No. _____

In the
Supreme Court of the United States

VICTOR J. ORENA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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[FILED AUGUST 31, 2022]

United States Court of Appeals
For the Second Circuit

August Term 2021

Argued: May 25, 2022
Decided: August 31, 2022

No. 21-2747

UNITED STATES OF AMERICA,
Appellee,

v.

PASQUALE AMATO, CARMINE SESSA, LAWRENCE A. FIORENZA, LAWRENCE MAZZA, JOSEPH RUSSO, AKA JO JO, ANTHONY RUSSO, AKA CHUCKIE, ROBERT ZAMBARDI, AKA BOBBY ZAM, JOSEPH MONTELEONE, SR., AKA JOE MONTE, ALPHONSE PERSICO, AKA ALLIE BOY, JOSEPH TOMASELLO, AKA JOE T, THEODORE PERSICO, AKA TEDDY, RICHARD FUSCO, AKA RICHIE, JAMES DELMASTRO, AKA JAMES DELMASTRO, MICHAEL SESSA,
Defendants,

VICTOR J. ORENA, AKA LITTLE VIC, AKA VICTOR J. ORENA,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of New York
No. 92-cr-351, Eric R. Komitee, *Judge*.

Before: POOLER, SACK, and NATHAN,
*Circuit Judge*s.

Appeal from an order entered in the United States District Court for the Eastern District of New York (Komitee, *J.*). denying the defendant-appellant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The district court found that the 18 U.S.C. § 3553(a) factors weighed against reduction of the defendant-appellant's sentence.

AFFIRMED.

DEVON LASH, Assistant United States Attorney (David C. James, Assistant United States Attorney, *on the brief*), *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, New York, *for Appellee*.

DAVID I. SCHOEN, Attorney at Law, Montgomery, AL, *for Defendant-Appellant*.

PER CURIAM:

As part of the First Step Act of 2018, Congress authorized courts to reduce a term of imprisonment upon motion by a defendant. *See* Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (amending 18 U.S.C. § 3582(c)(1)(A)). Section 3582(c)(1), colloquially known as the "compassionate release" provision, permits a district court to reduce a previously imposed sentence "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction." Appellant Victor Orena contends

primarily that the district court erred in denying his motion pursuant to § 3582 by refusing to consider new evidence that he says calls into question the validity of his conviction.

We conclude that when considering a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A), a district court does not have discretion to consider new evidence proffered for the purpose of attacking the validity of the underlying conviction in its balancing of the 18 U.S.C. § 3553(a) factors. Facts and arguments that purport to undermine the validity of a federal conviction must be brought on direct appeal or pursuant to 28 U.S.C. § 2255 or § 2241. Because the district court properly refused to consider such evidence here as to the § 3553(a) factors and otherwise did not abuse its discretion in denying Orena's motion for compassionate release, we affirm.[1]

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[1] After our initial disposition of this appeal, *see United States v. Amato*, 37 F.4th 58 (2d Cir. 2022), the Supreme Court issued its decision in *Concepcion v. United States*, --- U.S. ---, 142 S. Ct. 2389 (2022), which addressed the factors that district courts may consider when resentencing a defendant under section 404 of the First Step Act and, more broadly, discussed the scope of district courts' discretion in resentencing. Soon after, Orena filed a "Petition for Panel Rehearing and Rehearing En Banc," arguing that the Court's holding in *Concepcion* could not be reconciled with our previous decision. In order to carefully consider the impact of the Supreme Court's most recent opinion on judicial resentencing discretion, we hereby GRANT the petition for panel rehearing, conclude that additional oral argument is unnecessary, *see* Fed R. App. P. 40(a)(4)(A), withdraw our opinion of June 15, 2022, and issue this amended opinion in its place.

BACKGROUND

Orena is currently serving a mandatory life sentence for racketeering and murder in aid of racketeering, among other convictions. These convictions followed a month-long jury trial at which the Government introduced evidence establishing Orena's role within the Colombo organized crime Family, one of the five New York Families of La Cosa Nostra (also known as the Mafia). The trial evidence centered on an internecine war in the early 1990s, which erupted after Orena—the then-acting boss—refused to cede control to the son of the Family's official boss. The five Families' criminal activities and the war between the competing Colombo factions resulted in multiple assassinations and attempted assassinations and billions of dollars of economic impact on the city.

The Honorable Jack B. Weinstein sentenced Orena to mandatory life imprisonment on the racketeering counts. *United States v. Sessa*, 821 F. Supp. 870 (E.D.N.Y. 1993). Judge Weinstein emphasized the scale of destruction the Families' and Orena's criminal activities had wrought on the city, and the need for incapacitation and general deterrence. He concluded that the Guidelines' then-requirement of life imprisonment was "appropriate" in this "extraordinary" case involving "unusual defendants." *Id.* at 875. Orena's conviction and sentence were affirmed on direct appeal. *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994).

Orena subsequently sought post-conviction relief through a motion pursuant to Federal Rule of Criminal Procedure 33, a 28 U.S.C. § 2255 petition,

and a motion pursuant to Federal Rule of Civil Procedure 60(b). These attempts relied on Orena's allegation that he was responsible for neither the internecine war nor the murder that formed the basis of his murder in aid of racketeering conviction. Rather, he alleged, the Government covered up that a Colombo Family member, who served as a confidential FBI informant, and an FBI special agent secretly conspired to instigate the war and to commit the murder. The district court denied the motions after holding extensive evidentiary hearings. *See Orena v. United States*, 956 F. Supp. 1071, 1076–77 (E.D.N.Y. 1997) (denying Rule 33 motion and dismissing § 2255 petition), *aff'd*, No. 97-2277 (2d Cir. Apr. 20, 1998) (summary order); *Orena v. United States*, 299 F. Supp. 2d 82, 83–84 (E.D.N.Y. 2004) (denying Rule 60(b) motion).

In September 2020, this Court granted Orena leave to file a successive 28 U.S.C. § 2255 petition. *Orena v. United States*, No. 20-1984 (2d Cir. Sept. 24, 2020), doc. 16. Orena raised two grounds in his application. First, his 18 U.S.C. § 924(c) conviction predicated on conspiracy to murder under 18 U.S.C. § 1959(a)(5) is no longer valid following *United States v. Davis*, 139 S. Ct. 2319 (2019). And second, wrongfully withheld and newly available evidence demonstrates his actual innocence.[2] In April 2021, Orena requested that the district court hold in abeyance litigation of his successive petition

[2] Although this Court authorized the filing of the entire application, it addressed only the § 924(c) basis for the motion and noted that it had not "examined any other arguments or claims raised by Petitioner, including his claim based on newly discovered evidence." *Orena*, No. 20-1984, doc. 16, at 2.

pending the outcome of this motion for compassionate release.

Orena filed his compassionate release motion in July 2021, after exhausting his administrative remedies. He relied on his myriad medical conditions and the exculpatory and impeachment evidence he says was wrongfully withheld. The Government conceded that Orena's medical conditions arguably met the threshold requirement of an extraordinary and compelling reason but opposed the motion on the grounds that the § 3553(a) factors weighed against release. Judge Eric R. Komitee, assigned to the case in September 2020, denied the compassionate release motion, concluding that Orena's "undeniably serious" medical conditions did not outweigh the 18 U.S.C. § 3553(a) factors that supported his continued imprisonment. App'x 154. In doing so, Judge Komitee refused to consider Orena's new evidence and assumed "the legitimacy of Orena's convictions and the accuracy of the [Presentence Investigation Report ("PSR")]" because his arguments attacking his conviction "are properly made in a petition for habeas relief." *Id.* at 152 n.4. This appeal followed.

STANDARD OF REVIEW

"We review the denial of a motion for compassionate release for abuse of discretion, which incorporates de novo review with respect to questions of statutory interpretation." *United States v. Saladino*, 7 F.4th 120, 122 (2d Cir. 2021) (per curiam). A district court has broad discretion in considering a motion for a sentence reduction. *United States v. Brooker*, 976 F.3d 228, 237–38 (2d Cir. 2020). "A district court has abused its discretion if it has (1) based its ruling on an erroneous view of

the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016) (internal quotation marks omitted).

DISCUSSION

The district court acted within its discretion in denying Orena's motion for compassionate release on the basis that Orena's medical conditions, which the Government conceded constituted an extraordinary and compelling circumstance, did not outweigh the § 3553(a) factors. The district court weighed the "need for the sentence to reflect the seriousness of the offense, provide just punishment, and afford adequate deterrence," in light of the nature of the offense. App'x 152–53. The court also appropriately weighed the aggravating factors against the mitigating factors. In particular, the district court considered Orena's health, his activities while incarcerated, and the BOP's determination that he poses a "minimum" risk for violence. *Id.* at 154. The district court's conclusion following this careful consideration does not amount to an abuse of discretion. *See Saladino*, 7 F.4th at 122; *United States v. Ingram*, 721 F.3d 35, 37 (2d Cir. 2013) (per curiam).

Orena primarily contends that the district court erred by assuming the PSR's accuracy and refusing to weigh his new evidence as part of the § 3553(a) factors.[3] We disagree. Section 3582(c)(1)(A) directs

[3] Orena also argues that the district court had discretion to consider his new evidence as establishing an extraordinary and compelling reason for his release. But the district court assumed that Orena had demonstrated an extraordinary and

courts to "consider[] the factors set forth in section 3553(a)." Section 3553 in turn provides "[f]actors to be considered *in imposing a sentence*." 18 U.S.C. § 3553(a) (emphasis added). To impose a sentence, there must necessarily be a valid conviction. If a defendant contends his conviction by a federal court is invalid, Congress has provided a vehicle to raise such a challenge through a motion pursuant to 28 U.S.C. § 2255, which imposes particular procedural limitations. A defendant cannot evade this collateral review structure by attacking the validity of his conviction through § 3582. Accordingly, we conclude, arguments challenging the validity of an underlying conviction cannot be raised in a § 3582 motion as part of the § 3553(a) sentencing factors. Rather, such arguments are properly raised on direct appeal or collateral review pursuant to 28 U.S.C. § 2255.[4] Other courts have reached the same conclusion. *See e.g.*, *United States v. Bard*, No. 21-3265, 2022 WL 843485, at *2 (3d Cir. March 22, 2022) (unpublished per curiam); *United States v. Miller*, 855 F. App'x 949, 950 (5th Cir. 2021) (unpublished per curiam).

The Court is unpersuaded by Orena's arguments to the contrary. First, he contends that the district court had the discretion to consider his new evidence pursuant to *Brooker*, 976 F.3d 228. But *Brooker* recognizes a district court's broad discretion

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compelling reason for release in light of the Government's concession and denied Orena's motion on the weight of the § 3553(a) factors. Accordingly, the Court need not address this argument.

[4] In rare cases, a petition may instead be brought under 28 U.S.C. § 2241. *See Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003) (citing 28 U.S.C. § 2255(e)).

"to consider the full slate of extraordinary and compelling reasons" that may warrant an imprisoned person's release. *Id.* at 237. Nothing in that decision permits defendants to circumvent the procedural limitations of § 2255 by repackaging actual innocence arguments into the § 3553(a) factors. Second, contrary to Orena's arguments, the district court's refusal to consider the new evidence and its acceptance of the facts as established in the PSR did not run afoul of § 3553(a)'s directive that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." This contention necessarily assumes that Orena's arguments as to the validity of his conviction are meritorious. But the merit of these arguments will be determined if and when Orena litigates his pending successive habeas petition. The district court properly declined to weigh them in its balancing of the § 3553(a) factors when considering Orena's § 3582(c)(1)(A) motion.[5]

Orena's further arguments as to the district court's balancing of the § 3553(a) factors are unavailing. Orena suggests that the district court should have placed greater weight on his health conditions. But this court cannot require "that a particular

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[5] The Supreme Court's decision in *Concepcion* does not conflict with our decision in this case. In *Concepcion*, the Court emphasized a "longstanding tradition" of discretion afforded to courts to consider changes in law or fact when sentencing or resentencing a defendant. 142 S. Ct. at 2395. However, the Court acknowledged that that discretion is subject to constraints imposed by Congress and the Constitution. *Id*. at 2400–01. One such constraint is 28 U.S.C. § 2255, which provides the procedural mechanism for Orena's arguments regarding actual innocence and the legality of his conviction.

factor be given determinative or dispositive weight." *United States v. Halvon*, 26 F.4th 566, 571 (2d Cir. 2022) (per curiam) (internal quotation marks omitted). Nor did the court err in rejecting Orena's argument that his life sentence created an unwarranted sentencing disparity with similarly situated defendants. As the district court noted, the cases cited by Orena generally involved defendants who cooperated with the Government. Finally, the district court's order did not assume that defendants sentenced to life imprisonment for violent conduct are ineligible for a sentence reduction, as Orena contends. Rather, the district court appropriately relied on analogous case law and weighed the competing factors to conclude that the § 3553(a) factors did not warrant a sentence reduction in this case. Accordingly, we find no abuse of discretion by the district court.[6]

CONCLUSION

We have considered Orena's remaining arguments and find in them no basis for reversal. The district court's order denying compassionate release is AFFIRMED.

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[6] Orena raises that he did not have a copy of the PSR before the completion of briefing. Orena's counsel appears to have first alerted the district court that it did not have a copy of the PSR in October 2021 but made no specific request for relief from the court. *See* App'x 144–45. The Government also provided defense counsel a copy upon receipt of the October 2021 letter. Gov. Br. at 41 n.6. Accordingly, this Court declines to find that the district court erred by not ensuring that defense counsel had a copy of the PSR.

[FILED OCTOBER 27, 2021]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,
-against-
VICTOR J. ORENA,
Defendant.
----------x
ERIC KOMITEE, United States District Judge:

MEMORANDUM & ORDER
92-CR-00351(EK)

I. Background

Victor Orena was a senior member of the Colombo organized crime family and, for a time, its acting boss. In 1993, a jury found him guilty of a litany of serious crimes including murder, murder conspiracy, and racketeering.[1] The Honorable Jack B. Weinstein sentenced Orena to life imprisonment. Currently incarcerated at Federal Medical Center ("FMC") Devens, Orena now moves for compassionate release.

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[1] Orena was convicted of racketeering in violation of 18 U.S.C. § 1962(c); racketeering conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy to murder Thomas Ocera, in violation of 18 U.S.C. § 1959(a)(5); the murder of Thomas Ocera in-aid-of racketeering, in violation of 18 U.S.C. § 1959(a)(1); conspiracy to murder members of the "Persico faction" of the Colombo organized crime family in-aid-of racketeering, in violation of 18 U.S.C. § 1959(a)(5); conspiracy to make extortionate extensions of credit, in violation of 18 U.S.C. § 892; conspiracy to make extortionate collections of credit, in violation of 18 U.S.C. § 894; use and carrying of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1); and unlawful possession of firearms by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *See* ECF No. 198; Pre-Sentence Report ("PSR") ¶¶ 1-13.

In addition to the instant motion, Orena also has a pending habeas corpus petition. He invokes two grounds for habeas relief: first, that his conviction under Section 924(c)(1) is invalid, and second, that newly discovered evidence will demonstrate that he is actually innocent of one or more offenses for which he was convicted. The government has conceded the first ground — that Orena's Section 924(c)(1) conviction must be vacated in light of *United States v. Davis*, 139 S.Ct. 2319 (2019). Orena has requested, through counsel, that this Court decide his motion for compassionate release prior to briefing or a decision on the remaining Section 2255 ground.

For the reasons stated below, I deny Orena's motion for compassionate release.

II. Legal Standard

A motion for compassionate release is governed by 18 U.S.C. § 3582(c)(1)(A). This section "permits a defendant to bring a motion for a reduction in sentence, including release from prison, in federal district court after satisfying a statutory exhaustion requirement." *United States v. Fernandez*, 853 F. App'x 730, 731–32 (2d Cir. 2021) (summary order).[2] Under the First Step Act, a district court may

> reduce the term of imprisonment . . . after considering the factors set forth in section

[2] Orena filed a *pro se* administrative request in 2019; this request was granted by the Warden at FMC Devens but then overridden by the Assistant Director of the Bureau of Prisons ("BOP"). *See* Memorandum from Assistant Director Ken Hyle ("Hyle Memo"), ECF No. 1862-2. Because the government does not dispute that Orena exhausted his administrative remedies as required by 18 U.S.C. § 3582(c)(1), *see* Mem. in Opp'n. to Mot. for Release ("Opp'n. Memo"), ECF No. 1865 at 8 n.3, I need not further discuss the exhaustion requirement.

> 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction.

18 U.S.C. § 3582(c)(1)(A)(i). "[D]istrict courts have broad discretion in deciding whether to grant or deny a motion for a sentence reduction." *United States v. Antney*, No. 17-CR-229, 2021 WL 4502478, at *1 (E.D.N.Y. Sept. 30, 2021) (citing *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020)).

III. Discussion

A. "Extraordinary and Compelling Circumstances"

The government does not dispute that Orena, who is 87 years old, suffers from an array of medical issues. As acknowledged by the Bureau of Prisons, these include dementia and Alzheimer's disease, diabetes, glaucoma, anemia, an abdominal aortic aneurysm, hypertension, heart problems requiring a pacemaker, osteoarthritis, and degenerative joint disease. *See* Memorandum from Assistant Director Ken Hyle ("Hyle Memo") at 2-3, ECF No. 1862-2. Orena uses a wheelchair, is at risk of falling, and requires assistance with routine tasks. *Id.* Due to his mental decline, Orena is said to receive "a significant amount of redirection and reorientation," *id.*, and his medical records from the past year reflect certain "delusional episodes." BOP Health Services Clinical Encounter Records ("BOP Records") at 7, ECF No. 1862-4; *see also id.* at 6, 9, 11. Orena's medical conditions place him at increased risk of contracting COVID-19 or, if he contracts it, suffering severe consequences.[3]

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[3] *See Groups at Higher Risk for Severe Illness*, Centers For Disease Control & Prevention, https://www.cdc.gov/corona

The government concedes that these conditions "arguably meet the threshold 'extraordinary and compelling reason' requirement for the Court to consider the defendant's request." Mem. in Opp'n. to Mot. for Release ("Opp'n. Memo") at 9, ECF No. 1865. However, a finding of "extraordinary and compelling" circumstances alone is not sufficient to warrant a sentence reduction; the "court must also consider 'the factors set forth in section 3553(a) to the extent that they are applicable' before granting a sentence reduction." *Fernandez*, 853 F. App'x at 732. (quoting § 3582(c)(1)(A)); *see also United States v. Gotti*, 433 F. Supp. 3d 613, 615 (S.D.N.Y. 2020) ("[A] defendant who meets all the criteria for compassionate release consideration . . . is not thereby automatically entitled to a sentence modification.He is simply eligible for a sentence modification."). Thus, even if Orena is eligible, this Court "may deny [his] motion if, in its discretion, compassionate release is not warranted because Section 3553(a) factors override . . . what would otherwise be extraordinary and compelling circumstances." *Gotti*, 433 F. Supp. 3d at 615.

B. Section 3553(a) Factors

The Section 3553(a) factors that the Court must consider in granting or denying compassionate release include:

> the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to reflect

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virus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited October 16, 2021). The Court notes that, according to Orena's medical records, the medical staff at FMC Devens offered Orena the vaccine against COVID-19 but he declined it. BOP Records at 8.

> the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from future crimes by the defendant; and the need to avoid unwarranted sentencing disparities.

United States v. Seshan, 850 F. App'x 800, 801 (2d Cir. 2021) (quoting *United States v. Roney*, 833 F. App'x 850, 852 (2d Cir. 2020)); 18 U.S.C. § 3553(a).

Following the adoption of the First Step Act, a strain of cases – some of which I discuss below – has emerged in which the offenders' criminal history is so long, and their victims so numerous, that even serious health conditions do not suffice to merit relief. This case falls squarely in that category. Certain of the Section 3553(a) factors carry particular weight here: the nature and circumstances of the offense conduct; and the need for the sentence to reflect the seriousness of the offense, provide just punishment, and afford adequate deterrence.

Orena was a singular figure in the annals of the Colombo family, as detailed in the Indictment, the Pre-Sentence Report, and Judge Weinstein's comprehensive Sentencing Memorandum.[4] He rose to

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[4] I note that Orena has suggested that new evidence — a "vast array" of it — either casts doubt on his guilt on one or more counts of conviction or constitutes such powerful impeachment material that a jury would have rejected the testimony of key government witnesses. *See* Def.'s Reply in Support of Release at 2, ECF No. 1869. Those arguments are properly made in a petition for habeas relief, not this motion. For purposes of this motion, I assume the legitimacy of Orena's convictions and the accuracy of the PSR. *See, e.g.*, *Antney*, 2021 WL 4502478, at *5 ("A motion for compassionate release should not be used to

a leadership role, becoming acting boss in 1988, and his efforts to cling to power triggered a bloody war. PSR ¶¶ 43-49. Orena oversaw a campaign of violence that resulted in a swath of death and serious injury. He conspired to assassinate at least thirteen members of the Colombo family's "Persico faction," including Carmine Sessa and Gregory Scarpa, Jr. PSR ¶¶ 45, 47, 60. In the end, the war with the Persico faction led to the deaths or serious injuries of at least fifteen people. *Id.* ¶¶ 49, 61.

Orena ordered the murder of Thomas Ocera, among others; Ocera's strangled body was found nearly two years later. *Id.* ¶¶ 56-59.[5] At least three of the people injured or killed as a result of this campaign were bystanders. *Id.* ¶ 49, 60.

It may border on the mundane to invoke the economic consequences of Orena's activity, given this bloodshed. But the activities of the Colombo and other families during this period had crippling effects on substantial parts of New York City's economy. Judge Weinstein noted that the "drain on the city's human and economic resources caused by this criminal activity has been a major factor in the deterioration of our social, political and economic infrastructure." *United States v. Sessa*, 821 F. Supp. 870, 874 (E.D.N.Y. 1993), *aff'd sub nom. United States v. Amato*, 15 F.3d 230 (2d Cir. 1994), *and aff'd*

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attack the legitimacy of a judge's imposed sentence — such an attack is properly brought on direct appeal or in a habeas petition, not in a motion for compassionate release brought under 18 U.S.C. § 3582(c)(1)(A).").

[5] In addition, the PSR notes that a preponderance of the evidence supports the conclusion that Orena also ordered the murder of Jack Leale — the man who killed Ocera — as punishment for failing to properly bury Ocera, and to prevent Leale from testifying. *Id.* ¶¶ 266-273.

sub nom. United States v. Orena, 32 F.3d 704 (2d Cir. 1994), *and aff'd*, 41 F.3d 1501 (2d Cir. 1994).[6] In the end, Judge Weinstein estimated, "[t]he direct and indirect costs" of mafia activity "to the honest people of the metropolitan area are measured in the billions of dollars." *Id.* at 874.

Orena's medical issues, though undeniably serious, cannot outweigh the conduct that warranted his original sentence. I have considered Orena's arguments, including his activities in prison and the BOP's determination that he poses a "minimum" risk for violence. *See* BOP Risk Assessment, dated April 4, 2021, ECF No. 1862-3. But I am left with the inescapable conclusion that any sentence short of the life term imposed by Judge Weinstein would

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[6] Judge Weinstein explained the Colombo family's economic activities at the time as follows:

> The Colombo division of organized crime is one of five now operating in New York City. It is a lucrative enterprise. Its stock-in-trade is loansharking. Members of the various crews loan funds at extortionate rates of interest, usually in the neighborhood of 100 to 250 percent per year, and enforce the terms of those loans with threats of violence. A portion of the proceeds of these loans . . . is shared with the higher-ups within the organization. The mob's illegal gambling operations work in tandem with this financing scheme.
>
> Like the other New York City criminal mobs, the Colombos have profited from the control of labor unions. This activity depends upon the cooperation of corrupt union officials. Typically the organized crime families will assist contractors who wish to avoid utilizing union labor by guaranteeing "labor peace" in exchange for a fee which is then shared with the corrupt union leaders.

Id. at 871-72.

insufficiently reflect the seriousness of the offense conduct here and fail to provide just punishment.[7]

This conclusion finds support in other recent decisions on compassionate release. *See, e.g.*, *United States v. Gioeli*, No. 08-CR-240, 2020 WL 2572191, at *5 (E.D.N.Y. May 21, 2020) (denying release in light of "defendant's participation in multiple conspiracies to commit murder"; early release would be inconsistent with the need for adequate punishment and deterrence); *Gotti*, 433 F. Supp. 3d at 619 (even if organized- crime defendant were eligible for compassionate release, "reducing his sentence would undermine the goals of sentencing; among them, the need to provide just punishment").

Orena invokes a number of other cases in which organized crime defendants have served shorter sentences than his despite amassing what he says are similarly violent, or even more serious, criminal histories. Orena cites the cases of Gregory Scarpa, Jr.,[8] Joseph Massino,[9] and Carmine Sessa,[10] among others.But these cases generally involved high-ranking defendants who elected to cooperate with the government, at serious risk to themselves and at a time when such cooperation was necessary to

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[7] Judge Weinstein surely understood that a life sentence would likely result in Orena's incarceration even as an elderly and infirm inmate, and he would not have imposed the sentence lightly, given that understanding.

[8] *United States v. Scarpa*, No. 94-CR-1119-1, 2020 WL 6591455 (E.D.N.Y. Nov. 11, 2020).

[9] *United States v. Massino*, No. 03-CR-929 (E.D.N.Y.) (Am. J. Resentencing Def., dated Sept. 6, 2013, ECF No. 1182).

[10] *United States v. Orena*, No. 92-CR-351-3 (E.D.N.Y.) (J. Sentencing Def. Carmine Sessa, dated Sept. 29, 2000, ECF No. 1582).

break the stranglehold that the five families exerted over so much of the City's industry.[11] Those cases do not support a different outcome here.

IV. Conclusion

For the foregoing reasons, I deny the motion for compassionate release. The motion is denied without prejudice to renew in the event of significant developments in Orena's habeas proceeding or significant further deterioration of his health.

SO ORDERED.

/s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: October 27, 2021
Brooklyn, New York

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[11] Orena relies on other cases that are likewise distinguishable. For example, in *United States v. Wong Chi Fai*, the court granted compassionate release to a defendant who had only months to live due to terminal cancer; notably, the "[g]overnment . . . [did] not argue that . . . he would be a danger to the community or that his release would otherwise go against the 18 U.S.C. § 3553(a) sentencing factors." No. 93-CR-1340, 2019 WL 3428504, at *2 (E.D.N.Y. July 30, 2019). In *United States v. Underwood*, the defendant's rehabilitation in prison was so "pronounced" and "exemplary" as to be publicly recognized – including by a United States senator and federal judge – and the court noted that he would "likely merit a sentence reduction" *regardless* of his medical issues. No. 88-CR-822, 2021 WL 3204834, at *2, 5 (S.D.N.Y. Jan. 15, 2021).

[FILED NOVEMBER 17, 2022]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORDER
Docket No: 21-2747

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-two.

United States of America,
Appellee,

v.

Pasquale Amato, Carmine Sessa, Lawrence A. Fiorenza, Lawrence Mazza, Joseph Russo, AKA Jo Jo, Anthony Russo, AKA Chuckie, Robert Zambardi, AKA Bobby Zam, Joseph Monteleone, Sr., AKA Joe Monte, Alphonse Persico, AKA Allie Boy, Joseph Tomasello, AKA Joe T, Theodore Persico, AKA Teddy, Richard Fusco, AKA Richie, James Delmastro, AKA James Delmastro, Michael Sessa,
Defendants,

Victor J. Orena, AKA Little Vic, AKA Victor J. Orena,
Defendant - Appellant.

Appellant, Victor J. Orena, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the

active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk