UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2934

United States of America

Plaintiff - Appellee

v.

Timothy DeFoggi, also known as fuckchrist, also known as PTasseater

Defendant - Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:13-cr-00105-JFB-1)

JUDGMENT

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

September 30, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

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MANDATE

In accordance with the judgment of September 30, 2024, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

November 14, 2024

Acting Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY DEFOGGI, Defendant.	**8:13CR105** **MEMORANDUM AND ORDER**

This case comes before the Court on Defendant's third motion for compassionate release, Filing No. 504. For the reasons stated herein, the motion is denied.

I. BACKGROUND

The Court has set forth the background of this case at length elsewhere, including the orders addressing Defoggi's first and second motions for compassionate release, Filing No. 413; Filing No. 488. In short, Defoggi was found guilty of child-pornography offenses and ultimately sentenced to a lengthy term of 300 months' incarceration. After the denial of his appeal and habeas-corpus motion under 28 U.S.C. § 2255, Defoggi moved for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), commonly known as compassionate release. The Court granted the motion based on what it considered to be extraordinary and compelling reasons: Defoggi's disproportionately harsh sentence, his numerous health conditions which put him at risk from contracting COVID-19, and the balance of the § 3553(a) factors including his rehabilitation. Filing No. 413.

The United States appealed the grant of compassionate release, and the Eighth Circuit Court of Appeals reversed, finding there were no extraordinary and compelling

reasons for a sentence reduction. Filing No. 468. On remand, Defoggi filed a second motion for compassionate release, expanding the record on his medical conditions and arguing recent amendments to the sentencing guidelines warranted a grant of compassionate release. Filing No. 481. The Court concluded the amendments to the sentencing guidelines did not change its calculus because it had already considered all the "other reasons" Defoggi put forth before the applicable catch-all section was moved from a footnote to the text of the U.S.S.G § 1B1.13. It also found that Defoggi's age and health conditions did not warrant compassionate release because he was fully vaccinated and had survived COVID-19 infections twice with minor symptoms and provided no information that he was uniquely at risk from COVID-19. As constrained by the Eighth Circuit's remand order, the Court concluded it was without the ability to grant relief to Defoggi. Filing No. 488 at 6.

Defoggi has now filed a third motion for compassionate release, this time proceeding pro se and arguing his prior attorney failed to raise several issues. He points to various sections of the amended sentencing guidelines as a reason he should be granted compassionate release. Filing No. 504 at 3–16. He also argues the § 3553(a) factors support his release and asks for an updated PSR. *Id.* at 16–18.

II. ANALYSIS

First, Defoggi argues for release under amended U.S.S.G § 1B1.13(b)(2), which, as amended, provides that extraordinary and compelling reasons exist if "[t]he defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less." The Court agrees Defoggi meets

the first two prongs, but as repeatedly stated before, he fails the second prong. Although Defoggi provides additional detail and information on his health, the Court has considered his health conditions and difficulties in extensive detail in the previous two compassionate release motions. None of the additional information Defoggi sets forth changes that analysis.

Second, Defoggi argues he should be granted release under amended U.S.S.G. §1B1.13(b)(5), the Guidelines' catchall provisions which allows for release under any "other reasons." Defoggi argues BOP staff have shown a deliberate indifference to inmates' medical needs which places him at a risk of harm. The majority of Defoggi's argument focuses on other the health conditions and treatment of other inmates. The information about his own medical treatment has already been presented and weighed. This argument does not provide a new reason to grant Defoggi compassionate release.

Third, Defoggi argues he qualifies for a reduced sentence under amended U.S.S.G. § 1B1.13(b)(6) which provides:

> If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

U.S.S.G. § 1B1.13(b)(6). Defoggi argues the change in the law that supports a finding his sentence is unusually long is the Supreme Court's ruling in *Elonis v. United States*, 575 U.S. 723, 726 (2015). In *Elonis*, the Supreme Court concluded that the defendant's conviction for communicating a threat in interstate commerce could not be premised on whether a reasonable person would find the communication threatening, but rather

required that the defendant made the communication with, at minimum, knowledge that it would be viewed as a threat. Defoggi interprets this case to mean that the sentencing Court was prohibited from considering the chat messages he exchanged on child pornography forums because they were merely "fantasy" not a threat. Filing No. 504 at 10–11.

Defoggi's reliance on *Elonis* as a change in the law affecting his case is misplaced. *Elonis* dealt with the mens rea element for the crime of conviction, not the proper sentencing considerations as in Defoggi's situation. In the case at hand, the Court correctly considered the fantasy chat messages as part of the "nature and circumstances of the offense" under 18 U.S.C. § 3553(a)(1). Furthermore, as the United States correctly points out, the sentencing judge, while acknowledging that Defoggi may have been fantasizing, also considered that his messages nevertheless had a real-world impact by encouraging others to create child exploitation materials. Therefore, *Elonis* does not constitute a change in the law which would have affected Defoggi's sentence and does not present a basis to grant him compassionate release.[1]

Fourth, Defoggi argues the factors under § 3553(a) support release and asks for a new PSR. The Court has extensively addressed the § 3553(a) factors in previous orders. Furthermore, the § 3553(a) factors alone do not support compassionate release; the Court must also find extraordinary and compelling reasons exist. Because there are

[1] Defoggi also argues the Court should find he received an unusually long sentence based on changes in the law surrounding the use of acquitted conduct in sentencing. Filing No. 504 at 11. However, the case he cites to is a denial of certiorari, not a case constituting a change in the law. *See McClinton v. United States*, 143 S. Ct. 2400 (2023). Furthermore, the Court notes that the acquitted-conduct argument was extensively litigated as part of Defoggi's direct appeal. Filing No. 335. Therefore, this does not provide a basis for compassionate release at the present time.

no such reasons here, there is no need to further consider the § 3553(a) factors or order a new PSR to address them.

III. CONCLUSION

For the reasons set forth herein, Defoggi's third bite at the apple is unsuccessful. The Court denies his motion for compassionate release. Furthermore, his request for default judgment is denied as moot because the Court allowed the United States to respond out of time.

IT IS ORDERED:

1. Defendant's third motion for compassionate release, Filing No. 504, is denied.
2. Defendant's motion for default judgment, Filing No. 506, is denied.

Dated this 11th day of September, 2024.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge

UNITED STATES COURT OF APPEALS
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No: 24-2934

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Appellee

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Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:13-cr-00105-JFB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 07, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 8 Bail—Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Cl 3. Trial by jury.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

§ 875. Interstate communications

(a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on

any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(g) Child exploitation enterprises.

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591 [18 USCS § 1591], section 1201 [18 USCS § 1201] if the victim is a minor, or chapter 109A [18 USCS §§ 2241 et seq.] (involving a minor victim), 110 [18 USCS §§ 2251 et seq.] (except for sections 2257 and 2257A [18 USCS §§ 2257 and 2257A]), or 117 [18 USCS §§ 2421 et seq.] (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term—

(1) "minor" means any person under the age of eighteen years;

(2) (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B) [(8)(B)] of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title [18 USCS § 1030];

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i) (I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have

yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

§ 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

§ 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

HISTORY:

Added Oct. 15, 1970, P. L. 91-452, Title X, § 1001(a), 84 Stat. 951; Oct. 12, 1984, P. L. 98-473, Title II, Ch II, § 212(a)(1), 98 Stat. 1987.

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Oct. 15, 1980, P. L. 96-456, 94 Stat. 2025, which is popularly known as the Classified Information Procedures Act, and appears as this Appendix.

NOTES TO DECISIONS

Any omission in 18 USCS § 793 as to who may receive material is clarified and supplied by government's classification system provided under 18 USCS Appx § 1 for protection of national security. United States v. Morison, 844 F.2d 1057, 15 Media L. Rep. (BNA) 1369, 25 Fed. R. Evid. Serv. (CBC) 647, 1988 U.S. App. LEXIS 4066 (4th Cir. 1988), reh'g denied en banc 1988 U.S. App. LEXIS 8299 (4th Cir. Apr. 29, 1988), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 247, 1988 U.S. LEXIS 4575 (1988).

In context of Classified Information Procedures Act, 18 USCS app. 3 §§ 1–16, when determining whether government's privilege in classified information must give way, criminal defendant becomes entitled to disclosure of classified information upon showing that information is relevant and helpful to defense or is essential to fair determination of cause. United States v. Moussaoui, 382 F.3d 453, 2004 U.S. App. LEXIS 19770 (4th Cir. 2004), cert. denied, 544 U.S. 931, 125 S. Ct. 1670, 161 L. Ed. 2d 496, 2005 U.S. LEXIS 2609 (2005), dismissed, 186 Fed. Appx. 399, 2006 U.S. App. LEXIS 15006 (4th Cir. 2006).

District court's requirement that defendants seek declassification of specific Foreign Intelligence Surveillance intercepts was not abuse of discretion under Classified Information Procedures Act (**CIPA**), 18 USCS App. 3, §§ 1-16, and properly balanced defendants' need to mount defense with Government's need to protect classified information. United States v. El-Mezain, 664 F.3d 467, 2011 U.S. App. LEXIS 24216 (5th Cir. 2011), cert. denied, 568 U.S. 977, 133 S. Ct. 525, 184 L. Ed. 2d 338, 2012 U.S. LEXIS 8467 (2012), cert. denied, 568 U.S. 977, 133 S. Ct. 525, 184 L. Ed. 2d 338, 2012 U.S. LEXIS 8451 (2012).

Because Congress and President as Commander in Chief had exercised their military authority in connection with plaintiff inmate's prior military detention as enemy combatant under Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, court would not imply Bivens action against defendant federal officials; and, administrative concerns also counseled against creating such action in that, while courts would seek protect sensitive information that might come to light in such litigation under Classified Information Procedures Act, 18 USCS app. §§ 1–16, even inadvertent disclosure could jeopardize future acquisition and maintenance of sources and methods of collecting intelligence and chilling effects on intelligence sources of possible disclosures during civil litigation and impact of such disclosures on military and diplomatic initiatives at heart of counterterrorism policy often eluded judicial assessment. Lebron v. Rumsfeld, 670 F.3d 540, 2012 U.S. App. LEXIS 1246 (4th Cir.), cert. denied, 567 U.S. 906, 132 S. Ct. 2751, 183 L. Ed. 2d 616, 2012 U.S. LEXIS 4422 (2012).

Use of terms "classified information" and "national security" do not render 18 USCS Appendix void for vagueness inasmuch as terms are so defined in **CIPA** [18 USCS Appendix §§ 1 et seq.] to convey reasonable degree of certainty to defendant of what is required. United States v. Wilson, 571 F. Supp. 1422, 1983 U.S. Dist. LEXIS 13396 (S.D.N.Y. 1983).

Void for vagueness attack is inapplicable to procedural statute such as Classified Information Procedures Act (18 USCS Appx.). United States v. Collins, 603 F. Supp. 301, 1985 U.S. Dist. LEXIS 22450 (S.D. Fla. 1985).

Classified Information Procedures Act (18 USCS Appx §§ 1 et seq.) is constitutional as applied to criminal defendant, where numerous decisions were made to reconcile previous classification decisions with evidentiary needs and decisions did not impede development of evidence to jury, because defendant received fair trial, notwithstanding some delay, confusion, and substitution of documents. United States v. North, 713 F. Supp. 1452, 1989 U.S. Dist. LEXIS 13731 (D.D.C. 1989).

Court found it unnecessary under Classified Information Procedures Act, 18 USCS app., § 1 et seq., to preclude any evidence sought to be introduced by defendant, as Government stated it had no information that any of materials at issue were classified. United States v. Pickard, 243 F. Supp. 2d 1193, 2002 U.S. Dist. LEXIS 25602 (D. Kan. 2002).

U.S. had rebutted presumption of openness under both First and Sixth Amendments of hearing on motion to suppress based on government's showing that anticipated testimony of Israeli security agents was classified and governed by Classified Information Procedures Act (**CIPA**), 18 USCS app. 3. United States v. Marzook, 412 F. Supp. 2d 913, 2006 U.S. Dist. LEXIS 14243 (N.D. Ill. 2006).

On Government applications for pen register and trap/trace device on cell phones in connection with drug investigation, under Pen/Trap Statute, 18 USCS §§ 3121–3127, or Stored Communications Act, 18 USCS §§ 2701–2712, electronic surveillance orders were not to be sealed indefinitely; thus it was reasonable to establish 180-day period as protocol for sealing and non-disclosure of such orders unless further certifications for extensions were sought; it was noted that pen registers were not "classified" under 18 USCS app. 3, § 1(a), and that under statutes and rules, such as Fed. R. Civ. P. 5.2, 26(c), Fed. R. Crim. P. 41, 18 USCS § 5038, 31 USCS § 3730, 44 USCS § 3601, and 50 USCS § 1801, most documents that could be ordered sealed or that were classified had expiration for secrecy. In re Sealing & Non-Disclosure, 562 F. Supp. 2d 876, 36 Media L. Rep. (BNA) 1993, 2008 U.S. Dist. LEXIS 43100 (S.D. Tex. 2008).

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by defendant. If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply. If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

§ 6. Procedure for cases involving classified information

(a) Motion for hearing. Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information.

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings. If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded

classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity. Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

HISTORY: Amended Feb. 28, 1966, eff. July 1, 1966; April 30, 1979, eff. Aug. 1, 1979; April 29, 2002, eff. Dec. 1, 2002; April 23, 2008, eff. Dec. 1, 2008.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee.

1. The Constitution of the United States, Article III, Section 2, Paragraph 3, provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

28 USC [former] § 114 [see §§ 1393, 1441] provides:

All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district.

The word "prosecutions," as used in this statute, does not include the finding and return of an indictment. The prevailing practice of impaneling a grand jury for the entire district at a session in some division and of distributing the indictments among the divisions in which the offenses were committed is deemed proper and legal, *Salinger v. Loisel,* 265 U.S. 224, 237, 44 S. Ct. 519, 68 L. Ed. 989. The court stated that this practice is "attended with real advantages." The rule is a restatement of existing law and is intended to sanction the continuance of this practice. For this reason, the rule requires that only the trial be held in the division in which the offense was committed and permits other proceedings to be had elsewhere in the same district.

Rule 24. Trial Jurors

(a) Examination.

(1) *In General.* The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) *Court Examination.* If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case.* Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case.* The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) *Misdemeanor Case.* Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

(c) Alternate Jurors.

(1) *In General.* The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) *Procedure.*

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) *Retaining Alternate Jurors.* The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with

anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) *Peremptory Challenges.* Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) *One or Two Alternates.* One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) *Three or Four Alternates.* Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) *Five or Six Alternates.* Three additional peremptory challenges are permitted when five or six alternates are impaneled.

(e) Disclosing the Report and Recommendation.

(1) *Time to Disclose.* Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) *Minimum Required Notice.* The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) *Sentence Recommendation.* By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) *Time to Object.* Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) *Serving Objections.* An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) *Action on Objections.* After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) *In General.* At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and

discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) *Introducing Evidence; Producing a Statement.* The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) *Court Determinations.* At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) *Opportunity to Speak.*

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of

the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

Rule 33. New Trial

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) *Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Rule 52. Harmless and Plain Error

(a) Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

HISTORY: Dec. 26, 1944, eff. March 21, 1946l; April 29, 2002, eff. Dec. 1, 2002.

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

HISTORY: Jan. 2, 1975, P. L. 93-595, § 1, 88 Stat. 1930; April 26, 2011, eff. Dec. 1, 2011.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

HISTORY: Jan. 2, 1975, P. L. 93-595, § 1, 88 Stat. 1932; April. 26, 2011, eff. Dec. 1, 2011.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy — A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick § 152, pp. 319–321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

(a) Deadlines Set. — At the arraignment, the magistrate judge sets discovery and pretrial motion deadlines. These dates are strictly enforced. Motions for an extension of time to file pretrial motions are only granted for good cause shown, and absent good cause shown they must be filed within the pretrial motion filing deadline.

(b) Form of Motion. —

(1) Supporting Briefs. — A motion raising a substantial issue of law must be supported by a brief filed and served together with the motion. The brief must be separate from, and not attached to or incorporated in, the motion. The court may treat a party's failure to simultaneously file a brief as an abandonment of the motion. The brief must (A) concisely state the basis for the motion, (B) cite relevant legal authority, and (C) cite to the pertinent pages of the record, affidavit, discovery material, or other evidence on which the moving party relies. A party's failure to brief an issue raised in a motion may be considered a waiver of that issue.

(2) Evidence. — Unless evidence to be offered in support of a motion will be presented at an evidentiary hearing requested for that motion, when a motion raising a substantial issue of law requires the court to consider factual matters not established by the pleadings or evidence previously filed, the moving party must file additional evidentiary materials on which the party relies. Evidence must be filed under seal upon order of the court or as required under these rules. The evidence must be filed simultaneously with the motion and brief. The method for filing evidence in support of an electronically filed motion is governed by Nebraska Criminal Rule 49.2(a)(2). Evidentiary materials may be attached to the motion or brief if the filing includes a listing of each item of evidence being filed, and the evidence citations within the filing provide hyperlinks to the evidence attached and offered in support of the factual statements. In all other cases, evidentiary materials must not be attached to the brief but rather must be filed separately with an index listing each item of evidence being filed and identifying the motion to which it relates.

(3) Discovery Motions. — A motion seeking discovery or disclosure of evidence must include a statement verifying that (A) the moving party's attorney conferred with the opposing attorney in person or by telephone in a good-faith effort to resolve the issues raised in the motion and (B) the parties were unable to reach an agreement. This showing must also state the date, time, and place of the communications and the names of all participating persons.

(4) Request for Hearing. — If an evidentiary hearing is requested, the motion must state the estimated length of time needed for the hearing, whether an interpreter is needed, and whether any codefendant should be present or participate in the hearing.Unless the pretrial motion is unopposed, see NeCrimR 12.2, or does not raise a substantial issue of law, the motion must be filed as provided in this rule.

(c) Responsive Brief.

(1) Timing.

(A) The time for any party to file a response to a motion to suppress is 14 days after the motion to suppress is filed, unless otherwise ordered by the court.

(B) The time for any party to file a response to all other types of motions is 7 days after the motion is filed, unless otherwise ordered by the court.

(2) Form and Content. — The response must be in the form of a brief in opposition to the motion. A party`s failure to brief an issue raised in a motion may be considered a waiver of that issue. If the response relies on evidence that has not already been filed, the responding party must comply with Nebraska Criminal Rule 12.3(b)(2) in filing its evidence.

(3) Evidentiary Hearing. — If a party requests an evidentiary hearing, the response must state, unless the moving party has already provided the same information, the information required in Nebraska Criminal Rule 12.3(b)(4).

(d) Court-Ordered Evidentiary Hearing.

(1) Order. — The court determines whether an evidentiary hearing is required on a pretrial motion. Nothing in this rule limits the court`s authority to schedule an evidentiary hearing on any issue to assist the court in administering justice or to preserve the parties` right to an evidentiary hearing under the laws or Constitution of the United States.

(2) Notice to Court. — If the court orders a hearing sua sponte, the parties must promptly advise the court of the information required in Nebraska Criminal Rule 12.3(b)(4).

HISTORYAmended October 30, 2009, eff. Dec. 1, 2009; amended eff. Dec. 1, 2013; amended effective December 1, 2017; amended December 1, 2021; amended effective December 1, 2022; amended effective December 1, 2023.

Ch. 1 Pt. A

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defend- ant in concert with others, whether or not charged as a conspir- acy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions de- scribed in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (DETERMINING THE SENTENCE). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Ch. 1 Pt. A

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

(a) IN GENERAL.—Upon motion of the Director of the Bureau of Prisons or the defendant pursuant to 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 orig- inal 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 deter- mines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

(b) EXTRAORDINARY AND COMPELLING REASONS.—Extraordinary and compel- ling reasons exist under any of the following circumstances or a combina- tion thereof:

(1) Medical Circumstances of the Defendant.—

(A) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end-of-life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end- stage organ disease, and advanced dementia.

(B) The defendant is—

(i) suffering from a serious physical or medical condition,

(ii) suffering from a serious functional or cognitive impairment, or

(iii) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deteriora- tion in health or death.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or

at imminent risk of being affected by (I) an ongoing outbreak

of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be adequately mitigated in a timely manner.

(2) AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old;

(B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(3) Family Circumstances of the Defendant.—

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(B) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

(D) The defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving any other immediate family member or an individual whose relation- ship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available

caregiver for such family member or individual. For purposes of this provision, "***immediate family member***" refers to any of the individuals listed in paragraphs (3)(A) through (3)(C) as well as a grandchild, grandparent, or sibling of the defendant.

(4) VICTIM OF ABUSE.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

(A) sexual abuse involving a "sexual act," as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C.
§ 2246(2)(D) regardless of the age of the victim); or

(B) physical abuse resulting in "serious bodily injury," as defined in the Commentary to §1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.

For purposes of this provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

(5) OTHER REASONS.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

(6) UNUSUALLY LONG SENTENCE.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full considera- tion of the defendant's individualized circumstances.

(c) LIMITATION ON CHANGES IN LAW.—Except as provided in subsection (b)(6), a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

(d) REHABILITATION OF THE DEFENDANT.—Pursuant to 28 U.S.C. § 994(t), re-

habilitation of the defendant is not, by itself, an extraordinary and compel- ling reason for purposes of this policy statement. However, rehabilitation

of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what ex- tent a reduction in the defendant's term of imprisonment is warranted.

(e) FORESEEABILITY OF EXTRAORDINARY AND COMPELLING REASONS.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to war- rant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

Ch. 1 Pt. A

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility un- der the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Commentary

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present rele- vant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. *See, e.g., United States v. Ibanez*, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See, e.g., United States v. Jimenez Martinez*, 83 F.3d 488, 494–95 (1st Cir. 1996) (finding error in district court's denial of de- fendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); *United States v. Roberts*, 14 F.3d 502, 521(10th Cir. 1993) (remanding

because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); *see also, United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *See* 18 U.S.C. § 3661; *see also United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a crim-

inal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); *Nichols v. United States*, 511 U.S. 738, 747–48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. *Watts*, 519 U.S. at 157; *Nichols*, 511 U.S. at 748; *United States v. Zuleta- Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991); *United States v.*

Beaulieu, 893 F.2d 1177 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990). Reliable hearsay evidence may be con- sidered. *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Sciarrino*, 884 F.2d 95 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993); *see also United States v. Young*, 981 F.2d 180 (5th Cir.), *cert. denied*, 508 U.S. 980 (1993); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. *United States v. Ortiz*, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 294); November 1, 1991 (amendment 387); November 1, 1997 (amendment 574); November 1, 1998 (amendment 586); November 1, 2004 (amendment 674).

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