Docket No. _____

SUPREME COURT OF THE UNITED STATES

ALFREDO GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Kathryn Hayne Barnwell, Esq.
Counsel of Record
401 Andover Street, Suite 201-B
North Andover, MA 01845
attorney.barnwell@gmail.com
(978) 655-5011

TABLE OF CONTENTS

Neutral
As of: July 11, 2023 6:03 PM Z

United States v. Gonzalez

United States Court of Appeals for the First Circuit

May 25, 2023, Decided

No. 22-1007

Reporter
2023 U.S. App. LEXIS 13014 *; 68 F.4th 699

UNITED STATES OF AMERICA, Appellee, v. ALFREDO GONZALEZ, Defendant, Appellant.

Prior History: [*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE. Hon. Paul J. Barbadoro, U.S. District Judge.

United States v. Gonzalez, 2018 U.S. Dist. LEXIS 68425, 2018 WL 1936473 (D.N.H., Apr. 24, 2018)

Core Terms

district court, sentence, compassionate, disparity, circumstances, holistic, motions, policy statement, vaccination, mitigation, factors, reasons, reinfection, reduction

Case Summary

Overview
HOLDINGS: [1]-The district court noted that mitigation efforts only cumulatively reinforced its conclusion that the COVID-19 concerns did not rise to the level of an extraordinary and compelling circumstance; [2]-Given these discrepancies, it was eminently reasonable for the district court to follow defendant's lead in analyzing the two factors separately, especially since he sought different forms of relief under each argument.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN1[] Imposition of Sentence, Factors

Even a holistic review of a compassionate release motion under Trenkler should be guided by the defendant's presentation of his own arguments.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN2[] Standards of Review, Abuse of Discretion

The appellate court reviews a district court's denial or grant of a compassionate release motion for abuse of discretion. Questions of law are reviewed de novo and findings of fact are reviewed for clear error.

Governments > Courts > Rule Application & Interpretation

HN3[] Courts, Rule Application & Interpretation

Complying with the appellate court's express order to present arguments on a certain issue calls for applying the exception to the usual rule of reply-brief waivers where justice so requires and where the opposing party would not be unfairly prejudiced by our considering the issue.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

HN4[] Standards of Review, Clear Error Review

As Gonzalez recognizes, the clear-error standard is a high hurdle to clear: clear error exists only when the appellate court is left with the definite and firm conviction that a mistake has been committed.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN5[] Imposition of Sentence, Factors

The case law is pellucid that a district court, when conducting an 18 U.S.C.S. § 3553(a) analysis, need not tick off each and every factor in a mechanical sequence. Instead, the appellate court presumes --absent some contrary indication -- that a sentencing court considered all the mitigating factors and that those not specifically mentioned were simply unpersuasive.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Court's Authority

HN6[] Corrections, Modifications & Reductions, Court's Authority

A district court exercising its powers to reduce a sentence of imprisonment under 18 U.S.C.S. § 3582(c)(1)(A) ordinarily must ensure that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. The policy statement is therefore not applicable, on a literal reading, to motions brought by prisoners; it applies only to motions brought by the Bureau of Prisons.

Criminal Law & Procedure > ... > Departures From Guidelines > Downward Departures > Rehabilitative Efforts

HN7[] Downward Departures, Rehabilitative Efforts

In the absence of an applicable policy statement, the appellate court determined that a district court may consider any complex of circumstances raised by a defendant as forming an extraordinary and compelling reason warranting relief, with the exception of rehabilitation alone, since Congress explicitly mandated that such a rationale shall not be considered an extraordinary and compelling reason, 28 U.S.C.S. § 994(t). District courts should be mindful of the holistic context of a defendant's individual case when deciding whether the defendant's circumstances satisfy the extraordinary and compelling standard.

Governments > Courts > Authority to Adjudicate

HN8[] Courts, Authority to Adjudicate

This focus on the defendant's presentation of his own arguments comports with the notion that in the first instance and on appeal, the appellate court relies on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Circumstances, Eligibility & Factors

HN9[] Corrections, Modifications & Reductions, Circumstances, Eligibility & Factors

While courts should still follow the any complex of circumstances approach under Ruvalcaba for as long as no applicable policy statement applies to prisoner-initiated motions for compassionate release, this approach should be shaped by the arguments advanced by defendants. After all, as a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.

Counsel: K. Hayne Barnwell for appellant.

Seth R. Aframe, Assistant United States Attorney, with whom Jane E. Young, United States Attorney, and Alexander S. Chen, Assistant United States Attorney, were on brief, for appellee.

Judges: Before Kayatta, Lynch, and Howard, Circuit Judges.

Opinion by: HOWARD

Opinion

HOWARD, **Circuit Judge**. This appeal requires us to elaborate on our recent decision requiring a "holistic

approach" when considering compassionate release motions that are not governed by the U.S. Sentencing Commission's policy statement in U.S.S.G. §1B1.13. United States v. Trenkler, 47 F.4th 42, 50 (1st Cir. 2022). Defendant-appellant Alfredo Gonzalez contends that the district court, without having had the benefit of our decision in Trenkler, ran afoul of our guidance therein in evaluating his compassionate release motion. He consequently urges us to remand for resentencing. Because we determine that no such error occurred, we affirm the judgment of the district court. **HN1**[] In doing so, we also reaffirm that even a holistic review of a compassionate release motion under Trenkler should be guided by the defendant's presentation of his own arguments.

I.

We previously summarized the factual [*2] background of Gonzalez's case in his post-conviction appeal, see United States v. Gonzalez, 949 F.3d 30, 32-34 (1st Cir. 2020), and at this juncture we recite only the procedural background that postdates that decision. After we affirmed his conviction and sentence, Gonzalez moved in early 2021 for a reduction of his prison sentence under 18 U.S.C. § 3582(c)(1)(A), as revised by the First Step Act ("FSA"). See Pub. L. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018). The Act went into effect approximately six months after the district court sentenced Gonzalez to a 240-month term of imprisonment and, as described in more detail below, "created a new regime in which -- for the first time -- prisoners [could] seek compassionate release even when the [Bureau of Prisons ('BOP')] does not deign to act on their behalf." United States v. Ruvalcaba, 26 F.4th 14, 22 (1st Cir. 2022).[1]

Crucially for the purposes of this appeal, Gonzalez's motion to the district court presented two alternative arguments in favor of compassionate release. He urged the district court either to release him from prison immediately on account of medical preconditions "that increase his risk for serious illness or death from COVID-19," or -- "if the court denies [his] request to be released immediately" -- to reduce his sentence on account of "a gross sentencing disparity." The latter argument was, in turn, undergirded [*3] by two points. Gonzalez first noted that his November 2017 conviction and the district court's subsequent imposition of his sentence in June 2018 occurred during a nineteenth-month window between (1) the end, in May 2017, of a previously more lenient Justice Department policy about federal prosecutors' use of the sentence-enhancement regime of 21 U.S.C. § 851 and (2) the subsequent passage of the FSA in December 2018. That timing meant that Gonzalez was subjected to a lengthy 20-year mandatory minimum sentence, to which -- as the government conceded -- he in all likelihood would not have been subjected had he been sentenced outside of this window. He also objected in relevant part that he received a "substantially higher" sentence than his codefendants, a disparity that he contended was driven at least in part by the government's filing of an § 851 information.

The government responded -- incorrectly, as it would turn out -- that the district court was bound to follow the policy statement of U.S.S.G. §1B1.13 in assessing Gonzalez's motion. It consequently argued that the district court should not grant the motion under the framework of that provision because, despite being admittedly "eligible for compassionate release [*4] based on his medical condition," Gonzalez was "a danger to the community." See U.S.S.G. §1B1.13(2) (providing that a district court cannot reduce a prison term under that provision if the defendant is "a danger to the safety of any other person or to the community"). The government also asserted with reference to the factors of 18 U.S.C. § 3553(a) that "the seriousness of the defendant's criminal conduct and the danger he poses to the public militate against a sentence reduction." After the court ordered the government to file supplemental briefing addressing Gonzalez's sentencing disparity arguments, the government additionally contended in relevant part that granting compassionate release based on a sentencing disparity caused by the FSA would "undermin[e] [the FSA's] non-retroactivity provisions." See FSA § 401(c), 132 Stat. at 5221.

The district court ultimately granted Gonzalez's request for a sentence reduction, but not immediate release. The court accurately presaged our subsequent ruling in Ruvalcaba, holding that U.S.S.G. §1B1.13 did not apply to Gonzalez's compassionate release motion. Having freed itself from the strictures of that provision, the court wrote that it was persuaded that the sentence it had imposed was "disproportionately harsh" with reference both to [*5] the nineteen-month window described above and to Gonzalez's codefendants, even though "Gonzalez committed a serious crime." It concluded that resentencing was thus warranted. Nevertheless, the court noted in a footnote prior to its sentence-reduction discussion that it was "not persuaded that Gonzalez's health status qualifies as an extraordinary and compelling circumstance that justifies his immediate release," both because of (1) the BOP's mitigation measures and the availability of COVID-19 vaccines and (2) the fact that Gonzalez "committed a serious crime that warrants a lengthy

[1] As noted by the Second Circuit, "compassionate release is a misnomer" for the sentence-reduction provision of § 3582(c)(1)(A). United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020). We nevertheless opt to use "compassionate release" as a shorthand for the provision, in line with common practice.

prison sentence."

The district court proceeded to reduce Gonzalez's sentence from 240 to 180 months. This appeal followed.

II.

HN2[] "We review a district court's denial or grant of a compassionate release motion for abuse of discretion." Trenkler, 47 F.4th at 46. "Questions of law are reviewed de novo and findings of fact are reviewed for clear error." Id.

III.

As alluded to above, Gonzalez's primary argument on appeal is that the district court used the "singular[,] reason-by-reason analysis" against which we warned in Trenkler by "fail[ing] to assess the COVID-19 factors [that Gonzalez raised] along with the gross sentencing disparity" when it [*6] evaluated his compassionate release motion. Gonzalez's argument is that Trenkler worked a sea change in our law. It did not -- nor did it purport to do so.

A.

On a preliminary note, our framing of Gonzalez's arguments is informed by this appeal's unique procedural history. Gonzalez originally did not predicate his appellate arguments on Trenkler, a decision that postdated the filing of his opening brief by several weeks. Rather, he advanced several unavailing arguments that we describe in more detail below. We then ordered the parties to address the impact of Trenkler on Gonzalez's case in their subsequent briefs, and Gonzalez duly focused on Trenkler in his reply brief and at oral argument. HN3[] We now do so as well, recognizing that complying with our court's express order to present arguments on a certain issue calls for applying the "exception [to the usual rule of reply-brief waivers] where 'justice so requires' and where the opposing party would not be unfairly prejudiced by our considering the issue." United States v. Fields, 823 F.3d 20, 32 n.8 (1st Cir. 2016) (quoting United States v. Torres-Rosario, 658 F.3d 110, 116 (1st Cir. 2011)).

We nevertheless note that we are unpersuaded by Gonzalez's original arguments. He first claimed that the district court clearly erred in its analysis of the risks of a COVID-19 reinfection and, relatedly, [*7] of the BOP's mitigation measures, including administering the COVID-19 vaccine. HN4[] But, as Gonzalez recognizes, the clear-error standard is a high hurdle to clear: "[c]lear error 'exists only when we are left with the definite and firm conviction that a mistake has been committed.'" United States v. Centeno-González, 989 F.3d 36, 50 (1st Cir. 2021) (quoting United States v. Hicks, 575 F.3d 130, 138 (1st Cir. 2009)). And, despite Gonzalez's attempts to distinguish his case from our decision in United States v. Canales-Ramos, that case is instructive for the proposition that we should be especially loath to disrupt a district court's "judgment call[s]" concerning a defendant's health status in the context of a compassionate release motion. 19 F.4th 561, 567 (1st Cir. 2021); see id. ("The district court made a reasonable risk assessment and determined that the current state of the defendant's health and the care that he was receiving weighed against a finding [of] an extraordinary and compelling reason. . . . '[N]ot every complex of health concerns is sufficient to warrant compassionate release[.]'" (quoting United States v. Saccoccia, 10 F.4th 1, 5 (1st Cir. 2021)).

Mindful of those considerations, we discern no clear error in the district court's analysis of the COVID-19 risks. Gonzalez's counsel acknowledged to the district court that, even with the evidence he presented, "we just don't really [*8] fully have our arms around what the risk of reinfection is," and that the evidence at the time speculatively suggested "real concerns" of reinfection. And the district court explicitly said it was willing to reconsider its assumption that "reinfection is relatively rare" if Gonzalez presented it with "better evidence." Far from being left with a "firm conviction that a mistake has been committed" or a sense that the district court made an "[un]reasonable risk assessment," we glean from this record that the court came to a defensible, if debatable, conclusion based on the as-yet-emergent body of evidence before it. Cf. United States v. Correa-Osorio, 784 F.3d 11, 24 (1st Cir. 2015) ("[A] party cannot show clear error if there are competing views of the evidence.").

Gonzalez's arguments about the district court's reliance on BOP mitigation efforts and vaccination are no more persuasive on the same logic. The relevant footnote in the district court's opinion suggests that the court did not, as Gonzalez claims, "find[] that BOP mitigation efforts were adequate to protect [him] from harm," nor "assume[] that vaccination would eliminate Gonzalez's risks from another COVID-19 infection." Rather, the district court noted that these mitigation efforts only [*9] cumulatively reinforced its conclusion that the COVID-19 concerns did not rise to the level of an extraordinary and compelling circumstance.

Gonzalez's contention that the district court erred by "failing to consider [Gonzalez's COVID-19-related arguments] under [18 U.S.C.] § 3553(a)" is also without merit. The district court was under no obligation to repeat these arguments in its § 3553(a) analysis. HN5[] "Our case law is pellucid that a

district court, when conducting a section 3553(a) analysis, need not tick off each and every factor in a mechanical sequence. Instead, we presume --absent some contrary indication -- that a sentencing court considered all the mitigating factors and that those not specifically mentioned were simply unpersuasive." Saccoccia, 10 F.4th at 10 (citation omitted). In addition, to the extent that Gonzalez takes issue with the district court for seemingly not factoring in the COVID-19 arguments in its sentence reduction analysis, we cannot fault the court for following Gonzalez's own lead, as further discussed below, see infra, section III.C.

Finally, Gonzalez originally urged us to remand his case so that "the District Court [could] consider the latest developments concerning high reinfection rates of vaccinated people, waning immunity, [*10] and decreased vaccine effectiveness against the Omicron subvariants." It is true that our court in Trenkler "permitted [the district court] to consider any factual developments that ha[d] transpired since it[]" issued its original opinion. 47 F.4th at 50. But we see no reason to do so here, where -- unlike in Trenkler -- we discern no potential error in the district court's analysis that would warrant remanding in the first place.

B.

HN6[] A district court exercising its powers to reduce a sentence of imprisonment under § 3582(c)(1)(A) ordinarily must ensure that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." However, as we explained in Ruvalcaba, no such statement currently exists with respect to prisoner-initiated motions: U.S.S.G. §1B1.13 "was last modified in November of 2018 -- before the FSA amended the compassionate-release statute to allow for prisoner-initiated motions . . . [-- and] [t]he text of the current policy statement makes pellucid that it is 'applicable' only to motions for compassionate release commenced by the BOP." 26 F.4th at 20; see also U.S.S.G. §1B1.3 ("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 . . . ." (emphasis added)). "The policy statement [*11] is therefore not 'applicable,' on a literal reading, to motions brought by prisoners; it applies only to motions brought by the BOP." Ruvalcaba, 26 F.4th at 20.[2]

HN7[] In the absence of an applicable policy statement, we determined in Ruvalcaba that a district court "may consider any complex of circumstances raised by a defendant as forming an extraordinary and compelling reason warranting relief," id. at 28, with the exception of rehabilitation alone, since Congress explicitly mandated that such a rationale "shall not be considered an extraordinary and compelling reason."[3] 28 U.S.C. § 994(t). We then expounded upon the "any complex of circumstances" approach in Trenkler, reasoning that "district courts should be mindful of the holistic context of a defendant's individual case when deciding whether the defendant's circumstances satisfy the 'extraordinary and compelling' standard." 47 F.4th at 49-50. We remanded in that case because the "analytical path" that the district court took in analyzing the arguments Trenkler put forward for compassionate release -- and, consequently, in ultimately granting his motion -- was "susceptible to multiple interpretations," although it was at least evident that the court found the undisputed sentencing error that marred Trenkler's [*12] case persuasive in that regard. Id. at 46, 50. We noted that,

> [o]n one hand, we can appreciate the possibility that the district court discarded Trenkler's other proposed reasons [apart from the sentencing error] one by one but, with the holistic context of those reasons in mind, deemed the circumstances surrounding the sentencing error alone to meet the "extraordinary and compelling" criteria. But we can also see how discarding all proposed reasons except one could represent a singular reason-by-reason analysis, not a review of the individual circumstances overall. In the end, our careful review of the district court's thorough (but pre-Ruvalcaba) decision leaves us uncertain as to whether it took a holistic approach when reviewing Trenkler's proposed reasons and ultimately concluding that the sentencing error constituted a

[2] We note that this window may well be closing, as the Sentencing Commission voted to amend U.S.S.G. §1B1.13 to reflect the FSA's changes to 18 U.S.C. § 3582(c)(1)(A). See Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28254-59 (May 3, 2023); see also Ruvalcaba, 26 F.4th at 23-24 ("If and when the Sentencing Commission issues updated guidance applicable to prisoner-initiated motions for sentence reductions consistent with both section 3582(c)(1)(A) and the statutory mandate under [28 U.S.C. § 994(t)], district courts addressing such motions not only will be bound by the statutory criteria but also will be required to ensure that their determinations of extraordinary and compelling reasons are consistent with that guidance.").

[3] We have also clarified that "the mere fact of a 'pre-First Step Act mandatory life sentence imposed under **[21 U.S.C.] § 841(b)(1)(A)** cannot, standing alone, serve as the basis for a sentence reduction under [section] 3582(c)(1)(A)(i),'" Ruvalcaba, 26 F.4th at 28 (second alteration in original) (quoting United States v. McGee, 992 F.3d 1035, 1048 (10th Cir. 2021)), and that "correct application of the 'extraordinary and compelling' standard for compassionate release naturally precludes classic post-conviction arguments, without more, from carrying such motions to success," Trenkler, 47 F.4th at 48.

sufficiently extraordinary and compelling reason to grant relief.

Id. at 50.

C.

As noted, Gonzalez urges us to follow in Trenkler's footsteps and remand because, according to him, "the [d]istrict [c]ourt plainly took a 'reason-by-reason' approach[,] rather than a holistic appraisal with respect to [his] sentencing disparity claim and his claim that he was particularly vulnerable to COVID-19." [*13] He faults the district court for "fail[ing] to assess the COVID-19 factors along with the gross sentencing disparity suffered by [him], which is [ostensibly] what the holistic analysis requires."

We find no fault in the district court's reasoning under Ruvalcaba and Trenkler. Our court's instruction in Ruvalcaba explicitly stated that a district court can consider "any complex of circumstances raised by a defendant." 26 F.4th at 28 (emphasis added). **HN8**[] This focus on the defendant's presentation of his own arguments comports with the notion that "in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) (alteration in original) (quoting Greenlaw v. United States, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)).

To that end, Gonzalez made it clear to the district court no less than eight times over the course of his briefing and during the hearing on his motion for compassionate release that he meant to advance two alternative arguments, one for immediate release predicated on COVID-19 concerns and another for a reduced sentence based on the sentencing disparity.[4] In that respect, his presentation of the arguments crucially differs from Trenkler's, who by our court's count proffered [*14] five combined reasons in support of his motion for compassionate release. Trenkler, 47 F.4th at 45. Ruvalcaba also offered to the district court multiple arguments in favor of reducing his sentence, without seeking different remedies based on the separate arguments, thereby similarly differentiating his motion from Gonzalez's bifurcated argument. See Memorandum in Support of Motion to Reduce Sentence at 31, United States v. Ruvalcaba, No. 05-cr-10037 (D. Mass. Mar. 23, 20200), ECF No. 510; Supplemental Motion to Reduce Sentence at 5, United States v. Ruvalcaba, No. 05-cr-10037 (D. Mass. Apr. 21, 2020), ECF No. 512.

Given these discrepancies, we conclude from the record before us that it was eminently reasonable for the district court to follow Gonzalez's lead in analyzing the two factors separately, especially since Gonzalez sought different forms of relief under each argument. Cf. United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) (noting that, under § 3582(c)(1)(A), "[a] district court could, for instance, reduce but not eliminate a defendant's prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place"). **HN9**[] We moreover take this opportunity to clarify that, while courts should still follow the "any [*15] complex of circumstances" approach under Ruvalcaba for as long as no applicable policy statement applies to prisoner-initiated motions for compassionate release, this approach should be shaped by the arguments advanced by defendants. After all, "as a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" Greenlaw, 554 U.S. at 244 (quoting Castro v. United States, 540 U.S. 375, 386, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003) (Scalia, J., concurring in part and concurring in judgment)).

IV.

[4] As his counsel pointed out at oral argument before us, Gonzalez did at one point in his brief to the district court state that his "medical vulnerability to COVID-19 and gross sentencing disparity, either separately or in combination, constitute extraordinary and compelling reasons to reduce his sentence." However, when weighed against his multiple and consistent statements to the district court -- both in his briefing and in the subsequent hearing -- that the two arguments were meant to be proffered as separate alternatives, we do not accept the contention that this statement alone could have alerted the district court to an argument incorporating COVID-19 concerns as part of the sentence-reduction analysis, or vice-versa. Cf. United States v. Nieves-Meléndez, 58 F.4th 569, 579 (1st Cir. 2023) ("'[A] litigant has an obligation to spell out its arguments squarely and distinctly' before the district court." (quoting United States v. Diggins, 36 F.4th 302, 319 (1st Cir. 2022)).

Moreover, while Gonzalez's counsel did also state at the hearing that the district court could factor the sentencing-disparity issues as an "[18 U.S.C.] § 3553(a) factor[]" if it accepted the immediate release argument, we note that an argument for including a factor in the district court's § 3553(a) analysis differs from an argument that the same factor should constitute an "extraordinary and compelling reason[]" for compassionate release under § 3582(c)(1)(A). See Saccoccia, 10 F.4th at 4 (characterizing a district court's "extraordinary and compelling" and § 3553(a) analyses as separate findings under § 3582(c)(1)(A)).

For the foregoing reasons, the judgment of the district court is **affirmed**.

End of Document

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	
v.	16-cr-162-12-PB
	March 25, 2021
	2:24 p.m.
ALFREDO GONZALEZ	

TRANSCRIPT OF HEARING ON MOTION FOR COMPASSIONATE RELEASE
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Government: John S. Davis, AUSA
U.S. Attorney's Office

For the Defendant: Jeffrey David Odland, Esq.
Greenblott & O'Rourke, PLLC

Court Reporter: Susan M. Bateman, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1453

P R O C E E D I N G S

THE CLERK: This Court is in session and has for consideration a hearing on a motion for compassionate release in criminal matter 16-cr-162-12-PB, United States of America versus Alfredo Gonzalez.

THE COURT: All right. This isn't really an evidentiary hearing. I don't believe the defendant has a right to be physically present in court for the hearing. We're allowing him to listen in as a courtesy. I don't anticipate that we'll need to hear anything from him, but if we do, I'll give him a chance to speak before I make any decision.

Let me hear from defense counsel why you think I should grant compassionate release. I've read your memorandum.

You're muted.

MR. ODLAND: I apologize, your Honor.

Before I begin, I just wanted to ask if the Court -- I raised two issues, separate grounds in the alternative.

Does the Court want to hear argument from the defense with respect to both the medical grounds and the sentencing disparity grounds or would you like me to take the medical grounds first?

THE COURT: I want to hear your argument, which is

novel to me and quite problematic to me, that it doesn't matter whether the defendant has any medical condition. Anybody who is sitting in prison and thinks they've gotten a sentence that is disproportionate or problematic in your view apparently can file for a motion for compassionate release at any time.

That's a really unusual argument. One I haven't confronted before. So if you want to press that argument, you've got an uphill climb and try and convince me.

That's the broadest possible argument. If we get beyond that, then you can start focusing on the medical arguments that you have.

MR. ODLAND: Understood, your Honor.

Okay. I'll start with respect to the sentencing disparity argument.

I would note that the relief that would be sought between the two is different because on the medical issue I'm seeking immediate release based on my client's potential serious health issues due to COVID.

The best case scenario for Mr. Gonzalez if the Court was to indulge my sentencing disparity argument would obviously be a reduction down to ten years and he would still have a good amount of time to go.

With respect to that second argument, the sentencing disparity argument --

THE COURT: Have I got your position right, though, that any person serving a prison sentence at any time before completing that sentence can present an argument to the Court that the defendant's sentence should be modified because it's unjust to impose the sentence?

MR. ODLAND: Well, your Honor, I don't think that my position is quite as broad as that framing because I think that just by the inherent term gross sentencing disparity the defendant would have to come in and show either some change in the law or some significant deviation from the gravamen of cases that's presented by the facts of his case versus another case.

You know, if somebody said, well, the median sentence in the District of New Hampshire is 60 months for a trafficking offense and I got 66 months so that's a sentencing disparity, I don't think that they would have standing to even press that argument.

THE COURT: Help me understand the limiting principle then.

So you're saying this nonmedical compassionate release that you think is a power grid to be under the statute, is it only limited to what you say are gross sentencing disparities? There could be many arguments as to why a defendant thinks that he or she was sentenced to an overly harsh sentence and that compassion would weigh in favor

of reduction. I'm trying to figure out what the limiting principle is. I mean, it sort of eviscerates the ordinary requirements of 2255 and it radically changes the whole structure of sentencing law.

So I have not read the cases yet that you cite, but you apparently have found judges who are very willing to just take this very narrow statutory exception that was created for a very specific purpose and say, wow, it isn't limited to just that. You don't have to worry about the health and unusual emergency circumstances or any of that. It's just focus on very healthy young person going to live many years, but he got a grossly disproportionate sentence so we should give him compassionate release.

Help me understand how I can turn what is a very -- on its face a very narrow statutory exception into basically a giant super highway for reducing defendant's sentences.

MR. ODLAND: Well, your Honor, I think that I would start here.

The cases that I've cited are a fairly limited set of cases. They all involve either stacked 924(c) or situations such as Mr. Gonzalez's where he was subjected to an 851 enhancement that he would no longer be subjected to after the First Step Act.

So this -- admittedly, the framing around what is or what isn't a gross sentencing disparity and the Court's

question with regards to I guess at the end of the day what does the term gross mean and what is the limiting factor, the law is --

THE COURT: Are you telling me it only applies to gross sentencing disparities? Nothing other than a gross sentencing disparity or a medical condition could justify compassionate release? Is that your position?

MR. ODLAND: Well, I mean at the end of the day the statute refers to extraordinary and compelling reasons. So I certainly believe that there may be some other species of extraordinary and compelling reasons. I haven't thought that through, frankly, your Honor, but certainly I would argue that medical reasons I think everyone agrees is a basis and that gross sentencing disparities would also form a basis for extraordinary and compelling reasons.

I'm only asking the Court to accept that people in Mr. Gonzalez's situation where they have a legal change such as a 924(c) or an 851 would conceivably be within that auspice of potentially having a gross --

THE COURT: Until the statute was modified to specifically allow judges to grant compassionate release in the circumstances you describe did the Bureau of Prisons have the power to just release people because they think the sentence was disproportionate or extraordinary under this provision?

MR. ODLAND: No, your Honor, but the sort of overall landscape has changed at the moment. Because when BOP had the gatekeeper function, they were also by law limited to the reasons for compassionate release spelled out at the U.S. sentencing guidelines.

The U.S. sentencing guidelines, however, specifically refer to motions filed by the director of the Bureau of Prisons. In other words, the policy statements that are contained in the guidelines on their face only relate to motions filed by the director of prisons.

And so my position, which is more fully articulated in the cases that I have cited, is that in essence there's no limiting factor because when the First Step Act allowed defendants to come directly into court after exhaustion, they as petitioners don't have any limiting factor because there is no USSG guideline or limiting factor on what a defendant can raise, your Honor.

THE COURT: Did you find any contemporaneous evidence that anyone understood the statute the way you say it is intended to function? Because I'm not aware of any legislative history, any contemporaneous interpretations. I happened to be on Executive Committee of the Judicial Conference at the time the First Step Act was under consideration, and the judiciary's analysis of the bill did not in any way envision granting the kinds of release for

non-health and longevity reasons.

It's just like -- I'm just mystified. It seems to me just popping up out of nowhere. I respect that other judges may be construing the statute this way, but that's not my understanding of how it was being construed at the time. I was working with -- helping to formulate the judiciary's position with respect to the bill, and I recall zero indication that it was intended to work the way you're suggesting it was intended to work.

MR. ODLAND: So, your Honor, I have not done a deep dive on the legislative history or read the minutes regarding the debate on the Senate floor or anything like that.

I do recall from reviewing numerous cases in preparing my motion that a lot of the other courts cited to sort of the broad policy language that was invoked during those discussions about the overall thrust of the act being to try to combat mass incarceration, over incarceration, unduly long federal sentences generally.

I can't say though that there was specific floor debate about, oh, maybe folks can come back in and get a second look at 924(c) stacked cases or folks can ask for a second look at 851 enhancements.

And as I've conceded in my motion, Judge, when the First Step Act was passed the 851 amendments were not made retroactive.

THE COURT: I want to separate out -- I mean, before you could even get into your analysis of the -- look, I'm entirely sympathetic to people that say I got sentenced a month before the law changed, this is really unfair and bad to me, okay? So we can argue about that, but there's a threshold consideration.

Maybe I'm oversimplifying your position. Your position seems to me to be the statute uses the term extraordinary. Extraordinary is not limited to medical conditions in the text of the statute. Therefore, it applies to anything that's extraordinary, including unjustly disproportionate sentences if they're sufficiently severe. And this is one of those for the reasons I've described in my memo, so grant it.

That's your -- am I oversimplifying? Is that basically what you're saying?

MR. ODLAND: I think that's a fair summary at its core of my argument, your Honor.

THE COURT: And the counterargument to that is the entire context of that statute and the way it was implemented prior to the amendment makes clear that it's intended to deal with health and longevity problems that make the early release consistent with compassion, not the judge rethinking how reasonable his original sentence was. That's the -- counterargument is you read that term in context and you see

that it's meant to be limited to the kinds of things that that statute addressed before it was amended, because it's not enough to just say the word extraordinary is in there and you entirely change the meaning of the statute so that judges can basically resentence when they don't -- they come to the conclusion that their original sentence was grossly unjust.

That's the counterargument. What's your response?

MR. ODLAND: My response, your Honor, would be that I do think that my argument is that there has been somewhat a sea change in what the Court can consider, but it's not that simple because I think that even the law prior to the First Step Act did allow -- was more broad than just a limited set of medical issues. I make two arguments with response to that, Judge.

The guidelines specifically talk, for example, about a grounds for compassionate release is if a family member who's caring for the inmate's children becomes incapacitated, the inmate could seek compassionate release. That has nothing to do with the health of the inmate, obviously.

And also there was a catchall provision -- in 1B1.13, I think it's comment (D), was a catchall provision that would have allowed the Bureau of Prisons very broad discretion in what they could bring a petition under. But as recounted in my motion, even with respect to medical issues

BOP was extremely I guess miserly I will put it, your Honor, with respect to how often they would bring those matters to the Court let alone -- and I haven't done research about this, but I would venture to guess that it was very rare that the BOP ever brought motions before the Court under that catchall provision.

So part of my argument is that the First Step Act in opening up the courts to defendants was opening up the ability of a defendant to use that catchall provision to put forward a broader set of claims such as the one I'm advancing here.

THE COURT: Yeah. I mean, I have real trouble with it not because I don't have sympathy for people who are unjustly sentenced, but I would ordinarily expect a directive from Congress that we're substantially changing the entire system of reviewing the reasonableness of sentences. Not only can you as a defendant appeal the unreasonableness of the sentence initially, not only can you challenge the constitutionality of the sentence in a 2255, but at any point where you think the sentence is extraordinarily unreasonable you can bring one of these petitions. And you can bring them multiple times if you want, you know, you can just come back every year to the judge and say now do you think it's unreasonable, and it's a real big change.

If I were going to have a radical redesign of the

sentencing system, I might want something like that because I've sentenced people for 30 years and I have people serving very long sentences under the old mandatory guidelines that if I were free to reconsider them today, I would reconsider some of them. But I expect then, if you're right, that those defendants serving the long sentences under the mandatory guidelines will come in and say, hey, today they're not mandatory anymore. But for the fact it was mandatory, you would have given me a much lower sentence. There were many times where I said that was the case when I sentenced somebody. And that's extraordinary because it's unjust, and you need to lower my sentence.

So under your theory they could probably do that and maybe they should be able to do that, but ordinarily you would want to see a more -- an explicit grant of authority when you radically change the sentencing regime.

But I get your argument. It's well presented. You're the first person to present it to me and you've done it well citing a lot of cases, but I have to admit I'm quite skeptical about it. I'll look at it carefully.

Mr. Davis, what's your response on just that specific issue?

MR. DAVIS: Judge, I agree with the Court that this would be an enormous change in federal criminal procedure.

This is a question of statutory interpretation, and

I think the Court reads the statute correctly.

The best case I found to explain my view of it is a case Aruda, A-R-U-D-A, which is a District of Hawaii case, it's 472 F.Supp.3d 847, where there's a good explanation by a thoughtful district judge, but I would say just a few points.

First, that the First Step Act, as the Court noted, changed only procedure, not substance. The substance of this was well set, and there's nothing in the amendment of the statute that signals the enormous change that the defendant is essentially arguing for.

The second point is that even under 3582(c)(1)(A) as amended, the BOP is still required in the first instance to evaluate the prisoner's request and to make an administrative determination; that is, the exhaustion --

THE COURT: That's an issue -- can I just stop you? That's an interesting textual argument that I hadn't thought of.

The statute clearly doesn't authorize the BOP to grant reductions for reasons like gross sentencing disparity, highly unjust sentence, that kind of thing, but yet the statute requires administrative review of any kind of claim for compassionate release or at least that it be presented and that there be a 30-day period elapsed before the district judge can consider it.

So essentially there would be some grounds for

compassionate release that would still have to be administratively presented to the BOP, but the BOP would have no authority to grant the release based on that basis.

MR. DAVIS: Correct. And that creates an absurdity. How does the BOP, the director of the BOP evaluate an argument about sentencing disparity that really only a Court can adjudicate?

THE COURT: Okay. That's an interesting argument. I'll have to look at that.

MR. DAVIS: The third point is that 28 U.S.C. 994(t), which is in the sentencing commission legislation, remains fully in effect.

And I think that after Booker many of us tend to think that anything in the guidelines now is always sort of loosey-goosey and advisory because Booker made the guidelines advisory in imposing sentence, but that's not true and there are many aspects of the guidelines -- or at least some aspects of the guidelines that are not about imposing a sentence in the first instance but are about other things like this.

And the authority that Congress has to delegate to the Commission essentially a rulemaking power in the non-Booker context, that authority is still there and still operates, and that was the authority that Congress used in 994(t). And 994(t) says about this very statute that the Commission is going to set the criteria to be applied in

compassionate release and to list the specific examples.

THE COURT: Doesn't your colleague cite circuit court precedent in other circuits that have rejected that exception?

MR. DAVIS: Yes.

THE COURT: You think those cases were wrongly decided then?

MR. DAVIS: Yes.

THE COURT: Okay.

MR. DAVIS: And I'm frankly alarmed and did not understand because somehow this wave has not really struck the First Circuit yet how many courts have just sort of dived in here, but the implications of this are staggering.

THE COURT: I'm not assuming that the guidance did apply. You've seen how I issue my orders. I don't take a final position on it, but I act under the assumption that they do apply.

MR. DAVIS: Yeah.

THE COURT: And clearly one of the things the defense is arguing here is that I should affirmatively say that that guidance does not apply, and so I might have to take a final position on that issue in this case.

So there is circuit precedent to support the defense view in other circuits. You think that circuit precedent is wrongly decided.

Are there any circuit court opinions that go your way on that specific issue that you can draw to my attention?

MR. DAVIS: Not that I've found, no.

THE COURT: So I'll have to look at that. Obviously, multiple circuits giving careful consideration to an issue that's being presented to me, those circuit court decisions are entitled to careful consideration.

MR. DAVIS: Yes.

THE COURT: So I'll look at them hard and try to decide whether they were correctly decided or not.

MR. DAVIS: The last thing I would say is that -- well, two last things.

One is that the catchall provision in (D), like the exhaustion requirement, is geared toward the Bureau of Prisons, that is, in part (D) of the application notes, other reasons must be as determined by the director at the Bureau of Prisons, and they're not just any other reasons and those are binding guidelines under 994(t). And the Bureau of Prisons has never promulgated anything like an invitation to come in and make arguments about sentencing disparity for people who were correctly and lawfully sentenced at the time they were sentenced.

Finally, Judge, just -- and the Court started out so I don't know that I have much to add, but this work that we do depends on the finality of sentences and is very defined in

limited ways to challenge final sentences.

There are very careful limits in the statute and in the guidelines to the retroactive application of the guidelines, and we have fierce litigation about that under 1B1.10 and 3582(c)(2).

There are also -- and I know you remember and I remember the statute of limitations for 2255s and how important that was as courts became overwhelmed with habeas litigation with collateral attacks on sentences, and that -- Congress made that change, and that's been a critical and central part of review of sentences ever since.

What the defendant is proposing, as the Court says, is that Congress in the First Step Act decided to throw all of that out the window and to tie you and all the other district court judges up for the rest of your careers with hearing these petitions whenever they want to file -- whenever they're filed.

THE COURT: Well, you could construct a sentencing regime where that would be something that should happen. The state of New Hampshire -- I mean, I've been out of it longer than you, but in my day you could go to the state court and ask that your client's sentence be reduced or suspended long after the sentence was imposed, and one could certainly construct a sentencing scheme where that is so. And there may be arguments to have a kind of limited relook, you know,

somebody has basically become a secular saint in their last ten years and their whole life has changed and the judge should take that into account. That might be a good sentencing regime, but one would want to see some express statements about how that is supposed to work from Congress, how long -- how many times can you do it, exactly what kind of circumstances should be allowed and not others, and the use of just a general term like extraordinary is quite challenging for us. It will take us a couple of decades to devise enough opinions that we can specify the circumstances on what are extraordinary and what aren't. It will take a few Supreme Court decisions.

It's a big, big, big change. I'm not saying it would swamp us to the point where it would be nonfunctional, but already compassionate release in the age of COVID is a huge component of the work that I do.

I mean, I have -- in the criminal practice I probably have five compassionate release motions for every noncompassionate criminal motion I have. So that's what I've got so far and all of those are just COVID related.

But just a brief response from defense counsel. I think it's an interesting issue. As I said, well briefed. I'll give it careful consideration, but I acknowledge right up front my skepticism about it.

Is there anything more you want to say on that

issue? Then we'll briefly turn to 851 unjust issue, and then we'll get to the medical issue which is the more standard argument that you're making.

MR. ODLAND: Two brief responses to what Attorney Davis just argued to the Court.

The first is that I think that a lot of the conversation that we all are speaking around is sort of highlighted by one of the things that Attorney Davis brought up, which is that 28 U.S.C. 994(t) is still in effect and it is rulemaking authority that tells the Commission, fully flesh out what the limiting factors are about extraordinary and compelling reasons. They did that over a decade ago.

With respect to BOP, Congress has now decided this system is not working. It's too limited. Defendants should avail themselves of the courts directly. And there's simply a political problem, frankly, at the end of the day, your Honor, that's leading to there being no guidance for the parties and no guidance for the Court because there's no quorum at the Commission.

What really needs to happen is the Commission needs to sit and they need to rework 1B1.13 in the new world post First Step Act.

But my position representing Mr. Gonzalez, an individual that I feel as defense counsel was sentenced to an unjust grossly disproportionate sentence, is that because

there is no quorum, that's of no moment to Mr. Gonzalez that there's a political problem and an impasse.

So there is no guidance for the parties at this juncture, and therefore, the Court should just assess my argument on the merits basically because the Commission hasn't done its work yet.

THE COURT: All right. I hear you.

Again, I'm just skeptical because when you take a statute that had been focused on a particular set of issues and a change about who may consider those issues without changing the way the statute works, will also effectively change its meaning so broadly without any hint, is a real challenge from my approach to statutory interpretation, but I'll take that under advisement and analyze it.

I just wanted to make sure I understand your 851 point. You are saying -- and I'll see if Mr. Davis contests it. You are saying that had the sentencing of this defendant been postponed by a few months he would have been subject to a 10-year mandatory minimum, not a 20-year mandatory minimum.

Is that correct?

MR. ODLAND: Yes.

THE COURT: Do you agree, Mr. Davis?

MR. DAVIS: Yes.

THE COURT: Okay.

Mr. Davis, don't you have a bit of a problem about

that? I mean, I understand Congress chose not to make it retroactive and all of that, but it is problematic to so radically change the sentencing guidelines here and people to get caught up just a few months before a statute was enacted -- you know, the First Step Act was under consideration for a long period of time, and it's a little bit surprising to me that defense counsel wouldn't be anticipating that and raising it.

They did raise it with me in some cases. Maybe they raised it with me in this case. I don't recall.

So I understand the point that judgment has been made that this is not to be applied retroactively, but where the act was about to be passed just a few months later, it does resonate with me that it seems problematic and arguably unjust to treat two defendants who are otherwise identical except that one is sentenced the day before the act gets passed and one gets sentenced the day after the act's effective date, and one defendant is subject to a 20-year and the other is subject to a 10-year mandatory minimum.

You don't have any problem with that?

MR. DAVIS: Judge -- sorry. Am I muted?

THE COURT: No. You're good.

MR. DAVIS: Certainly it's troubling and it's jarring. It is in the nature of passing statutes and amending statutes and repealing statutes. And sometimes Congress sets

laws and decides later that the sentences are too harsh and they change the laws, and that happened here, but there have to be rules about how and when a sentence that was lawfully required and in circumstances where no one did anything improper. The government filed the enhancement and the Court imposed a mandatory minimum sentence that had to be applied.

I mean for a long time we had crack cocaine -- ten year sentences based on 50 grams of crack. I don't know what's happened in the child -- I don't really know much about child porn, but I know that there are very harsh, tough sentences that get changed.

THE COURT: Again, in a financial crime context I gave the chief financial officer of the Enterasys Corporation a ten year sentence for securities fraud based on a loss calculation and under guidelines that were mandatory.

MR. DAVIS: Right.

THE COURT: He agreed to that sentence because he was so afraid that it would be -- that the Court of Appeals would not agree with my loss calculation, which was favorable to him, that he waived his right to appeal, and within a year or two after -- and I said the sentence I was giving was too high -- within a year or two after that -- or a year or so after that he brought a 2255 saying, you know, your sentence is too high and you know it, and the guideline sentence is now no longer mandatory and the whole situation is different, but

I determined that I didn't have the authority to reduce the sentence.

That has happened more often than I would like. I would like always my sentences to be entirely fair and just appearing to me at least, but there are many times where I have imposed a sentence that is in my judgment too harsh.

This defendant had a significant prior criminal record and was a very significant drug dealer deserving of a very long sentence.

But I do understand the point that a change like this in a matter of months from a 20-year mandatory to a 10 would have at least resulted in a more substantial effort at sentencing.

Let me ask defense counsel. Was this 851 in a superseding indictment or a late filed notice after the defendant refused to plead guilty? Is that what happened in this case?

MR. ODLAND: It's a little bit murky, your Honor, and I don't want to overstate because I wasn't trial counsel.

I did attach some information, which is a colloquy that occurred between the Court and prior counsel which actually -- I guess let me just go through it.

Attorney Garrity, Paul Garrity, originally represented Mr. Gonzalez. There was a motion for status of counsel filed that was denied. Then it's my understanding

that Gonzalez hired as private counsel Scott Gleason. Scott Gleason tried the case, Mr. Gonzalez was convicted, and then I was appointed through CJA post-conviction. So that's sort of the posture with respect to his attorneys.

In the first instance when he was represented by Attorney Garrity, part of the issue that appears to have led to the status of counsel filing was that Attorney Garrity approximately nine months into the case had had a meeting with Gonzalez where he was reviewing his options, plea versus trial, and telling him that the government was saying they may file an Information under 851.

Gonzalez apparently had heard from a jailhouse lawyer who was analyzing it under the guidelines that that was impossible and his lawyer didn't know what he was talking about. There was a colloquy where it was all sorted out and Mr. Gonzalez was made clear by counsel and the Court that this was a possibility.

There was also a conversation between the Court and the government regarding why the late filing was being contemplated, and in that your Honor had noted that it was the government's prerogative but basically for the smooth administration of the courts this practice was difficult because at the eleventh hour the government could come in and sort of double the stakes, and that might send things off in a different direction. The Court might not be ready for it.

And in response to that the government basically said -- they kind of said two contradictory things, and I don't know what to make of it, frankly. I tried to be fair in my motion.

They said, well, Judge, the defendant has been aware of this the whole time, you know, they have his criminal history, they know what was out there, but then in the next breath the government also said, well, to be honest, DOJ guidance just changed on whether we should be filing these, which was accurate.

A memo had come down from Attorney General Sessions which repudiated prior memos from Attorney General Holder about when they should be filed. One of the things that the Holder memo said specifically, interestingly, was that they should be filed as a charging decision except for extraordinary circumstances at the beginning of the case and that whether the defendant would take a plea or not should not be part of the government's consideration, but the Sessions' memo explicitly says that it repudiates and withdraws the prior Holder memo.

So then shortly after that conversation, approximately just shy of a year into the case, the government filed.

THE COURT: Okay. I get it now. I'm recalling some of that history as you've laid it out for me.

And it is true that under the law the prosecutor makes the decision about whether to pursue an 851 case or not and that's a matter committed to prosecutorial discretion, but it is problematic if it's used as a device to pressure and threaten people who won't take whatever plea deal the government is offering. I do recall the discussion here about that particular issue.

Is there anything more you want to say about the 851 issue? I mean, as I've suggested by my questions to Mr. Davis, I am sensitive to this problem of fairness when you have a case that resolves very close to the date that a non-retroactive defense favorable statutory amendment occurs, and here it's pretty stark what the affect is on the defendant's case, so I understand that point.

Is there anything else you want to say about that?

MR. ODLAND: I would just briefly make this comment, your Honor, which is to sort of loop in this issue with our prior issue, which is that you could imagine a whole host and set of defendants who would really have no legitimate claim, but those defendants are not Mr. Gonzalez. And what I mean by that is you could imagine someone sentenced in November of 2018 who was a career offender and got a 20-year sentence and then the mandatory minimum went down to 10 years and he comes in and says, hey, that's not fair, you know, if I had been sentenced 30 days later, but the person's guideline

was 22 do 25 years or something.

The issue in Mr. Gonzalez's case is that not only would the Court have been able to have more discretion, but there's a very high chance that if the Court had that discretion the sentence would have been significantly lower.

So I don't think -- when we're contemplating the floodgate issue, your Honor, in our prior conversation, I guess my point is that it's not everyone affected by the change in 851 that would really have a colorable claim for resentencing.

THE COURT: That's true. I've dealt with resentencing in a number of instances where the change in the guideline doesn't have any affect on my ultimate sentencing judgment. So it wouldn't be 100 percent of the people who are sentenced within six months of the adoption of the statute to whom the notice was applied. It would be a smaller subset of those. Those who if recalculated under the guidelines without the mandatory minimum would have a substantially lower sentencing guideline range and there isn't anything aggravating about the case that would cause the Court to upwardly depart or vary, and so it's a smaller subset.

But again, I'm just very cautious about finding authority to do things that are radically different than I was granted authority to do in the past without clear statutory guidance that that is what I am supposed to be doing, but I'll

look at it carefully. It's an interesting point.

Let's turn to the medical issue very briefly. I think the medical issue is reasonably well set out and I'm more familiar with dealing with it.

I do have a couple of questions for defense counsel. This is the first case I've had with someone who has already had COVID presenting a medical argument for compassionate release based on vulnerability to COVID and the potential for serious complications or death because of preexisting conditions.

You make the assertion that there's enough of a risk of reinfection so that I should assume that there is some unspecified risk of reinfection and treat him just like he had never gotten COVID, but I'm not aware -- I am aware of reports of reinfections. They do occur. The reporting that I'm aware of is that they are rare.

There is evidence to suggest that the report of reinfection with particularly the Brazil variant and possibly the South African variant may be somewhat higher but that those are largely antidotal reports, and that the best scientific evidence at this point suggests that the immunity conferred by developing COVID is robust and while not complete substantially reduces a risk of acquiring COVID when comparing two people; one of whom has had COVID and one who has not.

And so, you know, my take on the generally

available information about reinfection is that reinfection does occur but it is very -- it is a rare event at least for the first six to nine months after you acquire the disease, and I don't see in your materials anything that causes me to form a different view about the risk of reinfection.

Do you want to say anything more about the risk of reinfection?

MR. ODLAND: I cited basically to two authorities, if you want to call it that, your Honor, with respect to this exact issue, which was some CDC guidance as well as an article from the Journal of Nature which both stated that evidence was trending in the direction of a concern that reinfection is possible based on the variants.

I will also say though, to be fair, your Honor, that both of those authorities in essence say that the issue is highly concerning and it deserves more study.

And so I think unfortunately as an advocate for Mr. Gonzalez, I'm left in a position that I think many of us are living our lives in these days, which is that the available evidence that I am aware of, your Honor, is that we just don't really fully have our arms around what the risk of reinfection is.

I did note in my --

THE COURT: Did you see the study in The Lancet that's reported on March 17th of this year? Assessment of

Protection Against Reinfection with SARS-CoV-2 Among 4 Million PCR-Tested Individuals in Denmark in 2020: A Population-Level Observational Study?

The bottom line -- my reading of that study is that it shows a very low risk of reinfection. Now, that was in a population in Denmark where it had not been demonstrated say that the Brazilian variant strain was prevalent. To the extent there were variants in Europe at that time, they were predominantly what people are referring to as the English variant, and neither the South African variant nor the Brazilian variant were common.

But that Lancet study -- again, it's an observational study, it's in only one country's population, but it suggests a very low rate of -- the immunity conferred by COVID appears to be robust. That's my take on it.

So I get the point. I will assume for purposes of analysis that reinfection is possible, but absent better evidence from you than you have provided to date, I'm going to assume that reinfection is relatively rare.

I think that that matters because there's inherent risk in everything. The risk of acquiring AIDS at a prison is probably greater than it is in the general population. There are many, many risks of death that are probably higher in a prison than they are in other places.

Simply because you have a risk that's increased by

incarceration is not ordinarily sufficient to consider it a medical extraordinary circumstance.

And so the fact that your client has COVID -- has had COVID suggests to me that he's at lower risk than most other people in the prison of reacquiring COVID.

He does have conditions that present and cause him to be at risk of severe complications and/or death as a result if he doesn't reacquire COVID, but even in cases where it's reacquired it tends to be a milder form of the disease.

So my assessment is probably that he's at reduced risk compared to the rest of the population about acquiring COVID, but if he does reacquire it, he's at somewhat greater risk of severe complications or death.

That's my take. If you have a different one, I'm happy to hear it.

MR. ODLAND: I think my take and my understanding of the evidence as it's known is similar, your Honor. I guess I'll just state it to make sure I'm expressing our position clearly.

I think the evidence seems clear that having COVID is a similar protective factor to being vaccinated with respect to whatever the original variant of COVID was. I actually don't know what we call that, but I assume the variant that came from China, the original COVID strain.

As I have said, I would direct the Court to the CDC

guidance and the Nature article that I cited. The Nature article is about two weeks prior to The Lancet study that the Court cited, but I think they are addressing different issues. Those do raise real concerns that those protective factors may not extend to the variant strains. And I would also note that that seems to be consistent with the studies around vaccination as well, your Honor.

THE COURT: Uh-huh.

MR. ODLAND: So I guess to the extent that he is likely protected for at least six to nine months from getting the original strain, I agree with the Court's position, but I still think that there are grave concerns regarding whether he could be exposed to a variant.

And as I noted in my brief, at least the South African variant was known to be in Maryland at the time of my filing at the end of February.

And I also noted that it was first detected in Maryland after Mr. Gonzalez was cleared. So, in other words, it appears that it's not possible that when he was sick in January he had a variant at that time. The available evidence seems to suggest he had original COVID.

THE COURT: Okay. I've e-mailed a copy of the PDF of The Lancet study to my case manager who will just include it in the record since we referred to it.

Okay. I appreciate that.

Do you take issue with Mr. Davis's representations regarding the state of disease within the institution at this time? Do you have any different take on that evidence that he cites?

MR. ODLAND: The only thing, which is really not taking issue with what Attorney Davis filed but it's just that this is a dynamic situation, is that I went on the BOP website today, and Attorney Davis in his objection has said there's no active cases which I'm sure was accurate when he filed his objection. It's no longer accurate though, your Honor. There are six -- according to the website, six inmates infected. Three staff infected.

My understanding is that Cumberland had a fairly widespread outbreak previously. Obviously, what's going on there is not to that extent. My understanding is in the late fall towards the holidays the case numbers got pretty high. I think above a hundred, Judge. So it's obviously not that now, but it's not zero either.

THE COURT: All right.

MR. ODLAND: And again, whether those are variants, you know, I don't think that BOP is testing for that. Frankly, I don't even know if the PCRs that the general public takes can even tell you that.

THE COURT: No. I think they need to have a sequencing of the genome to identify which variant that it is.

Mr. Davis, I was understanding that at least the BOP has some kind of vaccination program going that does result in some inmates being vaccinated. Do you know anything about that? And what is the prospect that the defendant would be vaccinated?

MR. DAVIS: The BOP's website today says that 97,000 doses have been administered. I believe a good many of those are on staff, but thousands of them are to inmates.

THE COURT: I mean it would make sense to offer vaccination to the defendant given his medical predisposition to greater risk. So whatever I do here, I'm going to -- if I do not grant the motion and allow his immediate release, I am going to direct you to at least communicate with Bureau of Prisons officials that it is my view that to the extent that BOP has a vaccination program ongoing that they should give careful consideration to offering the vaccine to the defendant as early as possible to mitigate as much as possible the risk that he could reacquire COVID. As low as that risk is, he does have conditions that would place him at greater risk and he is scheduled to serve a long sentence. And so it seems to me sensible, unless I were to grant the requested relief, that the BOP should assign him for a vaccine on a priority basis. It's not my prerogative to order that, but I can instruct you, and I would if I don't grant this motion, to inform the Bureau of Prisons of my position, which is that the BOP should give

careful consideration to vaccinating him at the earliest possible date if he's willing to accept a vaccine, okay?

MR. DAVIS: Understood.

THE COURT: All right. So let's get to the last issue.

Mr. Davis, I'll hear you. Your position basically is he's a very serious criminal offender, committed serious crimes warranting a lengthy sentence. You gave him a just sentence that met the requirements of the guidelines when you sentenced him, it remains a just sentence, and therefore even if he is at greater risk, I shouldn't reduce the sentence, and he is a risk of flight or harm to the community and -- or harm to the community and that is sufficient in your view to justify denial.

So what do you want to say, if anything, that's not in your motion about that?

MR. DAVIS: Nothing further, Judge.

THE COURT: All right.

MR. DAVIS: I've made the points in the objection.

THE COURT: All right.

I understand defense counsel's view that the sentence was unjustly harsh when imposed. You've identified a proposed release plan which has not been investigated yet by probation which we don't devote resources to that until the Court decides that if a satisfactory release plan can be put

together, the Court's inclined to grant the relief, in which case I would ask the probation office to investigate and comment on a release plan because that is a very important component of any decision I make regarding release. I need to make sure the public is protected, and without a carefully constructed release plan -- I'm not going to release anybody who poses a threat to the community.

Did you want to say anything else though about that particular issue of his -- whether it's appropriate to release him under the sentencing guidelines given the seriousness of his crime and his criminal history and what risk of harm he presents to the public if I were to grant your request?

MR. ODLAND: Yes, your Honor.

I guess I would just note that the issues that we were speaking about at the outset do sort of relate to the 3553(a) factors because depending on how the Court sees what a just sentence was, I think that color -- I think the Court can consider, for example, how much time he has served on the sentences meted out to his co-defendants in determining whether some of the goals such as just punishment and deterrence have been met.

THE COURT: But the problem is he was subject to a mandatory minimum so I can't -- it is not -- I can't say that the mandatory minimum is unjust and therefore it's not just to have him sentenced to this sentence and it would be just to

outright -- I mean, your position is outright release him so he doesn't have to serve anymore time in prison even though he's got more than a decade left on his sentence because -- I mean, if I were to buy your first argument, I could knock five years off his sentence and just leave him in prison unless I also bought your second argument, in which case I would -- I'm describing it as your second because we discussed it second here -- I would have to release him immediately and permanently. I can't yo-yo people back and forth out of prison, like furlough him for twelve months and then come back and serve the remainder. I have to cancel the whole sentence.

The question is, is that really consistent with the sentencing guidelines?

MR. ODLAND: I guess to phrase what I was trying to articulate a moment ago differently, your Honor, there's a way in which -- you know, the government argues, well, he's not even done a quarter of his sentence, but if the Court thinks -- you know, it sort of depends on what sentence was the correct sentence at the original sentencing to analyze that.

But not to go down that road too far, your Honor, if I could just state briefly, he's served almost exactly four and a half years at this point, which is about a five year legal sentence when you factor in his good time. Sixty months or thereabouts is right about the median sentence for drug

trafficking offenses in this district. It's commensurate with many of the co-defendants' sentences. Many of those co-defendants were responsible for similar weights as Mr. Gonzalez.

Admittedly, Mr. Gonzalez did have a higher criminal history category than many of his co-defendants, your Honor, but I think that when you factor in the fact that the sentence is similar, of a similar ilk to those his co-defendants did and the seriousness of his health condition, I think that chips away at the government's argument that it would somehow be a profound injustice for him to be released now because it would be such a lenient sentence, your Honor.

THE COURT: You make a lot of arguments that are carefully considered and, you know, worthy of serious weight.

The two that I'm most skeptical about -- one I've already talked about and whether the statute can be construed as broadly as you suggest it should, but the other is that releasing the defendant now in any world would be a just sentence apart from the fact that he might face a serious risk of death or a complication because of COVID.

It's debatable whether 20 years versus 16 years is a better sentence for the defendant if I were free to sentence him the way I think the law should be applied here, but there's no place on earth that I would think given this defendant's criminal history and his crime of conviction that

five years would be enough for him.

You know, I've sentenced thousands of drug dealing defendants to prison. He's very much in the category that would be serving over ten years for their term of imprisonment.

You can debate whether twenty years, but he definitely falls in the category of defendants who typically receive a sentence longer than ten years from me.

So releasing him after five would be only justifiable in my view because I conclude there's a very significant risk of death or serious complication because of a sufficiently high risk of acquiring COVID. Otherwise, the sentence would be unjustly lenient and inconsistent with the purposes of the sentencing statute.

So I'm skeptical about that argument, but I will consider it as well. Because you've done such a good job, I've got to tell you it's going to take me a fair amount of time to process your arguments here. Particularly, you're presenting an argument that has not been developed in any case in front of me over the last year based on an interpretation of the statute that if I accept it will have substantial ramifications for how judges on this court evaluate these issues in the future, and I'm going to need to give it careful consideration. It's going to take me some time.

It's not that I'm not paying attention to it. It's

that it's a complicated argument worthy of careful consideration. I'll give it that, but it's going to take me some time. All right?

Is there anything else you want to say and then anything else Mr. Davis wants to say?

MR. ODLAND: The only thing I would note just for the record, Judge, is I filed an addendum yesterday just fleshing out a little bit more my client's proposed release plan, and I wanted to note for the record that both my client's sister, Ms. Acevedo, as well as the gentleman, Mr. Lopez, who has offered Mr. Gonzalez a job, have appeared as I expected today. That shows that he has both community ties and community support.

With that, I would submit. Thank you.

THE COURT: Thank you.

And as I said, if I determine that it may be appropriate to justify his immediate release, then I'll ask the probation office to go out and do a release plan investigation to see whether the release plan is a sensible one or whether it might need to be modified, but it's premature at this point to spend those resources on it until I get further down in the analysis.

Mr. Davis, anything else from you?

MR. DAVIS: Nothing further, Judge.

THE COURT: All right. Thank you.

I'll take it under advisement and work on it diligently, but it may take me a while to get the analysis done given the nature of the arguments that are being presented.

I appreciate the carefully considered arguments of counsel. I'll take the matter under advisement.

That concludes the hearing. Thank you.

(Conclusion of hearing at 3:26 p.m.)

C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 3-14-22 /s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America

Case No. 16-cr-162-PB-12
v. Opinion No. 2021 DNH 139

Alfredo Gonzalez

MEMORANDUM AND ORDER

Alfredo Gonzalez is serving a 20-year prison sentence on a charge of conspiracy to distribute a kilogram or more of heroin. He seeks a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A) based on his claim that his disproportionately harsh sentence was caused by the timing of his conviction and sentencing rather than the unique facts of his case.[1] The government argues in response that I lack the power to reduce Gonzalez's sentence for the reasons he cites.

[1] Gonzalez alternatively contends that he is entitled to immediate release because he suffers from several medical conditions that leave him at increased risk of severe illness or death if he were to contract COVID-19. I am unpersuaded by this argument. The Bureau of Prisons has adopted mitigation measures that reduce the risk of transmission within prisons, and Gonzalez is eligible to receive a vaccine that will further reduce his risk of serious illness if he were to contract COVID-19. In any event, he committed a serious crime that warrants a lengthy prison sentence. Given the circumstances, I am not persuaded that Gonzalez's health status qualifies as an extraordinary and compelling circumstance that justifies his immediate release.

I. BACKGROUND

A grand jury charged Gonzalez with one count of conspiracy to distribute a kilogram or more of heroin on October 5, 2016. See Indictment, Doc. No. 1. Nearly a year later, on September 29, 2017, the government filed an information pursuant to 21 U.S.C. § 851 ("851 Notice"), informing Gonzalez that it intended to argue that he was subject to a mandatory minimum 20-year prison sentence because he had a prior New Hampshire state court conviction for possession with intent to sell or dispense cocaine.[2] See Information, Doc. No. 174. At an earlier hearing, the prosecutor explained that the government's decision to file the 851 Notice so late in the process was due to a recent policy change at the Department of Justice that required prosecutors to file 851 Notices in cases like Gonzalez's.[3] Gonzalez went to trial approximately a month later and was convicted. See Jury Verdict, Doc. No. 220.

I sentenced Gonzalez on June 14, 2018. During the sentencing hearing, I determined that Gonzalez's total offense

[2] Section 851 requires the government to file an information prior to trial that identifies any prior drug crime convictions that will be used to increase the defendant's sentence. See 21 U.S.C. § 851(a).

[3] When Gonzalez was indicted, United States Attorneys were operating under guidance from Attorney General Eric Holder that required prosecutors to consider several potentially relevant circumstances before filing an 851 Notice. See Attorney General Eric Holder, *Department Policy on Charging Mandatory Minimum*

level was 32 and his criminal history category was IV. See Transcript of Sentencing Hearing, Doc. No. 380 at 5. This would have resulted in a guideline sentencing range of 168 months to 210 months but for the government's decision to file the 851 Notice, which increased the guideline sentence to 240 months, the mandatory minimum sentence then required because of Gonzalez's prior conviction. See Presentence Report, Doc. No. 338 ¶ 73. Following the law as it existed at the time, I sentenced Gonzalez to 240 months of imprisonment.

Congress modified the mandatory minimum penalty provision I used to sentence Gonzalez approximately six months later as part of the First Step Act of 2018. See Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220. When I sentenced Gonzalez, 21 U.S.C. § 841 required a mandatory minimum sentence of 20 years for a defendant who was culpable in a conspiracy to

---

Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), available at https://tinyurl.com/myva6atp. Prosecutors were also instructed to file any 851 Notice "at the time the case is charged, or as soon as possible thereafter." Attorney General Eric Holder, *Guidance Regarding § 851 Enhancements In Plea Negotiations* (Sept. 24, 2014), available at https://tinyurl.com/t8buyzyd.

These policies changed under Attorney General Jeff Sessions, who issued new instructions that required prosecutors to "charge and pursue the most serious, readily provable offense," including potential mandatory minimum offenses. See Attorney General Jeff Sessions, *Department Charging and Sentencing Policy* (May 10, 2017), available at https://tinyurl.com/jabrn9kr. It was this policy change that prompted the prosecutor to file the belated 851 Notice in this case. See Transcript of Motion Hearing, Doc. No. 377 at 11-12.

distribute a kilogram or more of heroin if the defendant had a prior conviction for a "felony drug offense." See 21 U.S.C. § 841(B)(1)(a) (effective through Dec. 20, 2018). Congress amended § 841 in the First Step Act to reduce the mandatory minimum sentence to 15 years and require the prior conviction to be for a "serious drug felony" to trigger the mandatory minimum sentence. See § 401(a)(2), 132 Stat. at 5220; 21 U.S.C. § 841(B)(1)(a) (effective Dec. 21, 2018). Congress declined, however, to apply this change to defendants like Gonzalez who had already been sentenced. See § 401(c), 132 Stat. at 5221. Gonzalez's prior conviction met the definition of a "felony drug offense" under the prior law but it does not qualify as a "serious drug offense" under the current law.

II. DISCUSSION

Section 3582(c)(1)(A) authorizes a court to reduce a defendant's sentence after considering the factors specified in the sentencing statute if "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Until the First Step Act became law, a court could consider a motion for sentence reduction under § 3582(c)(1)(A) only on a motion from the Director of the Bureau of Prisons. See 18 U.S.C. § 3582(c)(1)(A) (effective through Dec. 20, 2018). Now, however, a defendant may file his own motion if he meets

the provision's exhaustion requirements. See 18 U.S.C. § 3582(c)(1)(A) (effective Dec. 21, 2018).

The government argues that Gonzalez is not entitled to a sentence reduction under § 3582(c)(1)(A) for two reasons: (1) a sentence reduction for the reasons he cites would not be consistent with a policy statement adopted by the Sentencing Commission before the First Step Act authorized defendants to file sentence reduction motions; and (2) § 3582(c)(1)(A) does not authorize a court to reduce a defendant's sentence based on a non-retroactive change to a mandatory minimum sentencing law.

A. The Policy Statement

Before the First Step Act amended § 3582(c)(1)(A) to authorize defendants to file motions for sentence reduction, the Sentencing Commission adopted a policy statement that explains how a court should evaluate a sentence reduction motion filed by the Director of the Bureau of Prisons. The statement provides:

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

U.S. Sentencing Guidelines Manual ("USSG") § 1B1.13 (U.S. Sentencing Comm'n 2018). The commentary to the policy statement further explains what is meant by "extraordinary and compelling reasons." It states, in relevant part, that "provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist" for any of four reasons: (1) the "medical condition of the defendant," (2) the "age of the defendant," (3) "family circumstances," or (4) "other reasons," defined as "an extraordinary and compelling reason other than, or in combination with, the reasons described [above]." USSG § 1B1.13 cmt. n.1 (cleaned up).

The government argues that this policy statement bars Gonzalez from obtaining a sentence reduction for the reasons he cites. I disagree.

A policy statement adopted by the Sentencing Commission binds a court considering a § 3582(c)(1)(A) motion only if it is an "applicable" policy statement. 18 U.S.C. § 3582(c)(1)(A). As my colleague, Judge McCafferty, has recognized, "eight of the nine circuits to address the role of the Sentencing Commission's policy statement have held that the policy statement 'does not apply to cases where an imprisoned person files a motion for compassionate release.'" United States v. Fields, 2021 D.N.H.

120, 2021 WL 3518832, at * 4 (D.N.H. Aug. 9, 2021) (collecting cases). This near-consensus view is persuasive because the policy statement itself states at the outset that it applies "[u]pon motion of the Director of the Bureau of Prisons . . .," USSG § 1B1.13, and the application notes that accompany the statement recognize that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)." USSG § 1B1.13 cmt. n.1.

The government's arguments to the contrary are not persuasive. The government does not explain how a policy statement that by its terms applies only to a motion filed by the Director of the Bureau of Prisons can be applied to limit a court's power to reduce a sentence when responding to a motion filed by a defendant. As the government notes in its brief, many courts, like this one, have acknowledged that the policy statement is still "relevant," United States v. Tomes, 990 F.3d 500, 503 n.1 (6th Cir. 2021), and provides "helpful guidance," United States v. McCoy, 981 F.3d 271, 282 n.7 (4th Cir. 2020), even in cases where motions are filed by defendants. But it cannot limit a court's power to consider additional extraordinary and compelling grounds for a sentence reduction when the motion is filed by a defendant. I, therefore, follow the majority of circuit and district courts and hold that the

policy statement is not binding where a defendant brings a sentence reduction motion.

B. The First Step Act

When Congress amended § 841 in the First Step Act, it specified that the amendment would apply only to defendants who had yet to be sentenced. See § 401(c), 132 Stat. at 5221. The government argues that § 3582(c)(1)(A) does not authorize a court to reduce a defendant's sentence based upon a prospective change in sentencing law. I am unpersuaded by this argument.

Although the government argues otherwise, "It is not unreasonable for Congress to conclude that not all defendants convicted under [the statute] 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. Maumau, No. 2:08-cr-00758-TC-11, 2020 WL 806121, at *7 (D. Utah Feb. 18. 2020); see also McCoy, 981 F.3d at 286-87 ("As multiple district courts have explained, there is a significant difference between automatic vacatur and resentencing of an entire class of defendants — with its avalanche of applications and inevitable resentencings — and allowing for the provision of individual relief in the most grievous cases.") (cleaned up). But see United States v. Jarvis, 999 F.3d 442, 444 (6th Cir. 2021) ("[W]e will not render § 403(b) useless by using § 3582(c)(1)(A) to thwart Congress's retroactivity choices.")

(cleaned up). Indeed, "The Act's broader purpose is . . . consistent with allowing courts to consider such gross sentencing disparities, rather than forcing judges to interpret lack of retroactivity as a complete bar to relief based on subsequent changes to sentencing." United States v. Quinn, 467 F. Supp. 3d 824, 829 (N.D. Cal. 2020).

In the present case, the record reveals that Gonzalez would not have faced a 20-year mandatory minimum sentence if he had been convicted before late May 2017, when the government changed its policy on the filing of 851 Notices, or sentenced after December 2018, when the First Step Act was signed into law. As a result, he faced a disproportionately harsh sentence when compared to similar defendants who were convicted before or sentenced after this brief 18-month window.

Gonzalez's sentence was also substantially higher than the sentences I gave to other co-conspirators in his case who were equally or more culpable. All but one of Gonzalez's co-defendants received a sentence at least 60 months lower, and for most, over 150 months lower, than Gonzalez — this despite all but one of them trafficking a larger quantity of drugs. See Doc. No. 338 ¶ 7. Further, all but one co-defendant received a sentence below the guidelines, while one received a sentence within the guideline range. See Doc. No. 338 ¶ 7. Even accounting for criminal history, which varied widely among co-

defendants, one co-defendant with a criminal history category of III, who was responsible for more heroin than Gonzalez and for 2,167 kilograms of marijuana, was sentenced to only 87 months in prison, compared to Gonzalez's 240 months. See Doc. No. 338 ¶ 7. When Gonzalez's sentence is compared to the sentences received by his co-conspirators, it is apparent that he received a disproportionately harsh sentence.

Gonzalez committed a serious crime, and he deserves a substantial sentence. But because of the timing of his conviction and sentence, Gonzalez was subject to a 20-year mandatory minimum sentence that is disproportionately harsh when compared to the sentences given to other defendants. The proper remedy for this injustice is to hold a further hearing to determine an appropriate new sentence.

III. CONCLUSION

For the foregoing reasons, Gonzalez's motion for a sentence reduction (Doc. No. 420) is granted to the extent that the court will hold a hearing to determine an appropriate sentence.

SO ORDERED.

/s/ Paul J. Barbadoro
Paul J. Barbadoro
United States District Judge

August 31, 2021

cc: John S. Davis, AUSA
Jeffrey D. Odland, Esq.
U.S. Marshal
U.S. Probation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	
v.	16-cr-162-12-PB (AND) 21-cv-94-PB
ALFREDO GONZALEZ	November 22, 2021 2:04 p.m.

TRANSCRIPT OF MOTION/RESENTENCING HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Government: Seth R. Aframe, AUSA
U.S. Attorney's Office

For the Defendant: Jeffrey David Odland, Esq.
Greenblott & O'Rourke, PLLC

Probation: Laura Roffo

Interpreter: Patricia Bluestein

Court Reporter: Susan M. Bateman, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1453

P R O C E E D I N G S

THE CLERK: This Court is in session and has for consideration a motion hearing and resentencing in civil matter 21-cv-94-PB and 16-cr-162-12-PB.

(Deputy clerk swears in the interpreter)

THE INTERPRETER: Good afternoon, your Honor, and all present.

Patricia Bluestein, certified Spanish interpreter.

THE COURT: Thank you.

All right. So the defendant is listening on the phone and has an interpreter interpreting for him.

We have two matters on for today. The first is a 2255 motion. The second is a resentencing that will occur pursuant to a prior ruling I made on the defendant's request for compassionate release. Unless I were to grant the 2255, in which case I would vacate the conviction and set the case for retrial.

Mr. Odland, I intend to proceed with the 2255 first. I am gathering from the fact that neither of you have identified any witnesses who want to testify today that you intend to proceed based on the trial exhibits and trial transcript and the arguments you presented in your memorandum in support of your 2255 motion. Is that correct?

MR. ODLAND: Yes, your Honor.

THE CLERK: Judge, excuse me for one moment.

Attorney Odland, I think we are hearing the interpreter over your phone. Can you just set that down or mute it?

MR. ODLAND: I'm just trying to figure out a way to have the line open.

THE CLERK: You can turn the volume down. If the interpreter needs to tell you that your client needs to talk to you, she will unmute here on the Zoom and let you know.

MR. ODLAND: Okay. I think I've got it.

Thank you. I apologize.

THE CLERK: No, that's okay. Thank you.

THE COURT: Mr. Aframe, are you intending to present any evidence in opposition to the 2255?

MR. AFRAME: No, just what I've put in my written pleading.

THE COURT: Okay. So I'll hear argument on that from you, Mr. Odland.

I really have to commend you here. You've done some really good brief writing both in your motion for compassionate release that you persuaded me to grant and in your memorandum in support of your Section 2255 motion.

I've read it. I understand it. You don't need to repeat what's in there, but if there's anything you would like to say orally in support of your motion in addition to what's in your briefs, I'll be happy to hear it.

What did you want to say, if anything?

MR. ODLAND: So, your Honor, I have a few comments.

The first would be just to make a small distinction between how Attorney Aframe framed the issues in the case and how I see them.

So Attorney Aframe in his objection to my 2255 basically said that the defendant has presented three arguments.

The first is that an agent testified that the defendant had previously been arrested; second, that the case agent testified words to the effect of that he knew the defendant was a drug dealer from the Manchester police; and then the third issue is the issue with regards to the lab analyst.

From my perspective analytically those first two issues are really the same in my opinion, your Honor, and so --

THE COURT: Let me just stop you and tell you I understand that I have to view a 2255 motion like this alleging ineffective assistance of counsel considering the totality of all relevant circumstances, and I think I construed Mr. Aframe's brief to say there are three incidents at the trial that support the ineffective assistance claim.

The first two that he cites are clearly related and have to be considered together in evaluating your motion, but

I -- in evaluating any ineffective assistance of counsel motion I consider all of the relevant circumstances of the case, including things like the strength of the other evidence against the defendant and how that might affect my calculation.

So to the extent -- I'm not sure it's anything more than semantical, but to the extent it's more than semantical, I'm telling you I will give you my assurance that I will consider those two incidents together because of their relationship to each other. Your theory is they're self-reenforcing as to why there's prejudice. So I fully get that.

MR. ODLAND: Okay, your Honor. That was the first point I wanted to make.

The second point I wanted to point out -- and just in reviewing my materials, I apologize, I don't remember how explicitly I stated this in my motion, but I cited a case, U.S. v. Williams from the D.C. Circuit, and in that case no prejudice was found in part because the Court found that the officer didn't link a prior booking photo that was shown to the jury with a specific prior arrest. And I would argue that that's distinct from the circumstance here where -- that was basically the point I was just making, your Honor, is that that link sure did occur in front of the jury. And then in Williams there was a curative instruction which, as I briefed,

didn't occur here.

You know, a lot of the cases involving this --

THE COURT: Just to be clear, no curative instruction was requested by the defendant. I often, I can't remember whether I did it in this case, offer curative instructions. I certainly0 would have given one if it had been requested, but I often also find that defense lawyers tell me they prefer not to have curative instructions because in their view tactically it only seeks to highlight the problem that they're trying to address and they feel that curative instructions are counterproductive. So certainly that is in large part a tactical judgment that we have to give the counsel discretion over as to how to determine when it's necessary or potentially helpful and when it might hurt.

MR. ODLAND: Understood, your Honor.

I guess my only reply would be that there was both in this case no request from prior counsel for a curative instruction or a mistrial.

I think the Court's point with respect to the propriety of a curative instruction being a strategic decision by prior counsel is well taken, but the same analysis wouldn't occur around a mistrial motion, I don't think, given that I can't see any way the defendant would have been prejudiced had the Court granted a mistrial on this.

THE COURT: Right. And I wouldn't have granted a

mistrial motion for this alleged error by counsel. Either one or both of them together would not have -- it doesn't even come within a mile of close to granting a request for a mistrial.

The only thing I would have considered and would have done had it been requested is granted an instruction to tell the jury to disregard it because I always do that when anything like this comes up.

MR. ODLAND: My final comment, Judge, would be with respect to the issue of prejudice. I think that's how it's been briefed by the government in reply. I think that's probably where the meat and potatoes is here quite frankly.

The argument that I would just put forward for the Court to consider is that the government's evidence was -- there was a substantial amount of evidence about a particular transaction, the transaction involving Mr. Gagnon and the interdiction of approximately 503 grams of heroin from Gagnon.

The Court sat on the trial both of Mr. Gagnon prior to Gonzalez's trial and Gonzalez's trial.

I think the issue of prejudice here, Judge, would move the needle more with respect to the government getting to the higher drug weight in this case.

So ultimately, as the Court's aware, the jury found beyond a reasonable doubt that Gonzalez was responsible for more than a kilogram of heroin, and that information was

gleaned from basically coded drug talk, a Title III wiretap that the government argued was indicative of past drug debts.

Those past drug debts were basically translated to the jury by a cooperating witness, Ms. DeJesus, who was a member of the drug trafficking organization, and my argument would be that the jury having heard that the defendant was previously arrested and was a drug dealer would in essence lower the government's burden specifically on that issue, on whether or not he would have cause to be speaking to DeJesus or Deivi, her husband, for any other reason other than drug transactions and it corroborated her testimony, and she's someone that could have been impeached given her cooperation. And so I think a question of prejudice would come down to whether that would bolster the testimony surrounding the ultimate drug weight and whether Gonzalez was prejudiced on that basis, and my argument would be that he was, Judge.

THE COURT: All right.

So the challenge for you, Mr. Odland, is how do these alleged errors affect -- could they have even possibly affected the jury's verdict given the overwhelming evidence of the defendant's guilt.

The challenge for the defense lawyer here was that there was almost no defense that could be produced that would have had any likelihood of success.

What I understand the defense lawyer did, which is

common in cases in which there's almost no defense, is to launch a three prong attack as to why there's reasonable doubt. Don't believe the cooperators because they're untrustworthy for a variety of reasons, fault the government for not doing alternative forms of trying to demonstrate the defendant's guilt even more strongly, and this was a rush to judgment where the investigating officers leaped to the first conclusion available to them in their overzealous desire to make arrests, and in combination those three things should support reasonable doubt.

Those are defenses that are often tried and in my 29 years of doing drug trials almost never successful. I've never had one where they've succeeded. They're very difficult defenses to create reasonable doubt when the government has, as it has here, people in the room watching while the drug transaction is going down. Where they have wiretap evidence of phone calls. Where they have surveillance demonstrating the conduct. Where they get the drugs from the co-defendant at the time while they're under surveillance. Where they viewed your client I think like three or four times driving by and circling back to see the same event over -- the stop of Mr. Gagnon, I think three or four times coming back, getting off, getting back on and going by while he's being stopped.

It was an almost impossible task to try to create reasonable doubt, and shouldn't we in trying to examine

prejudice take into account the overwhelming evidence of guilt that was presented at your client's trial and also recognize that because there were so limited defenses available to your client that we have to recognize that there's a -- the defense's effort to pursue the rush to judgment defense warranted the defense counsel taking greater than normal risks because it was the only hope for creating reasonable doubt. It didn't work.

But I would ask you to comment on what I've just said about the strength of the evidence supporting the charges against your client, how that affects the prejudice analysis, and how it affects the view we should take of defense counsel's cross-examination which in my view was a risky strategy but it was risky because there was virtually no other line of defense that could have been produced that would have had any possibility of success given the nature of the evidence against your client which has multiple sources.

I've had cases that depended heavily on cooperating co-conspirator cases. This didn't depend on cooperating co-conspirator cases entirely. There was substantial corroborating evidence.

I've had cases where wiretaps were played but didn't have drug seizures. I've had cases that involved drug seizures but didn't have in-the-room surveillance while the drug transactions are going down.

This is a very, very, very hard case for defense counsel to create reasonable doubt about.

So what's your thought about all of that?

MR. ODLAND: Well, first, your Honor, with respect to the risky nature of Attorney Gleason's cross-examination of the case agent and the Court's suggestion, you know, that this was a case where the defense was facing possibly insurmountable but if not, a very uphill battle with the state of the evidence, and therefore there's a certain logic to prior counsel taking the risky strategic tact in order to defend Gonzalez.

As I tried to lay out in my brief, I would respond the same way, Judge. I think that the points that prior counsel was trying to make about the lack of hand-to-hands, the lack of drugs being found on Gonzalez, those points could have been made in cross-examination without -- basically they were simply phrased incorrectly in my opinion, Judge. I mean, prior counsel -- you know, in law school they teach in trial ad, don't ask the last question, and there was a lot of asking the last question in this cross-examination, Judge. You know, prior counsel asked, you know, you didn't do a hand-to-hand transaction with my client. In closing he can now go and say, ladies and gentlemen, they weren't thorough. The jury history rejects that, of course, but the point is made. But throughout this line of questioning he then said, so when you

thought he was a drug dealer, that was an assumption.

And as the Court pointed out at sidebar later, instead of just making the point and moving on when he brought it back to the subjective beliefs of the case agent, that's really what created the opportunity for the prior arrest to come in.

THE COURT: Defense counsel did not pursue it the way I would have pursued it if I were the trial counsel, and with the benefit of hindsight obviously one could lay out many paths that counsel could have followed and counsel could have exercised greater control over the witness.

This was a case in which the agent did not blurt out something that he was not supposed to blurt out and was taking advantage of the situation to disclose prejudicial information, and a better constructed cross-examination might have avoided the disclosure of that information which, you know, had somebody raised with me in limine in advance, I want an instruction, Judge, before I begin my cross, do not mention where this booking photo came from and do not mention your prior information from Manchester PD that we knew he was a drug dealer, I would have stopped and instructed the witness, be very careful and do not blurt that out unless you're asked a question that requires you to answer with that information, and then I would have also warned defense counsel.

So there are ways it could have been done. I will

grant you that. But let's assume you can satisfy the first prong of the ineffective assistance of counsel test. You still really haven't responded to the concern about the second prong which is there was just overwhelming evidence of this defendant's guilt, and these two incidents by themselves or in conjunction with your concern about the drug analysis are just -- there's no possibility that it would have affected the jury's decision-making. I mean, if you want to just wrap up with any last thoughts you have about that, I would be happy to hear it.

MR. ODLAND: I mean, I think my response would be the same as it was at the beginning, your Honor. I mean, I noted when I reviewed the transcript that -- you know, the Court said I think at least twice in the transcript at the time of the trial that its view of the evidence was that it was overwhelming. So I understand that. That's the challenge to the 2255. I understand that.

I think, you know, many of the pieces of evidence that the Court just referred to in the surveillance of the Gagnon buy, Gonzalez's alleged circling the highway back to Gagnon after the seizure, those are things that directly relate, as I was saying, to that big 500 gram interdiction.

The evidence with respect to the other weight I think is where the question would come down to. That evidence I think was not as overwhelming. It was basically, you know,

what the jury made of sort of what the government would call coded language and the translation of that coded language by Ms. DeJesus.

For example, there's a time in the transcripts of the recorded calls where Ms. DeJesus refers to her husband and Mr. Gonzalez has alleged that they're talking about 5,000 pesos, and she translates that into drugs. And so her credibility would be at issue there, and I guess -- again, my argument really where the rubber meets the road with the prejudice prong, if anywhere, would be that on getting to that drug weight the evidence was less -- there's less evidence on that point and that the government's burden was in essence lightened because prior to deciding are we going to believe Ms. DeJesus that 5,000 pesos means, you know, a drug debt of $5,000 for heroin, they had already been told the defendant has been arrested and is a known drug dealer.

THE COURT: Okay. I do want to just comment. Of course I have taken to heart Judge Thompson's discussion of ineffective assistance of counsel in United States against Baptiste reported at 8 F.4th at page 30 where she notes that the weight of the evidence, and now I'm quoting her, "is not the be-all and end-all, for (after all) the chief "focus" remains on the fundamental fairness of the proceeding."

She makes the point that in the end of the day it isn't about whether the defendant is guilty or innocent of the

conviction. It's really about the fundamental fairness of the proceeding. But she does acknowledge and I do attach weight to the fact here that the evidence of the defendant's guilt was overwhelming. That's an important factor in my analysis.

Okay. Mr. Aframe, I've read your objection. What else do you want to say other than what's in your brief?

MR. AFRAME: Unless you have questions -- I mean, your questions sort of I think were in conjunction with what I was saying in the brief.

At the end of the day I don't think Strickland is a scalpel. It's a broader question of was this a fair trial. He got, as I think you said during the trial, a very vigorous defense from Attorney Gleason.

Yes, I can understand where those questions may have been better phrased, but frankly we see that to some degree in every trial where, you know, cross-examinations are messy. As you noted, this cross-examination had to take a pretty aggressive tact to make a point to the jury when there was so much evidence.

So as I tried to lay out in the brief, I just don't think that given the overall thrust of Strickland, which is not to recognize perfect trials but to recognize fair trials, this is a fair trial where the defendant got a vigorous defense in which there really was overwhelming evidence.

As to Mr. Odland's point as to the only evidence of

the drug weight was now the coded calls, I think that -- I see this a lot in the work I do. I think that misunderstands sort of the whole trial which is we just saw with overwhelming evidence the defendant at a restaurant involved in a 500 gram drug deal. There's then a car stop. There's then a telephone call to the drug dealer talking about how terrible that the runner got stopped. And the conclusion, well, that was the first time they had met and that was their first drug deal is not consistent with all of that activity and communication. So that supports DeJesus's testimony that, yes, they were in a long-term drug relationship which is consistent with what happened was fully documented. So I don't really accept that argument.

THE COURT: All right. I agree with you.

I commend Mr. Odland for his effort which was to vigorously raise this issue and he raised it well, as well as I think it could be raised, but in the end of the day the issue is not a close one in my mind.

So this 2255 motion is an ineffective assistance of counsel motion. The standard that I have to use is well-known. I'll just summarize it based on work I did in a prior case where I described the relevant law. The case I'm going to be quoting from is Berthel versus State of New Hampshire which is reported at 122 F.Supp.2d 247, an old case, '2000, but still largely has the law down correctly, and I'll

be quoting from it when setting forth the standard here.

To prevail on an ineffective assistance of counsel claim a petitioner must make a two-part showing.

First, he must establish that the counsel's conduct was deficient. Meaning it was unreasonable under prevailing professional norms. This standard is difficult to meet because reviewing courts begin with the presumption that under the circumstances the challenged action might be considered sound trial strategy. A petitioner must overcome this deferential presumption in order to meet the first part of the test.

Second, a petitioner must show that counsel's asserted deficiencies resulted in actual prejudice. In other words, he must show that there is a reasonable probability that but for counsel's conduct the trial outcome would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Updating that 20-year-old case with more recent guidance from the First Circuit, I have carefully read and tried to apply Judge Thompson's opinion in United States versus Baptiste which I've previously cited. It's an August 9, 2021, decision. She does a very effective job of outlining what it means to require proof of prejudice, and I'll quote from her opinion now. "Deficient performance requires showing that counsel made errors so serious that he was not

functioning as the counsel guaranteed the defendant by the Sixth Amendment." "And deficient performance prejudices the defense when it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different, i.e., a probability sufficient to undermine confidence in the result." "The probability of a different result must be substantial, not just conceivable." "But that does not require a showing that counsel's actions more likely than not altered the outcome."

Of course, I'm now speaking without quotation, as she notes, I have to consider the totality of relevant circumstances, and while the strength of the evidence can be an important consideration in evaluating claims of prejudice, it's only one part of the analysis. And in the end of the day, as Mr. Aframe has noted, the real issue here is whether counsel's allegedly deficient performance is significant enough to call into question the fairness of the underlying proceeding that led to his conviction. Under that standard I don't think we've come within a mile of demonstrating that the second prong of the ineffective assistance of counsel test has been met.

I don't need to make a finding with respect to the first prong. It's enough for me to say that I would not have done the cross-examination the way counsel did, but I have some -- a small amount of sympathy for him because of the

difficult task that he was facing, and he had to embark on a very risky path in aggressively trying to demonstrate the rush to judgment defense that would bolster his reasonable doubt defense.

But whether his performance was so deficient as to satisfy the first prong of the test I don't need to make a finding on now because it's quite clear to me that the defendant cannot satisfy the second prong of the ineffective assistance of counsel test using the standard that I've just described.

Here the evidence was overwhelming. As I've noted, there was close surveillance. There was wiretap evidence. There was in-the-room observations of the defendant engaged in the meeting with the supplier of the drugs. There were observations made of Mr. Gagnon moving something from one car into his car at that scene. The actual drugs were in his car. There was surveillance of Mr. Gagnon and the defendant back from that transaction. The defendant's observed behavior when Mr. Gagnon was stopped is really compelling evidence of his complicity in that particular transaction.

I agree with the government entirely that there was substantial evidence when you view it in totality to support the drug weight determination that the kilogram threshold was satisfied, and it really was not a close call at all.

I also -- I don't believe that the defendant has

made a showing with respect to the trial counsel's decision to call the -- to acquiesce in the drug weight determination without forcing the government to call the analyst to the witness stand, that that decision in any way could have affected the outcome of the case. There's no showing as to what could have been done on cross-examination of that analyst to create any doubt about the analyst's testimony.

So looking at the totality of relevant circumstances -- as I said, this is not a close case. The second prong of the ineffective assistance of counsel test is not satisfied. Accordingly, I deny the defendant's Section 2255 motion.

I also conclude that the defendant has not made the substantial showing of denial of a constitutional right here, and therefore, I decline to issue a certificate of appealability in this case. So the defendant's 2255 motion is denied.

Is there anything else you want me to -- any additional rulings you need me to make, Mr. Odland, or are you satisfied that I've sufficiently explained my thinking at least to allow you to evaluate it and consider whether to appeal or not?

MR. ODLAND: I don't think I need any further rulings from the Court. I think the Court's ruling was clear.

Thank you.

THE COURT: All right. Mr. Aframe, is there anything else that I've overlooked that you want me to address?

MR. AFRAME: No, your Honor.

THE COURT: Okay. All right. So that takes care of the 2255. Now we're here for a resentencing.

I do want to make clear -- Ms. Roffo is on the call. She did prepare a memorandum for me.

I just want to be sure, Mr. Odland, you did receive a copy of that memorandum? Is that right?

MR. ODLAND: Yes, I did, your Honor.

THE COURT: Okay.

So I am prepared to resentence the defendant. I am going to be operating under the assumption that the materials set forth in the presentence report that was originally prepared back in 2018 stand as correct except to the extent modified or supplemented by Ms. Roffo's October 15th memorandum, and I'm prepared to assume for purposes of resentencing that the defendant's Criminal History Category is IV. His guideline range removing the mandatory minimum provision which I said should not be applied to him results in a guideline sentencing range of 168 to 210 months.

I guess I would ask first the government and then Mr. Odland, do you take issue with any of the facts set forth in the original presentence report in Ms. Roffo's October 15th

memorandum or do you otherwise challenge the legal conclusions that I've just expressed about what the defendant's criminal history category and guideline sentencing range would be?

I'll start with you, Mr. Aframe.

MR. AFRAME: I don't -- one second, Judge, while I look at the memo which I just received today and I'm sure went to my colleagues, but they handle this part of it.

No. I mean, as you know -- I mean, we continue to question whether he's entitled to compassionate release at all. Once you get beyond that, no, I don't disagree with what you've just said.

THE COURT: Okay. Yes, that issue -- has the Supreme Court granted cert on that specific issue, I think on the retroactivity question dealing with at least in a very similar context another provision? I think the Court has granted it in a gun case maybe where there's a determination made in the First Step Act to grant prospective relief but not retrospective relief and whether that can be a basis for a grant of compassionate release.

So the Supreme Court will determine that ultimately. And if I'm wrong about it, your objection is noted for the record and preserved for purposes of that. Whether you will need to appeal or not -- I don't think you need to appeal to preserve your argument. You can just wait until the Supreme Court rules, but if you feel you need to

appeal, then go ahead.

MR. AFRAME: I didn't know that, but I have to look into the current status at the Supreme Court.

THE COURT: Yeah, the issue really -- there at least was a cert petition I believe was granted. I don't know.

Mr. Odland, have you been continuing to follow the issue?

MR. ODLAND: I knew that the circuit split, Judge, but I'm not aware that cert was granted as Attorney Aframe just set out. I'm curious, so I will go look it up.

THE COURT: It's me saying that I think cert was granted. I could be wrong.

MS. ROFFO: That sounds familiar to me, too, Judge, but I don't think anything has happened on it yet.

THE COURT: Yeah. I mean, there are two issues. The easier one is whether the policy statement is an applicable policy statement.

The harder issue and the one I think the Court is going to take up is this issue about how do you work out retroactivity where Congress has elected to make a change prospective, and my sense of it was I agreed with the one circuit that addressed the question and concluded that a judgment that someone should -- that a group of people should not categorically be entitled to retroactive relief doesn't

preclude a case-by-case determination in which the change in the law along with other evidence and other arguments might support an individualized determination for compassionate release, but the issue is a confusing one. I recognize I might be wrong on it, and we can await the Supreme Court's determination if cert has been granted and then Mr. Aframe can determine whatever he needs to do to ensure his right to take advantage of a Supreme Court decision in his favor. Whatever he needs do to preserve that he should do obviously because this is an unresolved issue. The circuit and the Supreme Court hasn't yet resolved it.

Okay. So, Mr. Aframe, as far as I'm concerned, your basic challenge on that issue is preserved. You'll look into whether you need to appeal in order to protect yourself or not. All right.

Now, Mr. Odland, do you in any way challenge what I've said about how I would analyze your case? In other words, taking the findings of fact and conclusions of law in the presentence report as modified by Ms. Roffo's October 15th memorandum?

MR. ODLAND: I do not, your Honor.

THE COURT: Okay. So for purposes of resentencing, I'm adopting the findings of fact and conclusions of law set forth in the presentence report except as modified by Ms. Roffo's memorandum. And given my determination not to apply

the mandatory minimum 240-month sentence, I determine that the defendant's total offense level is 32, his Criminal History Category is IV. The guideline sentencing range in the absence of a variance is 168 to 210 months.

So, Mr. Aframe, if I am right about my determination on compassionate release which you object to and you have preserved for purposes of appeal as far as I'm concerned, how do you think I should sentence this defendant if I am right about my analysis on the 240 months?

MR. AFRAME: Well, I don't see any basis that I'm aware of for a below guideline sentence. So the guideline sentence is 168 to 210.

I think his behavior in prison has been I would say mediocre based on the materials that Ms. Roffo has put forth. I would see nothing extraordinary there. Generally more negative than positive.

So I would say a mid range sentence of 188 is the government's recommendation.

THE COURT: All right. I have a slightly more benign take on his prison record. The way I see it is that it isn't like he's done something stunningly good, but most of his violations are relatively minor and earlier in his period of incarceration.

He seems to have adjusted reasonably well to prison. I'm not inclined to hold anything in his prison

record against him, but I don't see anything that would require me to do something substantial to reduce a sentence that I would otherwise impose based on what he's done in prison.

You can argue otherwise if you want, Mr. Odland, but that's my take on the defendant's prison record. I'm not going to hold it against him. The violations I see are the kind that are fairly common as someone works his way into a new life in prison.

He seems to have calmed down recently and I don't see anything that causes me to give him a longer sentence than I otherwise would, but I also don't see much in there that suggests he's engaged in some kind of transformation in his world view.

I recognize your point that he's been incarcerated during almost two years now of COVID which makes prison life all the more difficult, I recognize that that's true, but otherwise I don't find his prison record to be all that important in how I sentence him, neither aggravating nor mitigating.

So whatever you want to say in general about that, and you want to support your 120-month sentence, go ahead.

MR. ODLAND: Thank you, your Honor.

The first thing I would say is just -- especially the way it's developed in conversation here, I think I have

ethically an obligation to make the Court aware of one new fact that developed or that I became aware of after I filed my memo, which is -- I filed my memo I guess I think it was seven days ago. Last Monday, I learned that my client was in the Secured Housing Unit pending a new disciplinary ticket, Judge.

It's my understanding -- though I don't have records from BOP to be clear, it's my understanding though from the information I have from my client that he is again pending hearing. So my argument would be that it shouldn't affect the Court's analysis, and I agree with what the Court just said regarding his --

THE COURT: What's the alleged violation?

MR. ODLAND: I only know the information that my client has given me, Judge.

Number one, I'm not -- I don't know if it's accurate, and I would want to ask my client if I could divulge that.

THE COURT: I think you are ethically required to tell me about this because I was relying on the prison record, but I agree you don't have to give me more than that.

Ms. Roffo, this is relatively recent. I wouldn't expect you to know anything about it, but if you do, I would be interested.

MS. ROFFO: Sorry, Judge, I don't. Unfortunately, only a limited number of people in our office have the

authorization to run prison records. I could find out, but it would probably take a couple of days.

THE COURT: Yeah, I'm not sure -- I mean, he hasn't been adjudicated guilty on that charge yet. I wouldn't -- without giving the defendant an opportunity to have like a mini hearing here, which I don't think is a useful expenditure of time and resources, so I won't hold it against your client. I appreciate you telling me about the additional charge, but I won't hold it against him because he hasn't been adjudicated on it. My general assessment of him stands.

I mean, we all know this. We're all experienced in this process. Prison life is really hard and it's hard even for people that are trying to stay on the straight and narrow to completely avoid disciplinary violations over a multiple year period.

He doesn't have the kind of record that stands out to me as extremely problematic, nor does it stand out to me as the kind of record that suggests there's been some kind of transformation in his criminogenic thinking. That's just how I put it, okay?

All right. So what else do you want to say in support of your motion for a 120-month sentence?

MR. ODLAND: I think many of the points I would make, Judge, are in my written materials and I don't want to just recite the materials to the Court. I know that the Court

has paid a lot of attention.

THE COURT: No, I read it and I thought it was a well done memo that presents that side of the case effectively. So I do have all of that in mind, but if there's anything you want to say, feel free.

MR. ODLAND: There's two brief thoughts.

The first is I remember when I came on to the CJA panel your Honor had made a comment to the panel that it is helpful to have full context of the human being before you at any sentencing hearing, but in many of the cases that the Court sees unfortunately the defendants' prior lives have been very difficult. That's just sort of a self-selecting sample.

And so I understand that that can't be the be-all end-all of what happens with Gonzalez's case, but I think -- you know, it would be aggravating if we had a defendant in front of us who really didn't struggle and made these choices, Judge, and so I would just point out that it does appear that Mr. Gonzalez, like many defendants before this Court, hasn't had the easiest life ever, and that is, you know, he had a difficult childhood, lost a twin brother at a young age, has struggled with his own addiction.

I would also point out that he does have community support. He has a sister who appeared at the prior hearing on the CR motion and a daughter who I'm in touch with who I know are, you know, willing to support their loved one when

Gonzalez eventually comes home, and I think community support clearly is important.

But the next thing I would talk about, Judge, is just to expand slightly on what I've put in my brief with respect to the proportionality of this sentence as compared to Gonzalez's co-defendants and the way that that would interface with respect for the law as a notion of sentencing.

So I guess a couple of thoughts on proportionality. First of all, I think that a sentence of ten years or 120 months would be proportional in the sense that it would be a graduated sentence as compared to Gonzalez's own history.

He has not been sentenced to ten years in the past. This would be I believe the most serious conduct in Gonzalez's history, but it would also, even if the Court was to impose a 120-month sentence, be the most significant punishment he's ever received. So it would be consistent with notions of graduated sentencing and increased punishment over time for defendants that recidivate.

With respect to comparing this sentence, Judge, to Mr. Gonzalez's co-defendants, I think one of the things that's hard both for counsel and the Court when you make these comparisons, it's easy to -- I think that there has to be something for the notion, Judge, that co-defendants are treated in kind in a way and they're given the same justice as one another, but there's always going to be a sense in which

it's apples to oranges just because two human beings have different life stories.

So my comparison of Gonzalez to his co-defendants, Judge, is not to say that his case is exactly like any of these co-defendants, but I think that if the sentences get for lack of a better term, Judge, completely out of whack with one another, then I think that that should be a cause for concern.

And so this may be I concede, your Honor, too mechanical of a way to think about this problem, but one of the things I did in preparing for today's hearing, Judge, was to take a look at the three co-defendants that I highlighted in my sentencing memo and analyze what percentage of their guideline minimum was actually imposed by the Court.

And so what I mean by that is, for example, the Toribio Marte case, his bottom guideline calculation was 188. He received a sentence of 120 months. And by my math that calculates out to that he received a sentence of -- basically he got 63 percent of the minimum.

With respect to Guerrero, who was the next case that I went through in comparing to my client's, he received 87 months where the bottom guideline was 97, which works out to 89 percent of the bottom of the guideline.

And finally with respect to Mr. Pimentel, he received 63 months and the bottom guideline was again 97 months.

If you take an average of those three, it actually works out to 72 percent. These three cases that I've argued are sort of the closest in kind to Gonzalez. They received 72 percent of the bottom guideline.

And if you take 72 percent of the 168, which is the bottom of Gonzalez's guideline, you actually get 121 months, Judge, and that exercise -- again, it's pretty mechanical. I know that the Court has to consider factors under 3553, but I think it's telling that the cases that I've selected show that there is a way in which that even a low guideline sentence here, Judge, is just disproportional as compared to the types of sentences the co-defendants received.

There are co-defendants that received guideline sentences, Judge, but I don't believe any of those sentences were for people that received 120 months or more. Once the sentences got larger, more leniency, grace, however you want to phrase it, was shown to those defendants.

And so I've explained in my memo -- you know, the Marte case I highlighted because we're asking for 120 months. Marte asked for 120 months, and I think that an argument can be made that his case was more egregious. Again, there's always going to be some apples to oranges. Marte didn't have the criminal record that Gonzalez had, but he was also responsible for 13 kilograms of heroin.

The other two defendants were defendants who had

similar weights to Gonzalez, between 1 and 2 kilograms of heroin, and had prior records like Gonzalez, and their prior records were -- I believe one was a II and one was a III. Gonzalez is a IV. It would make sense that Gonzalez would have the heftiest sentence out of three, but that's what we're asking for, Judge. Guerrero got 87. Pimentel 63.

And so I think when you really dig into the numbers that were received by these co-defendants, the only to me meaningful distinction between the defendants is that Gonzalez went to trial, and I don't know that that can justify this type of disparity.

So I would ask that you impose 120 months, Judge. I'm happy to answer any questions.

THE COURT: Sure. Well, there are several things that in my mind distinguish your client from some or all of these defendants.

One is, your client did go to trial. The others all pled guilty. Acceptance of responsibility is in my mind a very important starting point on the rehabilitation process. And where there has been acceptance of responsibility, and I believe that tells me something substantial about the defendant's amenability to rehabilitation and about the danger that that defendant poses to the community, I am more open to considering downward variant sentences, all other things being equal, than defendants that do not manifest any acceptance of

responsibility.

On the list of people that you've identified, there are people who not only accepted responsibility but cooperated with the government, and their cooperation whether it resulted in a 5K or not is additional evidence that they are trying to make amends and undo as much of the damage that they can that resulted from their criminal behavior.

Third -- and I don't know, Mr. Aframe, were you trial counsel? I can't remember.

MR. AFRAME: No, your Honor.

THE COURT: All right. So of all of you I probably recall the case the best, but as I recall the case, most of these other co-defendants were essentially supervised by other people, and the drug weight that was attributed to them, they were lower level functionaries in a larger drug trafficking organization.

Whereas your client, Mr. Odland, was largely a drug seller who operated independently and in fact exploited other people, and particularly Mr. Gagnon. The exploitation of Mr. Gagnon here was quite troubling to me. If I'm remembering it correctly, your client essentially outsourced the transportation risk to an addict in exchange for feeding him heroin and then attacked him after he was afraid he was going to be cooperating, and that's -- the fact that your client really was the leader of his own little organization and only

the amounts of his organization was attributed to him and he was exploiting Mr. Gagnon to fulfill his drug dealing activities by outsourcing some of the risk to him and exploiting his addiction in my mind is an aggravating factor.

Finally, your client has a prior drug sale conviction which -- I have a long track record of identifying when people repeat patterns of similar behavior, particularly one where he's received a substantial prison sentence for that behavior as your client did, that's an aggravating factor.

So, yes, he has a higher criminal record than the others, but he also has a prior sentence of significant imprisonment for drug sales. That's an aggravating factor to me because it suggests a complete inability to respond to an intervention from the justice system and change his pattern of criminal behavior.

So those things are things that I think are potentially aggravating about your client's case.

I did in granting him a resentencing acknowledge that he ended up with a higher sentence than I would have given him but for the application of that mandatory minimum, so I do think he deserves a lower sentence, but he was a very significant drug dealer who at no point accepted responsibility for his behavior, who exploited an addict to engage in his drug dealing operations, and who has a significant criminal history category and a prior drug sale

conviction. Those are aggravating factors that suggest to me that a guideline sentence is an appropriate sentence for your client.

Do you want to respond to any or all of that?

MR. ODLAND: May I just have a brief moment, your Honor, to consult with -- I want to take a brief look at the PSR.

THE COURT: Yes. Go ahead.

(Pause.)

MR. ODLAND: So I think the only point I would like to make, your Honor, in response is that the Court had said, and I think this was in particular in response to my arguments concerning Toribio Marte, that while there were some co-defendants that were ascribed very heavy drug weights who in essence were still middlemen -- for example, Mr. Marte was known as the largest runner, but he wasn't running the DTO, and I understand your Honor's point with respect to that.

What I was just checking the PSR for is that Alberto Marte who my recollection is started the DTO and then -- that he -- pardon me. I mean, like I said, there's always going to be distinctions. He had a criminal history score of I, Judge, but he was a leader and controller of the overall conspiracy, he did plead guilty, but he received 180 months. So a large portion of the guideline that the Court references being appropriate for Gonzalez would be above that

sentence.

And so, you know, I still am asking the Court to impose 120 months, that's my client's request of this Court to be clear, Judge, but my secondary argument in response to what the Court just said --

THE COURT: Don't give him more than Marte.

MR. ODLAND: Exactly.

THE COURT: Right. And I'm mindful of that. I had made a similar observation on my own on that point.

All right. I'm going to give the defendant an opportunity to speak if he chooses in a second, but before I do, Mr. Aframe, is there anything you wanted to respond to in the discussion I've been having with Mr. Odland?

MR. AFRAME: No, your Honor.

THE COURT: All right. Good.

Sir, you have an opportunity to speak if you want to. The interpreter will translate for me anything you say, but you don't have to say anything. I won't hold it against you if you don't, but if there is anything you want to say, I'll be happy to hear it.

Before you speak, Mr. Odland is just raising a finger. He wanted to add one thing I guess.

What do you want to say, Mr. Odland?

MR. ODLAND: I wanted to know if it would be possible, Judge -- if we were in court, normally I would check

in with my client prior to him addressing you.

THE COURT: We can move you into a breakout room. Yes, we can move the interpreter and you into the breakout room. She can translate.

I would ask my case manager, why don't you do that.

Both of you when you're done, just exit out and you'll come back into the main room, okay?

(Attorney Odland goes into a breakout room with the defendant and the interpreter)

MR. ODLAND: I apologize. That took a little bit longer than I had hoped but with the interpreter --

THE COURT: We were just chatting so it's no big deal. We'll wait until the interpreter comes back on. Hopefully we can bring her on.

THE CLERK: I closed the breakout room. So if she doesn't know how to get back out, it should bring her back here in a minute.

THE COURT: There she is.

THE CLERK: There we go.

THE COURT: All right. The interpreter is back. So please let the defendant know if he wants to speak now it's his opportunity to do that. If he doesn't want to say anything, that's fine, I won't hold it against him, but if he wants to say anything now, sir, now is your time.

Would you like to speak?

MR. ODLAND: Judge, I think Mr. Gonzalez wanted me to alert the Court that he prepared some thoughts and he wrote it in English. So despite the fact that the interpreter is here, he wanted to address the Court in English which I told him would be appropriate.

THE COURT: All right. Let me ask my case manager. Has he got a Teams connection?

THE CLERK: No. The BOP told me they would not allow him to appear via Zoom.

THE COURT: So he doesn't have a Zoom connection so I'm not sure -- short of having him -- I just don't see how I can do it without completely -- we could set up a conference call.

THE CLERK: There's only one way we could try. If I have them -- because I'm the host of the conference call, I can turn my handset up really loud and hopefully it will catch it. I can put it up to my microphone and maybe it can catch --

THE COURT: Wait a second. You're the host of the conference call?

THE CLERK: Of the telephone conference, yes.

THE COURT: Can you give me the log in information? I can dial in and hear the defendant directly on the conference call.

The only problem with that is we don't have a

record of what -- so unless Ms. Bateman could call into the conference call and take that portion of the call over the phone, that's the only way I can think to do it.

THE CLERK: Or you could mute your mic on Zoom and the interpreter could read it out loud on Zoom.

THE COURT: Oh. Okay.

Yes, did the interpreter want to say something?

THE INTERPRETER: Yes, your Honor.

The other thing, if it were to work, I could put my microphone off my Zoom right next to the microphone that I'm using on the phone call and you would probably hear it very well.

THE COURT: Let's try that first. If that doesn't work, I'll dial in to the call and I'll mute my microphone and the interpreter can then repeat what he says and the reporter can take down what he says, all right? Let's first try that.

All right. Sir, just go ahead and speak.

No. All right.

Let me ask my case manager, give me the log in information for the call.

THE INTERPRETER: I just thought of something else. Can we try one more thing this way?

THE COURT: Go ahead.

THE DEFENDANT: Good afternoon, your Honor. First, I would like to thank you for this opportunity of being in

jail and calling in. This time that I am doing in prison has made me value life more. It has caused me to be away from my family for so long.

I also would like to beg for forgiveness for what I have done and for the life I have lived.

Your Honor, the decision of my sentence is in your hands. I would like for you to please give me a second chance. My plan is to change my life around, and I would like to be there for my family. All I ask is for a decision that you think is right in your heart.

Thank you, your Honor.

THE COURT: All right, sir. Thank you.

THE DEFENDANT: Excuse my English.

THE COURT: Your English is very good. I'm impressed. I'm impressed that you can write in English and speak as well as you do. That's good. I had no trouble in understanding you.

All right. So let me explain what I'm going to do. The 240-month sentence is too high. It's not a sentence in my view that's consistent with the purposes of the sentencing statute. It's higher than necessary to achieve the purposes of the sentencing statute, and I am going to resentence the defendant to a term of 180 months of imprisonment which is within the guideline range. Not at the bottom and not at the top. I will explain my thinking here, but I will do so in a

summary way because I have already offered some general thoughts about this particular case.

And I appreciate what the defendant has said to me about wanting to change his life. I'm glad you are at that point, Mr. Gonzalez, where you realize the need to change your life and I accept your statement as sincere, but I can't ignore the facts of this case and your criminal record when I sentence you. I have to hold you accountable for what you in fact did here, and I do think that a sentence of 180 months is necessary in this case to satisfy the sentencing statute. In particular, to promote respect for the law, to protect the public from the defendant, and to deter other people from committing similar crimes in the future, that I do believe a sentence of 180 months is appropriate.

I also believe it's a sentence that is warranted to avoid unwarranted sentencing disparity with respect to other defendants in similar situations.

So, as I said, this is a within guideline sentence. As to why I'm not sentencing the defendant at the bottom of the range, I do believe there are some factors here that are particularly problematic. And, as I noted, the way in which the defendant exploited Mr. Gagnon to facilitate his drug dealing and the action he took against Mr. Gagnon when he was afraid that Mr. Gagnon was cooperating are quite concerning to me. I don't think a sentence at the bottom of the guideline

range would adequately capture the seriousness of the defendant's criminal conduct, and that's why I'm imposing a sentence of 180 months.

And I have looked carefully at the evidence that Mr. Odland has drawn to my attention both in his oral presentation and in his sentencing memoranda, and none of those factors that he's identified cause me to conclude that a lower sentence is warranted.

So I will sentence the defendant to 180 months. I will modify the term of supervised release to three years. I believe it was -- it may have been ten years in the original sentence.

Ms. Roffo, do you remember?

MS. ROFFO: Yes, your Honor. I believe it was ten years. I'm just checking to see what the minimum was. I believe the minimum was four years, but I have to double check the PSR. I'm going to do that right now.

THE COURT: Okay.

MR. ODLAND: I believe it was mandatory for the same reasons that the -- because of the 851, Judge.

THE COURT: I think that's right, but I think it's three years up to life. Ms. Roffo is the expert on that so she'll tell me if that's --

MS. ROFFO: Sure. Let me just check really quickly. I apologize.

It looks like it would have been a minimum mandatory of five years prior to the filing of the 851 because he was sentenced under (A) penalties.

THE COURT: All right.

MS. ROFFO: Unless I'm missing something but --

THE COURT: I just don't give a lot of five year terms of supervised release to anyone other than people charged with child sex offenses. So that's the only reason I pause. I otherwise would defer to your expertise.

MS. ROFFO: Yes, your Honor, because it was charged with (A) penalty. So the minimum was five years.

THE COURT: So I will impose a sentence of five years of supervised release.

If the defendant completes two-thirds of that sentence without violation, he can petition to have the balance of it I think -- maybe if it's a mandatory five I can't do that. Normally I can suspend supervised release after two-thirds, is it, of the --

MS. ROFFO: Your Honor, I think he can always apply to get it reduced. It just has to be imposed with the minimum mandatory.

THE COURT: I'll impose it for five years but, Mr. Odland, you'll advise him that as an incentive to encourage good behavior, if he can finish three years of supervised release without violation and can demonstrate to me that the

public interest would be served by terminating that release earlier, he can apply to have it released earlier.

Otherwise, all the prior terms and conditions are imposed.

I certainly recommend that the defendant be eligible for any drug treatment program that's available. If that isn't in the prior sentencing judgment, it should be included.

Otherwise, all the terms and conditions of the prior sentence will be imposed.

Are there any objections from the government other than the ones that have been previously raised which we've talked about and are preserved?

MR. AFRAME: None other than those.

THE COURT: All right.

Mr. Odland, any objections from you other than the ones previously raised?

MR. ODLAND: No, your Honor.

THE COURT: All right. I'll impose that sentence as I have read it.

To the extent the defendant has any right to appeal, the defendant may ask counsel to file a notice of appeal on his behalf or he can ask the clerk's office for help and file the notice of appeal himself, but any notice of appeal does have to be filed within 14 days or the defendant

loses his right to appeal.

Is there anything else from the government, Mr. Aframe?

MR. AFRAME: No, your Honor. Thank you.

THE COURT: Anything else from you, Mr. Odland?

MR. ODLAND: No. Thank you, your Honor.

THE COURT: Anything else from my case manager that I've overlooked?

THE CLERK: No, Judge. I don't believe so.

THE COURT: All right. Thank you. That concludes the hearing.

My case manager will consult with Ms. Roffo, will get a proposed amended judgment up, and I'll sign it tomorrow, okay?

THE CLERK: Thank you, Judge.

MR. ODLAND: Thank you.

(Conclusion of hearing at 3:26 p.m.)

C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 3-14-22 /s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR

AO 245C (Rev. 09/19) Amended Judgment in a Criminal Case (NOTE: Identify Changes with Asterisks (*))
USDC-NH (8/21) Sheet 1

UNITED STATES DISTRICT COURT

District of New Hampshire

UNITED STATES OF AMERICA
v.
Alfredo Gonzalez

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 16-cr-162-12-PB
USM Number: 15463-049

Date of Original Judgment: 6/15/2018 *(Or Date of Last Amended Judgment)*

Jeffrey David Odland, Esq.
Defendant's Attorney

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 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841 (a), and 841(b)(1)(A)	Conspiracy to distribute and to possess with intent to distribute controlled substances	10/12/2016	1

The defendant is sentenced as provided in pages 2 through 7 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) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/22/2021
Date of Imposition of Judgment

/s/Paul Barbadoro
Signature of Judge

Paul J. Barbadoro U.S. District Judge
Name and Title of Judge

11/23/2021
Date

DEFENDANT: Alfredo Gonzalez
CASE NUMBER: 16-cr-162-12-PB

IMPRISONMENT*

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

*180 months

☑ The court makes the following recommendations to the Bureau of Prisons:
It is recommended to the Bureau of Prisons that the defendant participate in the intensive drug education and treatment program.

☑ 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 UNITED STATES MARSHAL

DEFENDANT: Alfredo Gonzalez
CASE NUMBER: 16-cr-162-12-PB

SUPERVISED RELEASE*

Upon release from imprisonment, you will be on supervised release for a term of :

*5 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☑ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Alfredo Gonzalez
CASE NUMBER: 16-cr-162-12-PB

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Alfredo Gonzalez
CASE NUMBER: 16-cr-162-12-PB

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay for the cost of treatment to extent you are able, as determined by the probation officer.

2. You must submit to substance abuse testing to determine if you have used a prohibited substance. You must pay for the cost of treatment to extent you are able, as determined by the probation officer. You must not attempt to obstruct or tamper with the testing methods.

3. You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the probation officer and follow the instructions on the prescription.

4. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption, except with the prior approval of the probation officer.

5. You must not go to, or remain at any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.

6. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030 (e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: Alfredo Gonzalez
CASE NUMBER: 16-cr-162-12-PB

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

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

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, 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 for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** 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: Alfredo Gonzalez
CASE NUMBER: 16-cr-162-12-PB

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk, U.S. District Court, 55 Pleasant Street, Room 110, Concord, N.H. 03301. Personal checks are not accepted.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the First Circuit

No. 22-1007

UNITED STATES OF AMERICA,

Appellee,

v.

ALFREDO GONZALEZ,

Defendant, Appellant.

JUDGMENT

Entered: May 25, 2023

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc: John Staige Davis, Seth R. Aframe, Mark S. Zuckerman, Georgiana MacDonald, Cam Thi Le, Alexander S. Chen, Kathryn Hayne Barnwell, Alfredo Gonzalez

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES,
-v-
ALFREDO GONZALEZ,
Defendant

No. 1:16-cr-00162-PB-12

MOTION FOR A REDUCTION OF SENTENCE UNDER SECTION 603(b) OF THE FIRST STEP ACT OF 2018 AND REQUEST FOR CJA COUNSEL

Movant, Alfredo Gonzalez, appearing in pro se, moves the Court for an order reducing his sentence under the First Step Act of 2018. Additionally, Movant requests that the Court appoint CJA counsel to represent him in this matter as he is indigent and unversed in law.

Argument

Movant is currently serving a term of 240 months of custody in the BOP at FCI Cumberland, Maryland. FCI Cumberland has recently had an

outbreak of COVID-19 positive cases this month with over 214 inmates testing positive for the disease along with 14 staff members. As such, the prison is on lockdown and Movant lacks access to the law library. For this reason along with those indicated above, Movant requests that the Court appoint him counsel who may collect the necessary supporting documents and file a memorandum of law concerning this motion.

Mr. Gonzalez points to two issues justifying an immediate reduction in sentence:

(1) Movant has numerous underlying medical conditions which, according to the CDC, renders him extremely vulnerable to the COVID-19 virus which now permeates the prison of his confinement creating a deadly ordeal for Movant; and

(2) the sentencing disparity between Movant and defendants with similar records who have been found guilty of similar conduct as Movant.

These two issues are "extraordinary and compelling" reasons warranting a sentence

reduction under the First Step Act and 18 U.S.C. Section 3582(c)(1)(A)(i). For instance, this court and district courts across the entire nation have repeatedly found that the ongoing pandemic combined with a prisoner's vulnerability to COVID-19 represents the extraordinary and compelling reasons Section 3582(c) was meant to address. See e.g. United States v. Moore, No. 3:16-CR-00171-JO)(D. Ore. May 21, 2020); United States v. Stephenson, (No. 3:05-CR-00511)(SD Iowa May 21, 2020); United States v. Galloway, No. RDB-10-0775)(ED Mich. May 21, 2020); United States v. Parker, (No. 2:98-CR-00749)(CD Cal. May 21, 2020); United States v. Bischoff, (No. 17-CR-196-JD)(D N.H. May 18, 2020).

In addition to the pandemic related reasons expressed above, the Court may also consider sentence disparity in determining whether to grant relief. The compassionate release provisions were first included in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987. Section 3582(c)(1)(A)(i), in particular, was intended to be a "safety valve" to reduce a sentence in the "unusual case in which the defendant's circumstances

are so changed,... that it would be inequitable to continue the confinement of the prisoner." S. Rep. 98-225, at 121 (1983). Although Congress never specifically defined what constituted "extraordinary and compelling reasons" for a Section 3582(c) reduction, but the legislative history of the Comprehensive Crime Control Act of 1983 provides some clues as to how Congress believed the statute should be employed by the federal courts. In particular, one of the initial goals of the Act was to abolish federal parole and create a "completely restructured guidelines system." S. Rep. No. 98-225, at 53 n. 196, 1983 WL 25404 (1983).

Nonetheless, recognizing the role that parole had historically played in responding to a prisoner's changed circumstances, the Senate Committee stressed its belief that some individual cases might warrant an eventual reduction of a sentence, a possibility that Section 3582(c) was meant to address: "The Committee believes that there may be unusual circumstances in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of

severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment." Id at 55-56.

In other words, rather than having an "expensive and cumbersome" Parole Commission deal with such cases, Congress decided that Section 3582(c) could and would decide, in individual cases, if "there is justification for reducing a term of imprisonment," albeit "subject to consideration of sentencing commission standards." Id at 56.

Clearly, "Congress's basic statutory goal" was to create "a system that diminishes sentencing disparity." Booker, 543 U.S. at 250. See also 18 U.S.C. Section 3553(a)(3); United States v. Brown, No. 4:05-CR-00277-1, 2019 WL 4942051 (S.D. Iowa Oct. 8, 2019)(where the Court acknowledged it could consider as extraordinary and compelling reasons for

sentence reduction the disparity the defendant suffered when he received a 300 month sentence on a firearm count that today would carry a 60-month sentence); United States v. Urkevich, (8:03-CR, 2019 WL 6037391, District of Nebraska, Nov. 14, 2019) (same).

In the Senate Judiciary Committee's Report on the Sentencing Reform Act, S. Rep. No. 225, 98th Cong., 1st Sess. 37-150, at 55-56, in a section entitled "Assuring Fairness in Sentencing, the Committee explained that the primary goal of sentencing reform was "the elimination of unwarranted sentencing disparity," but stated it did not intend the Guidelines to "be imposed in a mechanistic fashion." Id at 52. Therefore Congress intended sentence disparity to be one of numerous factors warranting a sentence reduction under Section 3582(c)(1)(A)(i) because "unwarranted sentencing disparity" is clearly an "extraordinary and compelling reason for relief under said Section.

In the instant case there are multiple factors that the Court may consider in determining whether a sentencing disparity

exists. For one, the prosecutor made what the Court described as an "eleventh hour" attempt to file an "851 notice" which gave the Court great concern. (See Exhibit A, Transcript of Motion Hearing, July 11, 2017, at page 11-12). In fact, the Court admonished the prosecutor, Mr. Feith, stating:

> "Well, one of the reasons you ought to consider is whether you've provided fair notice when all that information was available to you well in advance and delaying up until this point is quite problematic to the extent it complicates a defendant's decision." The Court went on to state "I am concerned about the kind of eleventh hour threat that if you don't plead [guilty] I'm going to file an 851 notice which ... [is] how it can appear to a defendant."

According to Mr. Feith. a serious change had just occurred at the DOJ, a change that cost Movant ten years of his life, a change that doubled his sentence, a change

that created an extraordinary sentencing disparity. According to Mr. Feith, "[t]he Department of Justice guidance changed just about 40 days ago," concerning the government having to file a notice for all relevant cases under 21 U.S.C, Section 851.

That the Section 851 enhancement was confusing to Movant is apparent from the record as Movant motioned to fire his Counsel over a misunderstanding of the Section 851 enhancement qualifying offenses. The Court even stepped in and provided a legal assessment on September 21, 2017 at the motion hearing whereas Movant's confusion and befuddlement over Section 851 led to his moving for new counsel. The Court stated:

"... in my assessing your motion to withdraw, to the extent it is based on a concern that your lawyer may be missing something important to you -- for you about whether your prior conviction is countable, my legal assessment is that his position is correct and I wouldn't allow him to withdraw

simply because you and he disagree about that issue." (See Transcript of Motion Hearing, Sept. 21, 2017 - Exhibit B at page 17).

Movant, still believing his counsel in err, and in utter confusion about the law, made the "eleventh hour" decision to exercise his right to a jury trial. The government filed the Section 851 notice, Movant lost at trial and received a twenty year mandatory minimum sentence as opposed to the ten year mandatory minimum he'd have received had he gone to trial or pled guilty only 40 days earlier as Mr. Feith indicated to the Court on July 11, 2017 at the above-noted motion hearing (Exhibit A).

To make matters even worse, Movant was subjected to another significant sentencing disparity. On June 15, 2018, this Court sentenced Movant to 240 months of confinement, a sentence based upon the Section 851 enhancement resulting in a mandatory 20-year sentence. Six months later Congress passed the First Step Act of 2018 which amended downward

the mandatory minimum that Movant would have faced under Section 851 had he been sentenced after the passage of the FSA.

These perhaps "unlucky" occurrences amount to real years in a man's life, years of confinement solely because he was "40 days" late and six months too early. The Court has both the jurisdiction and the power to remedy this unfortunate anomaly. Accordingly, Movant prays that the Court will appoint counsel and grant him a reduced sentence.

Respectfully submitted,

Dated: 12-26-20

X Alfredo Gonzalez

Alfredo Gonzalez
Prisoner no. 15463-049
FCI Cumberland
P.O. Box 1000
Cumberland, Md. 21501
(301) 784-1000

Declaration of Alfredo Gonzalez

1. Exhibit A is the transcript record of the motion hearing in my case held before Judge Paul J. Barbadoro on July 11, 2017.

2. Exhibit B is the transcript record of the motion hearing in my case held before Judge Paul J. Barbadoro on September 21, 2017.

3. I have a BMI of over 40 (obesity) and suffer from diabetes among other serious medical issues.

4. Exhibit C is a copy of my medical records released to me from the FCI Cumberland Health Services Department which evidence my diagnosis of diabetes.

5. I submitted a request for compassionate release to the warden of my prison in December 2020 but have not received any response.

6. Exhibit D is a copy of the certificate of completion I obtained from the Education Department at FCI Cumberland for my completion of the Drug Abuse Education Course. Due to the pandemic, we have been on lockdown at the prison which prevents my further rehabilitation efforts.

7. In the month of December alone, FCI Cumberland, where I am incarcerated, has reported over 220 new inmate cases of COVID-19 infections and 14 staff testing positive for the disease.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of December 2020.

Alfredo González

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES,
Plaintiff
-v-
ALFREDO GONZALEZ,
Defendant

No. 1:16-cr-00162-12-PB

DECLARATION OF ALFREDO GONZALEZ IN SUPPORT OF DEFENDANT'S COMPASSIONATE RELEASE MOTION

Alfredo Gonzalez states:

1. I am the defendant in this case. I submit this declaration in support of my compassionate release motion.

2. I submitted three requests to my Warden for compassionate release. The Warden of my prison has not approved any of my requests. Attached as Exhibit A is my most recent request to the Warden for compassionate release. The warden has not responded to this request.

Pursuant to 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of February 2021 at Cumberland, Maryland.

Alfredo Gonzalez
Prisoner no. 15463-049
FCI Cumberland
P.O. Box 1000
Cumberland, Md. 21501-1000
(301) 784-3067

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:16-cr-162-PB-12
	)	
ALFREDO GONZALEZ	)	
	)	

MOTION FOR COMPASSIONATE RELEASE OR, ALTERNATIVELY, A SENTENCE REDUCTION PURSUANT TO 18 U.S.C. 3582(c)(1)(A)

Mr. Gonzalez moves this court to convert his term of imprisonment to time served or, in the alternative, to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). Gonzalez submits that extraordinary and compelling reasons exist warranting a sentence modification, to wit: 1) his increased risk for serious illness or death should he contract COVID-19 again; and 2) the significant disparity between the sentence he received and that which he would expect to receive had he been sentenced after the passage of the First Step Act. A hearing is requested.

I. Factual Background and Procedural History

On October 5, 2016, a grand jury returned a single indictment charging Gonzalez with Conspiracy to Distribute and to Possess with Intent to Distribute one kilogram or more of heroin. A warrant issued and Gonzalez was taken into federal custody on October 12, 2016. He has been held on this matter since his initial arrest.

On September 29, 2017, counsel for the government filed a Notice of Information pursuant to 21 U.S.C. § 851. The information informed Gonzalez that if he was convicted the government would seek increased penalties based upon a prior conviction Gonzalez incurred on March 3, 1997 in New Hampshire state court.[1] That prior

[1] A copy of the documents associated with that conviction are attached as an exhibit.

conviction was for Possession with Intent to Sell or Dispense cocaine. Under the then operative statutory scheme, the filing of that § 851 notice increased the mandatory minimum sentence from ten to twenty years.

Gonzalez exercised his constitutional right to take his case to trial. On November 9, 2017, a jury found Gonzalez guilty.

The court ordered US Probation to prepare a pre-sentence investigation report (PSR). On May 18, 2018, probation filed its final PSR, which was later adopted by the court at sentencing. Probation calculated a total offense level of 32 and a criminal history category IV. *See* PSR at ¶¶ 36 and 45. The PSR states that based solely upon these findings the guideline range of imprisonment would have been 168 to 210 months. However, because the government had filed a § 851 notice, a mandatory minimum term of 240 months applied, increasing the advisory guideline sentence to that term. *Id*. *See also* U.S.S.G. § 5G1.1(b).

On June 14, 2018, the court held a brief sentencing hearing.[2] The government requested the court impose the mandatory minimum term of 240 months. The Court immediately indicated that it was inclined to accept and impose that sentence. Given the posture, prior defense counsel stated he too was in agreement. As a result, there was no further conversation as to the appropriateness of the punishment. The court accepted and formally imposed that sentence.

Approximately six months later, on December 21, 2018, President Trump signed the First Step Act into law. The First Step Act expanded inmates' access to the courts by removing BOP's gatekeeper function for filing compassionate release petitions. Further,

[2] A copy of the transcript of the sentencing hearing is attached as an exhibit.

the First Step Act amended 21 U.S.C. 841 by narrowing the categories of prior convictions that will increase mandatory minimum sentences for drug trafficking offenses.

On December 18, 2020, Gonzalez petitioned Warden H. Allen Beard of FCI-Cumberland to file a request for compassionate release on his behalf.[3] As a basis for this request, Gonzalez raised two issues: a "sentencing disparity" and his "vulnerability to COVID-19 as indicated in my medical records." On January 13, 2021, Warden Beard denied Gonzalez's request for compassionate release. More than 30 days have passed since the warden received Gonzalez's request and, therefore, Gonzalez's motion is ripe. *See* 18 U.S.C. § 3582(c)(1)(A).

Gonzalez's medical records show that on January 17, 2021 he tested positive for COVID-19.[4] At that time, he suffered from a dry cough. On January 28, 2021, a BOP nurse wrote that his COVID-19 case had been resolved. The records state that during the course of his illness Gonzalez did not suffer from a fever or low O2 saturation levels. Nevertheless, Gonzalez states that he was quite sick.

Gonzalez continues to suffer from several chronic conditions which would place him at high risk for serious illness or death should he be reinfected with COVID-19. Specifically, Gonzalez suffers from Type 2 diabetes, hypertension and sleep apnea. In addition, he is obese, having a last measured body mass index (BMI) of 38.7.

[3] A copy of Gonzalez's inmate request slip and the warden's response is attached as an exhibit.
[4] A copy of Gonzalez's pertinent medical records will be provided to the court and government via e-mail. Gonzalez requests that these documents be maintained under seal.

II. Gonzalez's increased risk of serious illness or death from COVID-19 if reinfected warrants his compassionate release

The court may reduce a defendant's sentence if: a) extraordinary and compelling reasons warrant such a reduction; and b) the reduction is consistent with the sentencing factors contained in 18 U.S.C. 3553(a); and c) the reduction is consistent with applicable policy statements issued by the Sentencing Commission. 18 U.S.C. 3582(c)(1)(A). Here, while the defendant has previously contracted COVID-19, his chronic medical conditions put him at high risk of serious illness or death should he contract COVID-19 again. Emerging evidence suggests individuals may be reinfected with COVID-19, especially in light of the rise of more virulent variants. Accordingly, extraordinary and compelling reasons exist that warrant Gonzalez's release.

The COVID-19 pandemic has raged for nearly a year. In that time, approximately 505,000 Americans have died from the disease.[5] By the end of 2020, more than 1,700 people had died of COVID-19 while in American jails or prisons.[6] To date, at least 222 federal inmates have died.[7]

Gonzalez suffers from a constellation of obesity-related maladies that increase his risk for serious illness or death from COVID-19. Gonzalez has two conditions that the CDC identifies as placing individuals at increased risk of severe illness from COVID-19: type 2 diabetes and obesity.[8] The CDC defines obesity as a BMI of 30 or greater.

---

[5] *Coronavirus in the U.S.: Latest Map and Case Count,* The New York Times (Feb. 25, 2021) retrieved from nytimes.com/interactive/2020/us/coronavirus-us-cases.html
[6] *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population,* Time Magazine (Dec. 28, 2020) retrieved from time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines/
[7] *COVID-19 Cases* (Feb. 25, 2021) retrieved from bop.gov/coronavirus/
[8] *People with Certain Medical Conditions* (updated Feb. 3, 2021) retrieved from https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

Gonzalez's BMI of 38.7 places him well above this threshold and closer to the threshold for severe obesity, which the CDC defines as 40 and above.

In addition, the CDC has identified hypertension as a condition that *may* increase risk for severe illness. *Id.* Further, at least one study suggests that patients with sleep apnea are at increased risk of death from COVID-19.[9]

Courts throughout the country have found conditions similar to Gonzalez's amount to extraordinary and compelling reasons supporting compassionate release. *See e.g. United States v. Lacy,* 2020 U.S. Dist. LEXIS 76849 at 7 (C.D. Ill. May 1, 2020) (granting compassionate release to a thirty-one-year-old defendant with hypertension and diabetes); *United States v. Rodriguez*, 2020 U.S. Dist. LEXIS 58718 at 7 (E.D. Pa. April 1, 2020)(finding that high blood pressure, in conjunction with other illnesses including Type 2 diabetes and COVID-19 pandemic, was a compelling reason to support compassion release); *United States v. Melinda Smith*, 6:15-cr-6 (W.D. Va. July 23, 2020)(sentencing defendant to time served due primarily to her obesity); *c.f. United States v. Hansel German*, 2020 U.S. Dist. LEXIS 181755 (D. N.H. October 1, 2020) (denying compassionate release where defendant was obese but young and without additional comorbidities). Indeed, as one court noted, "Some studies have found that the top comorbidities for COVID-19 patients were hypertension, obesity, and diabetes." *United States v. Christopher Williams*, 19-cr-134, DE 70 at 9, (D. Md. June 10, 2020)(internal citations omitted). Gonzalez has all three of these conditions.

[9] Cade et al., *Sleep Apnea and COVID-19 Mortality and Hospitalization*, American Journal of Respiratory and Critical Care Medicine Volume 202 Number 10 (November 15, 2020) retrieved from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7667903/pdf/rccm.202006-2252LE.pdf ("The results of this U.S. healthcare system–based analysis of mortality and markers of severe morbidity identify sleep apnea as a risk factor for COVID-19 mortality.").

In a recent case in this district, the government conceded that a defendant presenting with two high-risk comorbidities presented extraordinary and compelling reason for release. *See United States v. Rafael Beamud*, 1:15-cr-60-JD, DE 32 at 6 (government conceded defendant's obesity and cerebrovascular disease constitute extraordinary and compelling reasons for release but argued for denial on the basis that defendant remains a danger to the public). Similarly, the CDC counsels that "[the] more underlying medical conditions someone has, the greater their risk for sever illness from COVID-19."[10] Here, Gonzalez's several chronic medical conditions place him a great risk for serious illness or death from COVID-19 if reinfected.

Though Gonzalez has already recovered from COVID-19 that should not end the court's inquiry. Numerous courts have granted requests for compassionate release even where a defendant has already contracted COVID-19 and recovered. Given the uncertainty as to the risk of reinfection, these courts rightly focused instead on the seriousness of the defendant's risk factors. *See e.g. United State v. Huerte*, 11-cr-20587, DE 1584 at 2-3 (S.D. Fla July 31, 2020) (granting compassionate release to obese defendant where COVID illness did not require hospitalization finding "regardless of whether or not Huerte currently has Covid19, the compassionate release analysis is the same because of the risk of death," and "the danger of contracting the disease again"); *United States v. Moore*, 15-cr-55, DE 46 (C.D. Cal. July 16, 2020)(granting compassionate release to recovered inmate due to the uncertainty regarding reinfection); *United States v. Watson*, 3:18-cr-25, DE 51 (D. Nev. July 22, 2020)(defendant released despite being asymptomatic positive because his medical

[10] *People with Certain Medical Conditions*, CDC updated Feb. 3, 2021 retrieved from https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

conditions "put him at higher risks should he become reinfected"); *United States v. Williams*, 5:16-cr-386, DE 87 (N.D. Ohio Sept. 2, 2020) (releasing defendant who had already contracted COVID-19 previously noting "the CDC does not know if someone can be re-infected."); *United States v. Fields*, 2020 U.S. Dist. LEXIS 229692 (E.D. Mich. Dec. 8, 2020)(granting compassionate release to overweight defendant with hypertension and diabetes who served 60% of a 15 year sentence and had recovered from virus after being asymptomatic).

Recent developments vindicate the logic of the above decisions. During the initial stages of the pandemic, though reinfection risks were not greatly understood, they were believed to be low. That understanding, however, is evolving. For example, an update from the CDC, published on February 13, 2021, summarizes recent findings:

> To date, reports of reinfection have been infrequent. Similar to other human coronaviruses where studies have demonstrated reinfection, the probability of SARS-CoV-2 reinfection is expected to increase with time after recovery from initial infection because of waning immunity and the possibility of exposure to virus variants. Circulation of variant viruses (such as the B.1.1.7 variant or B.1.1.28 variant) has been reported in several countries. Reinfection with a SARS-CoV-2 variant virus has been reported in Brazil, the U.K., and South Africa. The risk of reinfection may be increased in the future with exposure to SARS-CoV-2 variant virus strains that are not neutralized by immune antisera, such as one recently described in South Africa. The risk of reinfection also depends on the likelihood of re-exposure to infectious cases of COVID-19. Continued widespread transmission makes it more likely that reinfections will occur.[11]

Similarly, the leading science journal Nature recently published an article noting that "[e]vidence is growing that some coronavirus variants could evade immune responses triggered by vaccines and previous infections."[12] Though the article notes that the risk of reinfection requires further study, it also states that based on present

[11] *Duration of Isolation & Precautions for Adults*, CDC (updated Feb. 13, 2021) retrieved from https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html.
[12] *Fast-spreading COVID variant can elude immune responses*, Nature, Jan. 21, 2021 retrieved from https://www.nature.com/articles/d41586-021-00121-z.

evidence, "It seems increasingly likely that the [South African variant's] ability to spread in places hit hard by earlier waves of COVID-19 is being driven, in part, by its capacity to evade immune responses that developed in response to earlier versions of the virus." *Id.*

This development is particularly concerning to Gonzalez. He is housed at FCI-Cumberland in Cumberland, Maryland. The South African variant of COVID-19 has recently been discovered in Maryland.[13][14] As with the initial strain of COVID-19, it is only a matter of time until the variant makes its way into congregant settings such as jails and prisons.

In sum, Gonzalez is at high risk for serious illness or death from COVID-19. Though he has previously contracted the disease, he continues to be at risk from reinfection. The risk of reinfection appears to be heightened now that the South African variant of COVID-19 has been identified in the state where he is held. Accordingly, extraordinary and compelling reasons exist warranting Gonzalez's compassionate release.

III. Alternatively, Gonzalez's sentence should be reduced due to a gross sentencing disparity

In this case, the government filed a § 851 enhancement. As a result, Gonzalez received a mandatory minimum sentence of 240 months. If he had been sentenced just six months later, he would have been ineligible for the enhancement and the mandatory

[13] *Two more cases of South African coronavirus variant reported in Maryland*, Baltimore Sun, Feb. 2, 2021 retrieved from https://www.baltimoresun.com/coronavirus/bs-md-south-african-variant-spread-20210202-qraigx405fbnvhmqzsretzifny-story.html

[14] Gonzalez was diagnosed with COVID via a rapid test on January 17, 2021 and recovered on January 28, 2021. Upon information and belief, it is impossible to tell from the available evidence which variant of the virus Gonzalez contracted. The Baltimore Sun reports, however, that the first known case of the South African variant in Maryland was confirmed on January 30, 2021, approximately two weeks after Gonzalez contracted the virus. *See* n. 13 above.

minimum would have been 120 months. Further, Gonzalez's sentence is disproportionate when compared to the sentences of his codefendants. If the court denies Gonzalez's request to be released immediately based upon his medical conditions, the court should reduce his sentence on the basis of a gross sentencing disparity.

Compassionate release is an appropriate vehicle for remedying unjust sentencing disparities

The phrase "compassionate release" is a misnomer. *United States v. Brooker*, 19-3218-CR (2nd Cir. Sept. 25, 2020). Rather than dealing solely with requests for immediate release, 18 U.S.C. 3582(c)(1)(A) speaks more broadly of sentence reductions.

Prior to the passage of the First Step Act, 18 U.S.C. 3582(c)(1)(A) gave BOP exclusive control over whether an inmate could seek a sentence reduction. *Brooker* at 5. To say BOP used this discretion sparingly is an understatement. *Id.* "A 2013 report from the Office of the Inspector General revealed that, on average, only 24 incarcerated people per year were released on BOP motion." *Id.* (internal citations omitted). With this history in mind, Congress passed the First Step Act and "amend[ed] numerous portions of the U.S. Code to promote rehabilitation of prisoners and unwind decades of mass incarceration." *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019). The Act removed BOPs gatekeeper function and allowed inmates to file for compassionate release directly in the courts after exhausting administrative remedies. As the Second Circuit observed, since the passage of the First Step Act, "BOP reports that over 1000 motions for compassionate release or sentence reduction have been granted. What Congress seems to have wanted, in fact occurred." *Brooker* at 9-10.

Before the First Step Act, the filing of a compassionate release motion by the BOP was limited to the grounds listed in application notes to U.S.S.G. § 1B1.13.[15] By removing BOP's gatekeeper function, however, Congress imbued the district courts with wide discretion as to what constitutes "extraordinary and compelling reasons," warranting a sentence reduction. At least four circuit courts have recently held that the policy statement contained in § 1B1.13, by its own terms, concerns motions filed by the BOP and does not apply to motions filed directly by an inmate.[16] As a result, the First Step Act "freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *Brooker* at 17 ("[n]either Application Note 1(D), nor anything else in the now-outdated version of Guideline 1B1.13, limits the district court's discretion"); *see also United States v. McCoy*, 20-6821 (4th Cir. Dec. 2, 2020); *United States v. Jones*, 20-3701 (6th Cir. Nov. 20, 2020); *United States v. Gunn*, 20-1959 (7th Cir. Nov. 20, 2020).

Several courts have concluded that sentencing disparities created by sentencing reform laws can amount to an extraordinary and compelling reason supporting a sentence reduction. *See e.g. United States v. Ledezma-Rodriguez*, 3:00-cr-71 (S.D. Iowa July 14, 2020) (reducing mandatory life sentence to twenty-years time-served where life sentence was triggered by § 851 prior offenses which would no longer satisfy the statute as they do not count as "serious drug felonies" under the current version of

[15] U.S.S.G. § 1B1.13 cmt. 1(A-C) authorized BOP to file motions on behalf of inmates exhibiting serious medical conditions (A), advanced age (B) or difficult family circumstances (C) such as the death of the caregiver to a defendant's minor children. Notably, however, even under the prior compassionate release regime there was a catchall provision allowing BOP to file a motion if "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. 1(D).

[16] Upon information and belief, to date, this issue has not been decided by the First Circuit.

21 § 841(b)(1)(A)(2018)); *United States v. Blanco*, 93-cr-20042, DE 2774 (N.D. Cal. Dec. 14, 2020) (where mandatory life sentence for drug trafficking would now be mandatory 25 year sentence after the First Step Act the "disparity between the sentence that Blanco received and the sentence that a defendant convicted of similar offenses would receive today constitutes, on its own, an extraordinary and compelling reason for reducing Blanco's sentence"); *United States v. Vigneau*, 473 F. Supp. 3d 31 (D. R.I. July 21, 2020) (finding an "unusually long," 365-month sentence for marijuana trafficking justified compassionate release).

Further, though the 2018 amendments to 21 § 841(b)(1)(A) were not made retroactive,[17] courts may still find that sentencing disparity is an "extraordinary and compelling" reason justifying a sentence reduction in a particular case. The First Step Act's reforms "explicitly aimed at empowering district courts to … conduct an individualized assessment of a defendant's case and approve a sentence reduction when warranted." *United States v. Quinn,* 467 F.Supp. 3d 824 (N.D. Cal. June 17, 2020). The Act's purpose, therefore, is "consistent with allowing courts to consider such gross sentencing disparities, rather than forcing judges to interpret lack of retroactivity as a complete bar to release based upon subsequent changes to sentencing." *Id.* "It is not unreasonable for Congress to conclude that not *all* defendants convicted under 18 § 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," via the

[17] The First Step Act stated that the amendments which narrowed what constitutes a predicate offense under 21 § 841(b)(1) "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." First Step Act of 2018, S. 756, 115th Congress § 2 at Title IV Sec. 401(c).

compassionate release statute. *United States v. Maumau*, 08-cr-758 (D.Utah Feb. 18, 2020) (emphasis added).

Here, it would be arbitrary, capricious and fundamentally unfair to allow Gonazlez's sentence to stand. Gonzalez received a sentence significantly higher than he would have expected had he been sentenced just months later. His sentence should not be significantly increased due merely to an accident of timing. Further, a comparison of Gonzalez's sentence to district-wide statistical data and the sentences received by his co-defendants shows he received an overly punitive sentence. His sentence must be reduced.

After the First Step Act, Gonzalez would not be eligible for a Section 851 enhancement

Central to the First Step Act's reforms was a limitation on the types of prior drug convictions that qualify as § 851 predicates. Before the First Step Act, 21 U.S.C. § 841(b)(1)(A) mandated a minimum sentence of 20 years where the defendant had a prior conviction for a felony drug offense. After the passage of the First Step Act, that same section mandates a 15-year minimum sentence where the defendant had a prior conviction for a "serious drug felony." A "serious drug felony," as now used in 18 U.S.C. 841, means a drug trafficking offense under state or federal law for which a) the maximum possible penalty was 10 years or more, b) the defendant actually served more than 12 months, and c) the defendant's release from that term of imprisonment was within 15 years of the commission of the instant offense. *See* 21 U.S.C. 802(57) citing 18 U.S.C. 924(e)(2).

In this case, the prior conviction referenced in the government's § 851 notice was more than 20 years old at the time of sentencing. A review of the indictment and

mittimus from that case show that Gonzalez was convicted of possession with intent to sell cocaine. Under New Hampshire state law, that offense has a maximum penalty of 7 years, unless the charge is a subsequent offense or the drug quantity is greater than ½ ounce. *See* N.H. RSA 318-B:26, I(c). The indictment in Gonzalez's 1997 case does not allege a drug quantity. Further, the indictment does not allege a prior offense. Gonzalez's PSR indicates that he did not have any drug charges predating that conviction. As a result, the maximum penalty for the 1997 offense was 7 years. That conviction, therefore, would not count as a "serious drug felony" under the present sentencing law. *See* 21 U.S.C. § 841(b)(1)(A) (2018). Accordingly, if Gonzalez had been sentenced in this case after December 21, 2018, rather than on June 14, 2018, the mandatory minimum sentence would have been ten years.

The Holder and Sessions Memorandum Regarding Section 851 Enhancements

Gonzalez was charged with drug trafficking on October 5, 2016. At that time, United States Attorneys were acting under guidance from Attorney General Eric Holder as to when to file 18 U.S.C. § 851 recidivist enhancements.[18] That memorandum noted that "[i]n some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution." Due to these disparate impacts, the Holder memo laid out a rubric for when § 851 were appropriate. The Holder memo instructed prosecutors to consider:

- Whether the defendant was an organizer, leader, manager, or supervisor of others within a criminal organization

[18] *See* Attorney General Eric Holder, *Department Police on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (August 12, 2013) retrieved from https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf

- Whether the defendant was involved in the use or threat of violence in connection with the offense
- The nature of the defendant's criminal history including any prior history of violent conduct or recent convictions for serious offenses
- Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels
- Whether the filing would create a gross sentencing disparity with equally more culpable co-defendants; and
- Other case-specific aggravating or mitigating factors

See Holder memorandum of August 12, 2013 at p. 3.

A second memorandum from Attorney General Holder, issued on September 24, 2014, offered additional guidance on § 851 enhancements. It directed, "[w]hether a defendant is pleading guilty is not one of the factors enumerated in the charging policy. Prosecutors are encouraged to make the § 851 at the time the case is charged, or as soon as possible thereafter."[19]

Operating within the above framework, the government did not initially file a § 851 notice. Approximately nine months after Gonzalez's initial arrest, however, in a status of counsel hearing on July 11, 2017, defense counsel explained to the court that the government was considering filing a § 851 notice.[20] In response, the court responded that it was "confused" about the government's contemplation of filing the notice to which the government responded, "Well, under the most recent DOJ memo from Attorney General Sessions, your Honor, we are supposed to pursue 851 notifications."[21] *Id.* In response, the Court noted that "I hope you will relay my concern

[19] Attorney General Eric Holder, *Guidance Regarding § 851 Enhancements In Plea Negotiations* (September 24, 2014) retrieved from https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download

[20] Dkt. 377 at p. 11. Additionally, a copy of the transcript of the above referenced status of counsel hearing is attached as an exhibit.

[21] *See* Attorney General Jeff Sessions, *Department Charging and Sentencing Policy* (May 10, 2017) retrieved from https://www.justice.gov/archives/opa/press-release/file/965896/download (instructing United States Attorneys to "charge and pursue the most serious, readily provable offense," and clarifying "[b]y definition, the most serious offenses are those that carry the most substantial guidelines, including

about any attempt to file notices like that at the eleventh hour when you haven't been talking at least to me about them in our meetings up till now. So I hope that you wouldn't take such an action." *Id.* The government stated that the filing would not be completely unexpected to the defense as the issue had "been out there for almost the entire time," and noted that the defendant's record was provided in discovery, but concluded, "[f]rankly, the Department of Justice guidance changed just about 40 days ago." *Id.* On September 29, 2017, nearly one year after the Gonzalez was indicted, counsel for the government filed a notice pursuant to 21 U.S.C. § 851.

Present counsel was not counsel of record at the time the notice was filed. However, given the discussion quoted above, it appears that a crucial factor, perhaps *the* crucial factor, in the government belatedly filing a § 851 enhancement was the change in DOJ guidance. Conversely, had Gonzalez been tried prior to the May 10, 2017 change in policy, it appears no enhancement would have been filed. As discussed above, had Gonzalez been sentenced after December 21, 2018, he could not have been subject to enhanced penalties under 21 U.S.C. 841. As a result of being tried and sentenced in that intervening 19-month window – i.e. after the Sessions memo but before the passage of the First Step Act – Gonzalez's sentence was greatly and arbitrarily increased.

Gonzalez's advisory guideline sentencing range would have been below the sentence he received but for the § 851 enhancement

Gonzalez's PSR contains an initial guideline sentencing range of 168 to 210 months. *See* PSR at ¶ 73. Due to the application of the 240-month mandatory minimum at the time of sentencing, however, the guideline sentence increased to that

mandatory minimum sentences."). The Sessions memorandum also explicitly rescinded the prior Holder memoranda.

number. *Id.* If sentenced today, Gonzalez's bottom guideline sentence would be six years (or 30%) lower than the sentence actually imposed – a significant disparity.

Gonzalez's sentence is substantially higher than would be anticipated in similar cases in the District of New Hampshire

As discussed above, if sentenced just six months later, Gonzalez would have faced a mandatory minimum term of 120 months and an advisory guideline range of 168 to 210 months. Statistical data maintained by the US Sentencing Commission suggests that, but for the enhanced mandatory minimum, Gonzalez's sentence would have been substantially lower.[22]

Gonzalez was sentenced in June of 2018. In fiscal year 2018, only 2.7 percent of defendants in the District of New Hampshire (just 5 of 184 total) received an upward variance.[23] None received an upward departure. That same year, 39.7% of defendants received a sentence within the guideline range while 9.8% received a downward departure and 47.8% of defendants received a downward variance. Therefore, in 2018, the majority of defendants (57.6%) in the District of New Hampshire received a sentence below their initially calculated advisory guideline range. In the District of New Hampshire that same year, the median drug trafficking sentence was 59 months while the mean sentence was 65 months.

Additionally, even prior to the passage of the First Step Act, a Sentencing Commission study found that the § 851 enhancements were rarely applied.[24] The

---

[22] *See* US Sentencing Commission, *Statistical Information Packet – Fiscal Year 2018 – District of New Hampshire*, retrieved from https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/nh18.pdf

[23] *Id* at p. 12.

[24] US Sentencing Commission, *Application and Impact of 21 U.S.C.* § 851: Enhanced Penalties for Federal Drug Trafficking Offenses (July 2018) retrieved from https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf ("

Commission's analysis of 2016 nationwide sentencing data showed that the government filed § 851 informations against just 12.3% of eligible offenders. Even after filing, the government frequently withdrew the informations. Ultimately, only 3.9% of eligible offenders were subjected to increased mandatory minimums pursuant to § 851 enhancements. The District of New Hampshire data is even more stark. In 2016, though a total of 14 drug trafficking defendants were eligible for § 851 enhancement *none* of them received an enhancement.

Gonzalez's sentence is substantially higher than his co-defendants'

There is a significant disparity between Gonzalez's sentence and that of his co-defendants. The following table contains the sentences of Gonzalez's co-defendants that were referenced in the PSR and occurred prior to Gonzalez's original sentencing:[25]

Name	**Plea/Trial**	**Drug Weight** [26]	**CHC**	**TOL**	**Guideline Range**	**Months Imposed**
Alfredo Gonzalez	Trial	1.42 kg	IV	32	240	240
Alberto Marte	Plea	11.84 kg	I	38	210 to 262	180
Toribio Marte	Plea	13.25 kg	I	36	188 to 235	120
Maria Lara	Plea	9.73 kg	I	27	70 to 87	36
Allison DeJesus	Plea	2.8 kg	I	21	37 to 46	None
Jonaly DeJesus	Plea	2.8 kg	I	21	37 to 46	None
Allan Pimentel	Plea	2.45 kg	II	27	78 to 97	57
Santo Mendez	Plea	1.5 kg	I	25	57 to 71	36
Wilkin Aria	Plea	635 g	I	23	46 to 57	54
Euris Guerrero	Plea	2 kg	III	28	97 to 121	87
Jose Pimentel	Plea	1.56 kg	II	29	97 to 121	63

[25] *See* PSR at ¶ 7.
[26] The drug weights referenced above refer to heroin. Euris Guerrero was also found responsible for 2,167 kg of marijuana. The above sentence reflects Guerrero's total sentence for both substances.

The PSR lists Alberto Marte, Toribio Marte, and Maria Lara as belonging to "DTO Leadership and Primary Drug Runners."[27] *See* PSR at ¶¶ 11-15. This finding is consistent with the significant drug weights attributed to those codefendants. Still, those defendants received sentences far more lenient than Gonzalez. Of the ten co-defendants listed above, nine received sentences below the guideline while one, Aria, received a sentence within guideline. No codefendant received a sentence above the advisory guideline range.[28]

Several of the codefendants had essentially no prior criminal history. However, one codefendant, Guerrero, had a criminal history category III. The PSR attributed more heroin to Guerrero than Gonzalez – not to mention 2,167 kg of marijuana. Nevertheless, Guerrero received 87 months while Gonzalez received 240 months.

In addition to listing the disposition of Gonzalez's codefendants' cases, the PSR also includes the dispositions in ten "related" cases. PSR at ¶ 8. In all but one of those cases, the defendant received either LASER or a below guideline sentence. In the single remaining case, Eric Sederquest, the guideline range was 92 to 112 months and the defendant received 92 months.

The docket report shows that one additional co-defendant, Santos Guerrero Morillo, has been sentenced since Gonzalez's sentence. *See* Dkt. 402. Morillo received a sentence of 240 months pursuant to a "C plea." A review of the sentencing transcript

[27] The codefendants names here, as in the above chart, have been truncated due to save space..
[28] Defense counsel acknowledges that the docket report shows that one additional co-defendant, Santos Guerrero Morillo, has been sentenced since Gonzalez's sentence. Dkt. 402. Morillo received a sentence of 240 months pursuant to a "C plea." A review of the sentencing transcript reveals that Morillo's advisory guideline range was 360 months to life. Dkt. 410 at p. 4. His sentence, therefore, was 10 years below guideline.

reveals that Morillo's advisory guideline range was 360 months to life. *See* Dkt. 410 at p. 4. His sentence, therefore, was 10 years below guideline.

When compared to his codefendant's, Gonzalez's sentence in this case is an anomaly. He received a sentence five years higher than any of his co-defendants who were sentenced before him. The only co-defendant to receive a similar sentence was facing a guideline recommendation of 360 months to life. These disparities cannot be justified. Upon comparing the above sentences, two things stand out: Gonzalez was the only defendant to receive a § 851 enhancement and the only defendant to take his case to trial. A 21-year old prior drug conviction and Gonzalez's refusal to accept a plea agreement do not justify this gross sentencing disparity. The court should fix this disparity and reduce Gonzalez's sentence.

IV. The § 3553(a) factors support a time served sentence or, alternatively, a sentence reduction

Gonazlez's medical vulnerability to COVID-19 and gross sentencing disparity, either separately or in combination, constitute extraordinary and compelling reasons to reduce his sentence. Upon making that finding, the Court must consider whether reducing the defendant's sentence is consistent with the factors contained in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3582(c)(1)(A). Here, the factors support reducing Gonzalez's sentence.

Gonzalez is fifty-four years old. He was born in Puerto Rico. He describes a childhood filled with constant arguments as well as verbal and physical abuse at the hands of his alcoholic father. In 1986, at the age of twenty, Gonzalez left Puerto Rico and moved to Florida in search of work. After two years, he moved to Manchester, NH. Upon information and belief, Mr. Gonzalez remains close to his elderly mother,

Margarita Rosario Crepo, who lives in Puerto Rico, as well as his sister, Alicia, who lives in Manchester.

Gonzalez also had a twin brother, Wilfredo Gonzalez, who was killed in a car accident in Hooksett, NH in 2014. After Wilfredo's death, Gonzalez became depressed and was prescribed the anti-depressant Celexa until later discontinuing it.

Gonzalez's medical issues – in addition to making him more vulnerable to COVID-19 – support a reduction of his sentence. At present, the BOP locator lists Gonzalez's anticipated release date as November 29, 2033. At that time, Gonzalez would be 67 years old. Given the nature of Gonzalez's chronic medical conditions, without a reduction, there is a substantial possibility that he will die in prison prior to his release.

Gonzalez's conduct in this case is in part the product of his own addiction. From 2010 to the time of his arrest, Gonzalez struggled with substance abuse. In 2010 he was prescribed Vicodin or Percocet to address back pain and became addicted. When he could no longer obtain pills, he started using heroin. By the time of his arrest, Gonzalez was using approximately 1.5 grams of heroin a day.

At present, Gonzalez has served more than 52 months. Four and a half years in federal prison is no slap on the wrist. If released today, that sentence is adequate to deter Gonzalez personally and the community generally. If Gonzalez is released, the public will be protected; he is subject to 10 years of supervised release.

In short, the traditional goals of sentencing – namely, punishment, deterrence, and rehabilitation – can still be met if the defendant is released at this time. If given that opportunity, upon information and belief, Gonzalez hopes to live with his sister in Manchester, NH and obtain work in the construction industry.

Alternatively, if the court is not inclined to release the defendant immediately due to his medical issues, the court should still reduce his sentence. A sentence reduction would correct an unwarranted, unjustifiable sentence disparity. Gonzalez's sentence is excessively punitive compared to the sentence he would receive after the passage of the First Step Act. Similarly, Gonzalez's sentence is excessively punitive as compared his codefendants. *See* 18 U.S.C. § 3553(a)(6).

V. Conclusion

Gonzalez's medical conditions and vulnerability to COVID-19 warrant his immediate compassionate release. Alternatively, should the court deny that request, a gross sentencing disparity justifies the court reducing his sentence to 120 months or, at minimum, to a term at or below the bottom of the now-applicable guideline range.

A hearing is requested. No memorandum of law is attached as all points and authorities are incorporated above.

Respectfully Submitted,

/s/Jeffrey D. Odland

_____

ALFREDO GONZALEZ
By his attorney,
Jeffrey D. Odland, Esq.
NH Bar No. 18967
Greenblott & O'Rourke PLLC
PO Box 465
Contoocook, NH 03229
jeff@golaw-nh.com

CERTIFICATE OF SERVICE

I hereby certify that this motion was electronically forwarded to counsel for the government on this day via the CM/ECF system.

/s/Jeffrey D. Odland

Jeffrey D. Odland, Esq. #18967

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	**No. 16-CR-00162-PB**
	)	
ALFREDO GONZALEZ	)	

GOVERNMENT'S OBJECTION TO DEFENDANT'S
MOTION FOR COMPASSIONATE RELEASE

The Government objects to defendant Alfredo Gonzalez's motion for early release under 18 U.S.C. § 3582(c)(1)(A)(i) based on concerns about the impact of COVID-19. Gonzalez was convicted after a jury trial of involvement in a multi-defendant heroin conspiracy, and in June 2018 he was sentenced to 20 years' imprisonment. Although the defendant has a qualifying serious medical condition, he has failed to show that he is not a danger to the community or that his release would be consistent with the sentencing factors in 18 U.S.C. § 3553(a). He remains a danger to the community. Accordingly, the Court should deny his request for compassionate release.

I. BACKGROUND

On November 9, 2017, a jury found the defendant guilty of conspiracy to distribute and to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 846, 841(a) and 841(b)(1)(A). ECF No. 220. On June 14, 2018, the Court imposed a 240-month sentence. ECF No. 352. The defendant has served approximately 52 months of his 240-month sentence. With credit for good time, the defendant is currently scheduled for release from custody on November 29, 2033. *See* BOP Inmate Locator, available at www.bop.gov/inmateloc (last accessed on March 1, 2021).

Defendant filed a request for release with the Warden at FCI Cumberland on December 18, 2020, and the request was denied on January 13, 2021. ECF No. 420-1.

On January 9, 2021, defendant filed a *pro se* motion for a reduction in sentence, ECF No. 415, and on February 26, 2021, filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), contending that he suffers from a number of medical conditions including Type 2 diabetes, hypertension, sleep apnea and obesity. ECF No. 420 at 3. Upon receipt of the defendant's motions and supporting documentation, the Government consulted with Dr. J. Gavin Muir, Chief Medical Officer of Amoskeag Health in Manchester, New Hampshire, regarding the defendant's medical conditions. After reviewing the defendant's medical file, Dr. Muir opined, based on the CDC's December 23, 2020, updated list, that Gonzalez has multiple medical issues, and that two of those issues, obesity and type 2 diabetes, put him at higher risk for severe illness if he were to contract Covid-19. Additionally, defendant has hypertension that might increase his risk for severe illness if he were to contract Covid-19. Therefore, the Government acknowledges that the defendant presents risk factors identified by the CDC as heightening the risk of severe illness if he were to contract COVID-19.

As set forth below, although Gonzalez is eligible for compassionate release based on his medical condition, this Court should exercise its considerable discretion and decline to order early release under section 3582(c)(1)(A) because the defendant presents a danger to the community, and the § 3553(a) factors strongly disfavor a sentence reduction in this particular case.

II. BOP RESPONSE TO COVID-19 PANDEMIC

As this Court is well aware, COVID-19 is a dangerous illness that has caused many deaths in the United States since early 2020 and that has resulted in massive disruption to our society and economy. In response to the pandemic, the Federal Bureau of Prisons (BOP) has

taken significant measures to protect the health of the inmates in its charge. The BOP continues to revise and update its action plan in response to the fluid nature of the COVID-19 pandemic.

The BOP has continued working with the CDC, confirming that its approach aligns with current CDC guidance for COVID management in correctional facilities. Federal Bureau of Prisons, Correcting Myths About BOP and COVID-19, at 1, available at https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf ("Correcting Myths"). Currently, BOP medical staff are "conducting rounds and checking inmate temperatures at least once a day"—twice a day where inmates are quarantined or in isolation. *Id.* All BOP staff and inmates have been issued cloth masks to wear on a daily basis—with staff required to wear masks, gloves, and potentially gowns when dealing with isolated and quarantined inmates. *Id*. at 1, 3. "Cleaning supplies have been provided to inmates," and the BOP has provided training on CDC best practices regarding disease transmission and prevention (including sanitation). *Id*. at 2. Common areas are sanitized multiple times a day. *Id*. at 3.

Like all other institutions, penal and otherwise, the BOP has not been able to eliminate the risks from COVID-19 completely, despite its best efforts. But the BOP's measures will help federal inmates remain protected from COVID-19 and ensure that they receive any required medical care during these difficult times. These efforts appear to be working. At the time of this submission, 5,530 federal inmates and 2,013 staff have had confirmed positive test results for COVID-19 nationwide. *See* Federal Bureau of Prisons, COVID-19 Coronavirus (updated daily at 3 p.m.), available at https://www.bop.gov/coronavirus/ (last visited March 2, 2021). Currently, nationwide, 46,618 inmates and 4,869 staff have recovered, and 222 inmates and 4 BOP staff members have died. *Id*. Of the inmate deaths, four occurred while on home confinement. *Id.* At FCI Cumberland, where Gonzalez is serving his sentence, there are currently 0 inmates and 6 staff members positive for COVID-19. *Id*.

Taken together, all of these measures are designed to mitigate sharply the risks of COVID-19 transmission in a BOP institution. BOP has pledged to continue monitoring the pandemic and to adjust its practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders.

Unfortunately and inevitably, some inmates have become ill, and more likely will in the weeks ahead. But BOP must consider its concern for the health of its inmates and staff alongside other critical considerations. For example, notwithstanding the current pandemic crisis, BOP must carry out its charge to incarcerate sentenced criminals to protect the public. It must consider the effect of a mass release on the safety and health of both the inmate population and the citizenry. It must marshal its resources to care for inmates in the most efficient and beneficial manner possible. It must assess release plans, which are essential to ensure that a defendant has a safe place to live and access to health care. And it must consider myriad other factors, including the availability of both transportation for inmates (at a time when interstate transportation services often used by released inmates are providing reduced service), and supervision of inmates once released (at a time that the Probation Office has necessarily cut back on home visits and supervision).

Finally, multiple vaccines have been approved for use to protect against COVID-19. While the details regarding the availability and distribution of these vaccines to BOP staff and inmates have not yet been finalized, it is likely that the availability of the vaccines will help to mitigate the spread of the disease in the upcoming months.

III. APPLICABLE LEGAL FRAMEWORK

A. Compassionate Release

Under 18 U.S.C. § 3582(c)(1)(A), this Court may, in certain circumstances, grant a defendant's motion to reduce his or her term of imprisonment. In the instant matter, since the "exhaustion requirement" is met, the Court may reduce the defendant's term of imprisonment pursuant to 18 U.S.C. § 3582(c)(1), after considering the factors set forth in 18 U.S.C. § 3553(a) if the court finds, as relevant here, both that (i) "extraordinary and compelling reasons warrant such a reduction" and (ii) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(1)(A)(i).

A reduction in sentence will be consistent with USSG § 1B1.13, the "applicable policy statement" referenced in § 3582(c)(1)(A)(i), if, after considering the § 3553(a) factors, the Court finds that (i) "extraordinary and compelling reasons warrant the reduction;" (ii) "the defendant is not a danger to the safety of any other person or to the community;" and (iii) the reduction is otherwise consistent with the policy statement. USSG § 1B1.13 (citing 18 U.S.C. § 3142(g)).

As the movant, the defendant bears the burden of establishing that he is eligible for a sentence reduction. *See, e.g., United States v. Jaca-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008); *see also United States v. Miamen*, Cr. No. 18-130-1 WES, 18-137-3 WES, 18-142 WES, 2020 WL 1904490, at *2 (D.R.I. Apr. 17, 2020). Here, pursuant to the position of the Department of Justice, the defendant's medical condition would constitute "extraordinary and compelling" circumstances that would make him eligible for relief, *if he did not pose a danger to the community*. *See* U.S.S.G. § 1B1.13 and cmt. n. 1(A)-(D).

B. Judicial Recommendation to BOP

Furthermore, under 18 U.S.C. § 3624(c)(2), BOP has the authority "to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." 18 U.S.C. § 3624(c)(2). Under this provision, Gonzalez would not typically be eligible for home confinement at this point in his sentence. But Congress recently amended the time

restrictions of § 3624(c)(2) in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). That amendment gave former Attorney General Barr the power to "lengthen the maximum amount of time for which the Director [of BOP] is authorized to place a prisoner in home confinement." Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 236 (March 27, 2020). Attorney General Barr has directed BOP to utilize this expanded home confinement authority to protect vulnerable inmates and prevent or control the spread of the virus. *See* Atty. Gen. William Barr, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, (Apr. 3, 2020), https://www.justice.gov/file/1266661/download.

The decision whether to exercise this authority in a particular case and release a defendant to home confinement lies entirely with BOP; the court lacks the power to order that a prisoner be released to home confinement, even under the CARES Act. See 18 U.S.C. §§ 3621(b), 3624(c)(2); *Tapia v. United State*s, 564 U.S. 319, 331 (2011); *United States v. Barnes*, No. 16-20308, 2020 WL 2733885, at *2 (E.D. Mich. May 26, 2020). Courts may, however, make a judicial recommendation to BOP that a defendant be placed on home confinement. *See* 18 U.S.C. § 3621(b)(4); *United States v. Duford*, No. 18-cr-42, 2020 WL 354226, at *4 (D.N.H. June 30, 2020) (McCafferty, J.). In evaluating whether to make such a recommendation, courts consider the non-exhaustive discretionary factors laid out in Attorney General Barr's Memo, including danger posed by the inmate's release, conduct while in prison, whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety, and the inmate's vulnerability to COVID-19. Atty. Gen. William Barr, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf.

IV. DISCUSSION

A. The defendant is a danger to the community.

Under the applicable policy statement, this Court must deny a sentence reduction unless it determines the defendant "is not a danger to the safety of any other person or to the community." USSG § 1B1.13(2). In determining whether the defendant poses a danger to the community, the Court shall consider:

(1) the nature and circumstances of the offense;

(2) the weight of the evidence against the defendant;

(3) the defendant's history and characteristics, including the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

See 18 U.S.C. § 3142(g). Here, the defendant is not eligible for a reduction in his sentence because he remains a danger to the community, under the factors set forth in 18 U.S.C. § 3142(g). *See* U.S.S.G. § 1B1.13(2) and cmt. n. 1.

Nature and Circumstances of the Offense: According to the PSR, the government established that the defendant, Alfredo Gonzalez, developed a working relationship with Alberto Guerrero Marte during which he acquired quantities of heroin for distribution in New Hampshire. The evidence showed that the defendant purchased finger quantities of heroin for $250 a finger. The evidence at trial established through recorded conversations between Gonzalez and Marte that, as of June 22, 2016, he owed Marte a drug debt of $11,750, which represented 47 fingers of heroin ($11,750 divided by $250 is 47). The evidence further showed that Gonzalez acquired another 30 fingers of heroin for $7,500 around the same time. The defendant met Marte on June 26, 2016, for the purpose of making a drug payment to Marte. Later, on June 28, 2016, the defendant acquired 15 fingers of heroin from Marte.

On July 10, 2016, agents intercepted a telephone call between Marte and Gonzalez. During the call, Gonzalez indicated that he had almost finished packaging suspected drugs and that he was bringing "the other guy," later identified as Mark Gagnon, to the meeting. Agents set up surveillance outside the Pollo Tipico Restaurant and intercepted a second call between Marte and Gonzalez. In that call, Marte advised Gonzalez that he "put 50 pesos to the transmission." Agents understood that to mean that they were exchanging 50 "fingers" or 500 grams of heroin.

Approximately an hour later, agents observed Marte and Michell DeJesus arrive in a black Jeep Cherokee and enter the restaurant. During that time, another agent observed a silver Chevrolet Impala heading south on Route 213 in Methuen, MA. That vehicle was known to belong to Gonzalez. The agent noted that a Chrysler Pacifica appeared to be following the Impala and both vehicles arrived at the restaurant shortly thereafter. Agents observed Gonzalez and Gagnon enter the restaurant and join Marte and DeJesus at their table. After a few minutes of conversation, the lights of the Jeep flashed, which indicated that it was unlocked. Gagnon got up from the table, walked outside, and opened the driver's side door of the Jeep. Agents observed him remove a bag from the Jeep and walk towards his vehicle, the Pacifica. He placed the bag in his car and left the area.

Agents advised assisting law enforcement officers that Gagnon had left the area and requested that his vehicle be stopped. A member of the New Hampshire State Police located the vehicle on Interstate 93 as it passed through Salem, NH, and conducted a traffic stop. The trooper briefly engaged with Gagnon and requested a consent search of the vehicle. Gagnon declined to give consent and the trooper informed him that a K9 unit would conduct a pass around the vehicle. The trooper conducted the K9 pass around the

exterior of Gagnon's vehicle and observed the K9 alert to the presence of narcotics inside the vehicle. The trooper advised Gagnon of the alert and told him that he intended to impound the vehicle pending a search warrant.

The search warrant was approved the next day and agents conducted a search of Gagnon's vehicle. In the rear of the car, agents located a grocery bag containing three large cans of tomato sauce. The agents noted that the cans appeared to be leaking as if they were previously opened and resealed. Upon opening each can, the agents removed a green plastic wrapped item which contained numerous "fingers" of suspected heroin. Laboratory analysis subsequently confirmed the quantity to be 504.4 grams of heroin. Later that day, agents intercepted a telephone call between Marte and Gonzalez regarding the stop of Gagnon's vehicle and both were concerned about police locating "the thing." Gonzalez assaulted Mark Gagnon, on July 11, 2017, after Gonzalez learned that Gagnon's vehicle containing the heroin had been seized by law enforcement.

The total quantity of heroin attributed to Gonzalez at sentencing was 1.42 kilograms. Also, Gonzalez received a 2-point enhancement in the PSR for using violence against Gagnon.

Weight of the Evidence: On November 9, 2017, a jury found the defendant guilty of conspiracy to distribute and to possess with intent to distribute controlled substances in violation of 21 U.S.C. §§ 846, 841(a) and 841(b)(1)(A).

Defendant's History and Characteristics: The defendant has a long history of criminal activity dating back to 1988. His criminal history category at the time of sentencing was IV. According to the PSR, in 1997 the defendant was convicted in a jury trial of drug charges in New Hampshire, and was sentenced to 3 ½ to 7 years in the State Prison. Afterwards he twice violated parole and was twice returned to prison. PSR ¶ 40.

In 2006, after failing to appear for a scheduled jury trial in 2004, the defendant pleaded guilty to violating a protective order after breaking into his ex-girlfriend's apartment. The defendant was placed on probation, but violated probation and was sentenced in 2007 to 12 months in jail. In that case Gonzalez provided a false address to his probation officer and did not report to the probation office as ordered. PSR ¶ 42.

In 2011, Gonzalez pleaded guilty in Texas to possession of 22 pounds of marijuana he was leaving for pickup. In 2013, he pleaded guilty to Simple Assault and Assault by a Prisoner. In 2015, he was arrested for heroin sales, and was scheduled for a guilty plea and sentencing in that matter when this case was sentenced. Gonzalez was also the subject of three domestic violence restraining orders.

Nature and Seriousness of the Danger Posed by Release: The defendant is a dangerous drug dealer, having been in engaged in criminal activity for over 23 years. Taken as a whole, the § 3142(g) factors all weigh towards a finding that the defendant poses a danger to the community, and nothing has happened during his incarceration to change that evaluation. Thus, under the terms of the Policy Statement, the defendant is ineligible for compassionate release, and his motion should be denied. *See* U.S.S.G. § 1B1.13(2).

B. Reduction of the defendant's sentence is not justified under the § 3553(a) factors.

Likewise, the § 3553(a) factors which supported this Court's imposition of a 240-month sentence just as strongly disfavor a sentence reduction now. As set forth above, the seriousness of the defendant's criminal conduct and the danger he poses to the public militate against a sentence reduction. Nothing about the defendant or his crime has changed since the sentence was imposed less than three years ago. Most significantly, he has served less than one fourth of his 240-month sentence, and a reduction of his sentence to time served would represent an

undeserved windfall and a constitute a failure to protect the public from further crimes of the defendant, to afford adequate deterrence, to promote respect for the law, and to provide just punishment for the offense.

As a final matter, if this Court determines the defendant should be released, for the protection of the community, the Government asks this Court to direct that the defendant remain in quarantine for fourteen days prior to release or until testing can confirm that he is negative for the virus. Finally, even if that condition is not imposed, to ensure that the appropriate travel arrangements can be made and his release plans affirmed, the Government requests that the Court allow for up to 72 hours after entry of the order for his release.

C. The Court should decline to recommend that the defendant serve the remainder of his sentence on home confinement.

Moreover, given the nature of defendant's crime, the Court should decline to recommend to BOP that the defendant serve the remainder of his sentence on home confinement. Although he presents a risk factor identified by the CDC as heightening the risk of severe illness were he to contract COVID-19, the risk does not outweigh the danger he poses to the community and his high risk of recidivism. Indeed, the BOP has already rejected his request for home confinement for these reasons. Gonzalez has failed to present anything that mitigates his risk to the community or his risk of recidivism and the Court should decline to provide a judicial recommendation to BOP that he serve the remainder of his sentence on home confinement.

CONCLUSION

For the above reasons, this Court should find that the 20-year sentence it pronounced on June 14, 2018, remains appropriate and deny the Defendant's motion for compassionate release.

Dated: March 5, 2021

Respectfully submitted,

SCOTT W. MURRAY
United States Attorney

/s/ John S. Davis
By: John S. Davis
Assistant U.S. Attorney
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301
(603) 225-1552

18 USCS § 3582, Part 1 of 2

Current through Public Law 117-159, approved June 25, 2022.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part II. Criminal Procedure (Chs. 201 — 238) > CHAPTER 227. Sentences (Subchs. A — D) > Subchapter D. Imprisonment (§§ 3581 — 3586)

§ 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment. The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment. Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742 [18 USCS § 3742]; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742 [18 USCS § 3742];

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) [18 USCS § 3559(c)], for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g) [18 USCS § 3142];

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) Notification requirements.

(1) Terminal illness defined. In this subsection, the term "terminal illness" means a disease or condition with an end-of-life trajectory.

(2) Notification. The Bureau of Prisons shall, subject to any applicable confidentiality requirements—

(A) in the case of a defendant diagnosed with a terminal illness—

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

(3) Annual report. Not later than 1 year after the date of enactment of this subsection, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.

(e) Inclusion of an order to limit criminal association of organized crime and drug offenders. The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 [18 USCS §§ 1951 et seq.] (racketeering) or 96 [18 USCS §§ 1961 et seq.] (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

History

HISTORY:

Added Oct. 12, 1984, P. L. 98-473, Title II, Ch II, § 212(a)(2), 98 Stat. 1998; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle C, § 7107, 102 Stat. 4418; Nov. 29, 1990, P. L. 101-647, Title XXXV, § 3588, 104 Stat. 4930; Sept. 13, 1994, P. L. 103-322, Title VII, § 70002, 108 Stat. 1984; Oct. 11, 1996, P. L. 104-294, Title VI, § 604(b)(3), 110 Stat. 3506; Nov. 2, 2002, P. L. 107-273, Div B, Title III, § 3006, 116 Stat. 1806; Dec. 21, 2018, P.L. 115-391, Title VI, § 603(b), 132 Stat. 5239.

End of Document