UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:11-cr-380-SDM-AEP

ZAVIEN BRAND

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR COMPASSIONATE RELEASE

The United States opposes defendant Zavien Brand's motion for compassionate release on the ground that he received an "unusually long sentence." Doc. 105. In any event, he represents a danger to the community and the 18 U.S.C. § 3553(a) factors do not support his early release from incarceration.[1]

I. Background

In 2012, this Court sentenced Brand to serve 372 months' imprisonment after he pleaded guilty to four counts of distribution and possession with intent to distribute cocaine, four counts of felon in possession of a firearm, and two counts of possession of a firearm during the commission of a drug trafficking crime. Doc. 63. The charges were based on multiple incidences between November 2010 and June 2011, of Brand selling cocaine and approximately five firearms to an undercover law-

[1] This is Brand's third motion for compassionate release and his second attempt to reduce his sentence on the argument that his "stacked" term of imprisonment for offenses charged in the same indictment is unconscionable and that the need to reduce the sentence is consequently "extraordinary and compelling." *See* Docs. 79, 83, 87, 89, and 92.

enforcement officer. Brand's adult criminal history includes convictions for attempted car burglary, robbery, grand theft, escape, domestic violence-battery (multiple convictions), possession of ammunition by a convicted felon, felon in possession of a firearm, possession cannabis, and multiple other criminal traffic citations. His juvenile criminal history includes convictions for aggravated assault with firearm, trespass, and assault.

Brand is incarcerated at Coleman Low FCI in Sumterville, Florida, is 40 years old, and is projected to be released on March 27, 2038. *See* BOP Inmate Locator at https://www.bop.gov/inmateloc/ (last accessed on November 14, 2023). Brand has served approximately 12 years of his 31-year sentence. Bureau of Prisons ("BOP") records revealed Brand has had two disciplinary incidences while in custody: (1) in 2013 for possession of drugs, and (2) in 2021 for being insolent to a staff member. *See* Attachment A.

II. Memorandum of law

A. Compassionate release, generally

This Court has no inherent authority to modify a sentence; it may do so "only when authorized by a statute or rule." *United States v. Puentes*, 803 F.3d 597, 606 (11th Cir. 2015). One of those statutes is 18 U.S.C. § 3582(c)(1)(A), which permits a court to reduce a term of imprisonment if the court determines that (1) "extraordinary and compelling reasons warrant such a reduction," (2) "such a reduction is consistent with applicable policy statements issued by the Sentencing

Commission," and (3) the section 3553(a) sentencing factors weigh in favor of a reduction. *Id.*; *see also United States v. Tinker*, 14 F.4th 1234, 1237 (11th Cir. 2021).

The Sentencing Commission's applicable policy statement, in USSG §1B1.13, defines "extraordinary and compelling reasons" for purposes of section 3582(c)(1)(A), and it is binding on the courts. *United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021). Under section 1B1.13, extraordinary and compelling reasons that may render a defendant eligible for a sentence reduction fit in the following categories: (1) medical circumstances of the defendant; (2) advanced age plus length of term already served; (3) family circumstances that result in the defendant being the only available caregiver for a minor or incapacitated immediate family member; (4) sexual or physical abuse of the defendant by an individual with custody or control of the defendant during the term of imprisonment sought to be reduced; (5) other circumstances similar in gravity to those in (1) through (4); and—purportedly—(6) an "unusually long sentence," if the defendant has served at least 10 years imprisonment and a change in the law would produce a gross disparity between the defendant's sentence and the sentence likely to be imposed at the time the motion is filed. USSG §1B1.13(b)(1)–(6). (As explained more fully below, subsection (b)(6) is invalid because it conflicts with section 3582(c)(1)(A) and exceeds the Sentencing Commission's statutory authority.)

If the court finds that an extraordinary and compelling reason exists, it still may not reduce the defendant's term of imprisonment under section 3582(c)(1)(A)

unless it also finds that the defendant's release would not endanger the community and that the factors listed in 18 U.S.C. § 3553(a) favor compassionate release. *Tinker*, 14 F.4th at 1237. If the defendant fails to establish any of the three requirements, the court need not analyze the other requirements and cannot grant relief. *See United States v. Giron*, 15 F.4th 1343, 1348 (11th Cir. 2021).

The defendant, as movant, bears the burden of establishing entitlement to relief under section 3582. *United States v. Green*, 764 F.3d 1352, 1356 (11th Cir. 2014) (addressing a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2)). And the defendant must first "fully exhaust 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." *See United States v. Harris*, 989 F.3d 908, 909–10 (11th Cir. 2021) (quoting 18 U.S.C. § 3582(c)(1)(A)(i)). The exhaustion requirement is "mandatory, in the sense that a court must enforce the rule if a party properly raises it." *Harris*, 989 F.3d at 911 (internal quotation marks omitted).

B. Brand's compassionate release motion

i. Exhaustion

Brand asserts that he sought a sentence reduction on or about August 28, 2023. Doc. 105. BOP could not provide counsel for the government the date of the denial of the administrative request. More than 30 days has passed from the BOP's receipt of Brand's original application before he filed his motion in this Court, so this

Court may consider the merits of Brand's motion.

ii. Extraordinary and compelling circumstances

Here, Brand requests a reduction of his sentence based on his claim that he received an "unusually long sentence." As relevant here, section 1B1.13(b) permits a reduction of a defendant's sentence based on an unusually long sentence when:

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

USSG §1B1.13(b)(1)–(6).

Section 1B1.13(c) further provides that, except as provided in subsection (b)(6), a court cannot consider a change in the law (including a non-retroactive guidelines amendment) for purposes of determining whether an extraordinary and compelling reason exists. USSG §1B1.13(c). But, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction, a court may consider a change in the law (including a non-retroactive guidelines amendment) in determining the extent of any reduction. *Id.*

A defendant's rehabilitation is not, by itself, an extraordinary and compelling reason that may justify a sentence reduction. 28 U.S.C. § 994(t); USSG §1B1.13(d). A court may, however, consider a defendant's rehabilitation while serving his

sentence in combination with other circumstances in determining whether and to what extent a reduction is warranted. USSG §1B1.13(d).

C. An unusually long sentence is not a valid basis for compassionate release, because the Sentencing Commission exceeded its congressionally delegated authority in promulgating subsection (b)(6).

Here, Brand argues that he has established extraordinary and compelling reasons for release based in part on a change in the law that, according to Brand, has produced a gross disparity between his sentence and the sentence he would receive if he were sentenced for the same offenses today. Although Congress has delegated broad authority to the Sentencing Commission, subsection (b)(6) is contrary to the text, structure, and purpose of 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(a), and is therefore invalid.

i. In exercising its authority, the Commission cannot act contrary to statutory authority.

Congress directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for [a] sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). This delegation of authority, however, "is not unlimited." *Batterton v. Francis*, 432 U.S. 416, 428 (1977). Even when reached through an exercise of delegated authority, an agency's interpretation of a statute must be set aside if the agency's interpretation is not reasonable. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011); *see Batterton*, 432 U.S. at 428. An agency cannot

adopt an impermissible reading of the statute—*i.e.*, a reading that exceeds the gap left by Congress. *See Mayo Found.*, 562 U.S. at 53–58; *Batterton*, 432 U.S. at 428.

The Sentencing Commission in particular "was not granted unbounded discretion," and, as the Supreme Court has explained, "[b]road as" the Commission's "discretion may be," it "must bow to the specific directives of Congress." *United States v. LaBonte*, 520 U.S. 751, 753, 757 (1997). In the Sentencing Reform Act, itself, Congress directed the Commission to ensure that its guidelines and policy statements remain "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). And Congress authorized the Commission only to "make *recommendations to Congress* concerning modification or enactment of statutes relating to sentencing." *Id.* § 995(a)(20) (emphasis added).

ii. Subsection (b)(6) conflicts with section 3582(c)(1)(A)'s plain text, context, and purpose.

Section 3582(c)(1)(A) provides an "except[ion]" to the overarching principle of federal sentencing law that a "federal court generally 'may not modify a term of imprisonment once it has been imposed.'" *Dillon*, 560 U.S. at 819 (quoting 18 U.S.C. § 3582(c)). Congress plainly instructed that any reason sufficient to overcome that general principle must be "extraordinary and compelling." 18 U.S.C. § 3582(c)(1)(A)(i). No reasonable interpretation of that phrase's text, particularly when considered in light of the statute's structure and purpose, can encompass nonretroactive or intervening changes in law. The Commission's interpretation of the

statute as set forth in subsection (b)(6) is unreasonable and therefore invalid.[2] *Mayo Found.*, 562 U.S. at 58; *see LaBonte*, 520 U.S. at 753 (invalidating Guidelines amendment where "the Commission's interpretation is inconsistent with [the statute's] plain language").

a. To justify a sentence reduction under Section 3582(c)(1)(A)(i), a proffered reason must be both "extraordinary" and "compelling."

The majority of the circuits to have considered the issue have concluded that, as a matter of plain language, an intervening change in the law is neither extraordinary nor compelling. *See United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc); *United States v. Thacker*, 4 F.4th 569, 571 (7th Cir. 2021); *United States v. Crandall*, 25 F.4th 582, 585–86 (8th Cir. 2022); *United States v. Jenkins*, 50 F.4th 1185, 1198–1200 (D.C. Cir. 2022); *see also United States v. McMaryion*, No. 21-50450, 2023 WL 4118015, at *2 (5th Cir. June 22, 2023) (unpublished).[3] This Court should conclude the same.

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[2] The Supreme Court has not addressed what deference is owed to the Commission's interpretations of a statute. *DePierre v. United States*, 564 U.S. 70, 87 (2011). This court need not resolve the question because the statute unambiguously excludes the Commission's chosen interpretation. *See, e.g.*, *LaBonte*, 520 U.S. at 762 n.6 ("Inasmuch as we find the statute at issue here unambiguous, we need not decide whether the [Sentencing] Commission is owed deference under [*Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)].").

[3] Four circuits have held that a change in law can form part of an individualized assessment of whether to grant a sentence reduction, but only in combination with other case-specific factors. *Ruvalcaba*, 26 F.4th at 28 (1st Cir.); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020); *United States v. Chen*, 48 F.4th 1092, 1097-1098 (9th Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1047-1048 (10th Cir. 2021). The Eleventh Circuit has not yet decided the issue.

Brand invokes Congress's decision not to extend the First Step Act's amendment to section 924(c) to defendants like him as a change in law warranting a sentence reduction. In the First Step Act, Congress amended section 924(c)(1)(C) so that the increased penalties for a second section 924(c) conviction do not apply unless the defendant has a prior section 924(c) conviction that became final before the defendant's current section 924(c) violation. Congress, however, made the deliberate choice not to apply that amendment to defendants who were sentenced before the Act's enactment, specifying that the change applies only "if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. In so doing, Congress adhered to "the ordinary practice" in "federal sentencing" of "apply[ing] 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); *cf.* 1 U.S.C. § 109 (general nonretroactivity provision).

Given Congress's deliberate choice not to apply the First Step Act's change to section 924(c) to defendants who had already been sentenced, "there is nothing 'extraordinary' about" the fact that Brand's sentence reflects the statutory penalty that existed at the time he was sentenced. *Thacker*, 4 F.4th at 574. That sentence "was not only permissible but statutorily required at the time." *United States v. Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring). And when Congress enacted the First Step Act, it specifically declined to disturb Brand's sentence for his second Section 924(c) conviction, even as it made other (previous)

statutory changes applicable to defendants previously sentenced. In section 404 of the same Act, for example, Congress expressly enacted a mechanism allowing defendants convicted under certain drug statutes to seek retroactive application of those statutory changes in their cases. Section 404 authorizes a sentencing court to "impose a reduced sentence as if [those provisions] of the Fair Sentencing Act" had been in effect at the time of the defendant's offense. § 404(b), 132 Stat. 5222. But Congress simultaneously declined to disturb section 924(c) sentences that had already been imposed notwithstanding the different penalties that section 924(c) would apply at future sentencings.

A nonretroactive change to a statutory provision likewise cannot constitute a "compelling" reason for a sentence reduction. When Congress enacted the Sentencing Reform Act of 1984, "[c]ompelling" meant (and still means) "forcing, impelling, driving." *McCall*, 56 F.4th at 1055 (quoting *Webster's* 463). Thus, for a reason to be "compelling" under section 3582(c)(1)(A)(i), it must provide a "forcing, impelling, [or] driving" reason to disturb the finality of a federal sentence. *Id.* (internal quotation marks omitted). Even beyond the First Step Act's explicit determination not to apply the amendment to section 924(c) retroactively, ordinary principles of nonretroactivity already consider, and reject, the notion that changes in statutory law generally should be applied retrospectively. Congress enacts new sentencing statutes against a background principle, codified in 1 U.S.C. § 109, that a criminal statute does not change the penalties "incurred" under an older criminal

statute "unless the repealing Act … so expressly provide[s]." The "strong presumption against statutory retroactivity" "is 'deeply rooted in our jurisprudence' and 'embodies a legal doctrine older than our Republic.'" *Jenkins*, 50 F.4th at 1198 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). To treat a nonretroactive change in the law as a "compelling" reason to disturb a final sentence would thus undo the balance already struck by ordinary nonretroactivity principles. Nothing about a nonretroactive change in the law compels such a nonsensical outcome.

Any disparity between Brand's sentence and the sentence he would receive today is the product of deliberate congressional design—namely, Congress's decision not to apply the First Step Act's change to section 924(c) to defendants who had already been sentenced. As the Supreme Court has recognized, such "disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date)." *Dorsey*, 567 U.S. at 280. And treating Congress's express adherence to "ordinary practice" in federal sentencing, *id.*, "as simultaneously creating an extraordinary and compelling reason for early release" would contravene several canons of construction, *Andrews*, 12 F.4th at 261.

Accordingly, a nonretroactive change in the law cannot serve as either an "extraordinary" or a "compelling" reason for a sentence reduction, whether in isolation or as part of a package of such "reasons." 18 U.S.C. § 3582(c)(1)(A)(i).

Whether considered alone or in combination with other asserted factors, the possibility that a previously sentenced defendant might receive a lower sentence if he were sentenced today is a "legally impermissible" consideration in determining whether an extraordinary and compelling reason exists. *Jenkins*, 50 F.4th at 1202; *see United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) (explaining that a prospective change to sentencing law is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations).

b. Section 3582(c)(1)(A)(i)'s context further confirms that the term "extraordinary and compelling" cannot encompass intervening changes in law.

Congress expressly required that any reason for a sentence reduction be both "extraordinary and compelling," 18 U.S.C. § 3582(c)(1)(A)(i). As explained above, an intervening change is neither, under those terms' ordinary meaning, and by using that phrase Congress placed clear textual limits on the reasons the Commission may use to warrant a sentence reduction.

"Statutory construction," moreover, "is a holistic endeavor" and a provision "is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Other features of the scheme confirm that the phrase "extraordinary and compelling reasons" does not encompass changes in law.

Most notably, in the very next paragraph—section 3582(c)(2)—Congress

expressly addressed the retroactive application of some changes in law, authorizing courts to modify a term of imprisonment where a defendant was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); *see* 28 U.S.C. § 994(u) (directing the Commission to determine when such modifications are appropriate). There would have been no reason for "the same Congress, skeptical of sentence modifications as a general rule," to have "provide[d] for the retroactive application of specific changes in sentencing law in § 3582(c)(2)" had section 3582(c)(1)(A)(i) "already covered all legal developments, retroactive or not." *McCall*, 56 F.4th at 1056. That Congress did not similarly provide the Commission or district courts with authority to revisit sentences in light of statutory amendments or changes in decisional law shows that Congress did not intend for section 3582(c)(1)(A) to reach such changes.

Reducing sentences based on intervening changes in the law also would undermine congressional design more generally because a 28 U.S.C. § 2255 motion is the "remedial vehicle" Congress "specifically designed for federal prisoners' collateral attacks on their sentences." *Jones v. Hendrix*, 599 U.S. 465, 473 (2023). Treating a nonretroactive change in the law as an "extraordinary and compelling" reason for a sentence reduction would allow defendants to "avoid the restrictions of the post-conviction relief statute by resorting to a request for compassionate release instead." *Crandall*, 25 F.4th at 586. It "would wholly frustrate explicit congressional intent to hold that [defendants] could evade" those restrictions "by the simple

expedient of putting a different label on their pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973). Congress surely "knew of its specific statutory scheme authorizing post-conviction relief" both "when it [enacted section 3582(c)(1)(A)] in 1984 and amended it in 2018," and had "Congress intended the compassionate-release statute to act as an exception to this post-conviction framework, it would have made that intent specific." *McCall*, 56 F.4th at 1057–58 (internal quotation marks omitted).

c. Recognizing intervening changes in law as extraordinary or compelling reasons for a sentence reduction under section 3582(c)(1)(A)(i) also would undermine a primary purpose of the Sentencing Reform Act, in which that provision was enacted.

Through the Act, Congress sought to eliminate the "'unjustifi[ed]' and 'shameful' consequences" of a sentencing regime that produced "great variation among sentences imposed by different judges upon similarly situated offenders" and "uncertainty as to the time [an] offender would spend in prison." *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (quoting S. Rep. No. 98-225, at 38, 65 (1983) (Senate Report)); *see also Neal v. United States*, 516 U.S. 284, 290–91 ("The Commission was born of congressional disenchantment with the vagaries of federal sentencing and of the parole system."). In "overhaul[ing] federal sentencing practices" by "abandon[ing] indeterminate sentencing and parole," Congress sought to "channel[] judges' discretion by establishing a framework to govern their consideration and imposition of sentence." *Tapia v. United States*, 564 U.S. 319, 325 (2011).

Consistent with Congress's goal of determinate sentencing, section

3582(c)(1)(A) was enacted as a narrow "safety valve" for "unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances." Senate Report at 55, 121. Congress anticipated that such "justification[s] for reducing a term of imprisonment" would arise in a "relatively small number" of cases, and specifically identified severe or terminal illness as the archetype of "extraordinary and compelling circumstances" that would justify reducing a sentence. *Id.* at 55-56, 121.

Subsection (b)(6), however, purports to allow a district court to reduce a defendant's sentence when, in the judge's estimation, the defendant received "an unusually long sentence" that, accounting for nonretroactive changes in law, now represents a "gross disparity" from the sentence the court would likely impose today. USSG §1B1.13(b)(6). That authority is incompatible with the Sentencing Reform Act's overarching purpose and Congress's specific intent with respect to section 3582(c)(1)(A), and it effectively reproduces the indeterminate system the Act sought to eliminate, in which judges applied their own varied "notions of the purposes of sentencing." Senate Report at 38. Individual judges inevitably will have divergent views concerning the fairness of adhering to the ordinary practice of applying a change in law prospectively, whether a sentence lawfully imposed under the prior regime is "unusually long," and whether Congress's or the courts' assessment not to apply a change in law retroactively produces a "gross disparity" (and what a "gross disparity" looks like). It is doubtful the Sentencing Reform Act "contained the[]

seeds of its own destruction," *Jenkins*, 50 F.4th at 1202, so there is no basis to think that, notwithstanding the Act's express purpose to eliminate parole in favor of determinative sentencing, Congress nevertheless created such "a freewheeling opportunity for resentencing based on prospective changes in sentencing policy or philosophy," *Crandall*, 25 F.4th at 586.

The Sentencing Commission's explanation for the amendment cites a single sentence from the Senate Report to support its conclusion that section 3582(c)(1)(A)(i) allows courts to reduce "unusually long sentences." *See* 88 Fed. Reg. at 28,258. In the relevant passage, the Senate Judiciary Committee expressed its belief that the "unusual cases in which an eventual reduction in the length of a term of imprisonment" would be "justified by changed circumstances" might include "cases of severe illness" or "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence." Senate Report at 55. The Commission took that line—which is ambiguous at best—out of context and elevated that single sentence above the Act's plain text and overarching purpose. In context, the passage suggests only that Congress anticipated that the sort of "changed circumstances" that might warrant a sentence reduction would most often emerge during the duration of an "unusually long" period of incarceration—during which a prisoner might become elderly or infirm, for example. *Id.* Indeed, the passage makes clear that to justify even the reduction of an unusually long sentence Congress understood section 3582(c)(1)(A) to require the identification of particular

"extraordinary and compelling circumstances." *Id.* The passage does not suggest that section 3582(c)(1)(A) provides authority to reduce any sentence a court subsequently comes to view, in hindsight, as "unusually long."

The Commission also invoked the First Step Act of 2018's stated intent to increase the use of sentence-reduction motions. *See* 88 Fed. Reg. at 28,256; § 603(b), 132 Stat. 5239. But nothing about the First Step Act's procedural amendment to section 3582(c)(1)(A) or Congress's expectation that the amendment would lead to greater use of the provision "suggests Congress intended to change th[e] *substantive* status quo with a process-oriented amendment." *McCall*, 56 F.4th at 1060 (emphasis added). Congress's effort to allow defendants to file sentence-reduction motions directly sought to remedy perceived deficiencies in the BOP's preexisting procedures, which prevented the BOP from filing section 3582(c)(1)(A) motions on behalf of some defendants who satisfied longstanding criteria for relief. Congress, however, did not amend the statutory requirement that the reason for a sentence reduction be extraordinary and compelling. Tellingly, the amendment explicitly conditioned a defendant's filing on a requirement that he first "exhaust[]" with BOP a request that BOP "bring a motion on the defendant's behalf." 18 U.S.C. § 3582(c)(1)(A). Congress could not have expected BOP to evaluate whether an intervening change in law warranted a defendant's early release from custody; indeed, BOP typically plays no role in "determining the lawfulness of individual sentences," "calculating guideline ranges," or assessing the possible disparity produced by a defendant's

sentence. *See Jenkins*, 50 F.4th at 1205–06. In short, nothing about the First Step Act's procedural amendment "indicates any intention on Congress's part" to "fundamentally change the nature of compassionate release." 4/5/23 Tr. 64-66 (Vice Chair Murray, delivering joint statement); *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress … does not, one might say, hide elephants in mouseholes.").

d. Finally, the Commission's interpretation of section 3582(c)(1)(A) to allow district courts to apply nonretroactive changes in law to particular defendants is in serious tension with basic separation-of-powers principles.

In upholding the Sentencing Commission's constitutionality, the Supreme Court observed that the Commission is not vested with "the legislative responsibility for establishing minimum and maximum penalties for every crime." *Mistretta*, 488 U.S. at 396. "Congress generally cannot delegate its legislative power to another Branch," *id.* at 372, and "[w]hatever views may be entertained regarding severity of punishment, … these are peculiarly questions of legislative policy," *Gore v. United States*, 357 U.S. 386, 393 (1958). The Commission does not pose a nondelegation or separation-of-powers concern, the Court held, precisely because Congress delegated to the Commission "nonadjudicatory functions that do not trench upon the prerogatives of another Branch." *Mistretta*, 488 U.S. at 388. Subsection (b)(6) contravenes those limits by purporting to empower courts to ignore Congress's retroactivity determinations on a case-by-case basis.

The separation-of-powers concern is particularly apparent when one considers

the Commission's directive regarding *its own* retroactivity determinations. Section 3582(c)(2) permits a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" to move for a sentence reduction "consistent with applicable policy statements issued by the Sentencing Commission," and USSG §1B1.10 identifies particular Guidelines amendments that the Commission has elected to make retroactive. *See* USSG §1B1.10(a), (d). In subsection (b)(6), the Commission expressly excluded "an amendment to the Guidelines Manual that has not been made retroactive" from qualifying as an extraordinary and compelling reason for a sentence reduction. USSG §1B1.13(b)(6); *see* 88 Fed. Reg. at 28,259. The Commission accordingly precluded courts from using compassionate release as an end-run around the Commission's own determinations concerning the retroactive application of its Guidelines amendments. But by permitting other changes in law, including a statutory change that *Congress* explicitly declined to make retroactive, to qualify, the Commission declined to afford the same respect to Congress's retroactivity determinations. That counterintuitive result cannot be squared with the Commission's statutory authority. *See, e.g.*, *LaBonte*, 520 U.S. at 757 (the Commission "must bow to the specific directives of Congress").

Indeed, the separation-of-powers concerns are particularly apparent with respect to Brand's invocation of section 403 of the First Step Act as grounds for a reduction. In the same statute in which Congress amended section 3582(c)(1)(A) to

permit defendants to file sentence-reduction motions, Congress made the deliberate choice *not* to make section 403 applicable to a defendant who was sentenced before the First Step Act's enactment. Congress specified that the change would apply only "if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. So, any disparity between Brand's sentence and the sentence he would receive today is the product of deliberate congressional design, and there's no reason to think that "the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean[t] to use a general sentencing statute from 1984 to unscramble that approach." *United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021); *see Andrews*, 12 F.4th at 261 ("[W]e will not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release. Such an interpretation would sow conflict within the statute.").

e. Congress's failure to reject the Commission's amendment does not demonstrate congressional acquiescence to the Sentencing Commission's interpretation.

The Supreme Court has categorically rejected the claim that Congress's failure to reject a Guidelines amendment "means that it has effectively adopted [the Commission's] interpretation with respect to the statute." *DePierre*, 564 U.S. at 87. A court "[o]rdinarily" should resist reading congressional intent into congressional inaction," *Kimbrough v. United States*, 552 U.S. 85, 106 (2007), and Congress's failure to expressly disapprove of the amendment does not mean that the Commission acted

consistent with the statute. Indeed, policy statements like the one at issue here need not be submitted to Congress at all. *See* 28 U.S.C. § 994(p) (requiring only that changes to "guidelines" be submitted for congressional review); *id*. § 994(a)(1)–(2) (distinguishing between guidelines and policy statements). If Congress's failure to disapprove a guideline is entitled to no weight in assessing the lawfulness of the Commission's action, the same is certainly true of a policy statement, which Congress might well conclude need not have been submitted in the first place.

f. *Concepcion* also does not authorize reductions under subsection (b)(6).

In *Concepcion*, the Supreme Court considered the scope of a district court's discretion under section 404 of the First Step Act, which provides an explicit statutory mechanism for a court to revisit the sentence of a defendant convicted of a crack-cocaine offense "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." § 404(a), 132 Stat. 5222; *see id*. § 404(b), 132 Stat. 5222; *Concepcion v. United States*, 142 S. Ct. 2389, 2397 (2022). The Court explained that, in adjudicating a motion under section 404, a district court "may consider other intervening changes" of law or fact, beyond the changes made by those sections of the Fair Sentencing Act. *Concepcion*, 142 S. Ct. at 2396.

Unlike section 404, which directly authorizes sentence reductions for a specifically defined subset of previously sentenced drug offenders, section 3582(c)(1)(A)(i) contains a threshold requirement that a district court identify "extraordinary and compelling reasons" warranting a sentence reduction. 18 U.S.C.

§ 3582(c)(1)(A)(i). Indeed, the Court in *Concepcion* identified section 3582(c)(1)(A) as a statute in which "Congress expressly cabined district courts' discretion" in a way that section 404 does not. 142 S. Ct. at 2401.

C. Factors in 18 U.S.C. § 3553(a)[4] and danger to the community

Even if this Court rejects everything above and rules that subsection 1B1.13(b)(6) is valid, and further finds that Brand has established extraordinary and compelling circumstances, it still should not reduce Brand's sentence because he remains a danger to the community. Brand's criminal record is lengthy and encompassed violent offenses for burglary, theft, robbery, and being a felon in possession of a firearm. Indeed, at the time of Brand's original sentencing, the Court calculated his criminal history as a category V. Moreover, the instant case involved Brand selling firearms and cocaine to an undercover law-enforcement officer on multiple occasions. Brand has only served approximately 12 years of his 31-year

[4]These are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

sentence. Finally, this Court should not grant Brand a reduction of his sentence because the applicable sentencing factors in section 3553(a) weigh against release.

THEREFORE, this Court should deny Brand's motion for compassionate release.

Respectfully submitted,

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U.S. v. BRAND **Case No. 8:11-cr-380-SDM-AEP**

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2023, a true and correct copy of the foregoing document and the notice of electronic filing were sent by United States Mail to the following non-CM/ECF participant(s):

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