APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1904

UNITED STATES OF AMERICA

v.

DANIEL RUTHERFORD A/K/A SQUEAKY,
Appellant.

Argued June 27, 2024

Filed: November 1, 2024

Before: JORDAN, SMITH, Circuit Judges and BUMB, Chief District Judge*.

OPINION OF THE COURT

JORDAN, Circuit Judge.

Daniel Rutherford seeks a reduction of the nearly 42.5-year sentence he received for committing two armed robberies. He argues that he is eligible for compassionate release because, if he were sentenced for those crimes today, his sentence would be at least eighteen years less than the one he received. That sentencing disparity results from changes effected by the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), which, among other things, made a non-retroactive change to the penalties for violating 18

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* Honorable Renée Marie Bumb, Chief Judge of the United States District Court for the District of New Jersey, sitting by designation.

U.S.C. § 924(c), the federal statute that forbids using or carrying a firearm in furtherance of drug trafficking or a crime of violence. The District Court denied Rutherford's sentence-reduction motion, holding that our precedent in *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021), prohibits the change to § 924(c) from being a consideration when determining eligibility for compassionate release.

After the Court denied Rutherford's motion, the United States Sentencing Commission amended its policy statement on compassionate release. It said, for the first time, that courts could consider nonretroactive changes in law, like the amendment to § 924(c), when making a decision about a prisoner's eligibility for compassionate release. Rutherford now argues that we must be guided by the Commission's policy statement, notwithstanding our *Andrews* precedent and the nonretroactive character of the statutory change. In *Andrews*, however, we held that allowing prisoners to be eligible for compassionate release because of the First Step Act's change to § 924(c) would conflict with Congressional intent on nonretroactivity. That conclusion remains true. Accordingly, we will affirm the District Court's order denying Rutherford's compassionate-release motion.

I. BACKGROUND

A. Legal Background

1. The Sentencing Reform Act of 1984 and the Creation of the Sentencing Commission

Prior to 1984, courts and parole officers shared responsibility for federal criminal sentencing. *Mistretta v. United States*, 488 U.S. 361, 363-66, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Courts had "wide discretion" to impose sentences, but parole officers had "almost absolute discretion" in deciding whether "to release a

prisoner before the expiration of the sentence imposed by the judge." *Id.* at 363-65, 109 S.Ct. 647. In that "indeterminate-sentence system," *id.* at 365, 109 S.Ct. 647, there were "significant sentencing disparities among similarly situated offenders" in the actual length of time prisoners served before being released, *Peugh v. United States*, 569 U.S. 530, 535, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013).

Public concern about such disparities prompted Congress to overhaul the federal sentencing system, which it did in the Sentencing Reform Act of 1984 (the "Act"). Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. § 3551 *et seq.* and 28 U.S.C. §§ 991-998). The Act created the United States Sentencing Commission,[1] the fundamental purpose of which is, as statutorily defined, to "establish sentencing policies and practices for the Federal criminal justice system[.]" 28 U.S.C. § 991(b)(1). Those policies and practices are supposed to meet three goals: (1) be in accordance with the purposes of sentencing,[2] (2) "provide certainty and fairness," by "avoiding unwarranted sentencing disparities among defendants with similar records who have been found

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[1] The Commission is an independent agency in the federal judicial branch consisting of seven voting members and one non-voting member. 28 U.S.C. § 991(a). The members are nominated by the President and confirmed by the Senate. *Id.* At least three of the members must be federal judges, and no more than four of the members can be members of the same political party. *Id.*

[2] The purposes of sentencing are "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]" 18 U.S.C. § 3553(a)(2).

guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted[,]" and (3) "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process[.]" *Id.*

The Commission fulfills its purpose by promulgating sentencing guidelines and policy statements. *Id.* § 994(a). Guidelines are used by sentencing courts to calculate "the sentence to be imposed in a criminal case[.]" *Id.* § 994(a)(1). Policy statements, on the other hand, more broadly "regard[] application of the guidelines or any other aspect of sentencing or sentence implementation[,]" including "the sentence modification provisions[.]" *Id.* § 994(a)(2). Guidelines and policy statements are promulgated when there is an "affirmative vote of at least four members" of the Commission.[3] *Id.* § 994(a).

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[3] "To amend the [g]uidelines, the Commission first must follow a notice-and-comment rulemaking process. Next, the Commission must notify Congress of the proposed revisions to the [g]uidelines. If, after 180 days, Congress does not disapprove or modify the proposed amendments, they then take effect." *United States v. Adair*, 38 F.4th 341, 356 (3d Cir. 2022) (citations omitted).

While "[a]mendments to policy statements . . . may be promulgated and put into effect at any time[,] . . . the Commission . . . endeavor[s] to include amendments to policy statements . . . in any submission of guideline amendments to Congress and put them into effect on the same . . . date as any guideline amendments issued in the same year." U.S. Sent'g Comm'n, *Rules of Practice & Procedure* § 4.1 (2016), www.ussc.gov/about/rules-practice-and-procedure [https://perma.cc/BHV7-3BDS]. And, although it is not required by statute, "the Commission will endeavor to provide, to the extent practicable, . . . opportunities for public input on proposed policy statements . . . considered in conjunction with guideline amendments." *Id.* § 4.3.

2. Compassionate Release

The Act "eliminated parole in the federal system[,]" *Peugh*, 569 U.S. at 535, 133 S.Ct. 2072, and emphasized that "'[a] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances[,]" *Dillon v. United States*, 560 U.S. 817, 824, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010) (second alteration in original) (quoting 18 U.S.C. § 3582(b)). One of those circumstances is set forth in 18 U.S.C. § 3582(c)(1)(A)(i), which, with a related subsection, is commonly known as the "compassionate release statute."[4] That statute allows a sentencing court to reduce the sentence of a prisoner if "extraordinary and compelling reasons warrant such a reduction" and the reduction is consistent with both the Commission's policy statements and the sentencing factors set forth in 18 U.S.C. § 3553(a).[5] A

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[4] Section 3582(c)(1)(A)(ii) is another part of the compassionate release statute and is applicable to defendants serving a mandatory life sentence. It is not relevant to this case.

The two other circumstances in which a district court may modify a sentence are when another statute or Federal Rule of Criminal Procedure 35 permits a sentence modification, § 3582(c)(1)(B), or when a defendant has been sentenced to a term of imprisonment based on a sentencing range that was subsequently lowered by the Commission and certain other requirements are met, § 3582(c)(2).

[5] Those factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) [the purposes of sentencing listed *supra* note 2]; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range . . . ; (5) any pertinent policy statement . . . [;] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar

sentencing court must first conclude, as a matter of law, that a prisoner is *eligible* for a sentence reduction before it decides whether he *qualifies* for a reduction. The two concepts – eligibility and qualification – sound similar, but they are distinct. We have explained that "whether any given prisoner has established an extraordinary and compelling reason for release" is a "threshold question" that determines a prisoner's eligibility for compassionate release. *United States v. Stewart*, 86 F.4th 532, 535 (3d Cir. 2023) (internal quotation marks omitted). After a prisoner "clears the threshold eligibility hurdle" of showing "extraordinary and compelling reasons," sentencing courts are then permitted "to exercise broad discretion" to determine whether and to what extent the prisoner warrants, or, in other words, is qualified for, a sentence reduction. *Id.*

Congress did not define the phrase "extraordinary and compelling reasons" in the compassionate release statute. Instead, it instructed the Commission to define it. 28 U.S.C. § 994(t) ("The Commission, in promulgating general policy statements regarding the sentencing modification provisions . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."). Congress placed only one limitation on the Commission's authority to define the phrase – namely, "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

In 2007, the Commission tackled the definitional challenge. It amended a policy statement, § 1B1.13

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

18 U.S.C. § 3553(a).

(the "Policy Statement" or the "Statement'), to provide examples of "extraordinary or compelling reasons" that would allow a prisoner to be eligible for a sentence reduction. The examples include certain medical conditions, severe physical or mental decline, and the death or incapacitation of the primary caregiver of a prisoner's child. U.S.S.G. Supp. App. C, amend. 698 (2007). The Policy Statement also includes a catch-all provision that allows for "an extraordinary and compelling reason other than, or in combination with" the examples, "[a]s determined" by the Bureau of Prisons (the "BOP"). *Id.* In 2016, the Commission added two more examples of extraordinary and compelling reasons related to the age and health of the prisoner. U.S.S.G. Supp. App. C, amend. 799 (2016).

Traditionally, only the BOP was authorized to file a compassionate release motion on behalf of a prisoner; prisoners could not file such motions themselves.[6] That changed in 2018 with passage of the First Step Act, which reduced mandatory minimum sentences for certain drug crimes and opened the door for prisoners to file compassionate-release motions themselves, after they have exhausted administrative remedies through the prison system. Pub. L. No. 115-391, §§ 401, 603(b), 132 Stat. 5194, 5220-21, 5239.

Until the First Step Act was enacted, the Policy Statement defining "extraordinary and compelling reasons" was widely understood to apply only to motions filed by the BOP. U.S.S.G. Supp. App. C, amend. 799 (2016). That was the view of nearly every U.S. Court of Appeals that considered the issue. *See*

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[6] The BOP "used this power sparingly, to say the least." *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (summarizing a report finding that, "on average, only 24 incarcerated people per year were released on BOP motion").

Andrews, 12 F.4th at 259 (holding that the Policy Statement at the time of the First Step Act's enactment was "not applicable" to prisoner-initiated motions, collecting cases from the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits holding the same, and citing to a contrary Eleventh Circuit decision). From 2019 to 2022, due to a lack of a quorum, the Commission did not update the Policy Statement to specify the circumstances that could support a prisoner's compassionate release motion. 88 Fed. Reg. 28,254, 28,256 (May 3, 2023). The timing of the Commission's incapacity was particularly unfortunate because it coincided with the COVID-19 pandemic. That left courts to determine what circumstances qualified as extraordinary and compelling reasons for prisoner-initiated compassionate-release motions, and there was not uniform agreement.

Relevant here, the courts of appeals are split over whether the First Step Act's nonretroactive changes to certain mandatory minimums could be considered an extraordinary and compelling reason to grant a sentence reduction. The First, Fourth, Ninth, and Tenth Circuits said such changes could be considered, while the Sixth, Seventh, Eighth, and D.C. Circuits said they could not.[7] We considered the issue in

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[7] *Compare United States v. Ruvalcaba*, 26 F.4th 14, 24 (1st Cir. 2022) (holding nonretroactive law changes to be an extraordinary and compelling reason), *United States v. McCoy*, 981 F.3d 271, 287-88 (4th Cir. 2020) (same), *United States v. Chen*, 48 F.4th 1092, 1094-95 (9th Cir. 2022) (same), *and United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021) (same), *with United States v. McCall*, 56 F.4th 1048, 1055 (6th Cir. 2022) (en banc) (declining to consider them extraordinary and compelling), *United States v. Thacker*, 4 F.4th 569, 573-74 (7th Cir. 2021) (same), *United States v. Crandall*, 25 F.4th 582, 585 (8th Cir. 2022) (same), and *United States v. Jenkins*, 50 F.4th 1185, 1198-99 (D.C. Cir. 2022).

United States v. Andrews, 12 F.4th 255 (3d Cir. 2021), the details of which are described herein (*see infra* Section II.A.).

3. The 2023 Amendment to the Policy Statement

In April 2023, the Sentencing Commission, by then re-constituted with a quorum, amended the Policy Statement to define "extraordinary and compelling reasons" for prisoner-filed motions for compassionate release. 88 Fed. Reg. 28,254. It issued the amendment in "respon[se] to [the] circuit split concerning when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling reasons within the meaning of section 3582(c)(1)(A)."[8] *Id.* at 28,258.

The amended Policy Statement provides that, as a general matter, a law change cannot be considered an extraordinary and compelling reason to grant compassionate release: "[A] change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement." U.S.S.G. § 1B1.13(c). But the Statement provides an exception to that rule. Through the following new provision, § 1B1.13(b)(6) (hereinafter "(b)(6)"), the Commission explained that nonretroactive changes in law can be considered if certain conditions are met:

> If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other

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[8] The amendment also included updates to the traditional extraordinary and compelling reasons provisions – those for medical circumstances, the age of the prisoner, and family circumstances – and added a new basis for relief for prisoners who were victims of abuse while in prison. 88 Fed. Reg. at 28,257-58. Those updates are not at issue in this appeal.

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

U.S.S.G. § 1B1.13(b)(6).

In promulgating subsection (b)(6), the Commission agreed with the "circuits that authorize a district court to consider non-retroactive changes in the law as extraordinary and compelling circumstances[,] . . . [but] only in narrowly circumscribed circumstances." 88 Fed. Reg. at 28,258. Breaking it down, the newly revised Policy Statement provides that a nonretroactive change in law "may be considered in determining whether the defendant presents an extraordinary and compelling reason" when (1) "a defendant received an unusually long sentence[,]" (2) the defendant "has served at least 10 years of the term of imprisonment," (3) an intervening law change has produced a "gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed," and (4) after the court gives "full consideration of the defendant's individualized circumstances." U.S.S.G. § 1B1.13(b)(6).

Notably, because (b)(6) states that changes in law *may* (not must) be considered, judges are not required to consider a change in law when determining a prisoner's eligibility for compassionate release. Thus, (b)(6) gives judges the opportunity, but not a mandate, to consider changes in the law under the defined circumstances. Judges therefore have two levels of

discretion under (b)(6): first, whether to consider a change in law when determining a prisoner's eligibility for compassionate release, and second, the usual discretion when deciding if an eligible prisoner should receive a sentence reduction after considering the § 3553(a) factors.[9]

The amended Policy Statement went into effect on November 1, 2023, 88 Fed. Reg. at 28,254, but not without controversy. The Commission adopted the amendment by a 4-3 vote. *See* April 5, 2023 United States Sentencing Commission Public Meeting Transcript at 82, available at https://www.ussc.gov/sites/default/files/pdf/amendment/process/public-hearings-and-meetings/20230405/20230405_transcript.pdf [https://perma.cc/E9W7-KB6N]. The three dissenting members delivered a joint statement opposing the amendment because, in their view, the Policy Statement "goes further than the Commission's legal authority extends[,]" "make[s] a seismic structural change to our criminal justice system without congressional authorization or directive[,]" and causes "separation of powers problem[s.]" *Id.* at 60-61. They said,

> Today's amendment allows compassionate release to be the vehicle for retroactively applying the very reductions that Congress has said by statute should not apply retroactively. To be sure, it doesn't do so automatically, but it makes any nonretroactive change in law potential grounds

[9] Since one of the § 3553(a) factors that a court must consider when deciding whether to grant a sentence reduction is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[,]" 18 U.S.C. § 3553(a)(6), the amended Policy Statement allows sentencing courts to consider sentence disparities both in making the threshold eligibility determination and in deciding whether to grant compassionate release.

> for re-sentencing once the defendant has served ten years. In practical effect, it provides a second look to revisit duly imposed criminal sentences at the ten-year mark based on intervening legal developments that Congress did not wish to make retroactive.

Id.

The Department of Justice also opposed the change, saying, "[T]he Department has taken the position . . . that Section 3582(c)(1)(A)(i) does not authorize sentence reductions based on nonretroactive changes in sentencing law. In particular, the Department has repeatedly argued in litigation that the fact that a change in sentencing law is not retroactive is not 'extraordinary' within the meaning of the statute. . . . The Commission's proposal thus conflicts with the Department's interpretation [of] Section 3582(c)(2)." Department of Justice Comment Letter, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf [https://perma.cc/P8A8-5ZYX].

B. Factual Background and Procedural History

In 2003, 22-year-old Daniel Rutherford committed two armed robberies at a chiropractic office in a five-day period. During the first robbery, he pulled a gun on the chiropractor and stole $390 and a watch. Four days later, he returned to the same office with an accomplice and again brandished a gun and stole $900 in cash and jewelry.

Rutherford was arrested, tried, and convicted of one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1). At

sentencing, Rutherford faced a 100-to 125-month sentence, plus mandatory minimum consecutive terms of 7 years for the first § 924(c) offense, and 25 years for the second. The District Court sentenced Rutherford to a top-of-the-guidelines term of imprisonment of 125 months in addition to the 32-year mandatory sentence, for a total sentence of nearly 42 and a half years. On appeal, we affirmed Rutherford's conviction. *United States v. Rutherford*, 236 F. App'x 835, 844 (3d Cir. 2007). He did not appeal his sentence. *Id.* at 838. Because of the First Step Act's amendment to § 924(c), if Rutherford were sentenced today, he would be subject to a 14-year mandatory minimum sentence for his two § 924(c) convictions (7 years for each), 18 years less than 32-year mandatory minimum he received.[10]

Acting pro se, Rutherford has attempted to seek compassionate relief before. He says that he sent a motion for compassionate release to the federal public defender's office in 2020, apparently believing the motion would be filed for him. He later asked the District Court if it had received the motion, and he claims the

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[10] Originally, 18 U.S.C. § 924(c) had required a defendant to be sentenced to a 25-year minimum sentence for each § 924(c) violation after the first, even if the defendant was convicted for both at the same time. The requirement that a defendant receive the 25-year enhanced minimum sentence for each subsequent § 924(c) violation at the same time he was sentenced for the first such offense is often called the "stacking" requirement of § 924(c). *United States v. Hodge*, 948 F.3d 160, 161 n.2 (3d Cir. 2020). The First Step Act eliminated the stacking requirement by amending § 924(c) to require the 25-year sentence for defendants who have a previous § 924(c) conviction only at the time they are sentenced for committing a subsequent § 924(c) offense. Rutherford's two § 924(c)(1) convictions were for brandishing a firearm and were rendered at the same time, so they each triggered a seven-year mandatory minimum, 18 U.S.C. § 924(c)(1)(A)(ii), and the penalties for both counts run consecutively, *id.* § 924(c)(1)(D)(ii).

Court did not respond. In February 2021, he filed with the District Court another handwritten motion for compassionate release. According to Rutherford, the District Court never addressed that motion either.

His third pro se motion for compassionate release came in April 2021. That is the motion at issue here. In it, Rutherford argued to the District Court that the First Step Act's enactment presents an "extraordinary and compelling" reason to grant him compassionate release. He further contended that the § 3553(a) factors support a sentence reduction because, among other things, he had completed over 50 educational courses in prison, he had secured employment upon release, and in the last decade he had committed only two minor infractions in prison. He also said that he has medical conditions – obesity and hypertension – that could "increase[] severity of illness and likelihood of lethality from COVID-19." (J.A. at 83.)

Before the District Court ruled on Rutherford's latest compassionate release motion, we decided *Andrews*, in which, as we shall discuss, we held that the First Step Act's amendment to § 924(c) does not constitute an extraordinary and compelling reason to be eligible for compassionate release. In April 2023, the District Court denied Rutherford's motion, holding that *Andrews* foreclosed his argument that the First Step Act could constitute an extraordinary and compelling reason to justify eligibility for compassionate release.[11]

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[11] In his motion for compassionate release, Rutherford mentioned his asserted health problems as something the District Court should consider under the 18 U.S.C. § 3553(a) sentencing factors, rather than as a separate basis for compassionate release. Nevertheless, "to the extent that [Rutherford]'s request could [have] be[en] construed to seek health related compassionate

Rutherford timely appealed.[12] We instructed the parties to discuss in their briefing

> (1) whether this Court should consider the impact of amendments to the Sentencing Guidelines on an 18 U.S.C. § 3582(c) motion in the first instance on appeal; and, assuming so, (2) to what extent, if any, the 2023 amendment to § 1B1.13(b) of the Sentencing Guidelines Manual abrogates this Court's decision in *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021).

(3d Cir. D.I. 16.)

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release, the Court [also found] no compelling or extraordinary health related circumstances presented in his various Motions." (J.A. at 7-8.)

[12] The government responded to Rutherford's appeal with a motion for summary affirmance. Finally with counsel, Rutherford opposed the government's motion and requested that we stay the matter pending an anticipated amendment to the Policy Statement. The amended Policy Statement went into effect on November 1, 2023, before we ruled on the parties' motions. The government then filed a response in opposition to Rutherford's motion to stay the appeal and, because of the amended Policy Statement, we denied the motion to stay as moot.

On appeal, Senators Dick Durbin and Cory Booker, members of the Senate Judiciary Committee, filed an amicus brief in favor of Rutherford, as did, jointly, the National Association of Criminal Defense Lawyers, FAMM (formerly known as Families Against Mandatory Minimums), and the Federal Public Defenders and Community Defenders for the Judicial Districts of the Third Circuit. We are grateful for the additional insights provided.

II. DISCUSSION[13]

On appeal, Rutherford argues that, even though the District Court did not have an opportunity to consider it, we should address the effect of the new (b)(6) provision of the Policy Statement on his compassionate release motion, including whether it abrogates our holding in *United States v. Andrews*. He asserts that *Andrews* is not in conflict with the amended Policy Statement and that, ultimately, we should remand the case so he has "an opportunity to show the [D]istrict [C]ourt that he qualifies for compassionate release under the new [P]olicy [S]tatement." (Opening Br. at 50.) The government, on the other hand, argues that we should not consider the amended Policy Statement for the first time on appeal and that the (b)(6) provision is invalid, both as applied to the First Step Act and on its face, because the "provision exceeds the Commission's statutory authority to define the bases of compassionate release[.]" (Answering Br. at 11.)

A. *Andrews*

We begin with a review of our *Andrews* decision. Eric Andrews was sentenced in 2006 and was serving a 312-year sentence for a series of armed robberies. *Andrews*, 12 F.4th at 257. He filed a compassionate release motion, arguing that his case presented "extraordinary and compelling reasons" warranting a reduced sentence under 18 U.S.C. § 3582(c)(1)(A)(i). *Id.* The gist of his motion was that he would have

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[13] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's determination denying compassionate release for abuse of discretion. *United States v. Pawlowski*, 967 F.3d 327, 330 (3d Cir. 2020). Issues of statutory construction are reviewed de novo. *Id.*

received a 91-year sentence had he been sentenced after the First Step Act's passage. *Id.*

Before we addressed the specific reasons Andrews advanced for his assertion that he was entitled to compassionate release, we first concluded that the Policy Statement, in its then-existing form,[14] was "not applicable – and not binding – for courts considering prisoner-initiated motions" because "the text of the [P]olicy [S]tatement explicitly limit[ed] its application to Bureau-initiated motions." *Id.* at 259. We then said it was not error for the district court to "consult[] the text, dictionary definitions, and the [P]olicy [S]tatement to form a working definition of 'extraordinary and compelling reasons[,]'" in part, because the Policy Statement, even if not binding, "still sheds light" on the meaning of that phrase. *Id.* at 260. Furthermore, "[b]ecause Congress reenacted the compassionate-release statute without any alterations to the phrase 'extraordinary and compelling reasons,'" we believed "it was reasonable . . . to conclude that the phrase largely retained the meaning it had under the previous version of the statute[,]" which did not mention non-retroactive changes in the law. *Id.*

After resolving those preliminary questions, we turned to the specific arguments Andrews advanced for why he was entitled to compassionate release. He claimed his case presented six reasons that, in combination, "were extraordinary and compelling under the compassionate-release statute": (1) "the duration of his sentence," (2) the First Step Act's changes to the mandatory minimums in his case, (3) "his rehabilitation in prison," (4) "his relatively young age at the time of his offense," (5) the abusive prosecutorial "decision to

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[14] *Andrews* was decided in 2021; the Policy Statement was amended in 2023.

charge him with thirteen § 924(c) counts," and (6) "his alleged susceptibility to COVID-19." *Id.* at 258 (cleaned up).

Taking up those contentions, we first considered whether the duration of Andrews's sentence could constitute an extraordinary and compelling reason and so allow a sentence reduction. *Id.* We held that "[t]he duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance[,]" *id.* at 260-61, because "'there is nothing extraordinary about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute[,]'" *id.* at 261 (quoting *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021) (internal quotation marks omitted)). "Moreover," we said, "considering the length of a statutorily mandated sentence as a reason for modifying a sentence would infringe on Congress's authority to set penalties." *Id.* at 261.

Next, we concluded that the second reason Andrews advanced – namely, the First Step Act's nonretroactive changes to the § 924(c) mandatory minimums – "also cannot be a basis for compassionate release." *Id.* at 261. We explained that, "[i]n passing the First Step Act, Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced." *Id.* at 261. And nonretroactive sentencing changes are "conventional[,]" because, as the Supreme Court has observed, "in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Id.* (quoting *Dorsey v. United States*, 567 U.S. 260, 280, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012)). So, "'[w]hat the Supreme Court views as the ordinary practice cannot also be an extraordinary and

compelling reason to deviate from that practice.'" *Id.* (quoting *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021) (internal quotation marks omitted)).

We went on to say that, "when interpreting statutes, we work to 'fit, if possible, all parts' into a 'harmonious whole.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Thus, we would "not construe Congress's nonretroactivity directive [in the First Step Act] as simultaneously creating an extraordinary and compelling reason for early release" because "[s]uch an interpretation would sow conflict within the [First Step Act]." *Id.* (citing *United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) ("Why would the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean to use a general sentencing statute from 1984 to unscramble that approach?")). We added this caveat: nonretroactive sentencing reductions may be relevant to a prisoner's compassionate release motion, but only if and after "a prisoner successfully shows extraordinary and compelling circumstances," because "the current sentencing landscape may be a legitimate consideration for courts . . . when they weigh the § 3553(a) factors." *Id.* at 262.

Finally, we held that the district court did not abuse its discretion in determining "that Andrews's four remaining reasons collectively fell short of being extraordinary and compelling under the statute." *Id.* at 259. Therefore, we affirmed the denial of his compassionate-release motion. *Id.* at 262.

B. We Can Properly Consider the Amended Policy Statement in the First Instance.

The government asserts that we are forbidden from resolving in the first instance the effect of (b)(6) on *Andrews* because the amended Policy Statement "is a substantive amendment that does not apply

on appeal." (Answering Br. at 11.) According to the government, only clarifying amendments, as opposed to substantive ones, are applicable on appeal when the amendment in question arose after sentencing. And, says the government, "[t]here is no question that the revision of [the Policy Statement] is substantive; it addressed for the first time inmates' new capacity to file compassionate release motions, and significantly revised, altered, and added to the permissible bases for compassionate release." (Answering Br. at 13.) Rutherford responds that the substantive-versus-clarifying test applies only to changes affecting an initial sentence.

As to initial sentencing, "[t]he general rule is that a defendant should be sentenced under the guideline in effect at the time of sentencing." *United States v. Diaz*, 245 F.3d 294, 300-01 (3d Cir. 2001). "A post-sentencing amendment to a guideline, or to its comments, should be given retroactive effect only if the amendment 'clarifies' the guideline or comment in place at the time of sentencing; the amendment may not be given retroactive effect if it effects a substantive change in the law." *Id.* at 303. "Generally, if the amended guideline and commentary overrules a prior judicial construction of the guidelines, it is substantive; if it confirms our prior reading of the guidelines and does not disturb prior precedent, it is clarifying." *Id.*

While the substantive-versus-clarifying test clearly applies in the initial sentencing context, we agree with Rutherford that the test does not apply to a sentence modification.[15] The government does not cite any

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[15] We part ways here with the Eleventh Circuit. *United States v. Handlon*, 97 F.4th 829, 833 (11th Cir. 2024) (holding that the amended Policy Statement is a substantive amendment that cannot be given retroactive effect). We also note that the Fifth Circuit did not apply the amended Policy Statement to a motion

within-Circuit precedent suggesting otherwise, and we have found none. Perhaps that is because the test rests primarily on § 1B1.11 of the guidelines, a provision that applies to initial sentencing proceedings, rather than sentence reduction proceedings like compassionate release. Section 1B1.11 says that, "if a court applies an earlier edition of the Guidelines Manual" to avoid ex post facto concerns, "the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes."[16] Since ex post facto concerns

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filed before the Policy Statement was amended, saying summarily that the amendment was "not in effect at the time the district court granted [the] motion, and thus [] not [part] of the [g]uidelines that we consider on appeal in terms of binding application." *Jean*, 108 F.4th at 288.

[16] Section 1B1.11 provides:

> (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
>
> (b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.
>
> (2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.
>
> (3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

U.S.S.G. § 1B1.11. *See United States v. Flemming*, 617 F.3d 252, 267 (3d Cir. 2010) (explaining the substantive-versus-clarifying

do not arise when a sentence is being reduced, the modification proceedings do not implicate the concerns underlying the substantive-versus-clarifying test.

Rutherford also points out the absurd outcomes that could result were we to conclude that (b)(6) is a substantive amendment. He explains that "inmates sentenced before November 1, 2023[, i.e., the date the amended Policy Statement became effective,] would forever be barred from using the new policy statement." (Reply Br. at 4 n.1.) "It would also mean (b)(6) – which requires inmates to have served ten years in prison – would not apply to any prisoner's motion until November 1, 2033." (Reply Br. at 4 n.1.) We highly doubt those results were what Congress intended when passing the First Step Act, so we will not apply the substantive-versus-clarifying test to the Policy Statement at issue here.

Moreover, the government concedes that Rutherford could file a new compassionate release motion if we were to deny application of (b)(6) in this case. The implication is that (b)(6) would then be applicable to the new motion. As we have said in a similar sentencing reduction context, "we see no need to force [the appellant] to take this additional step." *United States v. Marcello*, 13 F.3d 752, 756 n.3 (3d Cir. 1994); *see also United States v. Jones*, 567 F.3d 712, 719 (D.C. Cir. 2009) ("Nearly all courts of appeals that have considered the issue have decided . . . to save the defendant the 'additional step' of petitioning the district court for a sentencing modification.").

In *United States v. Stewart*, we recognized that amendments to the Commission's policy statements

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test and citing to § 1B1.11(b)(2)); *United States v. Spinello*, 265 F.3d 150, 160 (3d Cir. 2001) (same); *United States v. Marmolejos*, 140 F.3d 488, 490-91 (3d Cir. 1998) (same).

could potentially impact our holding in *Andrews*. 86 F.4th at 535 ("*Absent changes* in the applicable policy statements, our holding in *Andrews* remains undisturbed – and with it the limits imposed on courts' discretion when determining whether extraordinary and compelling reasons warrant relief." (emphasis added)). We acknowledged the amended Policy Statement, which had become effective two weeks prior to Stewart's filing, but we did not consider it in that case, saying, instead, that "[w]e may consider [its] effect on the validity of *Andrews* in an appropriate case." *Id.* at 535 n.2.

Rutherford argues that this is the case to decide the issue. He contends that the question involves a "novel, important, and recurring" "uncertainty in the law," and that the government has briefed the issue in over twelve cases in the Eastern District of Pennsylvania alone. (Opening Br. at 22 (quoting *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017)).) He says that "[i]t hinders judicial efficiency to send an issue . . . to the district court that the district court will simply send back" on appeal again. (Opening Br. at 22.) We agree.

While it is true that "[w]e generally decline to resolve issues not decided by a district court, choosing instead to allow it to decide in the first instance[,]" *Popa v. Harriet Carter Gifts, Inc.*, 52 F.4th 121, 132 (3d Cir. 2022), "[w]hen a district court has failed to reach a question . . . that becomes critical when reviewed on appeal, an appellate court may sometimes resolve the issue on appeal rather than remand to the district court[,]" *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 159 (3d Cir. 1998). "[That] procedure is generally appropriate when the factual record is developed and the issues provide purely legal

questions, upon which an appellate court exercises plenary review." *Id.* Deciding a legal question in the first instance on appeal is especially proper if "our resolution . . . will best serve the interests of judicial efficiency on remand," *Kedra v. Schroeter*, 876 F.3d 424, 436 n.5 (3d Cir. 2017), or when "the issue's resolution is of public importance[,]" *Loretangeli v. Critelli*, 853 F.2d 186, 189 n.5 (3d Cir. 1988).

Those considerations are operative here. The question of what, if any, effect (b)(6) has on our precedent is purely a legal one, and it is indeed a question of public importance – there are many people in prison whose sentences will be affected by our decision.[17] And resolving the question will serve the interests of judicial efficiency. If we refrain from deciding it, the various district courts that are, at present, grappling with the question may reach divergent conclusions.[18]

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[17] Referencing a BOP publication, Rutherford says that "2,412 people – 1.5% of the total inmate population – are serving stacked § 924(c) sentences[,]" who must, according to their individual circumstances, show that they are eligible. (Opening Br. at 35 (citing U.S. Sent'g Comm'n., *Estimate of the Impact of Selected Sections of S. 1014, The First Step Act Implementation Act of 2021*, at 1 (Oct. 2021) [https://perma.cc/8VC8-25A7]).

[18] We do have the benefit of a well-reasoned district court decision now, *United States v. Carter*, 711 F.Supp.3d 428 (E.D. Pa. 2024). Johnnie Carter was serving a 70-year sentence for a string of armed robberies, a sentence much longer than the one he would have received today because of the First Step Act's modification of § 924(c). *Id.* at 430. The district court noted that "it is undisputed Carter's motion for a new sentence identifies an 'extraordinary and compelling reason,' as defined by the . . . Commission[.]" *Id.* at 435. Yet, the court explained that "*Andrews* remains binding law in this circuit, and it forecloses Carter's argument that he is eligible for compassionate release[.]" *Id.* at 436. That is because, the court said, the policy statement "is incompatible with *Andrews*'s interpretation of the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A)(i), and its holding that

The parties have briefed the issue, and it is ripe for our consideration. Accordingly, we will resolve the (b)(6) question as it relates to First Step Act's change to § 924(c).

'the duration of [a defendant's] sentence and the nonretroactive changes to mandatory minimums' is not one of the 'extraordinary and compelling reasons' described by the statute." *Id.* (quoting *Andrews*, 12 F.4th at 260 (alterations in original)). Carter argued that the amended Policy Statement abrogated *Andrews*, but the court in *Carter* said that his argument "ha[d] it exactly backwards":

> In the absence of an applicable policy statement from the Sentencing Commission, *Andrews* can only be understood as a decision interpreting the text of the compassionate-release statute itself. And after considering that statutory language, the Third Circuit concluded that a defendant's unusually and disproportionately long sentence is not an "extraordinary and compelling reason[] warrant[ing] [] a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). That holding may not now be overridden by the Sentencing Commission, which "does not have the authority to amend the statute [the court] construed" in a prior case. *Neal v. United States*, 516 U.S. 284, 290 [116 S.Ct. 763, 133 L.Ed.2d 709] (1996).

Id. at 436-37 (first alteration not in original). The court acknowledged "that *Andrews* was decided without the benefit of input from" the Commission and that, "[i]f given the opportunity to do so, the Third Circuit might well elect to reconsider its prior holding to give the Sentencing Commission's expertise its fair due." *Id.* at 437. "But, as things currently stand," the court went on, "binding precedent instructs that a defendant's unusually long sentence is not an adequate basis for compassionate release. Unless and until any reconsideration of *Andrews* takes place or it is abrogated by a Supreme Court decision, that holding remains binding on district courts in this circuit." *Id.* at 437-38. Carter appealed, and we stayed his appeal pending resolution of this case.

C. The Amended Policy Statement Does Not Abrogate *Andrews*.[19]

1. Subsection (b)(6) of the Amended Policy Statement Is Inconsistent with the First Step Act.

The government does not dispute that the Commission possesses the authority to promulgate policy statements for prisoner-initiated compassionate-release motions, at least not to the extent such statements relate to the traditional bases for compassionate release. (Answering Br. 25 n.5 ("As a general rule, . . . the Commission's new policy statement, that clarifies eligibility based on medical, family, and other traditional bases for compassionate release, is binding.").) The government "objects only to the new 'change in law' provision [i.e., (b)(6)] as exceeding statutory authority." (Answering Br. at 25-26 n.5.) Thus, we consider only whether (b)(6) is binding on a court's compassionate release eligibility determinations when deciding a motion based in whole or in part on the First Step Act's change to § 924(c).

As explained previously (*see supra* Section I.A.2.), a sentencing court may grant a compassionate release motion if, "after considering the factors set forth in section 3553(a) to the extent that they are applicable, it finds that extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued

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[19] As noted (*see supra* Section I.A.2.), prior to the Commission promulgating the amended Policy Statement, several courts of appeals held that the First Step Act's nonretroactive changes to certain mandatory minimums could not be considered an extraordinary and compelling reason to grant a sentence reduction. We are aware of no case in which any of those courts of appeals has addressed the impact on the amended Policy Statement on its precedent.

by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Congress instructed "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions . . . [to] describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[20] 28 U.S.C. § 994(t).

When Congress expressly delegates the power to an agency to "prescribe standards for determining" the meaning of a particular term or phrase, as it did here for the phrase "extraordinary and compelling," "Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977). Consistent with that principle, the Supreme Court said in *Concepcion v. United States* that, in sentence reduction proceedings like those involving compassionate release, Congress has "cabined district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements." 597 U.S. 481, 495, 142 S.Ct. 2389, 213 L.Ed.2d 731 (2022). We thus do not gainsay that the Commission's policy statements are generally

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[20] The government does not dispute the constitutionality of Congress's delegation to the Commission of the responsibility to describe what should be considered "extraordinary and compelling." Nor is it likely it could successfully do so. It is true that "Congress generally cannot delegate its legislative power to another Branch" and that the "nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371-72, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). But the Supreme Court has said that it "harbor[s] no doubt that Congress'[s] delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements." *Id.* at 374, 109 S.Ct. 647.

binding on us. *United States v. Berberena*, 694 F.3d 514, 522 (3d Cir. 2012) ("Congress contemplated that the Commission would have the power to impose limits on . . . sentence reductions, by making the Commission's policy statements binding.").

That said, the Commission's authority to issue binding policy statements is not unlimited. The Supreme Court has also explained that, although "Congress has delegated to the Commission significant discretion[,]" "it must bow to the specific directives of Congress" and accurately reflect Congressional intent when it fulfills its responsibilities. *United States v. LaBonte*, 520 U.S. 751, 757, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997) (internal quotation marks omitted). Indeed, Congress has granted the Commission power to promulgate only those policy statements that are "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). It is the job of the courts to ensure that the Commission's amendments to its policy statements do not go beyond what Congress intended. *United States v. Adair*, 38 F.4th 341, 359 (3d Cir. 2022) (concluding that a particular amendment set forth by the Commission "ha[d] no force of law" because it "exceed[ed] the Commission's delegated powers); *cf. Loper Bright Enterprises v. Raimondo*, — U.S. —, 144 S. Ct. 2244, 2263, 219 L.Ed.2d 832 (2024) (explaining that "the role of the reviewing court under the [Administrative Procedures Act] is . . . to independently interpret the statute and effectuate the will of Congress subject to constitutional limits" and that "the court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." (cleaned up)).

We agree with the government that subsection (b)(6) in the amended Policy Statement, as applied to the First Step Act's modification of § 924(c), conflicts with the will of Congress and thus cannot be considered in determining a prisoner's eligibility for compassionate release. Congress explicitly made the First Step Act's change to § 924(c) *non*retroactive. Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222. And, in *Andrews*, we held that it would be inconsistent "with [the] pertinent provisions of [the First Step Act]," 28 U.S.C. § 994(a), to allow the amended version of § 924(c) to be considered in the compassionate release context because "Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced." *Andrews*, 12 F.4th at 261.

Just as we said in *Andrews*, we will "not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release[,]" because "[s]uch an interpretation would sow conflict within the statute."[21] *Id.* Simply put, allowing the change to § 924(c) to be considered when determining compassionate release eligibility does not align with "the specific directives [that]

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[21] As stated previously (*see supra* Section I.A.4.), Congress did not act to modify or disapprove of the amended Policy Statement. But, as the government notes, and as Rutherford does not dispute, "Congress'[s] failure to reject" the amended Policy Statement does not "mean[] that it has effectively adopted that interpretation with respect to the statute." *DePierre v. United States*, 564 U.S. 70, 87 n.13, 131 S.Ct. 2225, 180 L.Ed.2d 114 (2011); *Kimbrough v. United States*, 552 U.S. 85, 106, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) ("Ordinarily, we resist reading congressional intent into congressional inaction.").

Congress" set forth in the First Step Act.[22] *LaBonte*, 520 U.S. at 757, 117 S.Ct. 1673.

2. *Andrews* and the Amended Policy Statement are in Conflict.

Rutherford argues, however, that, in reality, "there is no conflict" between the amended Policy Statement and *Andrews* because our holding there was relatively narrow. (Opening Br. at 28.) He asserts that "[t]he argument *Andrews* rejected was that a nonretroactive change, *by itself*," could create an extraordinary and compelling reason. (Opening Br. at 28 (emphasis added).) The government retorts that *Andrews* "determined that a change in the law, whether considered alone or in combination with other factors," cannot be considered when making a compassionate-release eligibility determination. (Answering Br. at 23.) We do not have to rule as broadly as the government might like; it is enough to say that the government is right in this instance. The question we are addressing calls for an examination of § 924(c), not a far-ranging

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[22] The preceding discussion also explains why Rutherford's "statutory context" argument fails. (Opening Br. at 39.) In his view, in § 994(t), "Congress placed only one limit on the Commission's authority to describe 'extraordinary and compelling reasons' for relief": "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." (Opening Br. at 39 (quoting 28 U.S.C. § 994(t)).) He says that "Section 994(t) shows that Congress knew how to speak clearly when it wanted to exclude topics from consideration." (Opening Br. at 39.) Rutherford's argument would have more persuasive effect if the compassionate release statute were viewed in isolation, but we can undertake no such approach. Because the Commission may only promulgate policy statements that are consistent with all "pertinent provisions of any Federal statute[,]" 28 U.S.C. § 994(a), the Commission is inherently limited from creating policy statements that negate other relevant federal statutes, like the First Step Act's nonretroactivity directive.

examination of all changes in laws affecting criminal sentences. And we have already thoroughly examined the § 924(c) change in *Andrews*.[23]

As a reminder, the defendant in *Andrews* advanced six reasons that he claimed, "*together*, . . . were extraordinary and compelling under the compassionate-release statute." *Andrews*, 12 F.4th at 258 (emphasis added). We noted that the district court in that case "concluded that two of the proposed reasons – the duration of Andrews's sentence and the nonretroactive changes to mandatory minimums [in § 924(c)] – could not be extraordinary and compelling as a matter of law." *Id.* at 258. We upheld that conclusion. And we clarified that, although the district court appropriately

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[23] We are not suggesting that a change in law could never be considered in the compassionate release eligibility context. Our holding is solely that the First Step Act's change to § 924(c) cannot be considered in that context, on its own or with other factors, because of Congress's explicit instruction in that statute that the change be nonretroactive.

We also acknowledge that in *Stewart*, we used language to summarize our holding in *Andrews* that may have suggested our conclusion in *Andrews* was broader than it was. *United States v. Stewart*, 86 F.4th 532, 533 (3d Cir. 2023) ("[I]n *Andrews* we held that neither the length of a lawfully imposed sentence nor *any* nonretroactive change to mandatory minimum sentences establishes 'extraordinary and compelling' circumstances warranting release." (emphasis added)). *Andrews*'s holding itself was confined to the § 924(c) context. *See Andrews*, 12 F.4th at 261 (holding that "[t]he nonretroactive changes to the § 924(c) mandatory minimums also cannot be a basis for compassionate release" and referring to the § 924(c) mandatory minimums by using phrases like "*the* nonretroactive changes to mandatory minimums" (emphasis added)). In fact, *Andrews*'s discussion of the First Step Act makes it evident that we were specifically considering whether the changes to § 924(c) could be considered extraordinary and compelling when Congress had specifically made those changes nonretroactive. Accordingly, we view our holding in *Andrews* as confined to the § 924(c) context.

excluded those two reasons from the eligibility analysis, "we [were] not saying that they are always irrelevant to the sentence-reduction inquiry" because they "may be a legitimate consideration for courts at the next step of the analysis when [a court] weigh[s] the § 3553(a) factors."[24] *Id.* at 262. We also upheld the district court's decision that "Andrews's four remaining reasons *collectively* fell short of being extraordinary and compelling under the statute." *Id.* at 259 (emphasis added). Therefore, at bottom, our holding in *Andrews* was that the nonretroactive change to § 924(c), whether by itself or in combination with other factors, cannot be considered in the compassionate release eligibility context.

We stand by that ruling today. When it comes to the modification of § 924(c), Congress has already taken retroactivity off the table, so we cannot rightly consider it. *See United States v. Jean*, 108 F.4th 275, 295 (5th Cir. 2024) (Smith, J., dissenting) ("[P]resenting two insufficient things is different from presenting an insufficient thing together with something we are legally prohibited from considering because it is outside the scope of, or prohibited by, the statute.").

3. Even if an Ambiguity Analysis is Required in this Case, Our Holding in *Andrews* Trumps the Amended Policy Statement in the § 924(c) Context.

Rutherford argues that even if there were a conflict between the amended Policy Statement and *Andrews*,

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[24] Congress enumerated "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as a factor that must be considered after a prisoner is determined eligible for compassionate release, which suggests that Congress intended courts to consider changes in law at the post-eligibility phase, rather than as a part of the eligibility determination. 18 U.S.C. § 3553(a)(6).

"the Commission's reading would control" because, in his view, "[t]he government [did not show] that the compassionate release statute unambiguously forecloses the policy statement." (Opening Br. at 28, 30.) He says that "[t]he government cannot make that showing because *Andrews* already recognized that the phrase 'extraordinary and compelling' is 'amorphous' and 'ambiguous.'" (Opening Br. at 31 (quoting *Andrews*, 12 F.4th at 60).) The government responds that, "while the full reach of the term is doubtless imprecise, necessitating action of the Commission, the term is not at all ambiguous as applied to the specific context of a nonretroactive change in law."[25] (Answering Br. at 36.) The government again has the better of the arguments, at least insofar as it addresses the change in § 924(c).

Whatever else the Commission may be empowered to do, it plainly "may not replace a controlling judicial interpretation of an *unambiguous* statute with its own construction (even if that construction is based on agency expertise)[.]"[26] *Adair*, 38 F.4th at 361 (emphasis

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[25] Rutherford also says that the government itself acknowledged at oral argument before the District Court that "[e]xtraordinary and compelling is not the most unambiguous statement that anyone has ever made." (Opening Br. at 31 (quoting J.A. at 190).) But he does not mention that the government also advanced the same argument it does here, namely, that the statute is unambiguous as it relates to a nonretroactive change in the law. (J.A. at 191 ("Ambiguous as the term extraordinary and compelling is, it does not fit where what your circumstance is is a change in law that Congress had declared nonretroactive.").)

[26] Relying on *Braxton v. United States*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), Rutherford says that the Commission has the power to overturn Circuit precedent and resolve circuit splits and, thus, we must defer to the Commission's amended Policy Statement. (Opening Br. at 28-29.) But the guideline provision at issue in *Braxton* did not conflict with an unambiguous

added). And on retroactivity, the change to § 924(c) is not the least ambiguous. Congress made the change non-retroactive. No matter how well-intentioned, the Policy Statement cannot change that.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the long-standing rule that courts must defer to agency interpretations of statutes within an agency's expertise. The Court said such so-called *Chevron* deference was the "antithesis" of "the traditional conception of the judicial function[,]" especially when "it forces courts to [defer] even when a pre-existing judicial precedent holds that the statute means something else – unless the prior court happened to also say that the statute is 'unambiguous.'" —— U.S. ——, 144 S. Ct. 2244, 2263, 2265, 219 L.Ed.2d 832 (2024) (citing *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)). That ruling was made when considering the Administrative Procedures Act, which, admittedly, is not what we look to when considering actions of the Commission. *See United States v. Berberena*, 694 F.3d 514, 527 (3d Cir. 2012) ("Congress decided that the . . . Commission would not be an 'agency' under [that Act] when it established the Commission as an independent entity in the judicial branch." (internal quotation marks omitted)). But *Loper Bright* is still instructive as we

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congressional statute. 500 U.S. at 346-48, 111 S.Ct. 1854. And, as *Braxton* itself recognized, the Commission is not the only body that can resolve a split in judicial authority concerning the Guidelines. "Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute." *Id.* at 347-48, 111 S.Ct. 1854. That is what happened here when Congress unambiguously stated that the First Step Act's amendment of § 924(c) was not retroactive. The Commission cannot override that command.

assess the assertion that the Commission's view of a statute should trump our own.

The Supreme Court has explained that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case*." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (emphasis added). The particular dispute in *Andrews* was whether the "nonretroactive changes to the § 924(c) mandatory minimums [could] be a basis for compassionate release[,]" or in other words, whether such changes could be considered "extraordinary and compelling." *Andrews*, 12 F.4th at 261. We did not use the terms "amorphous" and "ambiguous" to describe that particular question; we used them only to explain that the district court did not err in using traditional methods of statutory interpretation to come to its own conclusion that "extraordinary and compelling" did not encompass that change in the law.[27] *Andrews*, 12 F.4th at 260.

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[27] We said:

> To start, the District Court did not err when it consulted the text, dictionary definitions, and the policy statement to form a working definition of "extraordinary and compelling reasons." Given that the compassionate-release statute does not define "extraordinary and compelling reasons," the court looked to those resources to give shape to the otherwise amorphous phrase. That was not error. "We look to dictionary definitions to determine the ordinary meaning of a word . . . with reference to its statutory text." *Bonkowski v. Oberg Indus., Inc.*, 787 F.3d 190, 200 (3d Cir. 2015). And courts may consider an extrinsic source like the policy statement if, like here, it "shed[s] a reliable light on the enacting Legislature's understanding of [an] otherwise ambiguous term[]." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 [125 S.Ct. 2611, 162 L.Ed.2d 502[]] (2005).

Andrews, 12 F.4th at 260.

And while it is true that we did not say that the phrase "extraordinary and compelling" was "unambiguous" as applied to the § 924(c) change, we need not make such an explicit statement to communicate the point. *See Bastardo-Vale v. Attorney General*, 934 F.3d 255, 259 n.1 (3d Cir. 2019) (en banc) ("[The] use of words like 'suggest' or 'implies,' when viewed in context . . . conveys that [the court] viewed the statute as clear.").[28]

In sum, the amended Policy Statement conflicts with *Andrews*, and *Andrews* controls. Therefore, the First Step Act's change to § 924(c) cannot be considered in the analysis of whether extraordinary and compelling circumstances make a prisoner eligible for compassionate release.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court order denying Rutherford's compassionate release motion.

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[28] In any event, an ambiguity determination comes only after courts apply traditional tools of statutory construction. *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."), *overruled by Loper Bright*, 144 S. Ct. 2244. So the fact that the district court in *Andrews* used traditional tools of statutory interpretation does not automatically mean that the statute can be called ambiguous with respect to the particular issue in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION No. 05-cr-0126-JMY-1

UNITED STATES OF AMERICA

v.

DANIEL RUTHERFORD, ET AL.

Signed April 26, 2023

Filed April 27, 2023

MEMORANDUM

Younge, Judge

Currently before the Court are Defendant's *Pro Se Motions for Compassionate Release and Appointment of Counsel*[1] (ECF No. 152), *Pro Se Motion for Sentence Reduction under the Compassionate Release Statute*

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[1] Federal Defenders represent Defendant in a *Motion to Vacate/Set Aside/Correct Sentence (2255) under 28 U.S.C. § 2255.* (ECF No. 141.) However, they do not represent Defendant in his request for compassionate relief. Since the Court finds Defendant's request for compassionate relief to have no merit, it will decline to appoint counsel to litigate the issue of compassionate relief. There is no right to counsel with respect to a motion for compassionate release. *United States v. Munford*, 2021 WL 111863, at *6 (E.D. Pa. Jan. 12, 2021) (Pratter, J.) (appointment of counsel denied where the defendant has competently presented his claim, and the legal issues are relatively straightforward); *United States v. Ryerson*, 2020 WL 3259530, at *2 (E.D. Tenn. June 16, 2020) (citing cases).

18:3582 (c)(1)(A)(i), as Amended by the First Step Act (ECF No. 153), and *Pro Se Daniel Rutherford Motion to Expand the Record* (ECF No. 155). The United States of America (the "Government") opposes the Motions ("Opp.," ECF No. 156); *Government's Supplemental Response to Defendant's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)* filed at (ECF No. 157).

For the reasons set forth below, the Court will deny Defendant's request for compassionate release.

I. PROCEDURAL AND FACTUAL BACKGROUND:

Defendant was twenty-two years old when he was convicted by a jury of committing two separate gun point robberies at DePativo Chiropractic Center's office located at 61st and Spruce streets in Philadelphia on July 7, 2003, and again on July 11, 2003. Defendant had a prior criminal record and was on escape status after failing to return from work release on May 27, 2003 at the time he committed these two robberies.

Defendant was indicted on charges of conspiracy to interfere with interstate commerce by robbery (Hobbs Act robbery) in violation of 18 U.S.C. § 1951(a) (Count 1); interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (Count 2); using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Count 3); and aiding and abetting in violation of 18 U.S.C. § 2 (Counts 4 and 5). He proceeded to trial, and on September 16, 2005, the jury returned a verdict of guilty on all counts. (Memorandum and Order, Judge Legrome D. Davis, 4/30/14, ECF No. 130.)

At sentencing on January 30, 2006, Defendant faced a sentencing guideline range for the robberies of

100-125 months, plus mandatory minimum consecutive terms of 7 years for the first 924(c) offense, and 25 years for the second. (*Government's Sentencing Memorandum* page 2, ECF No. 66; *Defendant's Sentencing Memorandum* page 10, ECF No. 67.) Although the Guidelines were advisory, Judge Davis elected to impose a sentence at the very maximum of the guideline recommendation, imposing a term of 125 months plus 32 years to run consecutively, for a total term of 509 months' imprisonment (42 years and 5 months). (Judgment of Sentence, ECF No. 72.) Defendant's Judgment of Sentence was affirmed on appeal. *United States v. Rutherford*, No. 06-1437, 236 F. App'x. 835 (3d Cir. June 26, 2007). Defendant's post-conviction challenges have also been unsuccessful.

Thereafter, in Section 403 of the First Step Act – effective December 21, 2018 – Congress amended Section 924(c) to provide that the 25-year consecutive term for a successive 924(c) offense did not apply unless the defendant had a previous, final conviction for 924(c) charge at the time of the offense.

Under current law, Defendant would face a seven-year sentence on each Section 924(c) charge (as a firearm was brandished on each occasion). The statutory requirement still applies that each such sentence must run consecutively to each other and to any other sentence imposed. That means the mandatory minimum sentence on the two 924(c) counts, if charged today in the same initial 924(c) prosecution, would be 14 years. (*Pro Se Motion for Sentence Reduction Under the Compassionate Release Statute, 18 U.S.C. § 3582(c)(1)(A)(i), as Amended by the First Step Act* page 23.) Based on this phenomenon, Defendant seeks compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), which permits a court to reduce a

sentence upon a showing of "extraordinary and compelling reasons." (*Id.*) Defendant avers that he is now forty-one years old, and he argues that he is serving a sentence of over 42 years that would not be imposed on a comparable current offender. (*Id.* page 1-2; Letter April 17, 2023, ECF No. 162.) He points to the fact that his sentence was based on the earlier version of 18 U.S.C. § 924(c), which required a mandatory consecutive 25-year term for each successive Section 924(c) conviction after the first, even when all offenses were prosecuted in the same case (a practice known as "stacking"). (page 22) (citing *Deal v. United States*, 508 U.S. 129 (1993).) He was therefore sentenced to a seven-year mandatory term on the first of his Section 924(c) offenses, and a stacked consecutive term of 25 years on the second such count. (*Id.*)

This matter was previously assigned to the Honorable Darnell Jones, and after a review of the docket it would appear that Judge Darnell Jones abstained from ruling on Defendant's request for compassionate relief pending the Third Circuit Court of Appeals' review of the decision reached by Judge Eduardo C. Robreno in *United States v. Andrews*, 480 F. Supp. 3d 669 (E.D. Pa. Aug 19, 2020).

II. LEGAL STANDARD:

On December 21, 2018, Congress enacted Section 603(b) of the First Step Act which amended 18 U.S.C. § 3582(c)(1)(A) to allow prisoners to directly petition courts for compassionate release. (§ 603(b).) Prior to the enactment of Section 603(b) of the First Step Act motions for compassionate relief under 18 U.S.C. § 3582 could only be brought by the Director of the Bureau of Prisons. The First Step Act added the procedure for prisoner-initiated motions while leaving the rest of the compassionate-release framework unchanged.

Therefore, a district court may reduce its sentence through compassionate release if it determines: (1) the incarcerated movant meets administrative exhaustion requirements; (2) "extraordinary and compelling reasons" warrant a reduction; (3) the reduction would be "consistent with any applicable policy statements issued by the Sentencing Commission," and (4) the applicable sentencing factors under 18 U.S.C. § 3553(a) warrant a reduction. 18 U.S.C. § 3582. 18 U.S.C. § 3582(c)(1)(A).

The district court's decision to grant compassionate release is a purely discretionary decision. *United States v. Pawlowski*, 967 F.3d 327, 330 (3d Cir. 2020). The Third Circuit Court of Appeals has reviewed the district court's decision to deny a compassionate-release motion for abuse of discretion. *Id.* Under this abuse-of-discretion standard, the Third Circuit has stated that it will not disturb a district court's determination unless it is left with "a definite and firm conviction that [it] committed a clear error of judgment in the conclusion it reached." *Id.* (quoting *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000)).

III. DISCUSSION:

Defendant Rutherford seeks compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), which permits a court to reduce a sentence upon a showing of "extraordinary and compelling reasons." The Parties do not dispute that Defendant has exhausted administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997(e); therefore, the Court will address Defendant's claim of extraordinary and compelling circumstances. In his requests for compassionate relief, Defendant primarily argues that due to the amendment of 18 U.S.C. § 924(c), his sentence would be at least 18 years shorter if imposed today. (*Pro se*

Motion for Sentence Reduction Under the Compassionate Release Statute, 18 U.S.C. § 3582(c)(1)(A)(i), as Amended by the First Step Act page 22-23.) He was sentenced on January 30, 2006, and if he were sentenced today under currently law, he believes his sentence would range between 14 to 15 years' imprisonment. (*Id.*)

As will be discussed more fully herein below, Defendant also references COVID-19 pandemic and certain medical conditions that afflict him. However, he does not assert the COVID-19 pandemic coupled with his personal medical condition as an independent basis for release; rather, he focuses on these issues when discussing the sentencing factors under 18 U.S.C. § 3553(a). In this regard, it would appear that Defendant is attempting to satisfy the fourth element of the test for determining whether he is entitled to compassionate relief when he argues that the COVID-19 pandemic and his medical condition entitle him to release from confinement under 18 U.S.C. § 3582(c)(1)(A)(i).

The Court will address Defendant's arguments in turn.

A. Compassionate Release Under the Amended Version of 18 U.S.C. § 924(c) in Light of *United States v. Andrews*, 12 F.4th 255 (3d Cir. Aug 30, 2021):

Based on the holding of *United States v. Andrews*, 12 F.4th 255 (3d Cir. Aug 30, 2021), the Court rejects Defendant's argument for compassionate relief under the amended version of 18 U.S.C. § 924(c). In finding Defendant's argument to have no merit, the Court relies on *Andrews* as persuasive authority. *Andrew*, 12 F.4th at 261 (holding that neither the length of a lawfully imposed sentence nor non-retroactive changes in § 924(c) of the statutory sentencing law

establish extraordinary and compelling circumstances for release.).

In *Andrews*, the defendant had been sentenced to a term of imprisonment of 312 years based on 13 armed robberies he committed at the age of 19, a sentence that would be far lower under current law based on the amended version of 18 U.S.C. § 924(c) – which Defendant cites to in this matter. Third Circuit Court upheld the district court's finding that the situation did not present an "extraordinary and compelling reason" for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), stating:

> The duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance. "[T]here is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute." *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021). "Indeed, the imposition of a sentence that was not only permissible but statutorily required at the time is neither an extraordinary nor a compelling reason to now reduce that same sentence." *United States v. Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring). Moreover, considering the length of a statutorily mandated sentence as a reason for modifying a sentence would infringe on Congress's authority to set penalties.

Andrews, 12 F.4th at 260-261.

The Court went on to write:

> The nonretroactive changes to the § 924(c) mandatory minimums also cannot be a basis for compassionate release. In passing the First Step Act, Congress specifically decided that the

> changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced. *See* First Step Act § 403(b). That is conventional: "[I]n federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Dorsey v. United States*, 567 U.S. 260, 280 (2012). "What the Supreme Court views as the 'ordinary practice' cannot also be an 'extraordinary and compelling reason' to deviate from that practice." *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021).

Andrews, 12 F.4th at 261.

Defendant seeks compassionate release from a sentence that was lawful when imposed based on changes in sentencing law that Congress expressly made non-retroactive. The Court finds that Congress expressly declined to extend benefits of the amended Section 942(c) to individuals like Defendant. Therefore, Defendant fails to come forward with extraordinary or compelling reasons for early release and his Motion will be denied.

B. Defendant's Health and the COVID-19 Pandemic:

Defendant presents his health-related justification for release in relationship to the fourth step of the compassionate release analysis, as a sentencing factor under 18 U.S.C. § 3553(a). (*Pro Se Motion for Sentence Reduction under the Compassionate Release Statute 18:3582 (c)(1)(A)(i), as Amended by the First Step Act* page 25; ECF No. 153.) Therefore, the Court need not address Defendant's COVID-19 Pandemic health related argument because it has already determined that Defendant fails to establish extraordinary and compelling circumstances to justify release under the

amended version of Section 924(c). However, to the extent that Defendant's request could be construed to seek health related compassionate release, the Court finds no compelling or extraordinary health related circumstances presented in his various Motions.

In his various filings, Defendant fails to establish that he is at an increased danger from COVID-19; therefore, he fails to set forth an extraordinary or compelling reason for granting compassionate release at this time. Defendant avers that he is overweight and suffers from hypertension or high blood pressure. (*Pro Se Motion for Sentence Reduction under the Compassionate Release Statute 18:3582 (c)(1)(A)(i), as Amended by the First Step Act* page 28, ECF No. 153.) Defendant also presented medical records to establish that he was prescribed Lisinopril in 20 mg tablets and hydrochlorothiazide in 25 mg tablets/capsules to treat hypertension/high blood pressure. (*Motion for Compassionate Release and Appointment of Counsel*, ECF No. 152; Bureau of Prison Medical Records, *Motion to Expand the Record* page 22-24, Exhibit 5, ECF No. 155.)

Defendant has not established that his high blood pressure and related medical conditions constitute a serious medical condition to find extraordinary and compelling reasons. Obesity and hypertension may be a risk factor for severe COVID-19 disease; however, the Government represented that Defendant received doses of the Pfizer vaccine on March 16 and April 6, 2021. Furthermore, the Federal Bureau of Prisons has taken substantial steps to limit the spread of the COVID-19 virus within its facilities among the inmate population. Therefore, Defendant failed to establish that he was in anymore apparent danger from the virus than if he were in the general population. *See*,

e.g., *United States v. Hannigan*, 2021 WL 1599707, at *5-6 (E.D. Pa. Apr. 22, 2021) (Kenney, J.) ("Other courts in the Third Circuit have agreed that the protection provided by an authorized COVID-19 vaccination reduces the risk of serious illness from COVID-19 to such a degree that the threat of the pandemic alone cannot present an extraordinary and compelling reason for compassionate release."); *United States v. Kamara*, 2021 WL 2137589 (E.D. Pa. May 26, 2021) (Bartle, J.); *United States v. Peterson*, 2021 WL 2156398, at *2 (E.D. Pa. May 27, 2021) (Joyner, J.) (the defendant "suffers from hypertension, asthma, and prediabetes and he is obese and a former smoker," but "[g]iven the significant protection the [Johnson and Johnson] vaccine offers and the declining rates of COVID-19 infections in prisons, we (like many other courts) do not find that Mr. Peterson has presented extraordinary and compelling circumstances at this time."); *United States v. Roper*, 2021 WL 963583, at *4 (E.D. Pa. Mar. 15, 2021) (Kearney, J.) ("The risk posed to an inoculated Mr. Roper is not an extraordinary and compelling reason for his release."); *United States v. Jones*, 2021 WL 1561959, at *1 (E.D. Pa. Apr. 21, 2021) (McHugh, J.) ("As the Government itself acknowledges, the scientific consensus surrounding vaccines can change. . . . But as of now, the available data confirms the extreme effectiveness of the vaccines."); *United States v. Willis*, No. 10-416, ECF 239 (E.D. Pa. May 3, 2021) (Padova, J.); *United States v. Newsuan*, 2021 WL 2856509, at *4 (E.D. Pa. July 7, 2021) (Pratter, J.) (68-year-old defendant who presents diabetes, obesity, and hypertension does not present extraordinary circumstance in light of vaccination); *United States v. Lopez-Batista*, No. 16-358, ECF No. 94 (E.D. Pa. Aug. 23, 2021) (Sanchez, C.J.) (diabetes and obesity do not warrant release in light of vaccination); *United States*

v. Berry, 2021 WL 3537145, at *3 (E.D. Pa. Aug. 11, 2021) (Savage, J.) ("Although he suffers from medical conditions making him more vulnerable to serious illness or death from COVID-19, the risks posed to Berry's health are minimal. His vaccination status provides sufficient protection against the risks. Moreover, Berry is housed at FCI Schuylkill, which has no reported cases among inmates or staff."); *United States v. Otero-Montalvo*, 2021 WL 1945764, at *3 (E.D. Pa. May 14, 2021) (Schmehl, J.) (41-year-old defendant presents asthma and obesity, but has been vaccinated; the court dismisses his complaints regarding prison management, stating, "The BOP and FCI Fort Dix administering vaccinations shows that they are taking the appropriate precautions to the COVID-19 pandemic and are safeguarding inmates."); *United States v. Glenn*, 2021 WL 3190553, at *7 (E.D. Pa. July 28, 2021) (Slomsky, J.) (the defendant presents diabetes, but relief is denied as he has been vaccinated).

IV. CONCLUSION:

For these reasons, Defendant's request for compassionate release is denied. Defendant is free to file a new petition for compassionate release if his health condition deteriorates. An appropriate order will follow.

STATUTORY PROVISIONS INVOLVED

1. Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221-22, provides:

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

2. Section 603(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5239-41, provides:

SEC. 603. FEDERAL PRISONER REENTRY INITIATIVE REAUTHORIZATION; MODIFICATION OF IMPOSED TERM OF IMPRISONMENT

* * *

(b) INCREASING THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE.—Section 3582 of title 18, United States Code, is amended—

(1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by

the warden of the defendant's facility, whichever is earlier,";

(2) by redesignating subsection (d) as subsection (e); and

(3) by inserting after subsection (c) the following:

"(d) NOTIFICATION REQUIREMENTS.—

"(1) TERMINAL ILLNESS DEFINED.—In this subsection, the term 'terminal illness' means a disease or condition with an end-of-life trajectory.

"(2) NOTIFICATION.—The Bureau of Prisons shall, subject to any applicable confidentiality requirements—

"(A) in the case of a defendant diagnosed with a terminal illness—

"(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

"(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

"(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

"(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

"(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

"(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

"(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

"(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

"(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

"(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

"(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

"(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

"(3) ANNUAL REPORT.—Not later than 1 year after the date of enactment of this subsection, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

"(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

"(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

"(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by

the criteria relied on as the grounds for a reduction in sentence;

"(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

"(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

"(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

"(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.".

3. 18 U.S.C. § 3582(c)(1)(A) provides:

§ 3582. Imposition of a sentence of imprisonment

* * *

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), 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; and

* * *

4. 28 U.S.C. § 994(t) provides:

§ 994. Duties of the Commission

* * *

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

* * *