

APPENDIX A
OPION OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

May 2, 2023

Lyle W. Cayce
Clerk

No. 22-20544
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LEWIS GILMORE HURST,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CR-355-1

Before SMITH, SOUTHWICK, and DOUGLAS, *Circuit Judges.*

PER CURIAM:*

Lewis Gilmore Hurst, federal prisoner # 38756-179, appeals from the district court's denial in part of his 18 U.S.C. § 3582(c)(1)(A)(i) motion for compassionate release. On appeal, Hurst contends that he was erroneously sentenced as a career offender under the Sentencing Guidelines and that the sentencing error constitutes an extraordinary and compelling circumstance

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

warranting relief. Because he does not reprise his arguments that extraordinary and compelling circumstances exist due to a change in the law as concerns the Armed Career Criminal Act and due to his susceptibility to contracting severe COVID-19, they are abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

We review the denial of Hurst's § 3582(c)(1)(A)(i) motion for an abuse of discretion. *See United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020). “[A] prisoner cannot use § 3582(c) to challenge the legality or the duration of a sentence.” *United States v. Escajeda*, 58 F.4th 184, 187 (5th Cir. 2023). As such, Hurst fails to demonstrate that the district court abused its discretion in denying relief as to his argument that he could show extraordinary and compelling circumstances inasmuch as he was erroneously sentenced as a career offender. *See Chambliss*, 948 F.3d at 693. The district court's decision is AFFIRMED.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: Rebecca L. Leto, Deputy Clerk

Enclosure(s)

Mr. Kristian Amundsen
Mr. Lewis Gilmore Hurst
Ms. Carmen Castillo Mitchell

APPENDIX B
REPLY TO APPELLEE'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, §
V. § Case No. 22-20544
LEWIS GILMORE HURST, §

APPELLANT'S REPLY TO APPELLEE'S BRIEF

COMES NOW, Lewis Gilmore Hurst, pro se, and respectfully submits his Reply to Appellee's Brief. The Appellee's brief was filed on or about March 10, 2023 and this reply is timely filed.

In the Appellee's Brief the Government advances the habeas channeling rule as recently set out in United States v. Jenkins, 50 F.4th 1185 (D.C. Cir. 2022) and adopted by the Fifth Circuit in United States v. Escajeda, 58 F.4th 184 (5th Cir. 2023). The Government did not advance this argument, nor any other argument, in its initial opposition to Hurst's motion under 18 U.S.C. 3582 at the district court level. The habeas channeling argument has been forfeited and is not available to the Government on appeal. (See Dufur v. United States Parole Comm'n, 34 F.4th 1090, 1095 (D.C. Cir. 2022))

However, the district court, in essence, advanced this argument on its own by stating that 18 U.S.C. 3582(c)(1)(A) was an in-

appropriate procedural posture for the issue of an illegal or unauthorized sentence. Hurst continues to disagree with this assessment. The habeas channeling rule was addressed in the context of a petition under 42 U.S.C. 1983 and while that rule may conceivably have been applicable to motions under 18 U.S.C. 3582 before Concepcion v. United States, 142 S.Ct. 2389; 213 L.Ed. 731; 2022 U.S. Lexis 3070 (2022), it cannot apply post Concepcion.

The Supreme Court, in Concepcion, makes it clear that Congress did not constrain the district courts in initial sentencing nor in sentence modification beyond what is stated in 28 U.S.C. 994(t); that a sentence cannot be modified based on rehabilitation alone. The prohibition against consideration of illegal sentencing errors set out in Jenkins and adopted in Escajeda is in direct contravention of the directions put forth in Concepcion and the limited constraints set out by Congress. The Concepcion case was reversed and remanded due to a misconception as to what may or may not be considered under 3582.

Hurst contends that the argument in his appeal of the district court's decision has not been harmed by the Government's response to it. It is extraordinary and compelling that ALL of the officers of the district court failed to protect Hurst from receiving an illegal and unauthorized sentence and it would shock the public conscience to learn that a valid statute was used to challenge this error and that it was, none the less, allowed to stand.

(3)

Respectfully submitted on this 29th day of March,
2023.

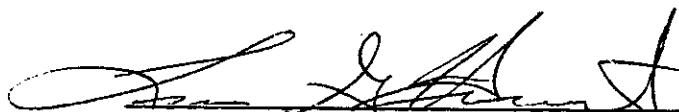


Lewis G. Hurst, pro se

SWORN DECLARATION

I, Lewis Gilmore Hurst, do hereby declare under penalty of perjury that the foregoing Reply to Appellee's Brief is true and correct to the best of my knowledge.

Sworn to pursuant to 18 U.S.C. 1746 on this 29th day of March 2023.



copy: file

U.S. Attorney

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CERTIFICATE OF SERVICE

I, Lewis Gilmore Hurst, do hereby certify that true and correct copies of the foregoing Reply to Appellee's Brief have been forwarded to all interested parties by placing same into the prison mailbox at the Beaumont Medium nad sending via First Class U.S. Mail on this 29th day of March 2023.

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APPENDIX C
APPELLEE'S BRIEF



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Re: *United States of America v. Lewis Gilmore Hurst*
Case No: 22-20544

Dear Mr. Hurst:

Please find enclosed a copy of the *Appellee's Brief*, which was filed in the above-referenced case.

Sincerely,

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/s/ Kristian Amundsen
Kristian Amundsen
Assistant United States Attorney

KA/bs
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No. 22-20544

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee;

v.

LEWIS GILMORE HURST,
Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of Texas
Houston Division, No. 4:04-CR-355

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. The record and briefs adequately present the facts and legal arguments, and oral argument would not significantly aid the decisional process. Fed. R. App. P. 34(a)(2)(C).

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STATEMENT OF JURISDICTION

This appeal arises from an order granting in part and denying in part Lewis Gilmore Hurst's motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The district court (Hughes, J.) had jurisdiction over his original prosecution under 18 U.S.C. § 3231 and this motion under § 3582(c)(1)(A).

The district court granted in part and denied in part Hurst's motion on September 14, 2022, which the clerk entered that same day. ROA.721-28.¹ An amended judgement was entered on September 29, 2022. ROA. 737-41. Hurst moved for reconsideration of the motion (ROA. 729-33, 743-45), which the district court denied on October 6, 2022. ROA. 749-50.

Hurst timely filed his notice of appeal on October 13, 2022. ROA. 756-58; *see* Fed. R. App. P. 4(b)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion when it determined that Hurst's challenge to the legality of his sentence was not cognizable in a compassionate release motion.

¹ "ROA" refers to the record on appeal and is cited by the page number following "22-20544." in the bottom-right corner of each page.

STATEMENT OF THE CASE

Hurst was convicted, following a bench trial, of three counts of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d), three counts of using and brandishing a firearm in violation of 18 U.S.C. § 924(c), and three counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 992(g); 924(e). ROA. 877; *see also* ROA. 248-49. Hurst was sentenced to an aggregate term of 946 months' imprisonment. ROA. 913; *see also* ROA. 250. This Court affirmed that judgment. *United States v. Hurst*, 272 F. App'x 409 (5th Cir. 2008) (unpublished).

Hurst moved for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) (ROA. 694-707), arguing that a sentence reduction was warranted because, in the First Step Act of 2018, Congress altered the way in which sentences for § 924(c) convictions were calculated (ROA. 698). According to Hurst, the large discrepancy between his sentencing exposure before the First Step Act was enacted as compared to after it was enacted justified a sentence reduction. ROA. 698. Hurst also argued his sentence was illegal because he was not a career offender. ROA. 698. Finally, he claimed that compassionate release was appropriate because of the COVID-19 pandemic. ROA. 698.

The district court granted Hurst's motion as to his claim regarding the sentencing discrepancy related to his § 924(c) convictions, but denied the other claims. ROA. 721-28. The district court resentenced Hurst to an aggregate sentence of 512 months' imprisonment. ROA. 725; *see also* ROA. 739. That ruling is the subject of this appeal.

I. Procedural Background

a. Underlying Conduct and Conviction

On January 27, 2004, Hurst stole \$54,715 during a robbery of an Encore Bank in which he displayed a black semi-automatic pistol. ROA. 924-25 (PSR ¶¶ 7-12). On June 9, 2004, Hurst returned to that same Encore Bank, again displayed a pistol, and stole \$12,675. ROA. 925-26 (PSR ¶¶ 14-19). On July 15, 2004, Hurst stole \$22,467 from a World Savings Bank during a robbery in which he also displayed a black semi-automatic pistol. ROA. 926-27 (PSR ¶¶ 21-26).

Hurst, following a bench trial where he acted as his own attorney and stipulated to the all the relevant facts (ROA. 859-76; *see also* ROA. 196-98),² was found guilty of three counts of armed bank robbery of banks

² Hurst intended to claim that he was not guilty by reason of insanity. ROA. 133. The Court rejected Hurst's claim after he was found sane by mental health professionals. ROA. 899-902.

insured by the Federal Deposit Insurance Corporation in violation of 18 U.S.C. § 2113(a) and (d), three counts of carrying, using, and brandishing a firearm in violation of 18 U.S.C. § 924(c)(1), and three counts of being a felon in possession of a weapon in violation of 18 U.S.C. §§ 992(g); 924(e) (ROA. 877; *see also* ROA. 248-49).

b. Sentencing and Appeal

Prior to sentencing, the United States Probation Department completed a Presentence Investigation Report. Probation assessed an initial adjusted offense level of 23. ROA. 931 (PSR ¶ 72). Given that Hurst had been “convicted of at least three prior violent felonies involving robbery,” Probation determined that Hurst was “an armed career criminal [within] the meaning of U.S.S.G. § 4B1.4.” ROA. 932 (PSR ¶ 82); *see also* ROA. 933-35 (PSR ¶¶ 86-91). Hurst’s “offense level determined under U.S.S.G. § 4B1.4(b)(3)(A)” was 34, because he “used a firearm in connection with a crime of violence, bank robbery.” ROA. 932 (PSR ¶ 82). Probation determined that Hurst total offense level was 34. ROA. 932 (PSR ¶ 84).

Despite multiple prior convictions, Probation did not assess criminal history points for these convictions pursuant to U.S.S.G. §

4A1.2(e)(1). ROA. 933-35 (PSR ¶¶ 86-91). Hurst received two criminal history points because he was on parole when he committed the instant crimes. ROA. 935 (PSR ¶ 93). Nevertheless, Hurst's criminal history category was IV because he "is a Career Offender." ROA. 935 (PSR ¶ 94).

With a total offense level of 34 and a criminal history category of IV, Hurst's guideline range was 262 to 327 months' incarceration. ROA. 941 (PSR ¶ 129). Additionally, the district court was required to impose a mandatory consecutive sentence of seven years' imprisonment for one § 924(c) conviction and two, separate mandatory consecutive sentences of 25 years' imprisonment for the other two § 924(c) convictions. ROA. 941 (PSR ¶ 128).³ Combining the guideline range with his mandatory consecutive sentences, Hurst faced an aggregate sentencing range of 946 to 1,011 months' imprisonment. ROA. 909.

The district court sentenced Hurst to 262 months' imprisonment for each of his three bank robbery convictions, to run concurrently to one

³ Each of the firearms counts involved the brandishing of guns and, therefore, carried mandatory minimum consecutive sentences of 7 years' imprisonment. 18 U.S.C. § 924(c)(1)(A)(ii). Since Hurst was convicted of three separate violations of § 924(c), all but one of the firearms counts constituted a "second or subsequent conviction" under § 924(c) according to Supreme Court precedent at the time and the mandatory minimum consecutive sentences for each of those firearms counts increased to 25 years' imprisonment. See 18 U.S.C. § 924(c)(1)(C); *Deal v. United States*, 508 U.S. 129 (1993).

another as well as to the terms of 180 months' imprisonment for each of his felon in possession of a firearm convictions. ROA. 913. The district court imposed a seven-year, mandatory-minimum, consecutive sentence as to Hurst's first § 924(c) conviction and two 25-year, mandatory-minimum, consecutive sentences as to the two remaining § 924(c) convictions. ROA. 913. Hurst's sentence was an aggregate term of 946 months' imprisonment. ROA. 913; *see also* ROA. 250. This Court affirmed Hurst's judgement. ROA. 274-75; *United States v. Hurst*, 272 F. App'x 409 (5th Cir. 2008) (unpublished).

c. Motion for Compassionate Release

Hurst's Initial Motion

Hurst moved for compassionate release pursuant to 18. U.S.C. § 3582(c)(1)(A)(i). ROA. 694-707. He first argued that a sentence reduction was warranted because Congress enacted a law which altered the way in which sentences for § 924(c) convictions were calculated. ROA. 698. At the time of his judgment, a conviction under § 924(c) carried a mandatory-minimum, consecutive sentence of five years' imprisonment. 18 U.S.C. § 924(c)(1)(A)(i). If the offense involved brandishing the firearm, that term increased to seven years' imprisonment. §

924(c)(1)(A)(ii). Where a § 924(c) conviction involved discharging the firearm, the term further increased to ten years' imprisonment. § 924(c)(1)(A)(iii). For any "second or subsequent" conviction under § 924(c), the mandatory-minimum, consecutive sentence increased further still, to a term of 25 years' imprisonment. 18 U.S.C. § 924(c)(1)(C).

In *Deal v. United States*, 508 U.S. 129 (1993), "the Supreme Court held that when a defendant is convicted of multiple counts in violation of § 924(c)(1) in a single proceeding, the convictions on all counts after the first one may be treated as 'second or subsequent convictions.'" *United States v. Harper*, 527 F.3d 396, 410-11 (5th Cir. 2008). "The Court rejected the argument that to be treated as a 'prior conviction,' the conviction must be a final judgment from a prior proceeding." *Id.* at 411. Thus, two of Hurst's three convictions under § 924(c) in this case constituted "second or subsequent" convictions, requiring 25-year mandatory-minimum, consecutive sentences.

In 2018, Congress changed § 924(c) so that only a second § 924(c) violation committed after a prior § 924(c) conviction has become final triggers the 25-year minimum. Pub. L. 115-391, § 403(a), 132 Stat. 5221. If convicted today, then Hurst would only have been sentenced to 84

months' incarceration for each of his § 942(c) convictions and not 25 years' incarceration on two of them.

In addition to this claim, Hurst's claimed that compassionate release was appropriate because he was illegally sentenced as a career offender. ROA. 698. Hurst's also argued that a change in the law related to the Armed Career Criminal Act justified a sentence reduction. ROA. 698. Finally, Hurst claimed that the COVID-19 pandemic justified compassionate release. ROA. 698.

The Government's Opposition and Hurst's Reply

The government requested that Hurst's motion for compassionate release be denied. ROA. 708-11. The government argued that there were no extraordinary and compelling reasons for a sentence reduction since those reasons typically exist only when a defendant has "a terminal illness, certain cancers, and end stage diseases." ROA. 709. Further, the government argued that Hurst was still a threat to society because of his criminal history. ROA. 710. Hurst filed a brief reply (ROA. 714-16), in which he stated that the district court had discretion to determine what constitutes an extraordinary and compelling reason for a sentence reduction (ROA. 714).

The Court's Initial Decision and Order

The district court granted Hurst's motion in part and denied it in part. ROA. 721-28. The district court ruled that the discrepancy between Hurst's sentencing exposure for his § 924(c) convictions at the time of his sentencing and when his compassionate release was filed constituted extraordinary and compelling justification for a sentence reduction. ROA. 722-25. The district court observed that, had Hurst been sentenced after the First Step Act was enacted, he would serve three consecutive mandatory minimum sentences of 84 months' incarceration; this aggregate term of incarceration for the § 924(c) convictions would be 252 months' incarceration and not 684 months. ROA. 723. The district court modified Hurst's sentence as if he was sentenced today, resulting in an aggregate term of 512 months' imprisonment for all nine counts. ROA. 725; *see also* ROA. 739.

As to Hurst's next two claims challenging the legality of his sentence, the district court rejected these claims because they "should have been raised on direct appeal or in a motion under 28 U.S.C. § 2255." ROA. 725. The district court stated such errors did not constitute "extraordinary circumstances." ROA. 725. The district court also rejected

Hurst claim that compassionate release was warranted because of the COVID-19 pandemic. ROA. 725-27.

Hurst's Motion for Reconsideration

Hurst moved for reconsideration of his compassionate release motion only as it pertained to the second claim. ROA. 729-33, 743-45. Hurst faulted appellate counsel for failing to raise that claim on appeal. ROA. 731. He also stated that, while he had previously filed a *pro se* § 2255 motion, he was ignorant of the law at the time of that filing. ROA. 731-32. Hurst contended that § 3582(c) empowered the district court to consider his claim in a compassionate release motion. ROA. 732.

The Court's Denial of the Motion for Reconsideration

The district court denied the motion for reconsideration. ROA. 749-50. The district court stated that Hurst's attempt to raise this claim in a compassionate release motion was "inappropriate in this procedural posture" and constituted an attempt to "end run around both the one-year limitations period and the successive petition bar of § 2255." ROA. 750. The district court explained that the claim "could and should have been raised in Hurst's § 2255 motion." ROA. 750.

Hurst timely filed a notice of appeal. ROA. 756-61, 771-73.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Hurst's claim that his sentence was illegal because he was not a career offender as that claim is not cognizable in a compassionate release motion.⁴ Instead, the district court correctly concluded the claim should have been raised in a § 2255 motion. This Court has held that claims that are cognizable in a habeas petition are not cognizable in a compassionate release motion. Therefore, the district court did not abuse its discretion in denying the claim as the decision was not based on an error of law.

ARGUMENT

I. The legal framework for compassionate release.

Generally, a district court "may not modify a term of imprisonment once it has been imposed." 18. U.S.C. § 3582(c); *see Dillon v. United States*, 560 U.S. 817, 824–25 (2010). Section 3582(c), however, allows a court to modify and reduce a sentence of imprisonment under certain, limited circumstances. One such circumstance is known as "compassionate release." *United States v. Escajeda*, 58 F.4th 184, 186

⁴ On appeal Hurst specifically states that he "has no legal authority" to challenge the district court's denial of his third and fourth claim. App. Br. p. 3. Hurst is only arguing that the district court erred in denying his second claim related to his status as a career offender. App. Br. p. 3.

(5th Cir. 2023); 18 U.S.C. § 3582(c)(1)(A). This provision is generally used “for prisoners with severe medical exigencies or infirmities.” *Escajeda*, 58 F.4th at 186.

Prior to 2018, a district court could only grant compassionate release on a motion from the United States Bureau of Prisons (BOP). *United States v. Chambliss*, 948 F.3d 691, 694 n.1 (5th Cir. 2020). Then, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), amended § 3582(c) to allow motions directly from inmates.

A court may grant a defendant’s motion for compassionate release only if three criteria are met: (1) “after considering the factors set forth in section 3553(a), to the extent that they are applicable”; (2) “extraordinary and compelling reasons warrant such a reduction”; and (3) “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18. U.S.C. § 3582(c)(1)(A) (emphasis added). Congress did not define what constitutes extraordinary and compelling reasons.⁵ To establish extraordinary and compelling reasons

⁵ Congress directed the Sentencing Commission to promulgate policy statements defining “what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied.” 28 U.S.C. § 994(t); see § 994(a)(2)(C) (directing the Commission to adopt policy statements regarding the appropriate use of the “sentence modification provisions” in “[§] 3582(c) of title 18”).

for a sentence reduction, a defendant must prove the existence of “some extraordinarily severe exigency, not foreseeable at the time of sentencing” that is also “unique to the life of the prisoner.” *Escajeda*, 58 F.4th at 186.

The relevant policy statement enumerates the extraordinary and compelling reasons that might make a defendant eligible for compassionate release, including: (A) “Medical Condition of the Defendant,” (B) “Age of the Defendant,” (C) “Family Circumstances,” and (D) “Other Reasons” as determined by the Director of the BOP. U.S.S.G § 1B1.13 cmt. n.1. The policy statement also states that the court should weigh any applicable factors under § 3553(a) and not permit release unless it finds that the defendant is “not a danger to the safety of any other person or to the community.” U.S.S.G § 1B1.13(2).

When a prisoner moves for compassionate release, “§ 1B1.13 informs [the] analysis as to what reasons might be sufficiently ‘extraordinary and compelling.’” *United States v. Thompson*, 984 F.3d 431, 433 (5th Cir. 2021) (citing *United States v. Rivas*, 833 F. App’x 556,

558 (5th Cir. 2020) (unpublished)).⁶ Unlike when BOP moves for compassionate release, “neither the policy statement nor the commentary to it *binds* a district court” when the motion is filed by a prisoner. *United States v. Cooper*, 996 F.3d 283, 288 (5th Cir. 2021) (emphasis added) (quoting *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021)).

Certain claims for relief are not cognizable in a § 3582(c) motion. *Escajeda*, 58 F.4th at 187–88. Specifically, “a prisoner cannot use § 3582(c) to challenge the legality or the duration of his sentence.” *Id.* at 187. Instead, defendants must raise these claims on appeal or in a habeas petition. *Id.* at 185–86. That is because “[t]he Supreme Court has repeatedly held that...Congress *required* prisoners to bring their legality-of-custody challenges under Chapter 153 [of Title 28] and *prohibited* prisoners from bringing such claims under other, more-general statutes.” *Id.* at 186–87. This requirement prevents a defendant from utilizing a “more permissive statute” to avoid “the strictures Congress imposed in Chapter 153[.]” such as the limitation on second and successive motions and the statute of limitations. *Id.* at 187.

⁶ Unpublished opinions, though nonprecedential, may be persuasive authority. *E.g.*, *United States v. Olivares*, 833 F.3d 450, 453 n.1 (5th Cir. 2016) (per curiam).

On appeal, this Court reviews a district court's decision to deny a compassionate release motion for an abuse of discretion. *See Id.* at 186 (citing *Chambliss*, 948 F.3d at 693). A district court abuses its discretion if it "bases its decision on an error of law." *United States v. Byrd*, 842 F. App'x 915, 917 (5th Cir. 2021) (unpublished) (quoting *Chambliss*, 948 F.3d at 693).

II. The district court did not abuse its discretion by denying Hurst's claim because it was not cognizable in a compassionate release motion.

Hurst claims the district court erred in denying his claim that his career offender enhancement was illegal because the predicate felony offenses were over 15 years old. App. Br. p. 1. Hurst faults the district court for not using "a legitimate and lawful vehicle" to correct a supposed error at his sentencing. App. Br. p. 8.

The district court's denial of this claim was correct. Hurst's challenge to the legality of his sentence is the "quintessential" type of argument that must be raised in a habeas petition or on direct appeal. *See Escajeda*, 58 F.4th at 187. Claims that are cognizable in a habeas petition may not be raised in a compassionate release motion. *Id.* at 187–88. Thus, the district court properly found that the claim "should have

been raised on direct appeal or in a motion under 28 U.S.C. § 2255.” ROA. 725; *see also* ROA. 750. The district court correctly rejected Hurst’s attempt to “end run around both the one-year limitations period and the successive petition bar of § 2255” by raising the claim in a compassionate release motion. ROA. 750.⁷ Therefore, this Court should affirm the district court’s order. *See Escajeda*, 58 F.4th at 188.

Despite the holding of *Escajeda*, Hurst contends Congress created an “end run for prisoners who have been illegally or unfairly sentenced” in the First Step Act. App. Br. p. 4.⁸ He theorizes that Congress created the compassionate release provisions because Congress recognized “the finality of a sentence should not trump the fair, just, and legal nature of that sentence.” App. Br. p. 8. This Court has clearly rejected these

⁷ In fact, Hurst laments that § 2255 “does not afford a defendant adequate time to research his sentence” given the statute of limitations and the limitation on second and successive habeas petitions. App. Br. p. 8. Yet, this Court explicitly rejected any attempt by a defendant to circumvent those exact procedural rules. In contrast to Hurst’s assertions, the very purpose of requiring that such claims be brought in a habeas petition is to “prevent[] a prisoner from...easily steering around” procedural rules like the statute of limitations or the limitations on second and subsequent habeas petitions. *Escajeda*, 58 F.4th at 187.

⁸ Hurst claims that the electronic law library he used in preparation of his brief had not been updated recently, and, to his knowledge, the issue of “whether or not this type of error is cognizable under [§] 3582(c)(1)(A)” had not yet been “directly addressed” by this Court (App. Br. p. 4).

speculations. *Escajeda*, 58 F.4th at 186-87. Instead of finding that Congress intended to allow defendants to challenge the legality of their sentences seemingly *ad infinitum* in compassionate release motions, this Court has explained that Congress intended to channel such claims into habeas petitions. *Id.* (discussing the habeas-channeling rule). Congress has, in fact, “*required*” defendants to bring their challenges to the legality of their sentences in habeas petitions and “*prohibited*” them from using a compassionate release motion for that purpose. *See Id.* at 187 (emphasis in the original).

Hurst’s challenge to the legality of his sentence is not cognizable in a compassionate release motion. Accordingly, the district court’s denial of the claim on that exact basis was not an abuse of discretion. This Court should affirm.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

ALAMDAR S. HAMDANI
United States Attorney

CARMEN CASTILLO MITCHELL
Chief, Appellate Division

s/ Kristian D. Amundsen
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ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, Kristian D. Amundsen, Assistant United States Attorney, certify that a true and correct copy of the attached brief was filed through the Court's CM/ECF filing system on March 13, 2023

Two paper copies of the attached brief were served by United States certified mail, return receipt requested, upon the following *pro se* appellant on March 13, 2023:

Lewis Gilmore Hurst
Reg. No # 38756-179
FCI Beaumont Medium
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Beaumont, TX 77720-6040

Upon notification that the electronically-filed brief has been accepted as sufficient, and upon the Clerk's request, seven paper copies of this brief will be placed in the United States Mail, postage prepaid, addressed to the Clerk. *See* 5th Cir. R. 25.2.1, 31.1; 5th Cir. ECF filing standard E(1).

s/ Kristian D. Amundsen
KRISTIAN D. AMUNDSEN
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,481 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook, 14-point font for text and 12-point font for footnotes.
3. This brief complies with the privacy-redaction requirement of 5th Cir. R. 25.2.13 because it has been redacted of any personal data identifiers.
4. This brief complies with the electronic-submission requirement of 5th Cir. R. 25.2.1 because it is an exact copy of the paper document.
5. This brief has been scanned for viruses with the most recent version of McAfee Endpoint Security scanning program and is free of viruses.

s/ Kristian D. Amundsen
KRISTIAN D. AMUNDSEN
Assistant United States Attorney
Dated: March 13, 2023

APPENDIX D
APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

§

v.

§

Case No. 22-20544

LEWIS GILMORE HURST,

§

APPELLANT'S BRIEF

COMES NOW, Lewis Gilmore Hurst, pro se, and respectfully submits his brief in support of his appeal of the district court's decision on his motion pursuant to 18 U.S.C. 3582(c)(1)(A).

Hurst's motion under 18 U.S.C. 3582(c)(1)(A) was filed with the United States District Court for the Southern District of Texas - Houston Division on or about 7-15-22. That motion was granted in part and denied in part on 9-14-22. This appeal is focused upon Circumstance #2 in Hurst's motion under 3582. In Circumstance #2 Hurst contends that his enhancement to career offender was erroneous in that he has no prior qualifying offenses. (please see Circumstance #2 of Memorandum in Support of Motion under 18 U.S.C. 3582(c)(1)(A)). All of the prior offenses that the probation department used to justify this career offender enhancement were over fifteen (15) years old and were no longer valid for enhancement purposes according to U.S.S.G. 4A1.2(e)(1).

In the district court's denial of relief on this Circumstance #2 it stated that this was an ordinary trial error and did not

qualify as an extraordinary and compelling circumstance. Hurst submitted a Motion for Reconsideration on the district court's decision on this issue concerning his career offender status. The district court denied Hurst's motion for reconsideration on or about October 6, 2022 stating, again, that this was an ordinary trial error and that relief on this issue is inappropriate in this procedural posture. Hurst respectfully appeals the district court's position on this matter.

FACTS

Hurst was sentenced as a career offender without any qualifying prior offenses. Hurst requested relief from this erroneous sentence in a motion under 18 U.S.C. 3582(c)(1)(A). The Court ordered the Government to respond to Hurst's motion and the Government did so on or about July 26, 2022. The Government made no mention of Circumstance #2 in its Response.

Hurst replied to the Government's Response and attempted to clarify some factual errors in the response but otherwise did not challenge the Government's assessment of him or his request. (please see Government's Response and Hurst's Reply to that Response)

The district court made its decision in this case and reduced Hurst's total sentence from nine hundred forty-six (946) months to five hundred forteen (514) months pursuant to the First Step Act's clarification of the sentencing provisions of 18 U.S.C. 924(e). It denied relief on Circumstance #2 concerning Hurst's career offender

(3)

status, Circumstance #3 concerning Hurst's status as a career offender under the Armed Career Criminal Act, and Circumstance #4 concerning Hurst's health concerns during the Covid/Corona Virus outbreak. Although Hurst did not agree with the district court's decision on these issues, he did not seek reconsideration on issues #3 and #4. Hurst understands and respects the district court's decision on these two circumstances and he has no legal authority at this time with which to legitimately challenge those two decisions. At this time Hurst would like to make his case for a reversal of the district court's denial of relief on Circumstance #2 of his motion under 18 U.S.C. 3582(c)(1)(A).

ARGUMENT

Neither the government nor the District Court has refuted that the career offender enhancement that Hurst challenges in Circumstance #2 of his 3582 motion is improper. The government did not address Circumstance #2 at all while the District Court described it as an ordinary trial error that does not rise to the level of extraordinary and compelling and that correction of this improper enhancement is inappropriate in this procedural posture.

Hurst is unsure whether the District Court thought that it was unable to consider the issue or whether it simply chose not to. If the Court thought it could not consider the issue, Hurst contends

that the Court had the authority to address it. If it chose not to address the issue, then Hurst contends that the Court abused its discretion in failing to address the issue and reduce his sentence accordingly.

The District Court accuses Hurst of attempting an end run around the appeal and 2255 processes. Hurst contends that Congress created and end run for prisoners who have been illegally or unfairly sentenced. The Concepcion court even stated in its opinion that the dissent stands firm on the finality front even though 18 U.S.C. 3582(c)(1)(A) is a vehicle that was designed to re-open final sentences. Hurst contends that he is simply taking advantage of the new provisions of 18 U.S.C. 3582 in bringing his improper sentence to the attention of the Court. The District Court did not demonstrate that it had considered the fact that this ordinary trial error was, in fact, unauthorized and improper.

Whether or not this type of error is cognizable under 3582 (c)(1)(A) has not been directly addressed by the Court of Appeals for the Fifth Circuit as far as Hurst has been able to ascertain, though the Electronic Law Library has not been updated recently, but case law exists at the district court level and it has evolved somewhat over the past year or so.

In United States v. Wells, 836 Fed. Appx. 313 (5th Cir. 2021) the district court determined that it did not need to decide whether 18 U.S.C. 3582(c)(1)(A) or some alternative avenue was the proper vehicle to seek relief for a guidelines calculation because it con-

cluded that Wells' career offender enhancement under 4B1.1 was proper and it rejected Wells' suggestion that his plea was "tentative".

In United States v. Cage, 2020 U.S. Dist. Lexis 73155 (5th Cir. 2020), a case brought under 18 U.S.C. 3582, the district court cites United States v. Black, 388 F. Supp. 3d 682(E.D. Va. 2019) in its denial of Cage's request for a sentence modification stating that: In U.S. v. Black, the government recognized the error in defendant's being considered a career criminal when in fact the predicate offense used to determine that the defendant was a career criminal should not have been considered as an offense under the Guidelines when the defendant was sentenced. Such is not the same in Cage's case. The government has not admitted to any error in Cage's sentencing calculation. Moreover, the government contends that the calculations are without error.

As in Wells the Cage court determined that it was unnecessary to consider whether an improper career offender enhancement at initial sentencing constituted an extraordinary or compelling circumstance because Cage's sentence was not improper at its pronouncement.

In its decision on a 3582(c)(1)(A) motion in the Fourth Circuit in United States v. Black, the Court states: "The Court simply cannot ignore an error of this magnitude, particularly where Black objected to the career offender enhancement before sentencing and raised on appeal a related challenge to his career offender status. Allowing the procedural posture of a case to overrule an individ-

dual's liberty undermines the integrity of the Court system and the value that society places on judges to get things right. The Court sees no reason to overlook this error and fundamental miscarriage of justice particularly where, as here, the First Step Act allows the Court to recalculate Black's Guidelines range. Indeed, the First Step Act affords the Court the opportunity to review the Motion on its merits and to determine the applicable Guidelines range after Congress modified the penalties for certain drug offenses.

- To be sure, the fact that the First Step Act permits sentence modification and all parties now recognize that Black should not have been sentenced as a career offender under settled law at the time of his sentencing makes this case distinguishable from others.

Again, the Cage court cited United States v. Black in distinguishing Cage's case from a case where an actual improper sentence had been imposed at initial sentencing. Hurst's career offender enhancement was improper at his initial sentencing. (please see Circumstance #2 of Hurst's 3582 motion)

More recently, in a motion under 18 U.S.C. 3582(c)(1)(A) in the Fifth Circuit, the Southern Dist. of Mississippi, Northern Division, in United States v. Spicer, 2022 U.S. Dist. Lexis 201689 (Aug. 2022) (reduced term of imprisonment based on erroneous imposition of multiple life sentences at initial sentencing) The Spicer court stated in its opinion - "The court can state with assurance that it would not have imposed six life sentences, four to be served consecutively, had anyone involved in the case - the parties, probation

officer and the court - not been so grievously mistaken about the law. It is certainly not a choice that the court would make today, post Booker, if defendant were appearing for the sentencing for the first time."

The Spicer court reduced Spicer's life sentence to 24 years due to extraordinary and compelling circumstances.

In Rosales-Mirales v. United States, 201 L.Ed. 2d 376 (2018) the Supreme Court stated - "in the ordinary case a failure to correct plain U.S.S.G. error that affected a defendant's substantial rights would seriously affect the fairness, integrity and public reputation of judicial proceedings."

Also in Rosales-Mirales - "A district court has the ultimate responsibility to ensure that the U.S.S.G. manual range it considers is correct and the failure to calculate the correct Guidelines range constitutes procedural error.

A court of appeals can consider a sentence's substantial reasonableness only after it ensures "that the district court committed no significant procedural error, such as failing to calculate (or properly calculate) the Guidelines range." Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 169 L.Ed. 2d 445. If a district court cannot properly determine whether, considering all sentencing factors, including the correct Guidelines range, a sentence is "sufficient but not greater than necessary," 18 U.S.C. 3553(a), the resulting sentence would not bear the reliability that would support a "presumption of reasonableness" on review. See 552 U.S., at 51, 128 S.Ct. 586, 166 L. Ed. 2d 445. And regardless of its ultimate reasonableness, a sen-

tence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings.

- The district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct, and the failure to calculate the correct Guidelines range constitutes procedural error" Peugh, 569 U.S. at 537, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013)

Although the Rosales-Mirales case was decided on direct appeal and not 18 U.S.C. 3582, the error is the same and this is an appeal of the decision by the district court not to notice and correct its procedural error when presented with a legitimate and lawful vehicle with which to do so. It therefore seems proper, to Hurst, for the appeals court to notice and correct the error under whatever authority is appropriate.

Hurst contends that Congress, in inacting the changes to the compassionate release/sentence reduction law has realized that the finality of a sentence should not trump the fair, just, and legal nature of that sentence. The ADEPA put a limit on the number of times a defendant may challenge his or her conviction and/or sentence. The limit on challenges and the one (1) year time constraint placed upon the challenge does not afford a defendant adequate time to research his sentence and all that went into pronouncing it. It takes time to know all of the laws and their respective provisions. Granting the fact that Hurst's erroneous career offender enhancement was inadvertent it becomes evident that even years of cumulative

(9)

legal experience is not adequate to assure that a just and fair sentence is pronounced.

RELIEF REQUESTED

Hurst respectfully prays that this Honorable Court will determine that an improper career offender enhancement at his initial sentencing - that went unnoticed by the district court, the U.S. Attorney, the probation office, and Hurst's sentencing attorney - must be considered an extraordinary and compelling circumstance and be corrected pursuant to 18 U.S.C. 3582(c)(1)(A) notwithstanding the fact that Hurst did not, himself, discover and challenge the error in his direct appeal or his 2255 motion.

Hurst requests that his sentence for the bank robberies be reduced to its proper range of 63 to 78 months and that his aggregate sentence be set at 432 months. 63 months for the banks, 252 months for the 924(c) offenses and 180 months for the ACCA enhancement on the 922(g) conviction.

Respectfully submitted on this 3rd day of February 2023.



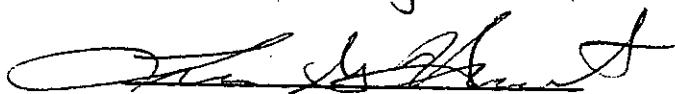
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Lewis Gilmore Hurst, pro se

CERTIFICATE OF COMPLIANCE

I, Lewis G. Hurst do hereby certify that the foregoing Appellant's brief meets all of the word and page limit requirements of the Court of Appeals to the best of my knowledge.

Certified to on this 3rd day of February 2023.



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Lewis G. Hurst, pro se

SWORN DECLARATION

I, Lewis Gilmore Hurst, pro se, do hereby swear under penalty of perjury that the foregoing Appellant's brief is true and correct to the best of my knowledge and recollection.

Sworn to pursuant to 18 U.S.C. 1746 on this 3rd day of February 2023.



Lewis Gilmore Hurst, pro se

CERTIFICATE OF SERVICE

I, Lewis G. Hurst, do hereby certify that true and correct copies of the foregoing Appellant's brief have been forwarded to all interested parties via first class, U.S. Mail by placing same into the prison mailbox on this 3rd day of February 2023.

Interested parties: United States Attorney's Office
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APPENDIX E
OPINION OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States District Court
Southern District of Texas

ENTERED

September 14, 2022

Nathan Ochsner, Clerk

UNITED STATES OF AMERICA,

§
§
§
§
§
§

v.

Criminal Action H-04-355-1

LEWIS GILMORE HURST

Memorandum and Order

Lewis Gilmore Hurst filed a motion for compassionate release and a supplement to that motion, the government responded to the motion, and Hurst has replied to the response. Based on Hurst's motion and supplement, the government's response, Hurst's reply, all the arguments and authorities submitted by the parties, and the relevant record, Hurst's motion is granted in part and denied in part. The reasons for this decision are set forth below.

I. Background

Hurst was convicted on three counts of bank robbery, in violation of 18 U.S.C. § 2113, three counts of brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c), and three counts of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g). This court sentenced Hurst to concurrent 262-month sentences on the bank robbery charges, a consecutive 84-month on the first brandishing charge, and consecutive 300-month sentences on the second and

third brandishing charges, and concurrent 180-month sentences on the possession charges. The net effect of these sentences was a 946-month term of imprisonment. Hurst now moves for compassionate release.

II. Compassionate Release

Title 18, section 3582(c)(1)(A) of the United States Code as amended by the First Step Act allows a sentencing court to modify a sentence on a motion by the defendant if the defendant demonstrates extraordinary and compelling reasons warranting early release. The United States Sentencing Commission issued a policy statement, found at U.S.S.G. § 1B1.13, defining “extraordinary and compelling reasons” as certain medical conditions, including terminal illness, the age of the movant if he is at least 65 years old and certain other conditions are present, and certain enumerated family circumstances. Under the First Step Act, courts considering motions for compassionate release brought by a defendant are not bound, but may be informed, by the policy statement. *See United States v. Shkambi*, 993 F.3d 388 (5th Cir. 2021).

A. Changes to Relevant Sentencing Law

Six hundred eighty four of Hurst’s 946-month sentence are the result of his three convictions for brandishing a firearm. Under the version of 18 U.S.C. § 924(c) in effect at the time of Hurst’s trial, the court was required to sentence Hurst to 84-months on the first brandishing count, and 300-months on each of the second

and third brandishing counts, to run consecutive to each other and to all other sentences for other crimes. That statute has been changed to provide that brandishing convictions only carry the mandatory 300-month minimum if the crime was committed "after a prior conviction under this subsection has become final . . ." 18 U.S.C. § 924(c)(1)(C). If Hurst were convicted of the same crimes under the same circumstances today, he would face a mandatory minimum of 252-months on the brandishing charges rather than the 684-months he received.

The First Step Act is not retroactive to sentences imposed before the Act became effective. This court, however, has authority to modify a sentence under 18 U.S.C. § 3582(c)(1)(A) if there are extraordinary and compelling reasons to do so. Such reasons are present in this case.

Section 3582(c)(1)(A) provides that

[t]he court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without

conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

- (i) extraordinary and compelling reasons warrant such a reduction ... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

The First Step Act modified this statute by adding the provision allowing a defendant to move for a sentence modification on his own. A number of courts reviewing the amended statute have found that subsequent modifications to the law which render an existing sentence significantly harsher than a newly imposed sentence would be for the same crime may constitute extraordinary and compelling circumstances. *See, e.g., United States v. Lyle*, 506 F. Supp. 3d 496 (S.D. Tex. 2020); *United States v. Urkevich*, 2019 WL 6037391 (D. Neb. Nov. 14, 2019).

Hurst's exceedingly harsh mandatory sentence on the brandishing counts is far longer than he would face for the same offenses today. This fact constitutes an extraordinary and compelling reason for modifying his sentence. Congress has passed legislation reflecting a change in policy on sentencing for these crimes, reflecting an acknowledgement that the prior sentencing regime was excessively harsh. The court will modify Hurst's sentence to 84-months on each of the brandishing counts for a total of 252 months to run consecutively to the sentences

imposed on the other charges. This results in a sentence of 514-months imprisonment: concurrent sentences of 262 and 180 months, and three 84-month sentence to run consecutively to each other and to the other sentences.

B. Career Offender Status

In his next two claims, Hurst argues that he was erroneously sentenced as a career offender under the sentencing guidelines and the Armed Career Criminal Act. These claims should have been raised on direct appeal or in a motion under 28 U.S.C. § 2255. They are claims of ordinary trial error, not extraordinary circumstances.

C. Covid-19

Finally, Hurst argues that he should be released due to the Covid-19 pandemic. Hurst notes that he is 62 years old and has certain underlying medical conditions which, he argues, makes him more vulnerable to serious illness or death from Covid.

The court takes judicial notice that the Bureau of Prisons has made Covid vaccines widely available to federal prisoners, and that statistics published by the Centers for Disease Control show that vaccinated individuals have a substantially lower risk of serious illness or death from Covid. See, e.g., https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e2.htm#T2_down.

Under similar facts, other courts have found that the Covid-19 pandemic, even when coupled with underlying health conditions, does not constitute extraordinary and compelling reason for compassionate release when those conditions are managed and the inmate has been offered a vaccine.

This Court agrees with the vast majority of other courts who have ruled, on the basis of present understanding, that the highly effective available vaccines dramatically affect whether an inmate's medical conditions constitute the "extraordinary and compelling reason" required to further consider compassionate release. *See, e.g., United States v. Gomez-Vega*, Cr. No. 19-1382-001 KG, 2021 WL 1339394, at *3 (D.N.M. Apr. 9, 2021) ("[A]bsent any evidence or argument combatting the efficacy of the vaccine's protection to mitigate his medical concerns, the Court is strained to accept that Mr. Gomez-Vega's conditions constitute extraordinary and compelling reasons for compassionate release."); *United States v. Leach*, Cr. No. 3:14-cr-229-MOC-DCK-10, 2021 WL 1318318, at *3 (W.D.N.C. Apr. 8, 2021) ("Defendant therefore can demonstrate an extraordinary and compelling reason as required by § 3582(c)(1)(A)(i), but the facts that support it are likely to soon change once she is vaccinated."); *United States v. Mendoza*, Cr. No. 06-167, 2021 WL 1312920, at *8 (W. D. Pa. April 8, 2021) ("While there are certainly still unknowns about the vaccine administered to Mendoza, it appears that Mendoza's risks of (1) being reinfected by COVID-19, and (2) suffering severe illness if he is reinfected, are speculative because of his vaccination and his initial bout with COVID-19 in May 2020."); *United States v. Singh*, No. 4:15-CR-00028-11, 2021 WL 928740, at *2 (M.D. Pa. Mar. 11, 2021) (concluding that recent vaccination mitigated the inmate's risk such that COVID-19, despite the inmate's underlying conditions, no longer presented an extraordinary and compelling reason to grant compassionate release). Clearly, there can be no bright-

line rule that a vaccinated individual is no longer at compellingly elevated risk, but in most instances, the risk of complications is dramatically reduced. Thus, while anything is possible, there is no articulable reason to believe that [Ortiz] will be a non-responder or will have a different reaction to the vaccine than the vast majority of its recipients, who develop significant antibody protection to the virus. On the present record, then, this Court concludes that [Ortiz]'s vaccination status removes his [underlying conditions] from the category of risk constituting an "extraordinary and compelling reason" to consider compassionate release.

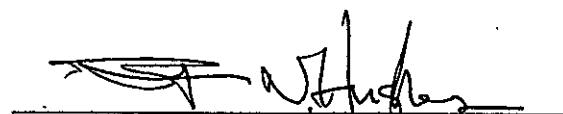
United States v. Harris, No. CR SAG-05-61, 2021 WL 1516012, at *2 (D. Md.

Apr. 16, 2021); vacated on other grds., 2022 WL 636627 (4th Cir. Mar. 4, 2022).

Under the current circumstances, the Covid-19 does not constitute extraordinary and compelling reasons to justify compassionate release.

III. Conclusion And Order

For the foregoing reasons, Hurst's motion for compassionate release (174) is granted in part and denied in part. An Amended Judgment will be entered reflecting the reduced sentences on the brandishing convictions.



Lynn N. Hughes
United States District Judge

Houston, Texas
September 14, 2022