Case No. 20-4056

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

KEPA MAUMAU,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
HONORABLE TENA CAMPBELL
NO. 2:08-CR-00758-TC-11

BRIEF FOR DEFENDANT-APPELLEE

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TABLE OF CONTENTS

INTRODUCTION 1
STATEMENT OF THE ISSUES.....2
STATEMENT OF FACTS 3
A. The Guilty Plea and Sentencing 3
B. The First Step Act.....4
1. *Section 603(b) of the First Step Act* 4
2. *Section 403 of the First Step Act* 6
C. The Sentence Reduction 6
D. The Stay Motion 7
STANDARD OF REVIEW 8
SUMMARY OF ARGUMENT 8
ARGUMENT 9
A. Under 18 U.S.C. § 3582(c)(1)(A), the district court had the authority to reduce Maumau's sentence.....9
1. *The text of § 3582(c)(1)(A) empowers district courts to reduce sentences in cases presenting extraordinary and compelling reasons.*.....11
2. *The legislative history of § 3582(c)(1)(A) demonstrates Congress's intent to grant federal sentencing courts discretion to reduce unusually long sentences.*.....12
3. *The Sentencing Commission's Policy Statement supports this approach.*.....15
4. *The government's reading of the commentary conflicts with the text of both § 3582(c)(1)(A) and § 1B1.13.* 17
5. *The district court's authority under § 3582(c)(1)(A) is neither new nor limitless.*.....24
B. The district court did not base its order on a "disagreement" with the length of a mandatory sentence," and in any event would not have erred if it did. 29
CONCLUSION.....34
STATEMENT REGARDING ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE
CERTIFICATE OF ELECTRONIC SUBMISSIONS
CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Dillon v. United States, 560 U.S. 817 (2010) 17

Dorsey v. United States, 567 U.S. 260 (2012).....16, 17

McCoy v. United States, No. 2:03-CR-197, 2020 WL 2738225 (E.D. Va. May 26, 2020).....23

Stinson v. United States, 508 U.S. 36 (1993).....19

United States v. Adeyemi, No. CR 06-124, 2020 WL 3642478 (E.D. Pa. July 6, 2020) 22

United States v. Allen, 909 F.3d 671 (4th Cir. 2018).....19

United States v. Arey, No. 5:05-CR-00029, 2020 WL 2464796 (W.D. Va. May 13, 2020).....23, 30

United States v. Cantu-Rivera, No. H-89-204, 2019 WL 2578272 (S.D. Tex. June 24, 2019) 14, 16, 23

United States v. Clausen, No. CR 00-291-2, 2020 WL 4260795 (E.D. Pa. July 24, 2020).....22

United States v. Cobb, 584 F.3d 979 (10th Cir. 2009) 8

United States v. Decator, No. 95-CR-0202, 2020 WL 1676219 (D. Md. Apr. 6, 2020.....30

United States v. Ebbers, 432 F.Supp.3d 421 (S.D.N.Y. 2020) 23

United States v. Haynes, No. 93-CR-1043, 2020 WL 1941478 (E.D.N.Y. Apr. 22, 2020).....30

United States v. Kupa, 978 F.Supp.2d 417 (E.D.N.Y. 2013) 26

United States v. Littrell, No. 4:05-CR-00084 (E.D. Mo. May 19, 2020).....30

United States v. Lott, No. 95-CR-72, 2020 WL 3058093 (S.D. Cal. June 8, 2020) 22, 30

United States v. Marks, No. 03-CR-6033, 2020 WL 1908911 (W.D.N.Y. Apr. 20, 2020) 23, 30

United States v. McGraw, No. 2:02-CR-00018, 2019 WL 2059488 (S.D. Ind. May 9, 2019) 21

United States v. McPherson, No. 94-CR-570, 2020 WL 1862596 (W.D. Wash. Apr. 14, 2020) 23

United States v. O'Bryan, No. 96-CR-10076, 2020 WL 869475, 2 (D. Kan. Feb. 21, 2020) 31

United States v. Quinn, No. 3:91-CR-00608, 2020 WL 3275736 (N.D. Cal. June 17, 2020) 22

United States v. Redd, No. 1:97-CR-00006, 2020 WL 1248493 (E.D. Va. Mar. 16, 2020) 30

United States v. Schmitt, No. 12-CR-4076, 2020 WL 96904 (N.D. Iowa Jan. 8, 2020) 23

United States v. Scott, No. 95-CR-202, 2020 WL 2467425 (D. Md. May 13, 2020) 23, 30

United States v. Urkevich, No. 8:03-CR-37, 2019 WL 6037391 (D. Neb. Nov. 14, 2019) 14, 23, 31

United States v. Wade, No. 2:99-CR-00257, 2020 WL 1864906 (C.D. Cal. Apr. 13, 2020) 23, 30

United States v. Willis, 382 F.Supp.3d 1185, 1187 (D.N.M. 2019).. 22

United States v. York, No. 3:11-CR-76, 2019 WL 3241166 (E.D. Tenn. July 18, 2019) 21

United States v. Young, No. 2:00-CR-00002-1, 2020 WL 1047815 (M.D. Tenn. Mar. 4, 2020) 23, 31

STATUTES AND RULES

18 U.S.C. § 924(c) 1, 3, 4, 6, 8, 26, 27

18 U.S.C. § 3553(a) 7, 11, 15

18 U.S.C. § 3582(c) 1, 2, 4, 6–12, 15–25, 28, 32–33

28 U.S.C. § 994(t) 33

P.L. 115-391, 132 Stat. 5194 .....5, 20

U.S.S.G. § 1B1.13.....1, 16, 17, 19 ,33

OTHER AUTHORITIES

164 Cong. Rec. S7649 (daily ed. Dec. 18, 2018) 5

BRIEF OF THE AMERICAN CONSERVATION UNION FOUNDATION NOLAN CENTER FOR JUSTICE ET AL. AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL, *United States v. Bryant*, No. 19-14267 (11th Cir. Feb. 20, 2020) 23

BUREAU OF PRISONS, PROGRAM STATEMENT 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (Jan. 17, 2019).....21

DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM (April 2013).....5

S. Rep No. 98-225 (1983) 9, 10, 13, 28

U.S. SENTENCING COMM'N, SUMMARY STATEMENT ACCOUNT REQUIREMENTS 10.7 (2020) 20

STATEMENT OF PRIOR OR RELATED APPEALS

- *United States v. Kamahele, et al.*, 748 F.3d 984 (10th Cir. 2014) (direct appeal)
- *United States v. Maumau* 10th Cir. Case No. 17-4155 (appeal from denial of 2255 motion)
- *In re: Maumau*, 10th Cir. Case No. 20-4070 (petition to file successive 2255 motion)

INTRODUCTION

Nearly two decades ago, 20-year-old Kepa Maumau participated in three robberies and was sentenced to 55 years in prison. The vast majority of that sentence was based on his "stacked" convictions under 18 U.S.C. § 924(c). The government does not defend this sentence, or argue its reasonableness.

Still, the government now contends that Maumau must spend the next three decades in prison because the district court lacked the authority to reduce his sentence. That is simply not correct. Such an approach ignores both the plain language of 18 U.S.C. § 3582(c)(1)(A) and the relevant policy statement in U.S.S.G. § 1B1.13, as well as the commentary that follows the latter provision. Indeed, a growing number of district courts have said as much in granting precisely the relief the district court granted here.

The government also attempts to cast the authority on which the district court relied below as novel and limitless, trotting out the all-too-familiar trope of the slippery slope. But that, too, is untrue. As explained below, since the enactment of § 3582(c)(1)(A)(i) in 1984, the district court has possessed precisely the power it exercised in this case: the power to reduce a sentence "in any case" that presents extraordinary and compelling reasons warranting a reduction. It is a narrow but important judicial check on exercises of prosecutorial discretion like the one on display in this case, where fully 45 years of the sentence had literally

nothing to do with the offense conduct or a need to incapacitate the defendant but rather operated as penalty for his decision to put the government to its burden of proving his guilt. *See* App'x Vol. I at 258–59 (government made Maumau a plea offer that would have required ten years in prison). In 2018, for the express purpose of increasing its use, Congress removed a Bureau of Prisons ("BOP") motion as a condition precedent to the exercise of that judicial authority. Thus, the district court in this case did nothing more than invoke the sentence-reducing authority it was given by Congress, and it did so based on a careful evaluation of the individual circumstances presented. Its order reducing Maumau's sentence should therefore be affirmed.

STATEMENT OF THE ISSUES

A. Whether 18 U.S.C. § 3582(c) authorize a district court to grant a defendant's motion for a sentence reduction when it determines that extraordinary and compelling circumstances warrant a reduction.

B. Whether the district court reduced Maumau's sentence based on a "disagreement with the length of a mandatory sentence," and, if it did, whether that was error.

STATEMENT OF FACTS

A. The Guilty Plea and Sentencing

In 2008, Kepa Maumau participated in two robberies in Arizona and a robbery in Utah.[1] App'x Vol. II at 280–81. He was charged with racketeering conspiracy, Hobbs Act robbery, three counts of assault with a dangerous weapon in aid of racketeering, and three firearm counts under 18 U.S.C. § 924(c). App'x Vol. II at 270. The government offered Maumau a plea agreement that would have resulted in a ten-year sentence. App'x Vol. I at 258–59. Maumau elected to exercise his right to a jury trial, and was convicted on all counts.

Maumau was then sentenced to a mandatory 55-year term of incarceration. The entirety of Maumau's sentence resulted from his three "stacked" § 924(c) convictions. App'x Vol. I at 100–01. At sentencing, the district court expressed reservations about the sentence it was required to impose: "I never hope for [a successful appeal] because that means that I made a mistake. But what I hope is that there is some way because this is the sentence that I'm going to impose, I must, but I think what's been said [about the excessive severity of the sentence] is accurate." App'x Vol. I at 215.

[1] On August 12, 2008, Maumau and an unidentified male entered a Gen-X Clothing store in Ogden, Utah. They took approximately $7,000 in cash and merchandise. On August 19, 2008, Maumau and Edward Kamoto stole approximately $505 from an El Pollo Loco restaurant in Tempe, Arizona. Immediately after, Maumau and Kamoto robbed a Jack-in-the-Box restaurant, also in Tempe, Arizona. No one was physically injured during these robberies.

Long afterwards, the district court remained troubled by Maumau's sentence. In a 2019 letter urging U.S. Attorney John Huber to exercise his discretion to agree to vacate Maumau's stacked § 924(c) counts, the district court wrote that Maumau's sentence was "offensive and unjust," and expressed "distaste with the mandatory sentence [the court was] required to impose on Mr. Maumau." Supp. App'x at 22.

B. The First Step Act

On December 21, 2018, the President signed the First Step Act into law. It contained two provisions relevant to Maumau's case. Section 603(b) amended 18 U.S.C. § 3582(c)(1)(A), the so-called compassionate release statute. And Section 403 corrected the interpretation of 18 U.S.C. § 924(c) by the Supreme Court that required the imposition of enhanced § 924(c) sentences for "second or successive" § 924(c) convictions even when the defendant had no prior § 924(c) conviction—the highly-criticized "stacking" practice that resulted in the excessive sentence imposed on Maumau.

1. *Section 603(b) of the First Step Act*

Section 603(b) of the First Step Act, titled "Increasing the Use and Transparency of Compassionate Release," amended 18 U.S.C. § 3582(c)(1)(A) to provide district courts with authority to reduce sentences in cases presenting extraordinary and compelling reasons whenever "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 after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]" First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

Previously, only the BOP could make such motions. The amendment removed the BOP as the compassionate release gatekeeper because it too infrequently opened the gate. *See, e.g.*, DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, at 11 (April 2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").[2]

The title of Section 603(b) summed up its purpose: to expand the use and transparency of compassionate release. *See* 164 Cong. Rec. S7649 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("[T]his legislation includes several positive reforms from the House-passed FIRST STEP Act . . . The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.").

[2] Available at https://oig.justice.gov/reports/2013/e1306.pdf.

2. *Section 403 of the First Step Act*

Section 403 of the First Step Act, titled a "Clarification of Section 924(c)," made clear that Congress always intended 18 U.S.C. § 924(c) to be a true recidivist statute. The amendment re-wrote § 924(c) so that the enhanced, 25-year mandatory minimum is mandated only by a § 924(c) conviction that occurs after a prior such conviction has become final. Accordingly, today, defendants like Maumau would receive a 5-year term on each § 924(c) count (or a 7-year term in the event of a jury finding that the firearm was brandished).

C. The Sentence Reduction

On August 13, 2019, Maumau submitted a written request to the Warden of USP Pollock asking that he move the district court for a reduction of Maumau's sentence under 18 U.S.C. § 3582(c)(1)(A)(i). The BOP neither denied Maumau's application nor filed a motion with the district court on Maumau's behalf. The government concedes Maumau has satisfied the exhaustion requirement of 18 U.S.C. § 3582(c)(1)(A). *See* App'x Vol. I. at 182, n.4.

On October 15, 2019, Maumau moved in the district court for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). App'x Vol. I at 106–25. The government filed an opposition brief on January 9, 2020, App'x Vol. I at 126–67, and Maumau filed a reply on February 3, 2020, App'x Vol. I at 168–79. On February 18, 2020, the district court granted Maumau's motion in a 14-page order

and scheduled a hearing to determine the appropriate sentence reduction. App'x Vol. I at 180–94. In its order, the district court explained that § 3582(c) authorized it to grant Maumau's motion based on the "extraordinary and compelling" circumstances presented, namely Maumau's "age, the length of sentence imposed, and the fact that he would not receive the same sentence if the crime occurred today." App'x Vol. I at 188.

In advance of the hearing to determine the appropriate amount of the reduction, the court ordered the Probation Office to prepare a new Presentence Report and ordered the parties to file new sentencing memoranda addressing the § 3553(a) factors. The court held sentencing hearings on May 4, 2020, and May 11, 2020, during which it heard argument from defense counsel and from the government. Supp. App'x at 30–67; App'x Vol. I at 240–69. On the latter date, the district court reduced Maumau's sentence to time served, and ordered his release on May 23, 2020, after serving 14 days in quarantine at the Salt Lake City Jail. Supp. App'x at 68–77. The government appealed.

D. The Stay Motion

During the May 11, 2020 hearing, the district court denied the government's motion to stay Maumau's release pending appeal. App'x Vol. I at 267. The next day, the government asked this Court to stay Maumau's release pending appeal. After briefing, this Court granted the government's request for a stay and set an

expedited briefing and oral argument schedule. If this Court affirms the order on appeal, Maumau will be released immediately.

STANDARD OF REVIEW

This appeal presents two questions for review. Both are reviewed *de novo*. *United States v. Cobb*, 584 F.3d 979, 982 (10th Cir. 2009). The first is whether the district court had the authority under § 3582(c)(1)(A)(i) to grant Maumau the requested sentence reduction. The second is whether the district court "disagree[d] with the length of a mandatory sentence," and, if it did, whether that was error.

SUMMARY OF ARGUMENT

The government raises two arguments on appeal. First, it argues the district court erred by concluding that "it had the authority to determine for itself what constitutes an 'extraordinary and compelling reason' that would justify compassionate release" under § 3582(c). *See* Gov't Br. at 12. That contention is wrong as a matter of law, as a growing number of district courts have held. The text of § 3582(c)(1)(A)(i), on its face, empowers a district court to reduce a sentence "in any case" where it finds that extraordinary and compelling reasons warrant a reduction. Nothing in the statute's text or legislative history or in the Sentencing Commission's policy statement suggests otherwise or supports the government's position here.

Second, the government argues that the district court was not authorized to grant compassionate release "based on its disagreement with the length of a mandatory sentence." *See* Gov't Br. at 35. But this mischaracterizes the record; the district court's decision was based on a number of factors, none of which was disagreement with the length of a mandatory sentence. The government also does not contend that the judge abused her discretion at any point in their brief. In any event, the argument is meritless. It would be bizarre indeed if district courts, in exercising discretion conferred by Congress to reduce sentences, were prohibited from considering the excessive harshness of the sentence enhancements that produced them. Congress has always intended the provisions of § 3582(c)(1)(A) to operate as "safety valves for modification of sentences," allowing for "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence." *See* S. Rep No. 98-225, at 55–56, 121 (1983). Of course judges may properly act upon their disagreement with excessively long mandatory sentences.

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

ARGUMENT

A. Under 18 U.S.C. § 3582(c)(1)(A), the district court had the authority to reduce Maumau's sentence.

The district court correctly held that it had the authority to reduce Maumau's sentence. First, the text of § 3582(c)(1)(A) empowers a district court to reduce a

sentence "in any case" where it finds that extraordinary and compelling reasons warrant a reduction. Second, the legislative history of both the Comprehensive Crime Control Act of 1984 and the First Step Act confirms that § 3582(c)(1)(A) means exactly what is says: courts have the authority to reduce criminal sentences "in particularly compelling situations," *see* S. Rep No. 98-225, at 52, 56 (1983), including when they see the need to reduce "an unusually long sentence," *see id*. at 55–56, 121. Third, contrary to the government's view, there is nothing in the relevant policy statement issued by the United States Sentencing Commission, or its commentary, that circumscribes that authority. Indeed, the policy statement expressly authorizes sentence reductions based on reasons "other than, or in combination with," the three grounds the government contends are the only possible grounds for a reduction in this context. The district court's authority to reduce Maumau's sentence is explicitly provided and appropriately confined by 18 U.S.C. § 3582(c)(1)(A)'s requirement that a sentence may be reduced for "extraordinary and compelling" reasons, and, contrary to the government's contentions, is neither new nor limitless.

1. *The text of § 3582(c)(1)(A) empowers district courts to reduce sentences in cases presenting extraordinary and compelling reasons.*

Section U.S.C. § 3582(c)(1)(A) expressly authorized the district court to reduce Maumau's sentence based on the combination of extraordinary and compelling reasons presented.

First enacted as part of the Comprehensive Crime Control Act of 1984, § 3582(c)(1)(A) soon became known as the "compassionate release" statute. The pre-First Step Act version of § 3582(c)(1)(A) provided that:

> *the court*, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent they are applicable, *if it finds that—*
>
> > (i) extraordinary and compelling reasons warrant such a reduction; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determiation 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 in the community, as provied under section 3142(g).
> >
> > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

See 18 U.S.C. § 3582(c)(1)(A) (emphasis added). And, as relevant here, the First Step Act amended § 3582(c)(1)(A) by permitting courts to grant a sentence

reduction not only "upon motion of the Director of the Bureau of Prisons," but also:

> upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facilitiy, whichever is earlier[.]

18 U.S.C. § 3582(c)(1)(A).

The text of the statute was—and still is—unambiguous. It does not limit a court's authority to specified sets of circumstances or circumscribe the "extraordinary and compelling reasons" upon which a court's decision can be based. That is true in both the pre- and post-First Step Act versions of the statute. Even before the First Step Act, § 3582(c)(1)(A) stated that the court may reduce a sentence "if *it* [the court] finds" extraordinary and compelling reasons exist for the reduction. The amended version of the statute reinforces this authority by allowing a court to exercise its discretion to reduce a sentence "in any case" where "extraordinary and compelling reasons warrant such a reduction," as long as that reduction is consistent with the applicable policy statement.

2. *The legislative history of § 3582(c)(1)(A) demonstrates Congress's intent to grant federal sentencing courts discretion to reduce unusually long sentences.*

The legislative history of § 3582(c)(1)(A) underscores its applicability to circumstances like the ones presented here. Congress did not cabin what can

constitute an "extraordinary and compelling reason," and the Senate Report states that the statute allows for "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence." S. Rep No. 98-225, at 55–56, 121 (1983). In abolishing parole and creating a "completely restructured [G]uidelines sentencing system," *id.* at 52, 53 n.74, Congress recognized the need for judicial authority to reduce previously-imposed sentences:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, *cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55–56 (emphasis added). This authority empowered judges to reduce a term of imprisonment when justified by factors that previously could have been addressed through the (now abolished) parole system, while keeping "the sentencing power in the judiciary where it belongs." *Id*. at 121.

The government claims that the legislative history shows one of Congress's primary goals was to eliminate unwarranted sentencing disparities. *See* Gov't Br. at 41. But the provision of limited authority for judges to reduce sentences in extraordinary and compelling circumstances not only does not undermine that goal, it was necessary to help achieve it. The government's argument is blind to the reality that unwarranted disparities are not produced solely by judges. Prosecutors

produce them as well. Armed with the discretion to invoke ultra-harsh mandatory sentencing provisions, the government over the past several decades has not limited its invocation of those provisions to ultra-culpable defendants, but rather has widely used them to punish defendants who refuse to plead guilty, forcing countless unwarranted disparities on judges. Our motion below relied explicitly on the fact that it did so in this very case,[3] and these government-produced unwarranted disparities have repeatedly been cited by the district judges around the country who are reducing onerous sentences in the wake of the First Step Act.[4]

---

[3] Our motion to Judge Campbell stated, in relevant part, as follows:

> [T]here is a glaring unwarranted disparity between Maumau's sentence and those of his co-defendants, who engaged in the same conduct as Maumau but pled guilty. Maumau's codefendant George Pupunu pled guilty to one count of racketeering conspiracy and one § 924(c) count and was sentenced to 10 years of imprisonment. Another codefendant, Peter Tuiaki pled guilty to the same two counts as Pupunu and was sentenced to 12 years of imprisonment. And, as stated above, Edward Kamoto, who took part in two of the three robberies with Maumau was not even charged because of his cooperation with the government. Even taking into account credits for accepting responsibility and for providing substantial assistance to the government, there are extraordinary disparities in this case, and they appear to be based solely on the fact that Maumau elected to exercise his constitutional right to a jury trial.

App'x Vol. I. at 123.

[4] *See, e.g.*, *United States v. Urkevich*, No. 8:03-CR-37, 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019) (considering § 3553(a)(6) ("need to avoid unwarranted sentence disparities among" similarly situated defendants) when finding "extraordinary and compelling reasons" for reduction in sentence); *United States v. Cantu-Rivera*, No. H-89-204, 2019 WL 2578272 at *2 (S.D. Tex. June 24, 2019)

In short, both the text and expressed purpose of the statute are directly at odds with the government's view that nothing in "the compassionate release statute itself gives authority to the courts to take over for the Director of the Bureau of Prisons" in determining whether there are extraordinary and compelling reasons warranting relief. *See* Gov't Br. at 38.

3. *The Sentencing Commission's Policy Statement supports this approach.*

We agree that the sentence reductions granted here must be "consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A); *see* Gov't Br. at 18. Section 1B1.13 confirms that a district court may grant a sentence reduction in any case where it determines that "extraordinary and compelling reasons warrant the reduction." There is no mention or suggestion in the policy statement itself that the *BOP's* determination of what constitutes extraordinary and compelling reasons warranting relief matters at all.

The text of § 1B1.13 largely parallels that of § 3582(c)(1)(A), stating, in relevant part:

> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment . . . if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, *the court determines that*—

(considering the "unwarranted [sentencing] disparities among defendants" in determining resentencing was appropriate).

> (1) (A) extraordinary and compelling reasons warrant the reduction; . . .
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

U.S.S.G. § 1B1.13 (emphasis added).

Thus, the text of § 1B1.13 does not support the contention that the BOP gets to determine when a sentence reduction is appropriate. To the contrary, it states that "the court determines" whether "extraordinary and compelling reasons warrant the reduction." The remainder of the policy statement adds one requirement: that the defendant is not a danger. It imposes no further constraints on the court's discretion to determine that extraordinary and compelling reasons warrant relief.

The only reference to the BOP in § 1B1.13 is to the pre-First Step Act condition precedent of a BOP motion—a requirement that directly conflicts with the First Step Act's amendments to § 3582(c)(1)(A). Accordingly, the phrase "upon motion of the director of the Bureau of Prisons" must be excised. *See Dorsey v. United States*, 567 U.S. 260, 266 (2012) ("The [statute] . . . interacts with the Guidelines in an important way. Like other sentencing statutes, it trumps the Guidelines."); *see also Cantu-Rivera*, 2019 WL 2578272 at *2 n.1 ("Because the current version of the Guideline policy statement conflicts with the First Step Act, the newly-enacted statutory provisions must be given effect.").

The government invokes *Dillon v. United States*, 560 U.S. 817 (2010) to support its theory that Maumau's sentence reduction was not authorized by the Sentencing Commission's policy statement. *See* Gov't Br. at 21–22. But *Dillon* stands for a point not at issue in this case: sentence reductions under § 3582(c)(2) (and, we agree, under § 3582(c)(1) as well) may not be inconsistent with any applicable policy statement in the Guidelines Manual. It has no bearing here, where legislation has superseded the text of a Guidelines provision the Sentencing Commission has not yet amended.

Congress's decision in the First Step Act to remove the BOP's gatekeeper status over § 3582(c) motions conflicts with the vestigial requirement that the BOP must seek a sentence reduction on a defendant's behalf. *See Dorsey*, 567 U.S at 266. The government does not contend otherwise. Thus, the *applicable* provisions of § 1B1.13, like the text of § 3582(c)(1)(A) itself, reinforce that the *court*, and the court alone, has the ultimate authority to determine whether extraordinary and compelling reasons warrant a sentence reduction.

4. *The government's reading of the commentary conflicts with the text of both § 3582(c)(1)(A) and § 1B1.13.*

The commentary following § 1B1.13 sets out four grounds for a finding that "extraordinary and compelling reasons exist": (1) where the defendant has a qualifying medical condition, *see* U.S.S.G. § 1B1.13 n.1(A); (2) where the defendant meets certain age-related criteria, *see id*. n.1(B); (3) where the defendant

has one of two enumerated "family circumstances," *see id.* n.1(C); or (4) where, "[a]s determined by the [BOP], there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)," *see id.* n.1(D). The fourth ground, commonly known as the "catch-all provision," clearly authorizes sentence reductions for extraordinary and compelling reasons other than age, medical condition, or family circumstances. But because it contains the language "as determined by the director of the Bureau of Prisons," the government contends that only the BOP can make use of that ground. *See* Gov't Br. at 37–39.

By clinging to these ten vestigial words—words that became obsolete the moment Congress removed the BOP as the gatekeeper for motions under the statute—the government seeks to unilaterally eliminate one of the four grounds for relief enumerated by the Sentencing Commission. The government's reading of the catchall provision in § 1B1.13 places the commentary in direct conflict with both the text of § 3582(c)(1)(A) and the text of the policy statement upon which the commentary elaborates. As discussed above, far from conditioning a finding of extraordinary and compelling reasons on the permission of the BOP, both § 3582(c)(1)(A) and § 1B1.13 vest this authority explicitly and solely with the court. 18 U.S.C. § 3582(c)(1)(A) ("the court . . . may reduce the term of imprisonment . . . if it finds that extraordinary and compelling reasons warrant

such a reduction"); U.S.S.G. § 1B1.13 ("the court may reduce a term of imprisonment . . . [where] the court determines that extraordinary and compelling reasons warrant the reduction"). Even the commentary itself says as much in Application Note 4. *See* U.S.S.G. § 1B1.13 n.4 (stating that "[t]he court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction)" and "encourag[ing]" the filing of a motion for compassionate release where a defendant "meets any of the circumstances set forth in [the] Application Note").

The introductory language of Application Note 1(D)—the part purporting to limit the determination of other circumstances warranting a sentence reduction to the discretion of the Director of the BOP—thus conflicts with § 3582(c)(1)(A) and § 1B1.13. As such, that introductory phrase must be read out of the commentary. *See Stinson v. United States*, 508 U.S. 36, 40–42 (1993); *United States v. Allen*, 909 F.3d 671, 675 (4th Cir. 2018). After the amendments to § 3582(c)(1)(A), that condition has no more place in the statutory regime than the multiple other references to the BOP as gatekeeper in both the policy statement and the commentary, including the instruction that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons." *See* U.S.S.G. § 1B1.13; *id.* n.1(D); *id.* n.4; *id.* n.5.

The government criticizes the district court for exercising "independent authority to determine what constitutes an 'extraordinary and compelling reason[.]'" Gov't Br. at 19. But that is exactly what the First Step Act's amendment of § 3582(c)(1)(A) was intended to accomplish. Congress sought to rectify the BOP's disuse and mismanagement of the compassionate release motions, and by doing so to increase the use and transparency of sentence reductions *See* P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). The Sentencing Commission, which since the enactment of the First Step Act has lacked the quorum necessary to amend the Guidelines Manual, has acknowledged that changes to § 1B1.13 are required related to the identity of the movant, with no mention of any limitations on the substantive grounds for relief available to moving defendants. *See* U.S. SENTENCING COMM'N, SUMMARY STATEMENT ACCOUNT REQUIREMENTS 10.7 (2020).

Moreover, there is another fundamental defect in the government's contention that one of the bases for a sentence reduction expressly authorized by both the statute and the policy statement—extraordinary and compelling reasons untethered to age, medical condition, or caregiver status—can be invoked only in a motion by the BOP. The BOP has literally *never* made a motion on such a basis, and, because its program statement on the topic precludes it from doing so, it never

will.[5] Thus, in the face of a statutory amendment, the title of which made clear it was supposed to *increase* the use of a sentence reduction provision, accepting the government's contention would effectively *eliminate* one of four grounds for such relief. And in the face of an express desire on the part of Congress to permit sentence reductions not only without the BOP's imprimatur but even if BOP affirmatively finds the reduction unwarranted, the government would use obsolete language in the commentary to § 1B1.13 to put the BOP right back in charge, where it would continue unilaterally to limit sentence reductions to only cases involving age, medical condition, or extraordinary family circumstances.

The government's argument cannot be reconciled with (1) the original text of § 3582(c)(1)(A), (2) its purpose back in 1984, (3) the text of the amended statute, (4) the purpose of the First Step Act amendment, or (5) the text of the policy statement and its commentary.[6] Nor can it be reconciled with the government's

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[5] The program statement that governs the BOP's procedure for evaluating requests for a reduction in sentence pursuant to § 3582(c)(1)(A) limits the grounds to age, medical condition and caregiver status. *See* BUREAU OF PRISONS, PROGRAM STATEMENT 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (Jan. 17, 2019).

[6] The district court cases the government cites in support of the proposition that "courts remain bound by the Commission's policy statement" *see* Gov't Br. at 30, either reflect the incorrect minority view of the district court's authority, or do not address Application Note 1(D). *See United States v. York*, 2019 WL 3241166, *4 (E.D. Tenn. July 18, 2019) (granting motion based on medical condition of defendant); *United States v. McGraw*, No. 2:02-CR-00018, 2019 WL 2059488, at

own insistence that the Sentencing Commission, and not the courts, determines the grounds for compassionate release in §1B1.13, Application Note 1. *See* Gov't Br. at 17–19.

For the foregoing reasons, the majority of district courts that have considered the issue have found that the authority to grant a sentence reduction under the catchall provision does not depend on a BOP motion, and indeed many have done so based on the same "extraordinary and compelling reasons" that the district court found present in Maumau's case.[7] We respectfully ask this Court to do the same.

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*2 (S.D. Ind. May 9, 2019) (same); *United States v. Willis*, 382 F.Supp.3d 1185, 1187 (D.N.M. 2019) (denying motion based on medical condition of defendant).

[7] *See, e.g.*, *United States v. Clausen*, No. CR 00-291-2, 2020 WL 4260795, at *8 (E.D. Pa. July 24, 2020) ("Based on the combination of Clausen's 'off the charts' sentence—which is longer than Congress now deems warranted—and his evident personal growth and rehabilitation, the Court finds that Clauson has established extraordinary and compelling reasons that warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)."); *United States v. Adeyemi*, No. CR 06-124, 2020 WL 3642478, at *15 (E.D. Pa. July 6, 2020)(finding that "[b]ecause the Sentencing Commission has not amended its policy statement or commentary after the passage of the First Step Act, and Note 1(D) contradicts the First Step Act's amendment to section 3582(c)(1)(A)(i), [district courts] may independently determine extraordinary and compelling reasons in line with the rest of the Commission's commentary not rendered contradictory to federal law."); *United States v. Quinn*, No. 3:91-CR-00608, 2020 WL 3275736, at *4 (N.D. Cal. June 17, 2020) (joining "numerous other courts" and holding that the First Step Act empowered district courts to consider "enormous sentencing disparit[ies] created by subsequent changes to federal sentencing law" as an "extraordinary and compelling reason" for compassionate release); *United States v. Lott*, No. 95-CR-72, 2020 WL 3058093, at *2 (S.D. Cal. June 8, 2020) ("[T]he Court finds that [the sentencing guideline] provisions are not a limitation upon the Court's ability to

determine whether a defendant has presented extraordinary and compelling reasons for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)"); *McCoy v. United States*, No. 2:03-CR-197, 2020 WL 2738225, at *4 (E.D. Va. May 26, 2020) ("[T]he Court has the statutory authority to define the contours of the "extraordinary and compelling reasons" for a sentence reduction and is not constrained by the Bureau of Prisons' interpretation of § 3582(c)(1)(A) via U.S.S.G. § 1B1.13"); *United States v. Scott*, No. 95-CR-202, 2020 WL 2467425, at *3 (D. Md. May 13, 2020) ("While Sentencing Commission and BOP criteria remain helpful guidance, the amended § 3582(c)(1)(A)(i) vests courts with independent discretion to determine whether there are "extraordinary and compelling reasons" to reduce a sentence."); *United States v. Arey*, No. 5:05-CR-00029, 2020 WL 2464796, *4 (W.D. Va. May 13, 2020) (the First Step Act revised § 3582(c) to vest the court with "independent discretion" to find extraordinary and compelling circumstances that warrant a reduction of sentence); *United States v. Marks*, No. 03-CR-6033L, 2020 WL 1908911, at *17 (W.D.N.Y. Apr. 20, 2020); *United States v. McPherson*, No. 94-CR-570, 2020 WL 1862596, at *4 (W.D. Wash. Apr. 14, 2020); *United States v. Wade*, No. 2:99-CR-00257, 2020 WL 1864906, at *5 (C.D. Cal. Apr., 13, 2020) ("A growing number of district courts . . . have concluded that, in the absence of applicable policy statements, courts can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 warrant sentence modification.") (citations omitted); *United States v. Young*, No. 2:00-CR-00002-1, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020) (determining that courts "have the authority to reduce a prisoner's sentence upon the court's independent finding of extraordinary and compelling reasons"); *United States v. Ebbers*, 432 F.Supp.3d 421, 433 n.6 (S.D.N.Y. 2020) ("[T]he First Step Act reduced the BOP's control over compassionate release and vested greater discretion with the courts. Deferring to the BOP would seem to frustrate that purpose"); *Urkevich*, 2019 WL 6037391, at *1 ("The First Step Act also amended 18 U.S.C. § 3582. In Section 603 of the Act, congress amended § 3582(c)(1)(A) to permit defendants to move a sentencing court for modification of sentence"); *Cantu-Rivera*, 2019 WL 2578272, at *2 n.1 (finding the court had the authority to determine that defendant was entitled to relief under the catch-all provision in the commentary to § 1B1.13); *see also United States v. Schmitt*, No. 12-CR-4076, 2020 WL 96904, *4 (N.D. Iowa Jan. 8, 2020); BRIEF OF THE AMERICAN CONSERVATION UNION FOUNDATION NOLAN CENTER FOR JUSTICE ET AL. AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL at 11, *United States v. Bryant*, No. 19-14267 (11th Cir. Feb. 20, 2020) ("The text of Section 3582(c) and its history show that Congress intended to give a federal court the power to grant a sentence reduction based on "extraordinary and

5. *The district court's authority under § 3582(c)(1)(A) is neither new nor limitless.*

Finally, the government's claimed fear that a decision affirming the district court's order would "convert[] the compassionate release statute into a plenary resentencing statute," and that it would make mandatory sentencing statutes "essentially advisory," *see* Gov't Br. at 3, 45, is unfounded.

First, the government's argument that district judges' authority to reduce unusually long sentences did not previously exist, *see* Gov't Br. at 28, is wrong. The First Step Act's amendment of § 3582(c)(1)(A) played a critical role in increasing the *use* of that authority, but it did not grant district courts power to reduce sentences. From 1984 until December 2018, the authority existed, but there was a condition precedent to its exercise: a motion from the BOP. That turned out to be a glaring mistake, because the BOP was a terrible gatekeeper, and, as mentioned above, it never once made a motion based on extraordinary and compelling reasons unrelated to age, medical conditions, or family circumstances, even though the statute expressly authorized reductions for other reasons. Accordingly, the First Step Act removed the BOP from its gatekeeper role,

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compelling reasons" even in the absence of a determination by the Bureau of Prisons that such reasons exist.").

allowing inmates to proceed to court when the BOP failed to make a motion or even expressly denied an application for one.[8]

Second, the authority granted by § 3582(c)(1)(A) is neither widespread nor troubling. A district court may reduce a sentence only when, among other requirements, the sentence reduction is warranted because of truly "extraordinary and compelling reasons." It is an important opportunity in a parole-less regime for

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[8] The government attempts to escape this logic by arguing that the First Step Act now permits defendants to file a motion for a sentence reduction based on extraordinary and compelling circumstances even without BOP approval, but that the district court lacks authority to *grant* such a motion without BOP approval. *See* Gov't Br. at 32. One would think that if Congress intended such an absurd result it would have said so. The odd analogy the government conjures fails because the government's argument here is much more analogous to a statute that lowers the threshold for diversity jurisdiction but says plaintiffs who cannot satisfy the old threshold can never win their cases.

More fundamentally, the government does not even try to explain why any court would strain in this way to reach a conclusion that is so obviously at odds with both the original purpose of the statute and the First Step Act's amendments to it. The stark fact is that *Congress*, not the district court, legislated the bases for sentence reductions, and they include the one at issue here. As discussed above, it unequivocally conferred that authority on *judges*, in a statute that makes no reference to the BOP. And though it also required any sentence reduction to be consistent with the Sentencing Commission's guidance, the Commission's policy statement also unambiguously confers the same authority on *judges*, again without any reference at all to the BOP. Then, when the BOP botched the job of gatekeeper for such motions, Congress removed it from that role for the explicit purpose of helping to reduce mass incarceration by *increasing the use* of sentence reductions. The government's convoluted argument would ignore that directive and inexplicably excise all references to BOP from the policy statement and commentary save one, all in an effort to produce the exact opposite effect: eliminating *all* sentence reductions based on reasons other than the specified ones, because the BOP playbook refuses to permit it to ever endorse such a motion. This Court should reject that argument out of hand.

judges to bring a belated measure of justice to excessive sentences, but it is narrowly cabined by the words of the statute and the Commission's policy statement. Over time, this Court will no doubt provide further guidance by affirming reductions that fall within the ambit of discretion afforded by the law and policy statement and reversing those that amount to abuses of that discretion.

The government's characterization of Judge Campbell's order as a "disagreement with Congress about what the sentence's length should be" betrays a dangerous misapprehension about the role of mandatory sentencing provisions in our system. Mandatory sentencing provisions like those in § 924(c) and 21 U.S.C. § 841 do not apply in every case that involves the use or possession of a firearm in a robbery, or every case involving more than specified amounts of particular narcotic drug. They apply only when those facts are present *and a prosecutor invokes them.* A sentence that embodies harsh mandatory minimums can *never* be considered a sentence Congress decided upon; Congress expects the executive to exercise its enormous discretion prudently. Indeed, in fighting for the legislative change that conferred the discretion *not* to seek mandatory recidivism-based sentences in drug cases, the Department of Justice assured Congress such enhancements were so harsh they should be invoked only against "professional criminals."[9] And though the government devotes considerable ink to the

[9] *See United States v. Kupa*, 978 F.Supp.2d 417, 426 (E.D.N.Y. 2013).

legislative history of § 924(c), the most important thing to be said on that topic is this: Congress did not put that powerful tool in DOJ's toolbox so it could strong-arm guilty pleas from young men of color like Kepa Maumau, or so it could add 45 years to their sentences when they stood up for their right to trial by jury.

Thus, this central premise upon which the government has been opposing motions like the one in this case—*i.e.*, that the district court would somehow be disagreeing with a sentence Congress decided was right—is frivolous. If Congress "agreed" with these sentences, and with the way DOJ invoked them over the years, it would not have amended the statute to put an end to them after the Sentencing Commission twice asked it to do so because they were both too harsh and invoked in discriminatory fashion against defendants of color.[10]

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[10] There are troubling demographic differences in the application of § 924(c)'s mandatory minimum penalties. In its 2004 report entitled *Fifteen Years of Guidelines Sentencing*, the Sentencing Commission wrote that Black defendants had been disproportionately subjected to § 924(c) "stacking" for decades. Specifically, they accounted for 48% of offenders who qualified for a charge under § 924(c), but they represented 56% of those actually charged under the statute, and 64% of those convicted under it. The report can be found at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

In its October 2011 *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at page 363, the Sentencing Commission observed that Black offenders still constitute the majority of offenders—55.7%—who are subjected to § 924(c)'s mandatory minimum penalties at sentencing, and are also convicted of multiple § 924(c) counts in greater proportions—61%—than other ethnicities. The Sentencing Commission recognized that these racial differences create an impression of "unfairness and unwarranted disparity" that is difficult to refute. The report can be found at:

The district court's authority to correct such injustices threatens no harm to the federal sentencing regime. Every day of Maumau's 55-year sentence was mandated by an erroneous interpretation of a sentencing provision that was used by the government against a young man for the wrong reason. There is nothing earth-shattering about a judicial check on the government's ability to force such an exorbitant sentence on the court. Indeed, limited as it is to cases presenting extraordinary and compelling reasons, § 3582(c)(1)(A) is arguably an insufficient check, but in any event it is certainly not a grant of limitless power.

As for the government's repeated references to the finality of sentences, sentences have precisely the degree of finality that Congress chooses to give them. It was always the intent of Congress that the provisions of § 3582(c)(1)(A) would operate as "safety valves for modification of sentences," allowing for "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence." *See* S. Rep No. 98-225, at 55–56, 121 (1983).

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http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

More recent data set forth in the Sentencing Commission's March 2018 Report, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, at 6, indicates that the only § 924(c) defendants who fare worse than black males are "Other Race" offenders, which includes those of Pacific Islander origin such as Maumau, who received the longest average sentences under § 924(c). This report is available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

Especially in a determinate regime that affords prosecutors enormous power to control sentencing outcomes by invoking mandatory sentencing statutes, the availability of a judicial check on the results, structured and circumscribed by statute and subject to appellate review, accords precisely with our constitutional model of checks and balances.

B. The district court did not base its order on a "disagreement with the length of a mandatory sentence," and in any event would not have erred if it did.

An especially telling feature of the government's brief is something it does *not* say. No variation of the phrase "abuse of discretion" can be found in it because the government does not contend that if Judge Campbell had the authority to reduce Maumau's sentence, she abused that authority on the facts of this case. Gone is the government's insistence that Maumau's offense conduct required his incapacitation for more than half a century to protect the community, as the prosecutor had no answer to Judge Campbell's inquiry on May 4, 2020 about how, if that were true, it would have agreed to a ten-year sentence if only Maumau would plead guilty.[11] Gone are the other arguments made below in an entirely unconvincing attempt to justify the breathtaking sentence in this case. There is no dispute here that the careful, thorough, and experienced district judge, informed by

[11] At the hearing a week later, the government claimed for the first time that its plea offer called for a 15-year or 16-year sentence, but that was immediately refuted by written documentation of the ten-year offer. App'x Vol. I at 17–20.

her years-long involvement with this case, robust briefing from the parties, and two oral arguments, arrived at a just sentence.[12]

[12] A growing majority of district courts have similarly concluded that the circumstances presented here warranted relief under § 3582(c)(1)(A). *See, e.g.*, *Lott*, 2020 WL 3058093, at *3 (finding the sentencing disparity created by Congress's revision of the stacking provisions under § 924(c) "presents an extraordinary and compelling reason for determining whether the factors in 18 U.S.C. § 3553(a) support a reduction in Defendant's sentence under § 3582(c)(1)(A)"); *United States v. Littrell*, No. 4:05-CR-00084, at 11 (E.D. Mo., May 19, 2020) (finding "many district courts have held that the sentencing disparity caused by the non-retroactive changes to § 924(c) can, when combined with other factors, constitute extraordinary and compelling reasons for a reduction of sentence"); *Arey*, 2020 WL 2464796, at *6 ("[P]ursuant to its independent discretion, the court finds that [defendant's] continued incarceration under a sentencing scheme that has since been substantially amended is a permissible "extraordinary and compelling" reason to consider a reduction in [defendant's] sentence"); *Scott*, 2020 WL 2467425, at *3 ("The fact that [defendant], if sentenced today for the same conduct, would likely receive a dramatically lower sentence than the one he is currently serving, constitutes an "extraordinary and compelling" reason justifying potential sentence reduction under § 3582(c)(1)(A)(i)."); *United States v. Haynes*, No. 93-CR-1043, 2020 WL 1941478, at *15 (E.D.N.Y. Apr. 22, 2020) (joining numerous courts in "holding that this sea change in § 924(c) law, coupled with the brutal impact of the original sentence, is an extraordinary and compelling circumstance warranting a reduction in sentence under the compassionate release statute"); *Marks*, 2020 WL 1908911, *7 ("Several courts have recently ruled that the combination of changes to the 'stacking' provisions of § 924(c), coupled with the defendant's rehabilitation, establish extraordinary and compelling conditions warranting a sentence reduction."); *Wade*, 2020 WL 1864906, at *6 (finding that defendant's rehabilitation coupled with "the injustice of facing a term of incarceration several decades longer than Congress now deems warranted" qualified as extraordinary and compelling circumstances meriting relief) (quotations omitted)); *United States v. Decator*, No. 95-CR-0202, 2020 WL 1676219, at *3 (D. Md. Apr. 6, 2020) (agreeing with the "[m]ultiple district courts [that] have reasoned that 'the First Step Act's change in how sentences should be calculated when multiple § 924(c) charges are included in the same indictment constitutes an extraordinary and compelling reason under 18 U.S.C. § 3582(c)(1)(A)"); *United States v. Redd*, No. 1:97-CR-00006, 2020 WL

All that remains along this dimension is the government's contention that the sentence Judge Campbell replaced with a fair one was mandatory. It asserts that the fair sentence must be set aside, and the egregious one reinstated, because it was based on Judge Campbell's "disagreement with the length of a mandatory sentence." *See* Gov't Br. at 14, 35.

Once again, the government's argument is based on a false premise. The district court did not reduce Maumau's sentence based on a "disagreement with the length of a mandatory sentence;" rather, it found that "Maumau's age, the length of sentence imposed, and the fact that he would not receive the same sentence if the crime occurred today all represent extraordinary and compelling grounds to reduce his sentence." *See* App'x Vol. I at 188. Unless the government is contending that

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1248493, at *5 (E.D. Va. Mar. 16, 2020) (granting sentence reduction under § 3582(c), noting that the defendant's sentence was "30 years, or three times longer, than what Congress has now deemed an adequate punishment for comparable § 924(c) conduct" and "20 years longer than what the Government at the time thought was an adequate punishment for [the defendant], as reflected in its plea offer"); *Young*, 2020 WL 1047815, at *8 (finding "the drastic change effected by the First Step Act's amendment of § 924(c) constitutes an extraordinary and compelling reason for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), at least when considered in conjunction with" other reasons warranting relief); *United States v. O'Bryan*, No. 96-CR-10076, 2020 WL 869475, at *1–2 (D. Kan. Feb. 21, 2020) (finding extraordinary and compelling reasons existed, in part, based on the fact that the defendant would be facing 10 years imprisonment rather than 25 if convicted of the same conduct following the passage of the First Step Act); *Urkevich*, 2019 WL 6037391, at *4 ("[R]eduction in [defendant's] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed").

district courts can never consider sentence length at all—which would be an odd prohibition given that the task at hand is to determine whether the sentence should be reduced—the district court simply did not do what the government complains about. She expressed no disagreement with a mandatory sentence.

More to the point, this argument is just another iteration of the government's meritless contention that only considerations of age, medical condition, and family circumstances may inform a sentence reduction under § 3582(c)(1)(A). The government conceded in the district court, as it must, that the fact that the initial sentence was mandatory does not constrain a reduction of sentence under § 3582(c)(1)(A) in any way.[13] Thus, the government's argument goes, a district

[13] Judge Campbell began the proceeding on May 4, 2020 by stating that she could not reduce Maumau's sentence to time-served because that would fall below the mandatory minimum he would face if he were sentenced today for three § 924(c) convictions. Supp. App'x at 35. Defense counsel disagreed, observing that the degree of a sentence reduction under § 3582(c)(1) is never limited by a mandatory minimum sentence. Supp. App'x at 38, 49–50. The district court adjourned the proceedings for a week for the purpose of receiving briefing on that issue. Supp. App'x at 64–65.

No such briefing occurred because two days later the government conceded that defense counsel was correct. It stated as follows:

> if a case is properly subject to sentence modification under the 3582 compassionate release statute (i.e., it involves a defendant who actually meets one of the specific criteria set forth in the applicable policy statement from the Sentencing Commission), then at that point, the mandatory minimum sentences that previously applied to that defendant would no longer apply, and the court would then be entitled to fashion a new sentence that is consistent with both the purposes of

court is free to reduce a sentence below the mandatory sentence, but it cannot do so on the ground that it "disagrees" with that mandatory sentence.

This Court need not address this contention, as Judge Campbell relied on a number of factors in reducing Maumau's sentence, and, as mentioned above, there is no argument here that she abused her discretion. However, the notion that a judge cannot base a sentence reduction under § 3582(c)(1)(A) on her disagreement with sentence length alone, or her disagreement with the length of a mandatory sentence, is nonsense. One of the expressed purposes of the statute was to provide for relief from unusually long sentences. And when Congress and the Sentencing Commission want to outlaw standalone reasons for sentence reductions, they know how to do so: both have expressly prohibited reductions based solely on rehabilitation. *See* 28 U.S.C. § 994(t) ("Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."); U.S.S.G. § 1B1.13, n.3 ("[R]ehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement."). Disagreements with sentence lengths are clearly appropriate considerations in determining whether to reduce a sentence, and if the government wants to avoid reductions on that basis, it should exercise its prosecutorial discretion more prudently.

> the identified compassionate release criterion and the 3553 factors as a whole.

Gov't Supp. Briefing at 2, 2:08-CR-00758-TC, Dkt. 1757.

CONCLUSION

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

DATED this 3rd day of August, 2020.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(2), Kepa Maumau respectfully submits that oral argument is necessary to the just resolution of this appeal, as it will significantly enhance the decision-making process and allow for critical dialogue with this Honorable Court regarding the important legal issues presented by this case. The Court has scheduled oral argument for September 22, 2020.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,818 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 2(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, Size 14.

CERTIFICATE OF ELECTRONIC SUBMISSIONS

I hereby certify that:

(1) All required privacy redactions have been made.

(2) The hard copies to be submitted to the Court are exact copies of the version submitted electronically.

(3) The electronic submissions have been scanned for viruses with the most recent version of Symantec Anti-Virus, last updated August 3, 2020, and, according to the program, are free of viruses.

Dated: August 3, 2020

/s/ John Gleeson
John Gleeson

Counsel for Defendant-Appellee Kepa Maumau

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I electronically filed the foregoing using the court's ECF system, which will send notification of such filing to all counsel of record, including:

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