS	09-30-2008	12-09-2008
FLP STPD	C	INTERMEDIATE WELLNESS	09-30-2008	12-09-2008
FLP STPD	C	INTERMEDIATE ART	09-30-2008	12-09-2008
FLM	W	GED PROGRAM	06-09-2005	08-28-2008
FLM	W	SCIENCE WARS	07-03-2008	08-28-2008
FLM	W	GED PROGRAM	07-01-2003	09-30-2004
FLM	C	THE AFRICANS	03-05-2003	05-06-2003
FLM	W	GED PROGRAM	04-03-2002	12-04-2002
FLM	C	WORLD PHILOSOPHY	01-10-2002	04-03-2002
FLM	W	GED PROGRAM	01-12-2001	02-12-2001
FLM	W	GED PROGRAM	04-04-2000	10-12-2000
LVN	W	2:00-3:00 GED CLASS-CRUM	08-02-1999	03-30-2000
FLP	W	PM GED CLASS 2:00 - 3:15	12-07-1998	04-01-1999

Discipline History (Last 6 months)

Hearing Date	Prohibited Acts

*** NO INCIDENT REPORTS FOUND IN LAST 6 MONTHS ***

Current Care Assignments

Assignment	Description	Start
CARE1	HEALTHY OR SIMPLE CHRONIC CARE	07-08-2020
CARE1-MH	CARE1-MENTAL HEALTH	06-22-2010

Current Medical Duty Status Assignments

Assignment	Description	Start
C19-T NEG	COVID-19 TEST-RESULTS NEGATIVE	09-18-2020
LOWER BUNK	LOWER BUNK REQUIRED	07-08-2020
REG DUTY	NO MEDICAL RESTR--REGULAR DUTY	07-08-2020
YES F/S	CLEARED FOR FOOD SERVICE	07-08-2020

Current Drug Assignments

Assignment	Description	Start
ED NONE	DRUG EDUCATION NONE	03-18-2014
NR COMP	NRES DRUG TMT/COMPLETE	04-23-2009

FRP Payment Plan

Most Recent Payment Plan

FRP Assignment: **COMPLT** **FINANC RESP-COMPLETED** **Start: 04-02-2019**

Inmate Decision: **AGREED** **$35.00** Frequency: **SINGLE**

Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00719323
Team Date: 03-15-2021

Dept. of Justice / Federal Bureau of Prisons
Plan is for inmate: TUCKER, ORVILLE 50259-004

Most Recent Payment Plan

Payments past 6 months: **$0.00** Obligation Balance: **$0.00**

Financial Obligations

No.	Type	Amount	Balance	Payable	Status
1	ASSMT	$500.00	$500.00	IMMEDIATE	EXPIRED
		*** NO ADJUSTMENTS MADE IN LAST 6 MONTHS *****			
2	REST NV	$210.00	$0.00	IMMEDIATE	COMPLETEDZ
		*** NO ADJUSTMENTS MADE IN LAST 6 MONTHS *****			

FRP Deposits

Trust Fund Deposits - Past 6 months: $335.00 Payments commensurate ? N/A

New Payment Plan: ** No data **

Progress since last review

Progressed to SMU Level 2 on 3/1/2021. Maintained clear conduct.

Next Program Review Goals

Maintain clear conduct, continue programming, and progress to SMU Level 3 on 5/1/2021.

Long Term Goals

Maintain clear conduct, continue programming, and complete the SMU Program in June 2021.

RRC/HC Placement

No.
Management decision - Will review 17-19 months from PRD..
Consideration has been given for Five Factor Review (Second Chance Act):
- Facility Resources : Resources available in area
- Offense : Nature of offense raises concerns
- Prisoner : No GED
- Court Statement : No statement
- Sentencing Commission : No statement

Comments

** No notes entered **

A-9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-CR-00447-UU

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORVILLE TUCKER,

Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

The Defendant, Orville Tucker, files the recent decision in *United States v. Wallace*, Case No. 95-8007-CR-CMA (S.D. Fla. Apr. 28, 2021) (Exhibit A) as support for his pending motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(1)(A).

In *Wallace*, Judge Altonaga reduced the harsh consecutive sentence imposed in 1995 for a defendant convicted of nine Hobbs Act robberies and nine § 924(c) convictions, to the minimum term that would be imposed after Congress's clarification of the proper stacking procedure for § 924(c) offenses in Section 403 of the First Step Act. Citing the decisions of the Second, Fourth, Sixth, and Seventh Circuits that Mr. Tucker cited in DE 152 – as well as the recent decisions of the Fifth, Ninth, and Tenth Circuits which have now reasoned consistently[1] – Judge Altonaga

[1] *See* Exhibit A at 4, n. 2 (citing *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021); *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021); *United States v. Shkambi*, 994 F.3d 338 (5th Cir. 2021)).

recognized that not only is a district court "free 'to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before [it] in motions for compassionate release,'" but indeed, the disparity between the defendant's sentence and the sentence that would be imposed today after the amendments made by Section 403 was an "extraordinary and compelling justification" for reducing Mr. Wallace's sentence to the term that "Congress has now deemed appropriate." Exhibit A at 4-6.

In *Wallace*, as here, the government argued that a reduction based upon the disparity between pre- and post-FSA § 924(c) sentences should be denied because Congress did not make Section 403 retroactive." But Judge Altonaga was "unpersuaded" by that argument. She explained:

> [T]he fact that the FSA changes in [section] 924(c) were not explicitly retroactive is relevant but ultimately has little bearing on whether the court is empowered to act under [s]ection 3582, because it is not unreasonable for Congress to conclude that not all defendants convicted under [section] 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis." *United States v. Haynes*, 456 F. Supp.3d 496, 516 (E.D.N.Y. 2020) (alternations added; other alternations adopted; quotation marks and citations omitted); *see also* [*United States v.*] *McCoy*. 981 F.3d [271,] 286 [(4th Cir. 2020)]) ("The fact that Congress chose not to make [section] 403 of the First Step Act categorically retroactive does not mean that courts may not consider the legislative change in conducting their individualized reviews of motions for compassionate release under [section] 3582(c)(1)(A)(i)" (alterations added)). The Court agrees with Defendant and will consider his sentence disparity as an extraordinary and compelling justification for relief.

Exhibit A at 5.

In so finding, Judge Altonaga noted with significance that the sentence

Wallace received on his nine § 924(c) counts was more than three times the sentence he would face on those counts if sentenced today. *Id.* at 6. And here, Mr. Tucker's stacked sentence of 25 years on two § 924(c) counts is more than twice the 14 year sentence he would face on those same two counts today. But in addition, and *unlike* Wallace, Mr. Tucker no longer qualifies as a Career Offender, which would bring his total offense level on his Guideline counts way down today as well, such that – *unlike* Wallace – he has overserved the total sentence that would likely be imposed today.

Even though Wallace was not even close to overserving the sentence that would be imposed today, Judge Altonaga nonetheless found during her individualized review of his case that several additional facts strengthened his argument for a reduction to the new statutory minimum on the § 924(c) counts. And notably, those factors are present here as well.

First, Judge Altonaga noted with significance Wallace's "young age at the time he committed the offenses and at the time of sentencing," which she found should be "considered together" with the severity and disparity of his sentence vis-a-vis that which would be imposed for the same offenses today. DE 135:5 (agreeing with Wallace's argument that 18 year-olds are little different than juveniles, and they "remain immature and prone to impulsive, emotionally triggered actions and peer pressure;" also agreeing with the court in *United States v. Harris*, No. CR 97—399-1, 2020 WL 7861325, at *14 (E.D. Pa. Dec. 31, 2020) that even the fact that a defendant was under age 25 when he committed a string of robberies "indicate[d] less culpability

and enhance[d] the possibility of rehabilitation").

So too here. Mr. Tucker was 19 at the time of his offense, and – like Wallace – 21 at the time of sentencing. Both defendants committed their crimes at a young age, and were thrust into some of the roughest USPs in the country. As of this writing, both have served at least 25 years for crimes committed when their brains were not yet fully developed and they were still immature and impulsive. While their conduct in these USPs has not been perfect (which is common for defendants housed in the roughest facilities), both have nonetheless grown up over their lengthy periods of incarceration and attempted to rehabilitate through coursework designed to improve their character, intellect, and real-world coping skills. One particular mark of maturity here is that Mr. Tucker, like Mr. Wallace, has been able to maintain close relations with his family (mother and sisters) throughout decades of incarceration. As such, he – like Mr. Wallace – will have a strong support system to ease his transition back to society when he is released. Undersigned counsel has spoken to Mr. Tucker's mother who has stood behind him all of these years, and is eagerly awaiting the day that her only son will be released.

Another factor Judge Altonaga pointed to in *Wallace* as weighing in favor of the requested sentence reduction there was "[t]he severity of the imposed sentence as compared to the sentences [Wallace's juvenile] accomplices received." DE 135:7. The juvenile accomplices in *Wallace* were tried as adults by the State of Florida, but given only 5 years imprisonment as compared to the effective life sentence Wallace received

in federal court due to the operation of the harsh stacking rule in former § 924(c).

And here, there is a marked disparity as well. Mr. Tucker's juvenile accomplice – Bolivea Facey – was not charged federally. However, like the accomplices in *Wallace*, he was tried as an adult by the State of Florida. And there, he was sentenced to only 7 years imprisonment for the KFC robbery and carjacking, *as well as the Chicken Plus robbery (a crime for which the federal jury acquitted Mr. Tucker). See* Exhibit B (Facey's publically-available DOC record and docket sheets). Thus, here as in *Wallace*, "the harshness of the sentence" Mr. Tucker received due to the operation of former § 924(c) for two – not three – crimes of violence, as compared to Facey's far more lenient concurrent sentence for additional violent incidents, is yet another "compelling reason to modify [Tucker's] sentence." Exhibit A, at 7.

In short, both case-specific circumstances that Judge Altonaga found strengthened Wallace's request for a sentence reduction strengthen Mr. Tucker's request for a sentence reduction as well. As such, Mr. Tucker urges the Court to find that based upon the combination of circumstances he has presented – which includes one crucial circumstance that did *not* exist in *Wallace*, namely, that he has now *overserved* the total term that Congress *and the Commission* would today deem sufficient for his precise offense conduct committed by an offender with his precise criminal history – there are indeed extraordinary and compelling reasons to reduce his sentence to the minimum term that would be imposed under the current Guidelines and current version of § 924(c).

While applying current law in *both* respects would result in a time-served sentence – which may, of course, be accompanied by imposition of additional conditions of supervised release term such as home confinement with electronic monitoring – this Court also has the discretion to simply reduce Mr. Tucker's total sentence by the 11 year differential in the consecutive terms that would be imposed for Counts 3 and 7 under § 924(c) today.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*

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CERTIFICATE OF SERVICE

I HEREBY certify that on May 5, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Brenda G. Bryn
Brenda G. Bryn

A-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 97-CR-00447-UNGARO

UNITED STATES OF AMERICA

V.

ORVILLE TUCKER,

Defendant.
_____/

GOVERNMENT'S NOTICE OF SUPPLEMENTAL AUTHORITY

On December 3, 2020, Defendant Orville Tucker filed a motion for compassionate release under the First Step Act, which remains pending. (CRDE 140). The government filed a response to the motion on December 16, 2020. (CRDE 143). In his motion, Tucker argues the First Step Act's amendments to § 924(c) fall within Subdivision D of the United States Sentencing Guidelines Manual (U.S.S.G.) § 1B1.13,[1] and the Court has discretion to grant extraordinary and compelling reasons under that provision. (CRDE 140:8). As stated in the government's response, Tucker's motion should be denied because he has not presented "extraordinary and compelling" reasons consistent with the U.S.S.G. § 1B1.13. (CRDE 143:8-11). At the time of the government's response, there was no binding authority as to whether the policy statement places a limit on what may be considered "extraordinary and compelling" in the context of 18 U.S.C. § 3582 motions.

[1] Subdivision D states:

> The Application Note for section 1B1.13 describes four categories of circumstances that may present "extraordinary and compelling reasons":
>
> […]
>
> Other Reasons. As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. § 1B1.13, cmt. n.1

Now there is.

On May 7, 2021, the Eleventh Circuit, in a published opinion, held that district courts cannot reduce a defendant's sentence unless a reduction would be consistent with the policy statement located at § 1B1.13. *United States v. Bryant*, --- F.3d ----, 2021 WL 1827158, at *1 (11th Cir. May 7, 2021). Pursuant to § 3582, courts may reduce a defendant's sentence "only if 'such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'" *Id*. at *5. Since the First Step Act's enactment, some courts have held that § 1B1.13 no longer applies to defendant-filed 3582 motions. *Id*. In *Bryant*, the Court rejected that view based on, among other things, the statutory context (*e.g.*, § 3582's mandate that the Sentencing Commission, not courts, define what constitutes "extraordinary and compelling" reasons) and general canons of statutory interpretation (*e.g.*, the presumption that the same words have the same meaning within the same statute—"extraordinary and compelling" should not have different definitions depending on whether the Bureau of Prisons or the defendant files a motion). *Id*. at *6–11. The Court also rejected the defendant's argument that § 1B1.13's "catch-all" provision conflicts with § 3582. *Id.* at *13–15. The First Step Act did nothing to alter the BOP's role in § 3582 motions as provided for by Application Note 1(D) (the "catch-all" provision). *Id*. In other words, the "catch-all" provision, though not applicable to defendant-filed motions, still applies to BOP-filed motions. *Id.*

In addition to the 18 U.S.C. § 3553 factors, this Court should deny Tucker's motion for compassionate release because he is not eligible for relief under § 3582. (CRDE 143:11-12). Tucker is not eligible because he has not presented an "extraordinary and compelling" reason that is consistent with the policy statement. Tucker must do so, according to binding precedent, at least

to be considered for early release.[2]

Respectfully submitted,

JUAN ANTONIO GONZALEZ
ACTING UNITED STATES ATTORNEY

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[2] The *Bryant* opinion is attached to this notice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 11, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent notification of such filing to Brenda G. Bryn, Esq., Counsel for the Defendant.

s/ Francesse Lucius Cheron
Francesse Lucius Cheron
Assistant United States Attorney

A-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-CR-00447-UNGARO

UNITED STATES OF AMERICA,

***Plaintiff*,**

v.

ORVILLE TUCKER,

Defendant.
_____/

DEFENDANT'S RESPONSE TO THE UNITED STATES' NOTICE OF SUPPLEMENTAL AUTHORITY

The defendant, Orville Tucker, through undersigned counsel, hereby responds to the United States' Notice of Supplemental Authority regarding *United States v. Bryant*, No. 19-14267, 2021 WL 1827158 (11th Cir. May 7, 2021), and states:

1. The *Bryant* decision has created a circuit split that is likely to receive further review.

In *Bryant*, a two-judge majority of the Eleventh Circuit broke from every other circuit to have addressed the matter, and held that the policy statement in U.S.S.G. § 1B1.13 applies to defendant-filed compassionate release motions, and binds the discretion of the courts. "In short," the court held, "1B1.13 is an applicable policy statement for all Section 3582(c)(1)(A) motions, and Application Note 1(D) does not grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence." *Bryant*, 2021 WL 1827158 at *2.

In doing so, the Eleventh Circuit expressly disagreed with the ***seven*** circuits which had by then ruled otherwise. *See United States v. Brooker*, 9796 F.3d 228, 235-

36 (2d Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109-11 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 275-77, 280-84 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1048-51 (10th Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 832-37 (10th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 799-802 (9th Cir. 2021); *United States v. Shkambi*, 994 F.3d 338, 392-93 (5th Cir. 2021). These courts have since been joined by the D.C. Circuit, making the Eleventh Circuit the lone dissenter of an 8-1 split. *See United States v. Long*, __ F.3d __, 2021 WL 1972245 (D.C. Cir. May 18, 2021).

The Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits all erred, the *Bryant* majority declared, by treating the first words of the policy statement ("Upon motion of the Director of the Bureau of Prisons"), and "the repetition of that clause in Application Note 4" ("A reduction under this policy statement may be granted only upon motion of the Director of the Bureau of prisons"), as limiting the policy statement's applicability to motions filed by the Director. According to the *Bryant* majority, these references are simply "prefatory," and not "operative." 2021 WL 1827158, at **11-12 (stating they were mere "prologue," reflective of the time they were written, when "there was no such thing as a defendant-filed motion").

But the majority rejected the suggestion that similar language in Application Note 1(D), requiring deference to the determination of the Director of the BOP on "other reasons" for a reduction, was likewise "prefatory" and not operative. And the majority saw no conflict at all between § 3582(c)(1)(A), as amended by the First Step Act of 2018, and the "unamended Application Note 1(D)." *Id.* at **14-15. It held that

courts still "can and should give effect" to both provisions as written, which means that district courts do *not* have authority to determine whether any factors "other than" those specifically identified by the Commission in Notes 1(A)-(C) or by the BOP are sufficiently "extraordinary and compelling" to warrant a sentence reduction. *Id.*

Judge Martin issued a powerful dissent, explaining why the reasoning of other circuits is correct, and why the majority's reasoning was internally inconsistent and flawed. *Id.* at *16-24 (Martin, J., dissenting). She underscored that in insisting that § 1B1.13 and its commentary remain fully "applicable" to a defendant-filed motion at this time, the majority had to "strike at least two phrases from the policy statement and accompanying application notes," while the other circuits' interpretation of "applicable policy statement" "preserv[es] as much of § 1B1.13 that can be saved." 2021 WL 1827158, at **21-22 (Martin, J., dissenting) (quoting *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2021)). According to Judge Martin, the Court's "interpretation ought to end there." *Id.* at *22.

For all the reasons articulated in Judge Martin's dissent, as well as those addressed by the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, Mr. Tucker maintains that *Bryant* is wrongly decided. It is counsel's understanding that Mr. Bryant will be seeking rehearing en banc from the Eleventh Circuit.

2. The *Bryant* majority interpreted 28 U.S.C. § 944(t) to create an unconstitutional delegation of legislative power.

At least for the time being, the *Bryant* majority's interpretation of 28 U.S.C. § 994(t) is authoritative in this Circuit. And notably, that statutory interpretation has

created a constitutional problem that was not contemplated by the *Bryant* Court. No party, amicus, or panelmember in *Bryant* raised this particular constitutional issue, "and so, of course, [the Court] had no occasion to resolve it." *See United States v. Edwards*, ___ F.3d ___, 2021 WL 1916358 at &4 (11th Cir. May 13, 2021) (citing *Cooper Indus., Inc. v. Aviall Servs., Inc*., 543 U.S. 157, 170 (2004), for the proposition that "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been decided as to constitute precedents.") (further citation omitted)). *See also United States v. Booker*, 543 U.S. 220, 239-241 (2005) (rejecting the government's argument that "four recent cases" precluded the application of *Blakey v. Washington,* 542 U.S. 296 (2004), to the Sentencing Guidelines, because none of those cases had presented the constitutional claim at issue therein).

This Court not only may – but must – consider the constitutional problem that *Bryant*'s statutory interpretation holding has created. For indeed, the never-considered constitutional issue completely undercuts the government's suggestion in its recent notice that *Bryant* has made clear that Mr. Tucker is not "eligible" for a reduction because the grounds he has asserted are not consistent with § 1B1.13. (DE 159:1-2). To the contrary, so long as *Bryant*'s interpretation of § 994(t) remains "binding" in this Circuit, Mr. Tucker was eligible for relief, and the district court's authority to grant him relief was not constrained by § 1B1.13 in any way – for the following reasons.

a. The *Bryant* majority used the word "*define*" where Congress used the word "*describe*."

Bryant's ruling diverging from that of 8 other circuits, rests in significant part on the majority's use of the word "define," where Congress used the word "describe," in 28 U.S.C. § 994(t). The government does the same subtle word switch in its notice of supplemental authority, referring to "3582's mandate that the Sentencing Commission, not courts, ***define*** what constitutes 'extraordinary and compelling' reasons." (DE 159:2) (emphasis added). But this is not the language that Congress used.

Title 18 U.S.C. § 3582(c)(1)(A) grants district courts the authority to reduce a defendant's sentence, for "extraordinary and compelling reasons," after consideration of the § 3553(a) sentencing factors, and provided that any such reduction is consistent with any applicable policy statements issued by the Sentencing Commission. Congress did not expressly define what constitutes extraordinary and compelling reasons for compassionate release in the statutory text. But, contrary to the *Bryant* majority's holding (and the government's notice of supplemental authority), neither did Congress direct the Sentencing Commission to do so. Instead, in 28 U.S.C. § 994(t), Congress directed that the Commission "in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall ***describe*** what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t) (emphasis added).

Congress' choice to have the Commission "***describe***" rather than "***define***" what should be "extraordinary and compelling reasons" illuminates the actual scope of both the Commission's and the district court's authority. As the Tenth Circuit explained:

> Congress, in outlining the Sentencing Commission's duties, chose to employ the word "describe" rather than the word "define." The word "describe" is commonly defined to mean "to use words to convey a mental image or impression of (a person, thing, scene, situation, event, etc.) by referring to characteristic or significant qualifies, features, or details." *Oxford English Dictionary Online* (3d ed. 2015) .... In contrast, the word "define" is commonly understood to mean "[t]o set bounds to, to limit, restrict, confine." *Id.* ....
>
> Congress's choice of the word "describe" makes sense when considered in light of the fact that the specific duty imposed by § 994(t) is part of the Sentencing Commission's overarching duty to "promulgate general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A). ... As Congress, the federal courts, and the Department of Justice have all long recognized, "general policy statements" differ from "substantive rules" ... "[G]eneral statements of policy" are issued by an agency to advise the public prospectively of the manner in which the agency intends for a discretionary power to be exercised, and thus differ from ... "substantive rules," which have the force and effect of law. ...
>
> Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase "extraordinary and compelling reasons," but rather for the Sentencing Commission to describe those characteristic or significant qualities or features that typically constitute "extraordinary and compelling reasons," and for those guideposts to serve as part of the general policy statements to be considered by district courts under the second part of the statutory test in § 3582(c)(1)(A).

United States v. Maumau, 993 F.3d at 821, 833-34 (10th Cir. 2021). Read in this light, § 994(t) creates no constitutional problem.

The *Bryant* majority, however, recast the language of § 994(t) to find that Congress directed the Commission to "***define***" what constitutes extraordinary and compelling reasons for compassionate release, rather than merely to "***describe***" such conditions. *See, e.g., Bryant*, 2021 WL 1827158 at *2 (stating that Congress "directed the Commission to ***define*** 'what should be considered extraordinary and compelling reasons ..."), *Id. at* *5 ("one of which must ***define*** 'extraordinary and compelling reasons"); *Id. at* *7 ("In other words, the statutory context shows us that the Commission had an obligation to ***define*** 'extraordinary and compelling reasons' for all motions under the statute, and that the Commission did so in 1B1.13.") (emphasis added). In light of the fictional "***define***" language, the majority concluded that Congress "did not put district courts in charge of determining what would qualify as extraordinary and compelling reasons that might justify reducing a prisoner's sentence." *Bryant*, 2021 WL 1827158 at *2. Instead, the majority interpreted 28 U.S.C. § 944(t) to delegate that authority entirely to the United States Sentencing Commission. "The ***only boundar***y the SRA placed on the Commission's definition was that '[r]ehabilitation ... alone shall not be considered an extraordinary and compelling reason.' ... And it required district courts to follow that ***definition***." *Bryant*, 2021 WL 1827158 at *3 (citing 28 U.S.C. § 994(t))(emphasis added)

If this is true, then § 994(t) violates the constitutional non-delegation doctrine. And, since any policy statement or commentary promulgated pursuant to an unconstitutional delegation of Article I authority is necessarily unconstitutional as well, § 1B1.13 cannot constrain the Court's authority here. *See Stinson v. United*

States, 508 U.S. 36, 45 (1993) (commentary cannot be "controlling" if it was issued in "violat[ion] of the Constitution.").

b. Congress may not delegate essential legislative functions.

The constitutional "non-delegation" doctrine is "rooted in the separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The framers entrusted the authority to legislate or make law solely to Congress. U.S. CONST. art. I, §§ 1, 8. And this authority carries with it a corresponding limitation: Congress cannot delegate its legislative authority to another branch of the government. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (explaining that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested").

Nonetheless, "in our increasingly complex society, replete with ever changing and more technical problems, '[the] Court has understood that 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" *Gundy v. United States,* 139 S. Ct 2116, 2123 (2019) (plurality op.) (alteration and citations omitted). The Court has therefore held that "a statutory delegation is constitutional so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to perform.'" *Id*. (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S 394, 409 (1928) (brackets in original)). "Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee

'the general policy' he must pursue and the 'boundaries of [his] authority." *Gundy*, 139 S.Ct. at 2129. When Congress follows these rules, there is no "forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton*, *supra*). But the statute must direct and fix the discretion bestowed upon the delegee. *See Mistretta*, 488 U.S. at 372. And this requires that Congress not only "clearly delineate[] the general policy," but also "the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

c. The first task is to determine the scope of the delegation.

"[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Gundy*, 139 U.S. at 2123. And therefore, the constitutional question of "whether Congress has supplied an intelligible principle to guide the delegee's use of discretion" requires "construing the challenged statute to figure out what task it delegates and what instructions it provides." *Id.* In *Gundy*, the Court rejected the petitioner's reading of 34 U.S.C. § 20913(d), the Sex Offender Registration and Notification Act (SORNA), as delegating to the Attorney General the discretion to decide whether SORNA would apply to pre-Act offenders, "to require them to register, or not, as she sees fit, and to change her policy for any reason at any time." *Id.* at 2123. "If that were so," the plurality wrote, "we would face a nondelegation question." *Id.* But that was not how the Court viewed the statute. Instead, the Court had previously interpreted SORNA to require that the Attorney General "should apply SORNA to pre-Act offenders as soon as feasible." *Id.*

Moreover, based on contextual clues including an express "statement of purpose" and the legislative history, the Court held that SORNA merely afforded the Attorney General a limited amount of discretion to determine *when* and *how* to resolve the practical difficulties in applying SORNA's registration requirements to offenders who had completed their sentences before the law took effect. *See id*. at 2127- 2129.

Similarly, here, if § 994(t) merely directs the Sentencing Commission to ***describe*** extraordinary and compelling reasons for compassionate release, as Mr. Tucker maintains, there is no unconstitutional delegation because the final determination of whether such reasons exist properly remains within the province of the Court.[1] But if, as the Eleventh Circuit found, Congress delegated to the Sentencing Commission the authority to ***define*** the core terms of the compassionate release statute, and to render those definitions binding as if written by the Congress itself, then the delegation violated the Constitution by failing to provide any intelligible principle to guide or constrain the Commission's discretion.

d. 28 U.S.C. § 994(t) contains no intelligible principle and imposes no meaningful limit on the Commission's authority.

According to the *Bryant* majority, Congress allowed the Commission to define the scope of § 3582(c)(1)(A) with *only one* caveat: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *See Bryant*,

[1] Notably, federal courts are frequently tasked with determining whether "extraordinary" circumstances warrant relief from an otherwise final judgment. See *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *Makir-Marwil v. U.S. Att'y Gen.*, 681 F.3d 1227, 1229 (11th Cir. 2012); *Calderon v. Thompson*, 523 U.S. 538, 550 (1998).

2021 WL 1827158 at *3. But telling the Commission that one circumstance, *alone*, would *not* be an extraordinary and compelling reason for release, did not provide the Commission any guidance as to what circumstances Congress believed *would* meet that standard – either alone or in combination with other factors. Congress did not declare any general policy regarding what circumstances should qualify for compassionate release, provided no specific directives as to what Congress believed might be "extraordinary and compelling," and provided no meaningful limit on how broadly or narrowly the terms should be defined. Instead, if the *Bryant* majority's reading of § 994(t) is correct, Congress granted the Commission plenary authority to make these determinations on its own.

While the Supreme Court has only rarely struck a delegation as exceeding permissible bounds, "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 430 (1935). *See also Gundy*, 139 S.Ct. at 2123 (noting that if Gundy's reading of the statute were correct, the Court "would face a nondelegation question."). And, when one compares delegations that have been found to lack sufficient limiting principles, with those that have been affirmed by the Court, the absence of any clearly-delineated policy, specific directives, and appropriate boundaries in § 994(t) becomes clear.

In *Panama Refining Co.*, the Court invalidated Section 9(c) of the National Industrial Recovery Act (NIRA), which authorized the President to prohibit the interstate transportation of petroleum produced or withdrawn in violation of state

law. *Id.* at 406, 432. Assuming without deciding that Congress had the authority to interdict the transportation of excess petroleum in interstate commerce, the Court held that "the question whether that transportation shall be prohibited by law is obviously one of legislative policy." 293 U.S. at 415. The Court therefore "look[ed] to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; [and] whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition." Section 9(c), however, had delegated to the executive branch unguided authority to make that determination:

> Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no crEterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

Id.

The Court turned to the "context" and "other provisions" of the relevant Act, and still found no sufficient standards to guide the President's discretion. Even the "declaration of policy" spoke only in general terms and contained "nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited—nothing as to the policy of prohibiting or not prohibiting the transportation of production exceeding what the states allow." *Id.* at

417-418; *see also id*. at 418-19 ("The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy."). The Court concluded that, "[i]f section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function." *Id*. at 430.

That same year, in *Schechter Poultry*, the Court invalidated another NIRA provision, which authorized the President to approve or prescribe 'codes of fair competition' for industry groups. 295 U.S. at 522. There as well, the Court held that Congress' failure to clearly articulate the intended policy, or the standards that would constrain the delegated authority, invalidated the statue. *Id.* at 542 (finding that the relevant statutory provision applied "no standards for any trade, industry, or activity," and did not "undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them."). The Court thus found the delegation of code-making authority to the President to be an unconstitutional delegation of legislative power. *See id*; *see also id*. at 538 ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be need or advisable for the rehabilitation and expansion of trade or industry.") (citing *Panama Refining Co., supra*).

These cases stand in sharp contrast to cases such as *Mistretta,* where the Court has found a constitutional delegation. The *Mistretta* Court rejected the argument that Congress had unconstitutionally delegated "excessive legislative discretion" to the Sentencing Commission, by authorizing the promulgation of the Sentencing Guidelines. In the Sentencing Reform Act, Congress had provided a detailed guide for the Commission in creating the Guidelines, specifying "what the Commission should do and how it should do it, and set[ing] out specific directives to govern particular situations." *Mistretta*, 448 U.S. at 379 (citation omitted).

Among other directives, Congress "charged the Commission with three [enumerated] goals" and "specified four 'purposes' of sentencing that the Commission must pursue in carrying out its mandate." *Mistretta*, 448 U.S. at 374 (citing 28 U.S.C. § 991(b)(1) and 18 U.S.C. § 3553(a), respectively). Congress prescribed the guideline system, and directed that sentencing ranges be consistent with the provisions of the United States Code. *Id.* at 375. "Congress directed the Commission to use current average sentences 'as a starting point'" for structuring sentencing ranges," and directed that "the maximum range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent of 6 months, except that if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." *Id*. (citing 28 U.S.C. §§ 994(b), (b)(2), and (m).). Congress further directed the Commission to consider specific factors in establishing categories of both offenses and offenders. *Id*. at 375-376 (citing 28 U.S.C. §§ 994(c)(1)-(7) and (d)(1)-(11)). Thus, in detailing the Commission's duties in promulgating the Guidelines, Congress

had set forth far "more than merely an 'intelligible principle' or minimal standards." *Id*. at 379.

There is nothing comparable to this in § 994(t). By contrast to the structured and detailed guidance Congress provided the Commission for promulgating Guidelines, it gave the Commission no guidance at all for writing a policy statement regarding § 3582(c)(1)(A). And therein lies the constitutional problem. Congress never made ***any*** identifiable policy judgment on what constitutes extraordinary and compelling reasons for a sentencing reduction. It provided the Commission ***no*** guideposts or directives, and set ***no*** limits for what the Commission could or should consider in establishing criteria and a list of examples. Even by the relatively low bar set in *Gundy*–which was decided by plurality opinion and issued over a compelling dissent–the provision at issue here fails. *See Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring in the judgment); *id*. at 2131 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). In short, Congress unconstitutionally abdicated its legislative responsibility on this issue to the Commission. The resulting application note is therefore null and void.

3. Application Note 1(D) creates an unconstitutional sub-delegation of authority from one agency to another, and is thus void.

In her dissent in *Bryant*, Judge Martin pointed out that the majority's upholding of Application Note 1(D) violates the well-settled principle that "[a]n agency cannot delegate to another agency powers that Congress did not give that second agency." 2021 WL 1827158, at *22 (Martin, J., dissenting) (citation omitted).

"Congress never gave BOP th[e] authority" to describe "what should be extraordinary and compelling reasons for a sentence reduction.'" *Id.* Rather, Congress authorized the Sentencing Commission to do so. "The Commission cannot lend this authority to the BOP Director [an Executive Branch official] any more than it can to the Administrator of the Environmental Protection Agency. Therefore, even if the majority's interpretation were correct, it would render Application Note 1(D) invalid. It would still not be binding as to Mr. Bryant's motion." *Id.*

Responding to that argument in a footnote, the *Bryant* majority appeared to recognize that there might indeed be a problem with the Commission's "sub-delegation" of its criteria-describing authority in § 994(t) to the BOP Director. 2021 WL 1827158, at *15 n. 6. Nonetheless, the majority refused to address that issue because it found "no party" had sufficiently placed the issue before the Court. *Id.*

Here, however, Mr. Tucker directly raises the argument that Application Note 1(D) constitutes an unconstitutional sub-delegation of authority from the Sentencing Commission to the Director of the Bureau of Prisons. Indeed, the Commission *did* improperly delegate its authority to *describe* what should be extraordinary and compelling reasons by setting forth criteria, to an Executive Agency. And because that sub-delegation was unconstitutional, Application Note 1(D) is similarly unconstitutional and "inapplicable" to Mr. Tucker's motion for compassionate release.

The *Bryant* majority correctly perceived that an illegal sub-delegation would render Application Note 1(D) severable in its entirety, but opined that severing this particular application note "would not help Bryant." 2021 WL 1827158, at *15, n. 6.

This was, of course, pure *obiter dictum*, since the Court held that the issue had not been properly raised in the briefs, and thus found the issue had been waived. Moreover, Mr. Bryant did not argue, as Mr. Saldana does here, that the unconstitutional sub-delegation rendered Application Note 1(D) void; he raised the argument only as a reason to hold that, in light of the First Step Act amendments, the ability to find "other reasons" for compassionate release could no longer rest exclusively within the Bureau of Prisons. *See* Brief of Appellant at 39, *United States v Bryant*, No. 19-14267 (11th Cir. Jan. 27, 2020). Thus, Mr. Bryant's position was different from that of Mr. Tucker – who maintains the unconstitutional sub-delegation of authority nullifies Application Note 1(D) in its entirety.

Striking and severing Application Note 1(D) leaves nothing of substance in the policy statement that can constrain the Court's discretion to determine "extraordinary and compelling reasons" on its own. Instead, rather than offering any criteria or description, the application note consists solely of a non-exclusive list of examples. The note contains no language suggesting that the list of examples is exhaustive, or that such reasons may be found ***"only"*** in the circumstances described. *See* U.S.S.G. § 1B1.13, *comment* n.1. Nor is there any reason to believe the Commission intended the language in Application Note 1 to be read this way. Rather, the inclusion of Application Note 1(D) provided "catch-all" authority to the only actor who, at the time, was authorized to initiate a request for relief. Thus, by striking Application Note 1(D), all that remains is a non-exclusive list of circumstances which

constitute "extraordinary and compelling reasons," and nothing to bar the Court from finding additional circumstances which might qualify, as well.

4. The Commission never fully discharged its duty of *describing* "the criteria to be applied" in finding extraordinary and compelling reasons for release.

Severing application note 1(D) further illuminates the fact that the Sentencing Commission has still not yet fully discharged its duty to "describe what should be considered extraordinary and compelling reasons for sentence reduction, ***including the criteria to be applied*** and a list of specific examples." 28 U.S.C. § 994(t) (emphasis added). As several courts have noted, it took the Commission 22 years to even write its first version of a policy statement for § 3582(c)(1)(A). *See United States v. Elias*, 984 F.3d 516, 518 (6th Cir. 2021); *Shkambi*, 993 F.3d at 391. The barebones policy statement that it issued in 2006 was "'little more than an unenlightening repetition' that 'parroted' the statute's language." *Id.*; *see* U.S.S.G., amend. 683 (2006). It was only through Amendment 698 in 2007 and Amendment 799 in 2016 that the Commission finally set forth the three examples of "extraordinary and compelling reasons" that we see today in Application Note 1(A), (B), and (C). And notably, the Commission ultimately declined to ever address "other reasons" for a reduction *itself*, instead delegating that authority to the BOP in Application Note 1(D). If the Commission believed that this unconstitutional sub-delegation satisfied its obligation to provide "criteria," it was wrong. The Commission failed to discharge its statutory duty under § 994(t).

It can hardly be disputed that, during the first 22 years in which the compassionate release statute was in effect with ***no*** corresponding policy statement, the district courts retained full authority to determine whether or not extraordinary and compelling reasons existed for compassionate release. Because the Commission has still failed to fulfill its statutory mandate, and provide any valid description of "criteria to be applied" in making that determination, the Court should find that the district courts still retains that authority – just as they did before the unconstitutional and incomplete policy statement went into effect.

CONCLUSION

WHEREFORE, Mr. Tucker respectfully requests that this Court grant this motion for compassionate release, and impose a reduced sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), based on the extraordinary and compelling reasons he has set forth.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on May 24, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Brenda G. Bryn
Brenda G. Bryn

A-12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, CASE NO. 97-447- CR-DIMITROULEAS

Plaintiff,

vs.

ORVILLE TUCKER,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant Tucker's November 1, 2020 Motion to Reduce Sentence [DE-140] and his Motion to Appoint Counsel [DE-141]. The Court has considered the Motion [DE-140], the December 16, 2020 Response [DE-143], the January 28, 2021 Reply [DE-152] with Exhibits [DE-153], the Government's May 11, 2021 Notice of Supplemental Authority [DE-159] and the May 24, 2021 Response [DE-161] and having reviewed the Court file and Pre-Sentence Investigation Report (PSIR), finds as follows:

Pursuant to 18 U.S.C. § 3582(c)(1)(A), the Court has considered the applicable factors in 18 U.S.C. § 3553(a) and the applicable Sentencing Guidelines Policy Statements.

Defendant is again complaining about the legality of his sentence. He has alleged that a warden has denied his request or not acted on it for thirty (30) days. Assuming the Court has jurisdiction, the Court does not find that there are extraordinary and compelling reasons to warrant any relief. Such relief would not promote respect for the law or act as a deterrent[1].

[1] When he committed these violent crimes, Tucker already had eleven (11) criminal convictions, which, at the time, qualified him as a career offender [PSIR ¶¶45-48].

The Court does not consider extraneous sentencing issues on a § 3582 motion. *U.S. v. Bravo*, 203 F. 3d 778 (11th Cir. 2000). The court does not find that a "change in the law" is an extraordinary and compelling basis for granting relief. *U.S. v. Bryant,* 996 F. 3d 1243 (11th Cir. 2021). The First Step Act did not overrule *Bravo.* On May 20, 2002 [DE-11 in 01-2413CV]; June 26, 2012 [DE-11 in 11-24485CV]; June 6, 2016 [DE-11 in 16-21050CV]; and April 21, 2020 [DE-6 in 20-21040CV] , previous Motions to Vacate were denied. The First Step Act did not repeal the ban on successive motions to vacate. Defendant may seek permission from the Eleventh Circuit Court of Appeal to file a successive collateral attack.

The Court is not comfortable utilizing the First Step Act as an authorization for the Court to become a *de facto* parole board, *but see, U. S. v. Brooker*[2],976 F.3d 228 (2d Cir. 2020).

The Court DENIES the motion [DE-140].

The Motion for Appointment of Counsel [DE-141] is Denied, as moot; the Public defender has appeared.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 11th day of June, 2021.

WILLIAM P. DIMITROULEAS
United States District Judge

[2] Even under the more liberal *Brooker* standard, the Court would not exercise discretion and grant relief.

Copies furnished to:

Counsel of Record