

APPENDIX

APPENDIX A

MANDATE

23-6918-cr
United States v. Giattino

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand twenty-four.

PRESENT: **DENNIS JACOBS,
SARAH A. L. MERRIAM,
Circuit Judges;
LAWRENCE J. VILARDO,
*District Judge.****

UNITED STATES OF AMERICA,

Appellee,

v.

No. 23-6918-cr

VINCENT GIATTINO,

Defendant-Appellant,

* Judge Lawrence J. Vilardo of the United States District Court for the Western District of New York, sitting by designation.

THOMAS PITERA, a/k/a Thommy Karate;
RICHARD DAVID; THOMAS CARBONE,
a/k/a Jerry Buccheri, a/k/a Uncle; ANTHONY
FLOTTE, a/k/a Tony Presto, a/k/a Tony
Diamonds; WILLIAM BRIGHT, a/k/a Billy
Bright; FRANK GANGI; LLOYD MODELL,
a/k/a Lorenzo Modica; FRANK MARTINI,
a/k/a Frankie Jupiter; MANNY MAYA;
MICHAEL CASSESE; LOUIS MENA;
ANGELO FAVARA; JUDITH HAIMAWITZ;
RAY ALBERTINA; DENNIS MICHAEL
HARRIGAN,

Defendants.

FOR DEFENDANT-APPELLANT: JOHN VINCENT SAYKANIC, Clifton, NJ.

FOR APPELLEE: STEPHANIE PAK (Susan Corkery, *on the brief*),
Assistant United States Attorneys, *for* Breon
Peace, United States Attorney for the Eastern
District of New York, Brooklyn, NY.

Appeal from an Order of the United States District Court for the Eastern District
of New York (Brodie, *Ch. J.*).

UPON DUE CONSIDERATION, the July 31, 2023, Order of the District Court
is **AFFIRMED**.

Defendant-appellant Vincent Giattino appeals from the Order of the District Court
denying his third motion for compassionate release made pursuant to 18 U.S.C.
§3582(c)(1)(A)(i). We assume the parties' familiarity with the underlying facts,
procedural history, and issues on appeal, to which we refer only as necessary to explain

our decision to affirm.

In 1992, Giattino was convicted after a jury trial of racketeering, murder, narcotics, and firearms offenses related to his association with the Bonanno Crime Family. *See generally United States v. Giattino*, 104 F.3d 354 (2d Cir. 1996) (unpublished table decision). Giattino was sentenced principally to five concurrent sentences of imprisonment for life on the convictions for racketeering, conspiracy-to-murder, and narcotics distribution; two 10-year terms of imprisonment on the convictions for two additional conspiracies to murder counts, to run concurrently with the life sentences; and one 30-year term of imprisonment on the charge of use of a firearm with a silencer, to run consecutively to the sentences on the other counts. *See id.*

On September 2, 2020, Giattino, proceeding without counsel, filed a motion for compassionate release asserting that his health conditions, his rehabilitation efforts in prison, and his relationship with his daughter warranted a sentence reduction and his immediate release from incarceration to home confinement. The District Court denied his motion, finding that the 18 U.S.C. §3553(a) factors did not support a sentence reduction because the life term of imprisonment reflected the seriousness of Giattino's crimes, promoted respect for the law, and provided just punishment. On February 14, 2022, Giattino filed a second motion for compassionate release seeking immediate release or a sentence reduction. The District Court denied that motion, in relevant part, because "the section 3553(a) factors do not warrant a modification of Giattino's sentence in light of the seriousness of his offenses," which included "two heinous murders using guns equipped with silencers and traffick[ing] narcotics." Special App'x at 16-17.

Giattino filed a third motion for compassionate release on November 25, 2022, seeking a reduction of his life sentence to thirty-five years. In this third motion, Giattino argued that his sentence should be reduced in accordance with *United States v. Russo*, 643 F. Supp. 3d 325 (E.D.N.Y. 2022), in which early release was granted to two defendants convicted of similar offenses. Giattino also asserted that the totality of the circumstances established extraordinary and compelling reasons and that a reduction in his sentence would be “consistent with the purposes and objectives of 18 U.S.C. §3553(a).” App’x at 290 (capitalization altered). In his reply briefing before the District Court, Giattino raised for the first time “additional information,” consisting “of a declaration from Salvatore ‘Sammy the Bull’ Gravano, the underboss of the Gambino crime family,” which Giattino asserted mitigated his culpability in the two murders of which he had been convicted. *United States v. Giattino*, No. 1:90CR00424(MKB), 2023 WL 4867564, at *4 (E.D.N.Y. July 31, 2023).

The District Court denied Giattino’s third motion for compassionate release, finding that *Russo* was non-binding and that, in any event, it “present[ed] different factual circumstances than the ones present in this case.” *Id.* The District Court also did “not find the additional information regarding Giattino’s murder convictions compelling.” *Id.* The District Court concluded, for the same reasons it had stated in its two prior denials of Giattino’s motions, that “the section 3553(a) factors do not favor a sentence reduction.” *Id.* Giattino appeals only the District Court’s denial of his third motion for compassionate release.

The denial of a sentence reduction under 18 U.S.C. §3582(c)(1) is reviewed for abuse of discretion. *See United States v. Halvon*, 26 F.4th 566, 569 (2d Cir. 2022) (per curiam). “[A] district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.” *Id.* (citation and quotation marks omitted).

A district court “may reduce” a defendant’s term of imprisonment “after considering the factors set forth in section 3553(a),” if it finds that “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. §3582(c)(1)(A)(i). When a district court concludes that the applicable section 3553(a) factors do not support a sentence reduction, it need not determine whether the defendant has shown extraordinary and compelling reasons. *See United States v. Keitt*, 21 F.4th 67, 73 (2d Cir. 2021) (per curiam).

We find no abuse of discretion in the District Court’s decision. “[A] district court’s reasonable evaluation of the Section 3553(a) factors is an alternative and independent basis for denial of compassionate release.” *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (per curiam) (citation and quotation marks omitted). We therefore need not reach the question of whether Giattino presented extraordinary and compelling circumstances; we affirm based on the District Court’s more than “reasonable evaluation of the Section 3553(a) factors.” *Id.* (citation and quotation marks omitted).¹ The District

¹ Although we do not reach the issue, it bears noting that “challenges to the validity of a conviction are not cognizable as ‘extraordinary and compelling reasons’ under section

Court acted well within its broad discretion in denying Giattino's motion for compassionate release based on the section 3553(a) sentencing factors. The District Court appropriately considered "the nature and seriousness of Giattino's offenses," including "two heinous murders . . . committed in horrific manners"; the need for the sentence to reflect "the seriousness of the offense[s], promote[] respect for the law, and provide[] just punishment for the offense[s]"; and the need to avoid unwarranted sentencing disparities. *Giattino*, 2023 WL 4867564, at *4 (citations and quotation marks omitted).

We have considered Giattino's remaining arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the July 31, 2023, Order of the District Court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

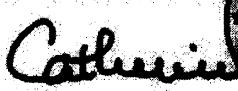


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Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals

Second Circuit


Catherine O'Hagan Wolfe

3582(c)(1)(A)." *United States v. Fernandez*, 104 F.4th 420, 431 (2d Cir. 2024). Nor does a district court "have discretion to consider new evidence proffered for the purpose of attacking the validity of the underlying conviction in its balancing of the 18 U.S.C. §3553(a) factors." *United States v. Amato*, 48 F.4th 61, 63 (2d Cir. 2022) (per curiam).

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand twenty-four.

United States of America,

Appellee,

v.

Thomas Pitera et al.,

Defendants,

Vincent Giattino,

Defendant - Appellant.

ORDER

Docket No: 23-6918

Appellant, Vincent Giattino, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



APPENDIX C

23-6918-cr
United States v. Giattino

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand twenty-four.

PRESENT: DENNIS JACOBS,
 SARAH A. L. MERRIAM,
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 LAWRENCE J. VILARDO,
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UNITED STATES OF AMERICA,

Appellee,

v.

No. 23-6918-cr

VINCENT GIATTINO,

Defendant-Appellant,

* Judge Lawrence J. Vilardo of the United States District Court for the Western District of New York, sitting by designation.

THOMAS PITERA, a/k/a Thommy Karate;
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FOR DEFENDANT-APPELLANT: JOHN VINCENT SAYKANIC, Clifton, NJ.

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In 1992, Giattino was convicted after a jury trial of racketeering, murder, narcotics, and firearms offenses related to his association with the Bonanno Crime Family. *See generally United States v. Giattino*, 104 F.3d 354 (2d Cir. 1996) (unpublished table decision). Giattino was sentenced principally to five concurrent sentences of imprisonment for life on the convictions for racketeering, conspiracy-to-murder, and narcotics distribution; two 10-year terms of imprisonment on the convictions for two additional conspiracies to murder counts, to run concurrently with the life sentences; and one 30-year term of imprisonment on the charge of use of a firearm with a silencer, to run consecutively to the sentences on the other counts. *See id.*

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The denial of a sentence reduction under 18 U.S.C. §3582(c)(1) is reviewed for abuse of discretion. *See United States v. Halvon*, 26 F.4th 566, 569 (2d Cir. 2022) (per curiam). “[A] district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.” *Id.* (citation and quotation marks omitted).

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We find no abuse of discretion in the District Court’s decision. “[A] district court’s reasonable evaluation of the Section 3553(a) factors is an alternative and independent basis for denial of compassionate release.” *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (per curiam) (citation and quotation marks omitted). We therefore need not reach the question of whether Giattino presented extraordinary and compelling circumstances; we affirm based on the District Court’s more than “reasonable evaluation of the Section 3553(a) factors.” *Id.* (citation and quotation marks omitted).¹ The District

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Court acted well within its broad discretion in denying Giattino's motion for compassionate release based on the section 3553(a) sentencing factors. The District Court appropriately considered "the nature and seriousness of Giattino's offenses," including "two heinous murders . . . committed in horrific manners"; the need for the sentence to reflect "the seriousness of the offense[s], promote[] respect for the law, and provide[] just punishment for the offense[s]"; and the need to avoid unwarranted sentencing disparities. *Giattino*, 2023 WL 4867564, at *4 (citations and quotation marks omitted).

We have considered Giattino's remaining arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the July 31, 2023, Order of the District Court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A handwritten signature in black ink, appearing to read "Catherine O'Hagan Wolfe", is placed over a circular official seal or stamp.

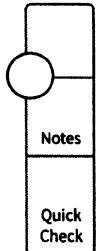
3582(c)(1)(A)." *United States v. Fernandez*, 104 F.4th 420, 431 (2d Cir. 2024). Nor does a district court "have discretion to consider new evidence proffered for the purpose of attacking the validity of the underlying conviction in its balancing of the 18 U.S.C. §3553(a) factors." *United States v. Amato*, 48 F.4th 61, 63 (2d Cir. 2022) (per curiam).

APPENDIX D

2024 WL 4579342

Only the Westlaw citation is currently available.

United States Court of Appeals, Second Circuit.



**UNITED STATES of America, Appellee,
v.**

**Vincent GIATTINO, Defendant-Appellant,
Thomas Pitera, a/k/a Tommy Karate; Richard David;
Thomas Carbone, a/k/a Jerry Buccheri, a/k/a Uncle; Anthony
Flotte, a/k/a Tony Presto, a/k/a Tony Diamonds; William
Bright, a/k/a Billy Bright; Frank Gangi; Lloyd Modell, a/k/a
Lorenzo Modica; Frank Martini, a/k/a Frankie Jupiter; Manny
Maya; Michael Casesse; Louis Mena; Angelo Favara; Judith
Haimawitz; Ray Albertina; Dennis Michael Harrigan,
Defendants.**

No. 23-6918-cr

October 25, 2024

Appeal from an Order of the United States District Court for the Eastern District of New York (Brodie, Ch. J.).

UPON DUE CONSIDERATION, the July 31, 2023, Order of the District Court is
AFFIRMED.

Attorneys and Law Firms

FOR DEFENDANT-APPELLANT: John **Vincent** Saykanic, Clifton, NJ.

FOR APPELLEE: Stephanie Pak (Susan Corkery, on the brief), Assistant **United States** Attorneys, for Breon Peace, **United States** Attorney for the Eastern District of New York, Brooklyn, NY.

PRESENT: DENNIS JACOBS, SARAH A. L. MERRIAM, Circuit Judges; LAWRENCE J. VILARDO, District Judge. *

SUMMARY ORDER

*1 Defendant-appellant **Vincent Giattino** appeals from the Order of the District Court denying his third motion for compassionate release made pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

In 1992, Giattino was convicted after a jury trial of racketeering, murder, narcotics, and firearms offenses related to his association with the Bonanno Crime Family. See generally *United States v. Giattino*, 104 F.3d 354 (2d Cir. 1996) (unpublished table decision). Giattino was sentenced principally to five concurrent sentences of imprisonment for life on the convictions for racketeering, conspiracy-to-murder, and narcotics distribution; two 10-year terms of imprisonment on the convictions for two additional conspiracies to murder counts, to run concurrently with the life sentences; and one 30-year term of imprisonment on the charge of use of a firearm with a silencer, to run consecutively to the sentences on the other counts. See *id.*

On September 2, 2020, Giattino, proceeding without counsel, filed a motion for compassionate release asserting that his health conditions, his rehabilitation efforts in prison, and his relationship with his daughter warranted a sentence reduction and his immediate release from incarceration to home confinement. The District Court denied his motion, finding that the 18 U.S.C. § 3553(a) factors did not support a sentence reduction because the life term of imprisonment reflected the seriousness of Giattino's crimes, promoted respect for the law, and provided just punishment. On February 14, 2022, Giattino filed a second motion for compassionate release seeking immediate release or a sentence reduction. The District Court denied that motion, in relevant part, because "the section 3553(a) factors do not warrant a modification of Giattino's sentence in light of the seriousness of his offenses," which included "two heinous murders using guns equipped with silencers and traffick[ing] narcotics." Special App'x at 16-17.

Giattino filed a third motion for compassionate release on November 25, 2022, seeking a reduction of his life sentence to thirty-five years. In this third motion, Giattino argued that his sentence should be reduced in accordance with *United States v. Russo*, 643 F. Supp. 3d 325 (E.D.N.Y. 2022), in which early release was granted to two defendants convicted of similar offenses. Giattino also asserted that the totality of the circumstances established extraordinary and compelling reasons and that a reduction in his sentence would be "consistent with the purposes and objectives of 18 U.S.C. § 3553(a)." App'x at 290 (capitalization altered). In his reply briefing before the District Court, Giattino raised for the first time "additional information," consisting "of a declaration from Salvatore 'Sammy the Bull' Gravano, the underboss of the Gambino crime family," which Giattino asserted mitigated his culpability in the two murders of which he had been convicted. *United States v. Giattino*, No. 1:90CR00424(MKB), 2023 WL 4867564, at *4 (E.D.N.Y. July 31, 2023).

*2 The District Court denied Giattino's third motion for compassionate release, finding that Russo was non-binding and that, in any event, it "present[ed] different factual circumstances than the ones present in this case." *Id.* The District Court also did "not find the additional information regarding Giattino's murder convictions compelling." *Id.* The District Court concluded, for the same reasons it had stated in its two prior denials of Giattino's motions, that "the section 3553(a) factors do

not favor a sentence reduction.” *Id.* Giattino appeals only the District Court’s denial of his third motion for compassionate release.

The denial of a sentence reduction under 18 U.S.C. § 3582(c)(1) is reviewed for abuse of discretion. See *United States v. Halvon*, 26 F.4th 566, 569 (2d Cir. 2022) (per curiam). “[A] district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.” *Id.* (citation and quotation marks omitted).

A district court “may reduce” a defendant’s term of imprisonment “after considering the factors set forth in section 3553(a),” if it finds that “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A)(i). When a district court concludes that the applicable section 3553(a) factors do not support a sentence reduction, it need not determine whether the defendant has shown extraordinary and compelling reasons. See *United States v. Keitt*, 21 F.4th 67, 73 (2d Cir. 2021) (per curiam).

We find no abuse of discretion in the District Court’s decision. “[A] district court’s reasonable evaluation of the Section 3553(a) factors is an alternative and independent basis for denial of compassionate release.” *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (per curiam) (citation and quotation marks omitted). We therefore need not reach the question of whether Giattino presented extraordinary and compelling circumstances; we affirm based on the District Court’s more than “reasonable evaluation of the Section 3553(a) factors.” *Id.* (citation and quotation marks omitted).¹ The District Court acted well within its broad discretion in denying Giattino’s motion for compassionate release based on the section 3553(a) sentencing factors. The District Court appropriately considered “the nature and seriousness of Giattino’s offenses,” including “two heinous murders ... committed in horrific manners”; the need for the sentence to reflect “the seriousness of the offense[s], promote[] respect for the law, and provide[] just punishment for the offense[s]”; and the need to avoid unwarranted sentencing disparities. *Giattino*, 2023 WL 4867564, at *4 (citations and quotation marks omitted).

We have considered Giattino’s remaining arguments on appeal and find them to be without merit. Accordingly, we AFFIRM the July 31, 2023, Order of the District Court.

All Citations

Not Reported in Fed. Rptr., 2024 WL 4579342

- * [Judge Lawrence J. Vilardo of the United States District Court for the Western District of New York, sitting by designation.]
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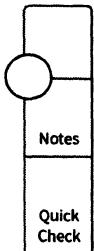
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APPENDIX E

2023 WL 4867564
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.
UNITED STATES of America,
v.
Vincent GIATTINO, Defendant.

90-CR-424 (MKB)
Signed July 31, 2023



Attorneys and Law Firms

Stephen E. Frank, Marietou Diouf, Government Attorney, Miranda Gonzalez, United States Attorney Office, Brooklyn, NY, for United States of America.

MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge:

*1 On November 5, 1992, a jury convicted Defendant Vincent Giattino on eight counts: racketeering, conspiring to commit two murders subject to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., committing two RICO murders, conspiring to distribute cocaine, distributing cocaine, and using a firearm with a silencer, (J. of Conviction 1, Docket Entry No. 270; Presentence Investigation Report ("PSR") 4-5, Docket Entry No. 716). On February 26, 1993, Judge Reena Raggi sentenced Giattino to five concurrent life sentences, two ten-year terms of imprisonment to run concurrent with the life sentences, and one thirty-year term to run consecutive to the other counts to be followed by five years of supervised release, and ordered Giattino to pay a \$200,000 fine, (J. of Conviction 2-3, 5; Sent'g Hr'g Tr. dated Feb. 26, 1993 ("Sent'g Tr.") 73:15-74:7, 74:21-23, Docket Entry Nos. 295, 710).

On November 25, 2022, Giattino filed a third motion for compassionate release, seeking a reduction of his life sentence to thirty-five years.¹ In support, Giattino argues that in a recent decision by Judge Frederic Block of the Eastern District of New York, the life sentences for two other defendants were reduced to thirty-five years, and that his should be similarly reduced. (Def.'s Mot. 1-5.) Giattino also argues that the totality of his circumstances point to the existence of extraordinary and compelling reasons for a reduction in his sentence and that a reduction in his sentence would be consistent with the purposes and objectives of 18 U.S.C. § 3553(a). (*Id.* at 5-9.)

For the reasons discussed below, the Court denies Giattino's renewed motion for compassionate release.

I. Background

a. Investigation, conviction, and sentencing

Between 1986 and 1987, Giattino "negotiated to sell half a kilogram net weight of marijuana" and "distributed an approximate combined total amount of 181 grams net weight of cocaine." (PSR ¶ 17.) "In addition to trafficking in narcotics," in September of 1987 and August of 1988 respectively, Giattino "took part in the murders of Phyllis Burdi and Wilfred 'Willie Boy' Johnson" under the direction of a higher-ranking authority in the Bonnano Crime Family (the "BCF"), a major organized criminal association. (*Id.* ¶¶ 16, 18–20.) On July 29, 1991, agents of the Federal Bureau of Investigation arrested Giattino in Miami, Florida, and found him in possession of false identification documents with the name John Robert Ianniello. (*Id.* ¶ 22.)

On November 5, 1992, a jury convicted Giattino on eight counts: racketeering, conspiring to commit two RICO murders, committing two RICO murders, conspiring to distribute cocaine, distributing cocaine, and using a firearm with a silencer. (*Id.* ¶¶ 1–13; J. of Conviction 1.)

At a sentencing hearing held on February 26, 1993, Judge Raggi noted that Giattino was involved in "truly heinous crimes" and that the murders of Burdi and Johnson "were committed in horrific manners," and sentenced Giattino to five concurrent life sentences, two ten-year terms of imprisonment to run concurrent with the life sentences, and one thirty-year term to run consecutive to the other counts to be followed by five years of supervised release, and ordered Giattino to pay a \$200,000 fine. (Sent'g Tr. 73:3–74:7, 74:21–23; J. of Conviction 2–3, 5.)

b. Prior compassionate release applications

~~F2~~ On September 2, 2020, Giattino filed a motion for compassionate release seeking a modification of his sentence, immediate release to home confinement, and supervised release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). (First Mot. for Compassionate Release, Docket Entry No. 711.) By Order dated November 19, 2020, the Court denied Giattino's motion (the "November 2020 Decision"). (Nov. 2022 Decision, Docket Entry No. 723.) On February 14, 2022, Giattino filed a second motion, seeking immediate release or reduction of his sentence. (Second Mot. for Compassionate Release, Docket Entry No. 726.) By Order dated July 26, 2022, the Court denied Giattino's motion ("July 2022 Decision"). (July 2022 Decision, Docket Entry No. 734.)

c. Current compassionate release application

On November 25, 2022, Giattino filed a third application for compassionate release, four months after the Court denied his second application. (Def.'s Mot.)

In support of his motion, Giattino argues that (1) Judge Block's decision in *United States v. Russo*, Nos. 92-CR-351, 90-CR-1063, 2022 WL 17247005 (E.D.N.Y. Nov. 28, 2022), in which Judge Block granted early release to two defendants convicted of

violent crimes supports his motion for a reduced sentence, (Def.'s Mot. 1-3); (2) the totality of circumstances that he has undergone point to the existence of extraordinary and compelling reasons that warrant a sentence reduction (*id.* at 3-5); (3) a reduction of his life sentence to thirty-five years is consistent with the purposes and objectives of 18 U.S.C. § 3553(a), (*id.* at 5-8); (4) additional information related to the murders of Burdi and Johnson support a reduced sentence, (Def.'s Reply 1-4); (5) other courts have reduced life sentences of those convicted of violent crimes and murders as part of organized crime and with "far greater culpability" than him, (*id.* at 4-8); and (6) sentencing disparities compel a reduction in his sentence, (*id.* at 8-9).

The government opposes the motion arguing that Giattino's motion contains no new facts or controlling law to justify the reversal of the Court's July 2022 Decision, and that Judge Block's decision in a separate case does not overcome the weight of the sentencing factors in 18 U.S.C. § 3553(a) or the absence of "extraordinary and compelling reasons" to warrant his early release. (Gov't Opp'n to Def.'s Mot. ("Gov't Opp'n") 1-7, Docket Entry No. 738.)

II. Discussion

a. Standard of review

"[O]ther than the limited exceptions provided by statutes ... courts are not free to modify sentences at will." *United States v. Martin*, 974 F.3d 124, 135 (2d Cir. 2020); see *United States v. Friedlander*, No. 20-CR-441, 2022 WL 280800, at *1 (E.D.N.Y. Jan. 31, 2022) ("A court may not modify a term of imprisonment once it has been imposed except pursuant to statute." (quoting *United States v. Rabuffo*, No. 16-CR-148, 2020 WL 2523053, at *1 (E.D.N.Y. May 14, 2020))). "A district court may, in an exercise of its discretion, reduce an inmate's term of imprisonment by granting a motion brought under 18 U.S.C. § 3582(c)(1)(A) — the 'compassionate release' provision." *United States v. Van Der End*, No. 21-2079-CR, 2023 WL 193633, at *1 (2d Cir. Jan. 17, 2023). "[T]here are three requirements that must be satisfied before a court can grant such relief" — namely, (1) "absent waiver or forfeiture by the government, an inmate must exhaust administrative remedies by requesting such relief from prison authorities"; (2) "a court must 'consider[] the factors set forth in [section] 3553(a) to the extent that they are applicable' "; and (3) "the inmate must demonstrate that his proffered circumstances are indeed 'extraordinary and compelling' such that, in light of these [section] 3553(a) factors, a sentence reduction is justified under [section] 3582(c)(1)(A) and would not simply constitute second-guessing of the sentence previously imposed."² *United States v. Keitt*, 21 F.4th 67, 71 (2d Cir. 2021) (per curiam) (alterations in original) (quoting 18 U.S.C. § 3582(c)(1)(A)); see also, e.g., *United States v. Davis*, No. 21-716, 2022 WL 1320316, at *2 (2d Cir. May 3, 2022) (citing *Keitt*, 21 F.4th at 71); *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (per curiam); *United States v. Cummings*, No. 20-CR-3156, 2021 WL 4142844, at *1 (2d Cir. Sept. 13, 2021); *United States v. DiBiase*, 857 F. App'x 688, 688-89 (2d Cir. 2021); *United States v. Fernandez*, 853 F. App'x 730, 731-32 (2d Cir. 2021); *United States v. Roney*, 833 F. App'x 850, 852 (2d Cir. 2020).

*3 “A court deciding a compassionate release motion can consider ‘the full slate of extraordinary and compelling reasons that an imprisoned person might bring before [it].’” *Keitt*, 21 F.4th at 71 (alteration in original) (quoting *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020)); *Jones*, 17 F.4th at 374 n.3 (“[D]istrict courts are not confined to those reasons set forth by the [Bureau of Prisons] Director in evaluating compassionate release motions brought by defendants and instead are free ‘to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them.’” (quoting *Brooker*, 976 F.3d at 235–37)); *United States v. Souza*, No. 20-3829, 2021 WL 3871262, at *1 (2d Cir. Aug. 31, 2021) (“[T]he Sentencing Commission’s policy statements do not ‘constrain district courts’ discretion to consider whether any reasons are extraordinary and compelling.’” (quoting *Brooker*, 976 F.3d at 236)).

However, if a defendant cannot satisfy the applicable section 3553(a) sentencing factors, then a district court “need not determine whether the defendant has shown extraordinary and compelling reasons that might (in other circumstances) justify a sentence reduction.” *Van Der End*, 2023 WL 193633, at *1 (quoting *Keitt*, 21 F.4th at 73); see *Jones*, 17 F.4th at 374 (noting that because “extraordinary and compelling reasons are necessary — but not sufficient — for a defendant to obtain relief ...,” panels of this [c]ourt have, in non-precedential summary orders, assumed the[ir] existence ... but held that a district court’s ‘reasonable evaluation of the [applicable] [s]ection 3553(a) factors’ is ‘an alternative and independent basis for denial of compassionate release’” (quoting *United States v. Robinson*, 848 F. App’x 477, 478 (2d Cir. 2021))); see also, e.g., *United States v. Cherry*, No. 21-913, 2022 WL 1210663, at *2 (2d Cir. Apr. 25, 2022) (“[S]ection 3582(c) permits a district court to reduce a sentence only if, ‘after considering the factors set forth in section 3553(a),’ it ‘finds that extraordinary and compelling reasons warrant such a reduction.’ Thus, ... a finding that the section 3553(a) factors disfavor early release is independently sufficient to deny a compassionate-release motion’” (first quoting 18 U.S.C. § 3582(c)(1)(A); and then citing *Keitt*, 21 F.4th at 73)); *Souza*, 2021 WL 3871262, at *2 (affirming ruling that “even if [a defendant]’s medical conditions demonstrated extraordinary and compelling reasons for release, ‘the factors set forth in [section 3553(a)] militate toward continued confinement’” (quoting *United States v. Bolino*, No. 06-CR-806, 2020 WL 4749807, at *2 (E.D.N.Y. Aug. 17, 2020))); *Roney*, 833 F. App’x at 853 (“We need not decide whether [the appellant] has proffered an extraordinary and compelling reason that warrants his release ... because, even assuming *arguendo* that he has, we discern no abuse of discretion in the district court’s conclusion that release is nevertheless unwarranted upon consideration of the [section] 3553(a) factors.”); *United States v. Mattes*, No. 20-CR-2349, 2022 WL 260395, at *2 (2d Cir. Jan. 28, 2022) (“[A] district court’s reasonable evaluation of the [s]ection 3553(a) factors is an alternative and independent basis for denial of compassionate release.” (quoting *Jones*, 17 F.4th at 374)).

b. The 18 U.S.C. § 3553(a) sentencing factors do not warrant a sentence reduction

Giattino argues that Judge Block's decision in *United States v. Russo* in which Judge Block granted early release to two defendants convicted of violent crimes supports his motion for a reduced sentence. (Def.'s Mot. 1-3 (citing *Russo*, 2022 WL 17247005).) In support, he argues that Judge Block reduced the life sentences of Anthony Russo and Paul Moore, two defendants with similar organized crime backgrounds to Giattino, to thirty-five years' imprisonment and therefore, the Court should grant Giattino similar relief. (*Id.* at 1-3.) In addition, Giattino argues that newly discovered information related to the murders of Burdi and Johnson support a reduced sentence. (Def.'s Reply 1-4.) In support, Giattino contends that “[m]ultiple interviews with former underboss or ‘second in command’ of the Gambino family and Government cooperator, Salvatore ‘Sammy the Bull’ Gravano, has yielded new facts that this Court should consider,” including that Giattino “did not directly participate in either murder and shoot and kill Burdi or Johnson,” nor “was he involved in the organizing or planning of either murder.” (*Id.* at 1-4.) Giattino also argues that the totality of circumstances that he has undergone point to the existence of extraordinary and compelling reasons including “the 30 years of incarceration that he has served,” “the harsh duration of his sentence,” his “remarkable record of rehabilitation and good conduct in prison given his life sentence, and extremely low risk of recidivism,” “service and mentorship to others,” “strong family relationships,” “dedication and commitment to his daughter,” “support network and reentry plan,” “age and serious medical conditions that make him vulnerable to more serious illness from COVID-19, and the deterioration of his health that will undoubtedly occur over the course of his life sentence given the aging process and effects of long-term incarceration,” and “harsh and brutal conditions that he has suffered in prison during the pandemic.” (Def.'s Mot. 3-4.) He further argues that a reduction of his life sentence to thirty-five years “is consistent with the purposes and objectives of 18 U.S.C. § 3553(a).” (*Id.* at 5-8.) Lastly, Giattino argues that other courts have reduced life sentences of those convicted of violent crimes and murders as part of organized crime and with “far greater culpability,” (Def.'s Reply 4-8); and that sentencing disparities compel a reduction in Giattino's sentence, (*id.* at 8-9).

***4** The Government argues that the Court should deny Giattino's motion because he presents no new evidence or controlling law. (Gov't Opp'n 2-3.) In support, the Government argues that *Russo* is not controlling law because it was issued by a district court in this circuit and that in any event, *Russo* is not applicable to or persuasive as to the facts of this case.³ (*Id.*) In addition, the Government argues that the section 3553(a) factors militate against early release. (*Id.* at 3-6.)

Russo is not binding on the Court. As the Court stated in the July 2022 Decision, “to the extent that Defendant relies on other district court decisions granting compassionate release to defendants whom he believes to be similarly situated, these cases are non-binding, and Giattino has not shown that his sentence creates unwarranted sentencing disparities in light of the intensely fact-specific rulings in those cases.” (July 2022 Decision 8-9.) *Russo*, and other district court cases cited by

Giattino, (see Def.'s Reply 4–6), present different factual circumstances than the ones present in this case. See *United States v. Brown*, No. 21-122, 2021 WL 5872940, at *2 (2d Cir. Dec. 13, 2021) (finding that defendant's reliance on "district court decisions granting compassionate release to defendants he deems to be similarly situated" was unavailing because those cases were "non-binding" and "present[ed] different factual circumstances"); cf. *United States v. Rigas*, 583 F.3d 108, 116 (2d Cir. 2009) ("[A] District Court must make an individualized assessment based on all the sentencing factors in § 3553(a).").

In addition, the Court does not find the additional information regarding **Giattino**'s murder convictions compelling. As an initial matter, **Giattino** raises this argument for the first time in his reply brief, but the Court need not consider new arguments made in a reply brief. See *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003) ("We will not consider an argument raised for the first time in a reply."); *United States v. Maciejewski*, 70 F. Supp. 2d 129, 137 (N.D.N.Y. 1999), *aff'd sub nom. United States v. Best*, 219 F.3d 192 (2d Cir. 2000) (declining to consider new arguments made in criminal post-trial motion). Nevertheless, **Giattino**'s additional evidentiary submission does not warrant a sentence reduction. The evidence consists of a declaration from Salvatore "Sammy the Bull" Gravano, the underboss of the Gambino crime family, stating that to his knowledge, he has "never heard **Vincent Giattino**'s name mentioned" in connection with the murders of Burdi and Johnson. (Decl. of Salvatore Gravano ("Gravano Decl.") ¶¶ 5–9, annexed as Ex. A to Def.'s Reply, Docket Entry No. 744.) Gravano's declaration regarding what he remembers hearing about murders that occurred almost thirty-five years ago does not cast doubt on **Giattino**'s conviction. **Giattino** was convicted of RICO murders after an extensive jury trial and significant evidence was presented against him and his co-defendants. In addition, a jury convicted **Giattino** of six other serious crimes. (PSR ¶¶ 1–13; J. of Conviction 1.)

Giattino's remaining arguments were previously made in his second motion for compassionate release. The Court already addressed and rejected those arguments in its July 2022 Decision. (July 2022 Decision 8–12.) In the July 2022 Decision, the Court found that the section 3553(a) factors did not favor release, given the nature and seriousness of **Giattino**'s offenses. (*Id.*) **Giattino** committed two heinous murders using guns equipped with silencers and trafficked narcotics as a devout member of Bonanno Crime Family. (See PSR ¶¶ 16–22; Gov't's Opp'n 2.) During sentencing, Judge Raggi acknowledged the "evidence about truly heinous crimes" and "murders that were committed in horrific manners." (Sent'g Tr. 73:3–6.) The life sentence that Judge Raggi imposed when considering "the horrible crimes committed," (*id.* at 73:8–10), plainly "reflect[s] the seriousness of the offense, ... promote[s] respect for the law, and ... provide[s] just punishment for the offense,"

18 U.S.C. § 3553(a)(2)(A); see *United States v. Robinson*, No. 21-CR-1865, 2022 WL 2204126, at *3 (2d Cir. June 21, 2022) (holding that the district court did not abuse its discretion in finding that the defendant's "rehabilitation ... was insufficient to justify relief"); *United States v. Vaughn*, No. 21-CR-1984, 2022 WL 2203857, at *1 (2d Cir.

June 21, 2022) (affirming denial of compassionate release where district court “considered [the defendant's] medical condition exposing him to risk from COVID-19, his good behavior while incarcerated, and the support he will receive from his spouse upon release” but “nonetheless reasonably concluded that reducing [the defendant's] sentence by more than six years was unwarranted”); *United States v. Garcia*, No. 21-CR-1181, 2022 WL 2154675, at *2 (2d Cir. June 15, 2022) (affirming denial of compassionate release where district court acknowledged the defendant's commitment to rehabilitation but concluded that his criminal history and seriousness of his crime counseled against release); *United States v. Reyes*, No. 20-3285, 2022 WL 1669388, at *1 (2d Cir. May 26, 2022) (affirming denial of compassionate release where the “court acknowledged [the defendant's] efforts toward rehabilitation, [but] nevertheless found that the [] section 3553(a) factors weighed heavily against a sentence reduction” in light of the defendant's conduct); *United States v. Williams*, No. 22-4156, 2022 WL 1554649, at *2 (2d Cir. May 17, 2022) (affirming denial of compassionate release where “[t]he district court held that [the defendant] was not entitled to a sentence reduction under the [] section 3553(a) factors because of the seriousness of his offenses and because the danger to the community outweighed any rehabilitative attempts, given the severity of his offenses which included murder, distributing drugs, and participating in a gang”); *United States v. Stinson*, No. 20-CR-3744, 2021 WL 5499478, at *1 (2d Cir. Nov. 24, 2021) (affirming denial of compassionate release where the district court noted the defendant's rehabilitation and “positive contributions” to try to mentor other individuals and specifically young people to “get their lives on track once they get out”); *Cummings*, 2021 WL 4142844, at *2 (“While we commend [the defendant] for his efforts at self-improvement while incarcerated, we conclude that the [d]istrict [c]ourt did not abuse its discretion when it considered these points and still found that the [s]ection 3553(a) factors weighed against release.”). Therefore, the Court finds that the [] section 3553(a) factors do not favor a sentence reduction.

III. Conclusion

*5 Accordingly, the Court denies Giattino's motion for compassionate release.

All Citations

Not Reported in Fed. Supp., 2023 WL 4867564

Footnotes

1 (Def.'s Mot. for Compassionate Release (“Def.'s Mot.”), Docket Entry No. 735; Def.'s Reply in Supp. of Def.'s Mot. (“Def.'s Reply”), Docket Entry No. 744.)

2 “The statute sets out a fourth requirement: that the ‘reduction is consistent with applicable policy statements issued by the Sentencing Commission.’” *United States v. Keitt*, 21 F.4th 67, 71 n.2 (2d Cir. 2021) (per curiam) (quoting 18 U.S.C. § 3582(c)(1)(A)). However, the Second Circuit has “held that, at present, the policy statement governing compassionate release – U.S.S.G. § 1B1.13 – governs only motions brought by the Director of the Bureau of

Prisons, not those brought directly by inmates.” *Id.* (citing *United States v. Brooker*, 976 F.3d 228, 236–37 (2d Cir. 2020)). The Sentencing Commission has adopted an amendment, effective November 1, 2023, to U.S.S.G. § 1B1.13 to reflect that 18 U.S.C. § 3582(c)(1)(A) authorizes a defendant to file a motion seeking a sentence reduction. See Adopted Amendments (Effective November 1, 2023) to the Federal Sentencing Guidelines 1, U.S. Sent’g Comm’n, <https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2023> (“Section 1B1.13 is amended — by inserting at the beginning the following new heading: “(a) In General.—”; by striking “Bureau of Prisons under” and inserting “Bureau of Prisons or the defendant pursuant to....”).

3 The Government frames Giattino’s compassionate release motion as a motion for reconsideration, however the Court notes that Giattino does not indicate that his motion is for reconsideration of the Court’s July 2022 Decision. Therefore, the Court considers the motion as a new motion for compassionate release.

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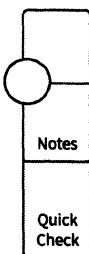
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APPENDIX F

31 Fed.Appx. 7

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.

**Vincent GIATTINO, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.**

Docket No. 01-2354.

Feb. 15, 2002.

Synopsis

Defendant filed motion to vacate. The United States District Court for the Eastern District of New York, Reena Raggi, J., denied motion. Defendant appealed. The Court of Appeals held that factual finding that movant did not file motion to vacate within limitations period was not clearly erroneous.

Affirmed.

West Headnotes (1)

1 **Criminal Law**

District court's factual finding that movant did not file motion to vacate within limitations period was not clearly erroneous, given court's careful consideration of movant's testimony and persuasive reasons for rejecting it, precluding Court of Appeals' consideration of movant's arguments concerning alleged ineffective assistance of counsel and application of prison mailbox rule. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2255; Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

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Criminal Law

Post-Conviction
Relief

Proceedings

In General

Time for
Proceedings

[*8 Appeal from the United States District Court for the District of New York, Raggi, J.

Attorneys and Law Firms

Bobbi C. Sternheim, New York, NY, for Appellant.

Jodi Avergun, Assistant United States Attorney, Brooklyn, NY, for Appellee.

Present POOLER, and SOTOMAYOR, Circuit Judges, LEWIS A. KAPLAN, District Judge.

SUMMARY ORDER

****1 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the order of said District Court be and it hereby is **AFFIRMED**.

Vincent Giattino appeals from an order denying his motion, made under 28 U.S.C. § 2255, for vacation of his conviction. On November 24, 1999, Giattino filed a Section 2255 motion dated April 16, 1997, in the Office of the Clerk of the United States District Court for the Eastern District of New York. In an accompanying affidavit, Giattino explained that this motion was a photocopy of one he had mailed to the Clerk's office on April 14, 1997. He noted that in 1997 he was aware of a need to file his petition by April 23, 1997, under the new Anti-Terrorism and Effective Death Penalty Act's one year statute of limitations, 28 U.S.C. § 2255 ¶ 6. Giattino also said that he was "quite certain" of the date of mailing because it was his birthday. Robert M. Barry, an inmate law clerk, submitted an affidavit in which he claimed that he observed Giattino placing the motion in a legal mailbox and that the two joked that the petition was Giattino's birthday present to himself. Giattino claimed that he was lulled into inaction during the months after his mailing by another inmate's assurance that the courts were overwhelmed with Section 2255 motions due to the new accelerated filing deadline. By January 1999, Giattino had become concerned enough to ask Barry whether the delay in his case was unusual. Barry's wife called the Clerk's office on Giattino's behalf and found that the Clerk had no record of ever receiving Giattino's motion.

Giattino's motion is based on the alleged failure of the government to disclose a witness' prior cooperation with law enforcement and on ineffective assistance of counsel. In his affidavit, Giattino claimed that his attorney, James Froccaro, denied him the right to testify in his own defense.^{¶9} Froccaro submitted an affidavit in which he stated that he "did not permit [Giattino] to testify at trial."

The district court (Reena Raggi, Judge) appointed counsel for Giattino and scheduled a hearing to consider the timeliness of his petition and the merits of his ineffective assistance of counsel claim. Giattino, Froccaro, and the Assistant United States Attorney who prosecuted Giattino testified at the hearing.

At the close of the hearing, Judge Raggi denied Giattino's petition, finding that it was untimely and, in any case, lacked merit. She nevertheless granted a certificate of appealability on both timeliness and ineffective assistance of counsel. With respect to the timeliness issue, the judge found Giattino's testimony that he mailed

the motion in mid-April 1997 to be incredible. She cited several factors supporting her conclusion including Giattino's initial assertion that he was certain he mailed the motion on April 14, 1997, which conflicted with the date of the motion; Giattino's failure to explain this discrepancy at the hearing; the general incoherence of Giattino's testimony; and the long delay between Giattino's learning that his motion had not been received by the court and his filing of an alleged copy.

****2** On appeal, Giattino argues that trial counsel was deficient in prohibiting Giattino from testifying in his own behalf and, citing *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), that his motion should have been deemed timely under the so-called "prison mailbox rule." Giattino fails to confront directly or plausibly the district court's factual finding that he did not attempt to file his motion at any time "up to early 1998," which, because Giattino had a direct appeal pending until November 1996 and was entitled to an additional period to file a certiorari petition, the district court found was the latest possible time during which he could have filed his motion. We may reverse this factual finding-and thus reach Giattino's arguments-only if it is clearly erroneous. Fed.R.Civ.P. 52(a); cf. *Whaley v. Rodriguez*, 840 F.2d 1046, 1050 (2d Cir.1988) (holding on appeal from a district court's grant of a habeas petition that this court may reject "the district court's findings of basic historical fact, if they are clearly erroneous"). The district court carefully considered Giattino's testimony and gave persuasive reasons for rejecting it. Therefore, there was no clear error in the court's finding that Giattino's motion was not timely, and we do not reach Giattino's arguments concerning the ineffectiveness of his counsel or the prison mailbox rule.

All Citations

31 Fed.Appx. 7, 2002 WL 243735

Footnotes

* The Honorable Lewis A. Kaplan, **United States** District Court Judge for the Southern District of New York, sitting by designation.

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APPENDIX G

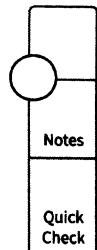
104 F.3d 354

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See Federal Rule of Appellate Procedure 32.1 and this court's local Rule 32.1.1. for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Second Circuit.



UNITED STATES OF AMERICA, Appellee,

v.

Vincent GIATTINO, Defendant-Appellant.

No. 95-1503.

Nov. 5, 1996.

[Appeal from the United States District Court for the Eastern District of New York.]

Attorneys and Law Firms

Appearing for Appellant: James R. Froccaro, Port Washington, N.Y.

Appearing for Appellee: Elisa Liang, Ass't U.S. Att'y, EDNY, Brooklyn, N.Y.

Synopsis

E.D.N.Y.

AFFIRMED.

Procedural Posture(s): On Appeal.

Before KEARSE, WALKER and JACOBS, Circuit Judges.

Opinion

*1 This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

[Defendant Vincent Giattino appeals from a judgment entered in the United States District Court for the Eastern District of New York convicting him, following a jury

Ltrial before Reena Raggi, *Judge*, of racketeering, murder, narcotics, and firearms offenses, in violation of 18 U.S.C. §§ 924(c), 1952B(a)(1) and (5), 1962(c), 3623, and 2; and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), (B), and (C), and 846. Giattino was sentenced principally to five concurrent life terms of imprisonment, two 10-year terms to be served concurrently with the life terms, and one 30-year term to be served consecutively to the other terms, to be followed by 23 years of supervised release, and was ordered to pay a \$200,000 fine. On appeal, he contends principally that there was insufficient evidence (a) to establish a nexus with interstate commerce and (b) to establish that he committed a murder in order to “maintain or increase” his position in a racketeering enterprise, in violation of 18 U.S.C. § 1952B. He also contends that his conviction should be vacated because the government failed to disclose *Brady* material that could have been used to cross-examine the government witness Hunt. Finding no merit in his contentions, we affirm.

In challenging the sufficiency of the evidence to support his conviction, a defendant bears a heavy burden. In order to prevail, he must show that, after viewing the evidence in the light most favorable to the government, a rational jury could not have found him guilty beyond a reasonable doubt. See, e.g., **United States v. Matthews**, 20 F.3d 538, 548 (2d Cir.1994). The government “need not exclude ‘every possible hypothesis of innocence.’” **United States v. Sureff**, 15 F.3d 225, 228 (2d Cir.1994) (quoting **United States v. Friedman**, 998 F.2d 53, 59 (2d Cir.1993)).

The interstate commerce connection needed to support a racketeering conviction is minimal. See, e.g., **United States v. Barton**, 647 F.2d 224, 233 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981). The government need only show that the enterprise itself engaged in or affected interstate commerce, regardless of the role of the individual enterprise member. See, e.g., **Khaimi v. Schonberger**, 664 F.Supp. 54, 60 (E.D.N.Y.), *aff'd mem.*, 838 F.2d 1203 (2d Cir.1987). In the present case, Giattino was shown to be a member of the Pitera crew of the Bonanno organized crime family, and the government presented extensive evidence as to interstate crimes committed by that crew, including accomplice witness testimony with regard to, *inter alia*, a shipment of narcotics from California to New York. The evidence was ample to permit the jury to infer that interstate commerce had been affected by the acts of the Pitera crew.

F2 Nor do we find merit in Giattino's challenge to the sufficiency of the evidence to convict him for murdering an individual “for the purpose of ... maintaining or increasing position in an enterprise engaged in racketeering activity,” 18 U.S.C. § 1952B. To come within this section, “[s]elf-promotion need not have been the defendant's only, or even his primary, concern, if [the crime] was committed as an integral aspect of membership in the enterprise.” **United States v. Thai**, 29 F.3d 785, 817 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 115 S.Ct. 456 (1994); **United States v. Concepcion**, 983 F.2d 369, 381 (2d Cir.1992), *cert. denied*, 510 U.S. 856 (1993). The motive requirement is satisfied where “the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in

furtherance of that membership." *Id.* Here the government presented evidence that Giattino helped to murder Phyllis Burdi at the behest of Tommy Pitera, who had a personal vendetta against Burdi. The record permitted the inference that Giattino participated in the murder in order to please Pitera, his superior in the Bonanno crime family, an organization in which he was hoping to be promoted to the status of a "made" member with Pitera's sponsorship. This was ample evidence to permit a rational juror to infer that Giattino participated in the murder in order to maintain or increase his role in the organization.

Finally, we reject Giattino's *Brady* claim. The government is obliged to disclose favorable evidence that is material to the defense. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here the government had in fact made pretrial disclosure to Giattino of the allegations against Hunt. Though opinions in two other cases granting new trials on the basis of allegations of Hunt's misconduct had not yet been rendered, see *Alvarez v. United States*, 808 F.Supp. 1066, 1097 (S.D.N.Y.1992); *United States v. Bravo*, 808 F.Supp. 311, 326 (S.D.N.Y.1992), well publicized comments by the court in another case prior to Giattino's trial, *United States v. Lara*, 89 CR 1006(KC) (S.D.N.Y. Hearing Transcript Aug. 7, 1990), had raised serious questions as to Hunt's conduct, warning the government to "very carefully re-examine this case.... This is the integrity of the United States Attorney's Office and the DEA which transcends the question of whether these agents get off the hot spot...." (*Id.* at 719-20.) In a pretrial letter in which the government disclosed to Giattino the allegations that there had been misconduct by Hunt, the government also discussed the *Lara* court's comments. The contention that Giattino did not pursue the allegations against Hunt in cross-examination merely because the government said it believed the allegations were without substance is scarcely credible and in any event cannot gain him a new trial.

***3** Nor were the allegations with regard to Hunt material to Giattino's case, see generally, *Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995) (favorable evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different). Hunt's testimony took up less than five pages of the 1,188-page trial transcript, and the other evidence of Giattino's commission of the offenses with which he was charged was ample. We see no error in the district court's assessment that the result of the trial would not have been different even if Hunt had been impeached.

We have considered all of Giattino's contentions on this appeal and have found them to be without merit. The judgment of conviction is affirmed.

All Citations

104 F.3d 354, 1996 WL 636542 (Table)

APPENDIX H

United States Court of Appeals for the Second Circuit
United States of America, Plaintiff-Appellee

v.

Vincent Giattino, Defendant-Appellant

Case No. 23-6918

Proceedings on Appeal from the United States District Court
October 16, 2024

JUDGE SARAH A. L. MERRIAM: ...is our final case for argument today, which is United States versus Vincent Giattino. Case number is 23-6918. Okay, great. Thank you, [laugh]. Oop, that's right. That's Judge Vilardo's.

JUDGE LAWRENCE J. VILARDO: Thank you.

JUDGE MERRIAM: And counsel for Mr. Giattino, have you checked in with the clerk?

MR. JOHN VINCENT SAYKANIC: I did not. I apologize. Good morning, Your Honors, I'm John Vincent Saykanic on behalf of the appellant Vincent Giattino.

JUDGE MERRIAM: Good morning. Hang, hang on one second, counsel. Let me just make sure we get the, the clock set and that I know it looks like you're reserving one minute for rebuttal. Is that right?

MR. SAYKANIC: I take one minute.

JUDGE MERRIAM: All right. So, you've reserved one minute. You may begin.

MR. SAYKANIC: Your Honor, I submitted an opening brief and a reply brief, and I also did a Rule 28(J) letter. I would just like to briefly highlight some of the more salient issues. Mr. Giattino will be 72 in April, but he's a really, really old 71-year-old. There are young 71-year-olds, and there's old 71-year-olds. He's a really, really, really old 71-year-old. He had no criminal history points when he was sentenced by Judge Raggi in '93. And my main argument, of course, is that she abused her discretion by not granting compassionate release and not reducing his sentence. Now, the government submitted a 28(J) letter also on same day I did. And they cite the new Fernandez case, but I will point out that Fernandez allows the district court to reduce the term of imprisonment if it finds extraordinary and compelling reasons to warrant such a reduction. And I submit that's a situation here. Mr. Giattino is a totally changed man. And 3553 I think is a great statute because it's a three-dimensional look at a man as opposed to the two-dimensional look at a man that the government always takes, or not always, I misspoke, sometimes takes. My first point that I'd like to talk about is a fundamental error, which I think leads to an abuse of discretion. And that's that Mr. Giattino was never a made man or a member of the Bonanno or any crime family. Now, the government misstates Mr. Giattino's relationship, and it writes, "Giattino was an associate of BCF and the Lucchese family - became a member BCF in the early 1980s." That's not correct, Your Honors. The pre-senate report, which Your Honors have, paragraph 16, FBI agents informed that Vincent Giattino was an associate of both the Bonanno crime family and the Lucchese crime family. He was never a made member or a made man. "What is an associate?" I mean, I've been representing alleged organized crime figures for 40 years in New York and New Jersey. In fact, I represented Alan Grecco, who was released on compassionate release two years ago by Judge Wigenton in New Jersey. She's a, she's a very tough judge. Very tough by the book, hard line judge. She released him on November 18, two years ago, and he had been convicted and was serving a 65-year RICO sentence. He served 33 years, and on a Friday, I got the decision, and he was home on Monday, three days later, he's doing fantastic. He's

been with his family for two years. So, people do change. But "What is an associate?" I mean, "Am I an associate just because I represented alleged organized crime figures for 40 years?" But that's not the problem. The problem is that, they said he is a made man. And that's such a ...

JUDGE MERRIAM: Whose "they" here, the government?

MR. SAYKANIC: The government and the judge below, Judge Brody, they both said he's a made man. Judge Brody said, this what the government wrote in their brief to Your Honors, in particular, the court, meaning Judge Brody, cited Giattino's two heinous murders using "guns equipped with silencers" that he committed as a "devout member of the Bonanno crime family". In determining that the section 3553(a) factors weighed against his release.

JUDGE MERRIAM: Alright, so, if- sorry, go ahead Judge...

MR. SAYKANIC: I'm sorry.

JUDGE VILARDO: No, you go ahead.

JUDGE MERRIAM: If they said instead, as a devout associate, would that, that, I mean, it feels to me like that sentence is more focused on the heinous murders than on the membership.

MR. SAYKANIC: Well, I just wanna clear up, he's not a made member.

JUDGE MERRIAM: I, I understand. That's what I'm saying. If that sentence said "associate" instead of "member", I, we absolutely hear you saying that he's not a made man. My point is that, that sentence that's drawn from the, from the order, it talks about the heinous murders and then it uses the word "member."

MR. SAYKANIC: Yes.

JUDGE MERRIAM: Let's assume that that's an error.

MR. SAYKANIC: Yes.

JUDGE MERRIAM: For the sake of argument...

MR. SAYKANIC: Yes.

JUDGE MERRIAM: ...that it should have said "associate". Now is the, is that, is that the error? Is that an error sufficient to work-

MR. SAYKANIC: I don't know what was in the judge's mind, but even associate to me is meaningless. I don't, I don't understand that at all.

JUDGE MERRIAM: Okay...

JUDGE VILARDO: But you understand, you understand what associate and member mean? If, if I know nothing about organized crime families, why, why is made man necessarily member? What, why, why does, why do those things go hand in glove, as a matter of language, and not with, without the extra knowledge you have?

MR. SAYKANIC: Because a made member, somebody takes an oath to commit violent crimes...

JUDGE VILARDO: I understand, I understand that...

MR. SAYKANIC: ...to their life. It's so bad.

JUDGE MERRIAM: You know that...

MR. SAYKANIC: It's so bad.

JUDGE MERRIAM: We might not...

MR. SAYKANIC: ...but this is what they, they said he was.

JUDGE VILARDO: I, no, no, I under-
MR. SAYKANIC: ...he took an oath.

JUDGE VILARDO: I understand that.

MR. SAYKANIC: He did.

JUDGE VILARDO: Why, why does member necessarily mean made man? I understand what you're saying that, made man is somebody who takes an oath and who's part of this

organization. But why does member necessarily mean made man?

MR. SAYKANIC: That's the connotation it's given. Made, made, made guy. He's a made guy...

JUDGE VILARDO: Who says?

MR. SAYKANIC: Oh, the government says. The made guy, I mean, they, they use that in pleadings all the time. Made member...

JUDGE VILARDO: I understand. I, I get the made member, the made, I, I, I, but I, I don't understand how member necessarily equates with made man. I understand what a made man is.

MR. SAYKANIC: Okay.

JUDGE VILARDO: I, I get it, but I don't understand how member necessarily equates with that any more than associate or some other word might equate with it.

MR. SAYKANIC: I think, I, with all due respect, Your Honors, I, again, my understanding is they are considered the same. A member of a crime family is different than an associate. Associate is meaningless in my mind, but made guy, member, good fella, you, you know, all the [inaudible] they're all interchangeable, got straightened out. He's a, you know, I mean, this is what the government says all the time in indictments and pleadings.

JUDGE MERRIAM: So, counsel, let me point you then. So, I'm looking at the judge's ruling where she says, he committed two heinous murders using guns equipped with silencers and trafficked narcotics as a devout member. It then cites for that "See PSR paragraph 16 to 22." When I go to paragraph 16 of the PSR, it says, "FBI agents informed that Vincent Giattino was an associate."

MR. SAYKANIC: Alright.

JUDGE MERRIAM: So, she's, she's equating, she's very clearly equating member and associate in her, that, that's the reference that she- counsel?

MR. SAYKANIC: Yes?

JUDGE MERRIAM: ...that's the reference she relies on. So why is it not a reasonable inference that she was accurately reporting. She just chose the word "member"?

MR. SAYKANIC: I don't know what was in her mind, but he was not a member. He didn't have his finger prick. He didn't go for a ceremony. He didn't say, "I take an oath to commit violent crimes or whatever you tell me to." That's a very bad thing. And I, again, I don't know what was in her mind, but...

JUDGE MERRIAM: Well, we do, 'cause she gave us the cite.

MR. SAYKANIC: Okay.

JUDGE MERRIAM: So, we know what was in her mind. It was paragraph 16 to 22.

JUDGE VILARDO: Let, let me ask you this. One of the things that you do very well in, in your brief is cite other decisions by other judges, to, to compassionately release folks. That, that's, that's kind of a dangerous road to go down, isn't it? I mean, if, if, if I, if, if my decisions as a district judge whether to compassionately release someone, are gonna hinge on what another judge did first, that, that might result in, in, fewer people getting compassionate release in my court, perhaps [laugh] for, for that very reason. So, so isn't it a, isn't it a dangerous road to go down?

MR. SAYKANIC: I have to cite cases, Your Honor, and a case like Tommy Reynolds, which I cite in my 28(J), he was a soldier in the Bonanno crime family of La Cosa Nostra. He admitted committing numerous predicate racketeering acts, including several homicides, robberies, extortions, violent crimes. My argument is Mr. Giattino's much better than him.

JUDGE VILARDO: And what I, and what, and what I'm asking you is, aren't these cases

supposed to be decided by district judges on a case-by-case basis? And isn't the, the fact that another judge might think that this guy's entitled to compassionate release shouldn't trigger a, a, a later judge saying that this guy isn't entitled to compassionate release any more than a judge first saying this person's not entitled to compassionate release should make me, when I get a very similar guy say, now he doesn't get compassionate release either because Judge, so - and - so said he didn't get compassionate release.

MR. SAYKANIC: You're absolutely right, Your Honor. Every case is different like snowflakes. There's no two of the same. But I have to make an argument...

JUDGE VILARDO: No, no, I understand.

MR. SAYKANIC: ...If I, if I don't cite any cases, the government will say, "There's no cases that ever released a guy like this." So, I'm citing cases where the individuals were worse as far as the government says. Number two: the plea offer. When he was age 37, more than 34 years ago, he was offered 10 years, and that was pre-guidelines. So that was just three to four years. And that's in his attorney's affidavit. That's an A196. Bail was granted. Mr. Giattino was immediately granted bail with the government's consent, Your Honors. Again, how could he have been that dangerous of person at age 37 if they gave him bail? And they gave him a, a, a, a ten, which you'd only do three or four years. And he, again, he said he's innocent. That's his, you know, position. Number four: the disparity. And I understand that the government's gonna say, forget disparity, and I'm just, I rely on the brief and cases come along every day that reverse other cases and cases go up to the US Supreme Court, maybe in this case. So, I'm just putting it on the record. There was a massive disparity in this case. Everybody's out except Thomas Pitera, and that he, that was a death penalty case. He's the only defendant from his case still incarcerated, with the exception of Pitera and his punishment was drastically different than his co-defendants. Everybody else got out. My 5th point: rehabilitation. Judge Brody did commend Mr. Giattino for his post-incarceration conduct, such as his mentorship to other inmates, his good conduct in prison, his ability to maintain strong and close relationships with his family and his support network in re-entry plan. And he is extremely remorseful. Number 6: new information by Salvatore Gravano. And again, that's in the record, and I understand the government's gonna say with the new case, do a 2255. I understand that, and I'll move on to what's most important: his medical condition. In footnote 2, the government concedes "Medical records from the BOP indicate that Giattino does have serious medical issues." They admit that. He, he respectfully submits that both the government and the district court undervalued the myriad of ailments that he has, which include asthma, which requires a use of an inhaler, high blood pressure, which requires prescription medication, Lisinopril. Diabetes type II, a heart condition, circulatory conditions, morbid obesity.

JUDGE MERRIAM: All right, counsel, you're over your time. Do you wanna wrap up or do you wanna use your rebuttal?

MR. SAYKANIC: I'll use my rebuttal. And Covid is still going strong e, e, e everywhere. I saw people yesterday. I was in court in Jersey. They were wearing masks for they had covid. And he's certainly susceptible. I, I already talked about the Tommy Reynolds case, but I would like to just say, not only are his ailments very important, but his release plan, if in fact he is released and I wish to cite the letter from his cousin, John Raucci dated January 22, 2022. It's in the record. At 8246, he would not only provide a room with his family, and he would give him a job with his company. It's a legitimate company, electronic distribution business,

North Star Micro Electronics and that's very important. And in the end, this is his last chance, he's gonna die in prison if Your Honors don't reverse. That, that's just the bottom line. And I would, I would quote Portia, in the Merchant of Venice that "The quality of mercy is not strained, it droppeth as a gentle rain from heaven, upon the place beneath. It blesseth him that gives and him that takes." And I'm asking Your Honors not only bless Mr. Giattino, but Your Honors as well, with Mercy.

JUDGE MERRIAM: Thank you, coun-

MR. SAYKANIC: ...unless Your Honors have any questions.

JUDGE MERRIAM: We have your argument. Thank you.

MR. SAYKANIC: I submit.

JUDGE MERRIAM: We'll hear from the government, Ms. Pak.

MS. STEPHANIE PAK: Thank you. Your Honors. May it please the court. My name is Stephanie Pak, and I represent the United States. The defendant Vincent Chino-Vincent Giattino is arguing that the district court abused its discretion in denying his motion for compassionate release and a sentence reduction. The defendant's arguing that the district court failed to appropriately consider several 3553A factors. First, Your Honors, I point out that United States versus Fernandez, which the defendant mentioned in his oral argument, does foreclose two of his arguments from the get-go. This court held in Fernandez, that a sentencing disparity between the defendant and co-defendants who plead guilty does not constitute an extraordinary or compelling reason for compassionate release. And secondly, Fernandez also held that for challenging a sentence based on potential innocence or the potential value of new evidence, the vehicle to do so is not through a compassionate release motion, but through a habeas section 2255 motion. In other words, while the court can consider a variety of factors, if another statute circumvents the type of evidence that this court may consider, then it is circumvented. And that section 25, habeas route does exactly that. Now, turning to the section 3553(a) factors, Your Honor, the district honors, the district court did in fact, as explained over the span of three orders, consider the arguments that the defendant makes before you today, and deemed release to be inappropriate upon a balancing of all of those factors. It acted well within its broad discretion to deny the defendant's motions for compassionate release, and its decision should not be disturbed on appeal. To elaborate—

JUDGE DENNIS JACOBS: One of the, one of the arguments that your friend makes is that there, there was a, a trial penalty imposed here and, and you offered him 10 years and he gets life plus 30 after he goes to trial. Is there any point where we should find that there's a trial penalty that, that, that by, by, by going to trial, it, it's, it's just so disparate, so different. The sentence that he gets, that, that it's, that it is in effect a penalty for exercising his right to go to trial?

MS. PAK: Yes, Your Honor. While this, circuit has not recognized the concept of the trial penalty in an abstract, perhaps it would be more persuasive that there was a trial penalty if there were defendants who were charged with the same crimes similarly situated in the case in terms of their culpability. And the only difference is that one, exercised his or her right to a trial and that another, took a guilty plea instead. Here, that's not what we have Your Honor. In your, in this case, I, I'll point to two of the co-defendants that, the defendant focused on them is free...

JUDGE VILARDO: Excuse me, but I think you're talking about disparity rather than trial penalty.

MS. PAK: Yes, Your Honor.

JUDGE VILARDO: You're saying, you're comparing him with others, but why not compare him with, with himself prior to trial being offered 10 years?

MS. PAK: Yes, Your Honor. Um...

JUDGE VILARDO: ...with a sentence basically of life plus 30.

MS. PAK: Your Honor, it's, there is, there is nothing unusual about the fact that, what a defendant may be ultimately sentenced to after trial in which evidence is presented to both the presiding judge and jurors over, what would probably be multiple crimes if that is the case here [?] ...

JUDGE VILARDO: No, I, I understand that, but the quest- the question I was trying to get at is, is, is does there come a point where, where it becomes a penalty for, for, I mean, you are from 10, 10 years versus life plus 30? I mean, that's just the, the, there's a huge difference there. And the only thing that in the, in the government's mind, the government knew all the evidence before they offered him 10 years. And the only thing that changed was he went to trial, he exercised his right to go to trial. So isn't life plus 30 a penalty for going to trial? And, and isn't there, isn't there a point at somewhere? So if, if he goes to, if he goes to trial and he gets 20 years versus 10 years, okay, I get it. But, but if, if a, a difference, isn't there some point at which an appellate court ought to find that there was a trial penalty imposed and that, that, that ought to factor into the analysis here?

MS. PAK: Perhaps in, in a certain, scenario, it would be appropriate for this court to find that there was a trial penalty, if that is the court's finding. However, again, the standard that this court should consider is the abuse of discretion and whether the district court took a holistic look at both prongs that need to be satisfied for the granting of a compassionate release motion, both prongs being well, setting aside, an administrative exhaustion, which the government is cons, not fighting here, was there, are there extraordinary and compelling circumstances? And on balance of the 3553(a) factors, is a sentence reduction or release warranted. And here, while Judge Brody did not reach the extraordinary compelling analysis on the section 3553(a) factors alone, which as, Your Honor, Judge Vilardo, pointed out, consideration of a factor such as that can be taken into consideration by the district judge, but it is also not an abuse of discretion for the district judge to have considered other factors such as the nature and circumstances of the crime that the defendant [crosstalk]

JUDGE VILARDO: Did Judge Brody address the trial penalty argument?

MS. PAK: She did not, Your Honor.

JUDGE VILARDO: Okay.

MS. PAK: But she did, consider a variety of other, section 3553(a) factors such as the defendant's health, such as the defendant's rehabilitation. She did commend it, but even on balance, considering the chart, the crimes that the defendant was ultimately convicted of, found that, the analysis did not favor release. And, Your Honor, what the defendant's, what the defendant is essentially asking this court to do, is what the law does not allow: to disagree with the district court's balancing of the section 3553(a) factors, to substitute its own judgment and find that it rises to the level of an abuse of discretion. There is well established precedent in this, circuit court that declines to do so, and there is no reason that this case is any different from that. And even if this court were to find that, one of the section 3553(a) factors was more persuasive than the district court gave credit for, Judge Raggi at, at sentencing and Judge Brody, in reviewing these three motions, are

entitled to the weighing of the two murders in their analyses of the, of this case. The gravity of the defendant's crimes remains the same then as it did, as it does now. One of those murders was that of an FBI informant, strikes at the heart of the criminal justice system. And the other was also a, a murder in which the victim was lured, preyed upon by her, status as a drug addict. These were simply assassinations, Your Honor. It honors, either murder alone would have made a life sentence acceptable and not outside the bounds of permissibility under the abuse of discretion standard. And here the defendant was convicted by a jury trial of both.

JUDGE VILARDO: Was the, was the 10 year plea bargain based on a plea to fewer than all of the counts of which he was ultimately convicted?

MS. PAK: Unfortunately, Your Honor, the record is unclear as to the basis of, of that plea offer.

JUDGE MERRIAM: Isn't, [pause]. Never mind, I'm not gonna say that out loud. I'm looking at some of the other sentences given to some of the other people and thinking about the considerations that might have come into play in determining whether to make an offer, remembering that we rarely see 11(c)(1)(C) pleas. So the idea of a 10-year plea is unusual in federal court, right? We don't usually have determinate sentence- pleas in federal court but I, it sounds like you don't contest the idea that some plea was offered pre-trial in which Mr. Giattino could have expected his sentence to be no more than 10 years. The government doesn't contest that, that is true?

MS. PAK: That's correct, Your Honor.

JUDGE MERRIAM: Okay. [silence].

MS. PAK: Unless the court has any further questions, we request that the court affirm the District Court's denial of the defendant's motions for a compassionate release and a sentence reduction and rely upon our brief for the remainder of the argument.

JUDGE MERRIAM: All right. Thank you, counsel. That case will be submitted. That, that, completes our calendar for the day. We'll reserve decision on all matters. Thanks to our court staff, in particular, our courtroom deputy and our court security officer today. I'll ask the clerk to adjourn this session.

[END]

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MEMORANDUM & ORDER
90-CR-424 (MKB)

VINCENT GIATTINO,

Defendant.

MARGO K. BRODIE, United States District Judge:

On November 5, 1992, a jury convicted Defendant Vincent Giattino on eight counts, which included racketeering, conspiring to commit two murders subject to the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, committing two RICO murders, conspiring to distribute cocaine, distributing cocaine, and using a firearm with a silencer, (J. of Conviction 1, Docket Entry No. 270), and on February 26, 1993, the Court¹ sentenced Defendant to five concurrent life sentences, two ten-year terms of imprisonment to run concurrent with the life sentences, and one thirty-year term to run consecutive to the other counts to be followed by twenty-three years of supervised release, and ordered Defendant to pay a \$200,000 fine, (*id.* at 2–3, 5; Feb. 26, 1993 Sentencing Hr’g Tr (“Sentencing Tr.”) 73:15–74:7, 74:21–23 Docket Entry Nos. 295, 710).

On September 2, 2020, Defendant filed a motion for compassionate release seeking a modification of his sentence, immediate release to home confinement, and supervised release

¹ Judge Reena Raggi presided over Defendant’s sentencing hearing. (See Feb. 26, 1993 Sentencing Hr’g Tr (“Sentencing Tr.”), Docket Entry Nos. 295, 710.)

pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).² In support, Defendant argues that his “serious medical conditions” and resulting heightened vulnerability to COVID-19, his rehabilitation, and his relationship with his family warrant the modification of his sentence and his release to home confinement. (Def.’s Reply 4, 9–10, 14, 16.) The government opposes the motion on substantive grounds, arguing that the Court should deny the motion because “[D]efendant’s medical conditions are appropriately managed” at the medium-security facility housing in the Federal Correctional Institution in Allenwood, Pennsylvania (“FCI Allenwood Medium”) and because the factors set forth in 18 U.S.C. § 3553(a) weigh in favor of Defendant’s continued incarceration. (Gov’t Opp’n to Def.’s Mot. (“Gov’t Opp’n”) 8–9, Docket Entry No. 719.)

For the reasons discussed below, the Court denies Defendant’s motion for compassionate release.

I. Background

a. Investigation, conviction, and sentencing

On July 29, 1991, agents of the Federal Bureau of Investigation arrested Defendant in Miami, Florida, who was found in possession of false identification documents with the name John Robert Ianniello. (Presentence Investigation Report (“PSR”) ¶ 22, Docket Entry No. 716.) Between 1986 and 1987, Defendant “negotiated to sell half a kilogram net weight of marijuana” and “distributed an approximate combined total amount of 181 grams net weight of cocaine.” (*Id.* ¶ 17.) “In addition to trafficking in narcotics,” in September of 1987 and August of 1988 respectively, Defendant “took part in the murders of Phyllis Burdi and Wilfred ‘Willie Boy’ Johnson” under the direction of a higher-ranking authority in the Bonnano Crime Family

² (Def.’s Mot. for Compassionate Release (“Def.’s Mot.”), Docket Entry No. 711; Def.’s Reply in Supp. of Def.’s Mot. (“Def.’s Reply”), Docket Entry No. 721; Def.’s Letter in Supp. of Def.’s Mot. (“Def.’s Letter”), Docket Entry No. 722.)

(“BCF”), a major organized criminal association. (*Id.* ¶¶ 16, 18.)

On November 5, 1992, a jury convicted Defendant on eight counts, which included racketeering, conspiring to commit two RICO murders, committing two RICO murders, conspiring to distribute cocaine, distributing cocaine, and using a firearm with a silencer. (*Id.* at 4–5; J. of Conviction 1.)

At a sentencing hearing held on February 26, 1993, the Court noted that Defendant was involved in “truly heinous crimes” and that the murders of Burdi and Johnson “were committed in horrific manners,” and sentenced Defendant to five concurrent life sentences, two ten-year terms of imprisonment to run concurrent with the life sentences, and one thirty-year term to run consecutive to the other counts to be followed by twenty-three years of supervised release, and ordered Defendant to pay a \$200,000 fine. (Sentencing Tr. 73:3–74:7, 74:21–23; J. of Conviction 2–3, 5.)

b. Compassionate release application

On June 22, 2020, Defendant filed a request for compassionate release with the warden at FCI Allenwood Medium, (Def.’s Mot. 2), and on July 2, 2020, the warden denied his request, (*id.*; Letter from Warden dated July 2, 2020, annexed to Def.’s Mot. as Ex. A).³

Defendant, who is sixty-seven years old, argues that he is “a high and at-risk inmate [due] to the COVID-19 virus as he currently takes medications and suffers from” asthma, high blood pressure, diabetes, heart and circulatory conditions, severe obesity, high cholesterol, and sleep complications. (Def.’s Mot. 3.) Defendant asserts that his approximately twenty-eight years of sentence served and his “period of supervised release that will follow[] appropriately reflect[s]

³ The parties agree that Defendant has exhausted his administrative remedies. (See Gov’t Opp’n 3; Def.’s Mot. 4.)

the seriousness of the offense, promotes respect for the law[,] and provides just punishment for the offense.” (*Id.* at 14.) In further support of his motion, Defendant reiterates his arguments as to why his medical history and the COVID-19 risks presented by the conditions at FCI Allenwood Medium, where he is being held, represent extraordinary and compelling circumstances warranting relief. (*Id.* at 10; Def.’s Reply 5–7.) Defendant asserts that the totality of circumstances, including his strong familial relationship, (Def.’s Reply 9–14), and “genuine signs of rehabilitation,” warrant a sentencing reduction under 18 U.S.C. § 3582, (Def.’s Mot. 13–14).

II. Discussion

The Court finds the reduction of Defendant’s sentence to be inconsistent with the section 3553(a) factors.

“A court may not modify a term of imprisonment once it has been imposed except pursuant to statute.” *United States v. Gotti*, 433 F. Supp. 3d 613, 614 (S.D.N.Y. 2020). Section 3582(c)(1)(A)(i) “empowers a court to reduce a defendant’s term of imprisonment if it finds that ‘extraordinary and compelling reasons warrant such a reduction.’” *United States v. Ebbers*, 432 F. Supp. 3d 421, 423 (S.D.N.Y. 2020) (quoting 18 U.S.C. § 3582(c)(1)(A)(i)).

Under section 3582(c), and as relevant here, courts may modify a previously imposed sentence where:

- (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 . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

- (i) extraordinary and compelling reasons warrant such a reduction; or
- (ii) the defendant is at least [seventy] years of age, has served at least [thirty] years in prison, pursuant to a sentence imposed under section 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);
and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A)(i)–(ii).

Although the Court takes seriously the threat posed by the pandemic to incarcerated individuals and the heightened risk of complications faced by individuals, such as Defendant, with “obesity, hypertension, asthma and diabetes,” (Def.’s Reply 4), the Court finds that the requested relief is inconsistent with the section 3553(a) factors.

While the Court applauds Defendant’s “life history and characteristics,’ and his rehabilitation and transformation over the last [thirty] years,” (*id.* at 15), Defendant committed two heinous murders and trafficked narcotics as a devout member of BCF, (*see* PSR 16–18). Due to the gravity of his crimes, the Court sentenced Defendant to the “maximum sentence that can be imposed” on some of his convicted counts, (Sentencing Tr. 73:12–13), and did not downwardly depart from the United States Sentencing Guidelines, (*id.* at 72:10–19), which plainly “reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense,” 18 U.S.C. § 3553(a)(2)(A). The nature and seriousness of Defendant’s crimes mandate his continued detention.

III. Conclusion

Accordingly, for the reasons explained above, the Court denies Defendant's motion for compassionate release.

Dated: November 19, 2020
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MEMORANDUM & ORDER
90-CR-424 (MKB)

VINCENT GIATTINO,

Defendant.

MARGO K. BRODIE, United States District Judge:

On November 5, 1992, a jury convicted Defendant Vincent Giattino on eight counts, which included racketeering, conspiring to commit two murders subject to the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C § 1961 *et seq.*, committing two RICO murders, conspiring to distribute cocaine, distributing cocaine, and using a firearm with a silencer, (J. of Conviction 1, Docket Entry No. 270; Presentence Investigation Report (“PSR”) ¶ 1, Docket Entry No. 716), and on February 26, 1993, Judge Reena Raggi sentenced Giattino to five concurrent life sentences, two ten-year terms of imprisonment to run concurrent with the life sentences, and one thirty-year term to run consecutive to the other counts to be followed by twenty-three years of supervised release, and ordered Giattino to pay a \$200,000 fine, (J. of Conviction 2–3, 5; Sentencing Hr’g Tr. dated Feb. 26, 1993 (“Sentencing Tr.”) 73:15–74:7, 74:21–23, Docket Entry Nos. 295, 710).

On September 2, 2020, Giattino filed a motion for compassionate release seeking a modification of his sentence, immediate release to home confinement, and supervised release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). (First Mot. for Compassionate Release, Docket Entry No. 711.) By Order dated November 19, 2020, the Court denied Giattino’s motion. (Mem. and

Order dated Nov. 19, 2020 (the “November 2020 Order”), Docket Entry No. 723.) On February 14, 2022, Giattino renewed his motion, seeking immediate release or reduction of his sentence.¹ In support, Giattino argues that his “declining health” and resulting heightened vulnerability to COVID-19, his rehabilitation during incarceration, and his strong relationship with his family warrant modification of his sentence and his release. (Def.’s Mot. 1–3.) Giattino also argues that compared to “similarly situated defendants,” including his co-defendants, he received a much higher sentence and faced a “trial penalty” compared to the ten-year sentence that he would have received through the Government’s plea offer prior to his trial. (*Id.* at 7.) The government opposes the motion on substantive grounds, arguing that the Court should deny the motion because Giattino fails to demonstrate “an extraordinary and compelling reason for release,” (Gov’t’s Opp’n to Def.’s Mot. (“Gov’t’s Opp’n”) 3–7, Docket Entry No. 730), and because the factors set forth in 18 U.S.C. § 3553(a) weigh in favor of Giattino’s continued incarceration, (*id.* at 7–10).

For the reasons discussed below, the Court denies Giattino’s motion for compassionate release.

I. Background

a. Investigation, conviction, and sentencing

On July 29, 1991, agents of the Federal Bureau of Investigation arrested Giattino, who was found in possession of false identification documents with the name John Robert Ianniello, in Miami, Florida. (PSR ¶ 22.) Between 1986 and 1987, Giattino “negotiated to sell half a kilogram net weight of marijuana” and “distributed an approximate combined total amount of

¹ (Def.’s Mot. for Compassionate Release (“Def.’s Mot.”), Docket Entry No. 726; Def.’s Reply in Supp. of Def.’s Mot. (“Def.’s Reply”), Docket Entry No. 733.)

181 grams net weight of cocaine.” (*Id.* ¶ 17.) “In addition to trafficking in narcotics,” in September of 1987 and August of 1988 respectively, Giattino “took part in the murders of Phyllis Burdi and Wilfred ‘Willie Boy’ Johnson” under the direction of a higher-ranking authority in the Bonnano Crime Family (the “BCF”), a major organized criminal association. (*Id.* ¶¶ 16, 18–20.)

On November 5, 1992, a jury convicted Giattino on eight counts: racketeering, conspiring to commit two RICO murders, committing two RICO murders, conspiring to distribute cocaine, distributing cocaine, and using a firearm with a silencer. (*Id.* ¶¶ 1–13; J. of Conviction 1.)

At a sentencing hearing held on February 26, 1993, Judge Raggi noted that Giattino was involved in “truly heinous crimes” and that the murders of Burdi and Johnson “were committed in horrific manners,” and sentenced Giattino to five concurrent life sentences, two ten-year terms of imprisonment to run concurrent with the life sentences, and one thirty-year term to run consecutive to the other counts to be followed by twenty-three years of supervised release, and ordered Giattino to pay a \$200,000 fine. (Sentencing Tr. 73:3–74:7, 74:21–23; J. of Conviction 2–3, 5.)

b. Compassionate release application

On February 14, 2022, Giattino renewed his application for compassionate release. (Def.’s Mot.)

In support of his motion, Giattino, who is “approaching [seventy] years of age,” argues that (1) he is a high-risk inmate in light of the COVID-19 virus because he suffers from “obesity, hypertension, asthma[,] . . . diabetes, and utiliz[es] a [continuous positive airway pressure (“CPAP”)] machine,” (Def.’s Mot. 1, 5); (2) his punishment “was drastically different from . . . what the Government offered his co-defendants charged with murder” and he was a victim of the

“trial penalty” because his sentence after his jury trial was far higher than his plea offer, (*id.* at 4, 7); (3) continued incarceration at the Federal Correctional Institution in Allenwood, Pennsylvania (“FCI Allenwood Medium”), where he is being held, “will likely result in a debilitating and unnecessarily cruel decline in his physical and emotional health,” (*id.* at 5); and (4) he has strong family relationships, (*id.* at 8–9), has been rehabilitated during his time in prison and has mentored others, (*id.* at 9–12), and has a “loving and close relationship with his daughter,” (*id.* at 12–14), all further evidence of the “totality of circumstances” that would warrant a sentencing reduction under 18 U.S.C. § 3582.

II. Discussion

“[O]ther than the limited exceptions provided by statutes . . . courts are not free to modify sentences at will.” *United States v. Martin*, 974 F.3d 124, 135 (2d Cir. 2020); *see United States v. Friedlander*, No. 20-CR-441, 2022 WL 280800, at *1 (E.D.N.Y. Jan. 31, 2022) (“A court may not modify a term of imprisonment once it has been imposed except pursuant to statute.”) (quoting *United States v. Rabuffo*, No. 16-CR-148, 2020 WL 2523053, at *1 (E.D.N.Y. May 14, 2020))). Under 18 U.S.C. § 3582(c), and as relevant here, a court may modify a previously imposed sentence where:

- (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 [thirty] days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that —
 - (i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least [seventy] years of age, has served at least [thirty] years in prison, pursuant to a sentence imposed under section 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);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A)(i)–(ii).

“Section 3582(c)(1)(A) authorizes a court to reduce a previously imposed term of imprisonment upon finding that ‘extraordinary and compelling reasons warrant such a reduction.’” *United States v. Keitt*, 21 F.4th 67, 71 (2d Cir. 2021) (per curiam) (quoting 18 U.S.C. § 3582(c)(1)(A)(i)); *United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (per curiam) (same); *see also*, e.g., *United States v. Cummings*, No. 20-CR-3156, 2021 WL 4142844, at *1 (2d Cir. Sept. 13, 2021) (same); *United States v. DiBiase*, 857 F. App’x 688, 688–89 (2d Cir. 2021) (same); *United States v. Fernandez*, 853 F. App’x 730, 731–32 (2d Cir. 2021) (same); *United States v. Roney*, 833 F. App’x 850, 852 (2d Cir. 2020) (same). “A court deciding a compassionate release motion can consider ‘the full slate of extraordinary and compelling reasons that an imprisoned person might bring before [it].’” *Keitt*, 21 F.4th at 71 (alteration in original) (quoting *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020)); *Jones*, 17 F.4th at 374 n.3 (“[D]istrict courts are not confined to those reasons set forth by the [Bureau of Prisons] Director in evaluating compassionate release motions brought by defendants and instead are free ‘to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them.’” (quoting *Brooker*, 976 F.3d at 235–37)); *United States v. Souza*, No. 20-3829, 2021 WL 3871262, at *1 (2d Cir. Aug. 31, 2021) (“[T]he Sentencing Commission’s

policy statements do not ‘constrain district courts’ discretion to consider whether any reasons are extraordinary and compelling.’” (quoting *Brooker*, 976 F.3d at 236)).

However, “there are three requirements that must be satisfied before a court can grant such relief” — namely, (1) “absent waiver or forfeiture by the government, an inmate must exhaust administrative remedies by requesting such relief from prison authorities”; (2) “a court must ‘consider[] the factors set forth in [section] 3553(a) to the extent that they are applicable’”; and (3) “the inmate must demonstrate that his proffered circumstances are indeed ‘extraordinary and compelling’ such that, in light of these [section] 3553(a) factors, a sentence reduction is justified under [section] 3582(c)(1)(A) and would not simply constitute second-guessing of the sentence previously imposed.”² *Keitt*, 21 F.4th at 71 (alterations in original) (quoting 18 U.S.C. § 3582(c)(1)(A)); *see United States v. Davis*, No. 21-716, 2022 WL 1320316, at *2 (2d Cir. May 3, 2022) (citing *Keitt*, 21 F.4th at 71)). “[W]hen a district court denies a defendant’s motion under [section] 3582(c)(1)(A) in sole reliance on the applicable [section] 3553(a) sentencing factors, it need not determine whether the defendant has shown extraordinary and compelling reasons that might (in other circumstances) justify a sentence reduction.” *Keitt*, 21 F.4th at 73; *see Jones*, 17 F.4th at 374 (noting that because “extraordinary and compelling reasons are necessary — but not sufficient — for a defendant to obtain relief . . . , panels of this [c]ourt have, in non-precedential summary orders, assumed the[ir] existence . . . but held that a district court’s ‘reasonable evaluation of the [applicable] [s]ection 3553(a) factors’ is ‘an alternative and independent basis for denial of compassionate release’” (quoting *United States v. Robinson*, 848 F. App’x 477, 478 (2d Cir. 2021))); *see also, e.g.*, *United States v. Cherry*, No. 21-913, 2022 WL

² The Government does not argue that Giattino did not exhaust his administrative remedies. (*See generally* Def.’s Mot; Gov’t’s Opp’n.)

1210663, at *2 (2d Cir. Apr. 25, 2022) (“[S]ection 3582(c) permits a district court to reduce a sentence only if, ‘*after* considering the factors set forth in section 3553(a),’ it ‘finds that extraordinary and compelling reasons warrant such a reduction.’ Thus, . . . a finding that the section 3553(a) factors disfavor early release is independently sufficient to deny a compassionate-release motion. . . .’” (first quoting 18 U.S.C. § 3582(c)(1)(A); and then citing *Keitt*, 21 F.4th at 73)); *Souza*, 2021 WL 3871262, at *2 (affirming ruling that “even if [a defendant]’s medical conditions demonstrated extraordinary and compelling reasons for release, ‘the factors set forth in [section 3553(a)] militate toward continued confinement’” (quoting *United States v. Bolino*, No. 06-CR-806, 2020 WL 4749807, at *2 (E.D.N.Y. Aug. 17, 2020))); *Roney*, 833 F. App’x at 853 (“We need not decide whether [the appellant] has proffered an extraordinary and compelling reason that warrants his release . . . because, even assuming *arguendo* that he has, we discern no abuse of discretion in the district court’s conclusion that release is nevertheless unwarranted upon consideration of the [section] 3553(a) factors.”). Thus, “a finding that the section 3553(a) factors disfavor early release is independently sufficient to deny a compassionate-release motion, regardless of the presence of any ‘extraordinary and compelling reasons.’” *Cherry*, 2022 WL 1210663, at *2 (quoting *Keitt*, 21 F.4th at 73); *see also* *United States v. Mattes*, No. 20-CR-2349, 2022 WL 260395, at *2 (2d Cir. Jan. 28, 2022) (“[A] district court’s reasonable evaluation of the [s]ection 3553(a) factors is an alternative and independent basis for denial of compassionate release.” (quoting *Jones*, 17 F.4th at 374)).

Giattino argues that his “release following nearly [thirty] years of incarceration satisfies the . . . factors set forth in [section] 3553(a),” (Def.’s Reply 3), due to the length of his sentence in view of the ten years he would have served through a plea bargain, the sentences served by his co-defendants, and the “trial penalty” he allegedly faced; his age and serious medical conditions;

the productive and responsible conduct that he has had while incarcerated; and his strong family support, (Def.'s Mot. 5-15).

The Government argues that the section 3553(a) factors militate against early release. (Gov't's Opp'n 7-10.)

The requested relief is inconsistent with the section 3553(a) factors. *See Roney*, 833 F. App'x at 853 (affirming denial of compassionate release where the district court had weighed the defendant's "serious medical conditions," the "seriousness of his offense conduct," and "the need for his original sentence to remain in place to promote respect for the law and to provide just punishment," among other section 3553(a) factors). While Giattino argues that he received a longer sentence than his co-defendants, (Def.'s Reply 5), the Court does not find this to be a basis for reducing Giattino's sentence. *See United States v. Roman*, No. 21-CR-185, 2022 WL 363909, at *1 (2d Cir. Feb. 8, 2022) (affirming denial of compassionate release motion and stating that there is "no requirement that a district court consider or explain sentencing disparities among co[-]defendants" (quoting *United States v. Alcius*, 952 F.3d 83, 89 (2d Cir. 2020) (per curiam))); *United States v. Bryant*, 976 F.3d 165, 180 (2d Cir. 2020) ("[T]here is no requirement to consider a disparity with a co-defendant's sentence." (citing *Alcius*, 952 F.3d at 89)); *United States v. Clinton*, 820 F. App'x 34, 37 (2d Cir. 2020) ("We also disagree with [the defendant's] contention that the [d]istrict [c]ourt [erred by] fail[ing] to consider sentencing disparities between [the defendant] and his co-defendants. We have repeatedly held that a district court is not required to consider such disparities."); *Alcius*, 952 F.3d at 89 ("[T]here is no requirement that a district court consider or explain sentencing disparities among co[-]defendants."); *United States v. Frias*, 521 F.3d 229, 236 (2d Cir. 2008) (holding that district courts are not required "to consider disparities between co-defendants"). Further, to the extent that Defendant relies on

other district court decisions granting compassionate release to defendants whom he believes to be similarly situated, these cases are non-binding, and Giattino has not shown that his sentence creates unwarranted sentencing disparities in light of the intensely fact-specific rulings in those cases. (Def.'s Mot 15–18; Gov't's Opp'n 9); *see United States v. Brown*, No. 21-122, 2021 WL 5872940, at *2 (2d Cir. Dec. 13, 2021) (“To the extent that [the defendant] relies on district court decisions granting compassionate release to defendants he deems to be similarly situated . . . those cases are non-binding.”).

The Court is also unpersuaded by Giattino's additional argument that he suffered a “trial penalty” for not accepting his plea bargain, (Def.'s Mot. 7); *see United States v. Bennett*, 252 F.3d 559, 562 n.5 (2d Cir. 2001) (“[T]he lower sentence after a guilty plea reflects a ‘reduction from a sentencing norm ascertained independent of the procedure by which guilt is ascertained. A sentence imposed upon a defendant who stands trial is that norm; it is not an enhancement above the norm as a cost of standing trial.’” (quoting *United States v. Cruz*, 977 F.2d 732, 734 (2d Cir. 1992))); *United States v. Cruz*, 156 F.3d 366, 374 (2d Cir. 1998) (collecting cases supporting the practice of the Government offering a plea with a lower sentence); *United States v. Lorenzano*, No. 03-CR-1256, 2021 WL 734984, at *4 (S.D.N.Y. Feb. 24, 2021) (denying motion for compassionate release where the defendant asserted that “he was unfairly punished for exercising his right to a jury trial and refusing to plead guilty along with his co-defendants”).

Further, although the Court takes seriously the threat posed by the pandemic to incarcerated individuals and the heightened risk of complications faced by individuals, such as Giattino, with “serious medical conditions that make [them] vulnerable to more serious illness from COVID-19,” (Def.'s Reply 2), Giattino's medical conditions do not warrant reducing his sentence. *See United States v. DiMartino*, No. 21-CR-81, 2022 WL 761511, at *1 (2d Cir. Mar.

14, 2022) (affirming denial of compassionate release where defendant suffered from “asthma, hypertension, obesity, sleep apnea, heart disease, and high cholesterol” and alleged that this put him “at a higher risk of complications from COVID-19”). In addition, Giattino is vaccinated against COVID-19, (Def.’s Mot. 5), and the Court is not aware of any COVID-19 cases among inmates and staff at FCI Allenwood Medium, (Gov’t’s Opp’n 3; Federal Bureau of Prisons, *Covid-19 Cases*, (last visited July 26, 2022), <https://www.bop.gov/coronavirus>); *see United States v. Hunter*, No. 21-1773, 2022 WL 2288688, at *2 (2d Cir. June 24, 2022) (affirming denial of compassionate release where defendant had “underlying medical conditions” but was “protected against the COVID-19 pandemic with two doses of the . . . vaccine” and noting that “the vaccine remains a highly effective means of preventing the most severe effects of COVID-19” (collecting cases)); *United States v. Patel*, No. 21-1746, 2022 WL 1634454, at *2 (2d Cir. May 24, 2022) (“[B]ecause [the defendant] has now been vaccinated, any risk of severe illness from COVID-19 has been substantially decreased.” (citations omitted)); *United States v. Jeffries*, No. 14-CR-6001, 2022 WL 2036331, at *1 (W.D.N.Y. June 7, 2022) (“Furthermore, . . . [the defendant] has been twice vaccinated for the virus and that fact alone warrants dismissal of this motion.”); *United States v. Reiter*, No. 87-CR-132, 2021 WL 1424332, at *7–8 (S.D.N.Y. Apr. 15, 2021) (noting that obesity put defendant at increased risk of severe illness from COVID-19 but that the risk was reduced because the defendant was vaccinated and the spread of the virus at his facility was controlled).

In addition, the Court acknowledges and applauds Giattino’s “rehabilitation in the face of a life sentence” and his mentorship to other inmates, (Def.’s Reply 2–3), his good conduct in prison, (*id.*), his ability to maintain strong and close relationships with his family, particularly his daughter, (*id.*), and his support network and reentry plan, (*id.*). Nevertheless, the section 3553(a)

factors do not warrant a modification of Giattino's sentence in light of the seriousness of his offenses. Giattino committed two heinous murders using guns equipped with silencers and trafficked narcotics as a devout member of BCF. (See PSR ¶¶ 16–22; Gov't's Opp'n 2.) During sentencing, Judge Raggi acknowledged the "evidence about truly heinous crimes" and "murders that were committed in horrific manners." (Sentencing Tr. 73:3–6.) The life sentence that Judge Raggi imposed when considering "the horrible crimes committed," (*id.* at 73:8–14), plainly "reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense," 18 U.S.C. § 3553(a)(2)(A); *see United States v. Robinson*, No. 21-CR-1865, 2022 WL 2204126, at *3 (2d Cir. June 21, 2022) (holding that the district court did not abuse its discretion in finding that the defendant's "rehabilitation . . . was insufficient to justify relief"); *United States v. Vaughn*, No. 21-CR-1984, 2022 WL 2203857, at *1 (2d Cir. June 21, 2022) (affirming denial of compassionate release where district court "considered [the defendant's] medical condition exposing him to risk from COVID-19, his good behavior while incarcerated, and the support he will receive from his spouse upon release" but "nonetheless reasonably concluded that reducing [the defendant's] sentence by more than six years was unwarranted"); *United States v. Garcia*, No. 21-CR-1181, 2022 WL 2154675, at *2 (2d Cir. June 15, 2022) (affirming denial of compassionate release where district court acknowledged the defendant's commitment to rehabilitation but concluded that his criminal history and seriousness of his crime counseled against release); *United States v. Reyes*, No. 20-3285, 2022 WL 1669388, at *1 (2d Cir. May 26, 2022) (affirming denial of compassionate release where the "court acknowledged [the defendant's] efforts toward rehabilitation, [but] nevertheless found that the section 3553(a) factors weighed heavily against a sentence reduction" in light of the defendant's conduct); *United States v. Williams*, No. 22-4156, 2022 WL 1554649, at *2 (2d Cir. May 17,

2022) (affirming denial of compassionate release where “[t]he district court held that [the defendant] was not entitled to a sentence reduction under the [section] 3553(a) factors because of the seriousness of his offenses and because the danger to the community outweighed any rehabilitative attempts, given the severity of his offenses which included murder, distributing drugs, and participating in a gang”); *United States v. Stinson*, No. 20-CR-3744, 2021 WL 5499478, at *1 (2d Cir. Nov. 24, 2021) (affirming denial of compassionate release where the district court noted the defendant’s rehabilitation and “positive contributions” to try to mentor other individuals and specifically young people to “get their lives on track once they get out”); *Cummings*, 2021 WL 4142844, at *2 (“While we commend [the defendant] for his efforts at self-improvement while incarcerated, we conclude that the [d]istrict [c]ourt did not abuse its discretion when it considered these points and still found that the [s]ection 3553(a) factors weighed against release.”).

While the Court appreciates Giattino’s efforts at building relationships with prison staff and counselors, mentoring and supporting other inmates, maintaining cohesive family relationships, and demonstrating remorse for his past actions, the nature and seriousness of Giattino’s crimes support his continued detention under the 3553(a) factors.

III. Conclusion

Accordingly, for the reasons explained above, the Court denies Giattino's motion for compassionate release.

Dated: July 26, 2022
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge