IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 5:06cr13-RH

FOEY B. PADGETT, JR.,

Defendant.

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ORDER REDUCING THE SENTENCE

The defendant Foey B. Padgett, Jr. has served 18 years on a minimum mandatory life sentence. He has moved for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), which allows a reduction for "extraordinary and compelling reasons." Under recently adopted United States Sentencing Guidelines Manual ("Guidelines Manual") § 1B1.13(b)(6), an unusually long sentence that meets specified criteria may be an extraordinary and compelling reason for a sentence reduction. Mr. Padgett meets the specified criteria.

The government asserts § 1B1.13(b)(6) is invalid and that a reduction would be inconsistent with the overall sentencing purposes set out in 18 U.S.C. § 3553(a). The government does not, however, deny that Mr. Padgett meets the criteria in

§ 1B1.13(b)(6). This order holds § 1B1.13(b)(6) valid and, upon consideration of the § 3553(a) sentencing purposes and all relevant circumstances, reduces the sentence.

I

The Sentencing Reform Act of 1984 fundamentally changed federal sentencing. The Act created the Sentencing Commission and directed it to promulgate guidelines that would be used in imposing determinate sentences—for sentences imposed under the Act, there would be no parole. *See* 28 U.S.C. § 991; *see also United States v. Bryant*, 996 F.3d 1243, 1248–49 (11th Cir. 2021). The Act strictly limited a district court's ability to reduce a sentence after it was imposed. *See* 18 U.S.C. § 3582(c).

Even so, from the day it took effect, the Sentencing Reform Act has authorized a district court to reduce a sentence for "extraordinary and compelling reasons," so long as the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." *Id*. § 3582(c)(1)(A). Congress directed the Sentencing Commission to promulgate "general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A)" and 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." 28

U.S.C. § 994(t) (originally codified as § 994(s)). The only limit was that rehabilitation alone could not be considered extraordinary and compelling. *Id*.

Until 2018, a district court could grant such a sentence reduction only on motion of the Director of the Bureau of Prisons. The First Step Act changed this, allowing a sentence reduction on the motion of the Director *or the defendant*. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239. A defendant may file such a motion after exhausting administrative remedies. *See* 18 U.S.C. § 3582(c)(1)(A). Or the defendant may file such a motion without exhausting administrative remedies if more than 30 days have passed since the defendant delivered a request for relief to the warden of the defendant's facility. *Id*.

Mr. Padgett filed this motion more than 30 days after requesting relief from the warden. The warden denied relief. It is uncontested that Mr. Padgett has met the exhaustion-or-30-days requirement.

II

This case involves a recurring pattern: a substantial disparity between the sentence that was imposed and the sentence that would now be imposed under the same circumstances. For convenience, this order sometimes refers to this as a "temporal disparity." Such a disparity usually results from a change in the law, often statutory. Some statutes make changes retroactive. Others do not. This case

involves changes that Congress did not make retroactive—changes affecting minimum mandatory sentences in drug cases.

For a temporal disparity resulting from a nonretroactive change in the law, a 3582(c)(1)(A)(i) motion sometimes provides the only possibility for a sentence reduction, other than a presidential commutation. In the period between Congress's 2018 adoption of the First Step Act and the Sentencing Commission's 2023 adoption of a guideline explicitly addressing defense 3582(c)(1)(A)(i) motions, there was a circuit split on whether a nonretroactive change in the law could ever constitute an extraordinary and compelling reason for a sentence reduction. *Compare United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021) (holding it could not); *United States v. McCall*, 56 F.4th 1048 (6th Cir. 2022) (same); *United States v. King*, 40 F.4th 594 (7th Cir. 2022) (same); *United States v. Crandall*, 25 F.4th 582 (8th Cir. 2022) (same); *and United States v. Jenkins*, 50 F.4th 1185 (D.C. Cir. 2022) (same) *with United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022) (holding it could); *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020) (same); *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022) (same); *and United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021) (same).

In a series of cases, the government opposed certiorari petitions asking the Supreme Court to resolve the issue. The government asserted that instead, the issue should be addressed by the Sentencing Commission. *See* Br. for U.S. in Opp'n to

Grant of Cert., *Jarvis v. United States*, No. 21-568, 2021 WL 5864543, at *12, *17–20 (Dec. 8, 2021); Mem. for U.S. in Opp'n to Grant of Cert., *Watford v. United States*, No. 21-551, 2021 WL 5983234, at *2 (Dec. 15, 2021); Mem. for U.S. in Opp'n to Grant of Cert., *Williams v. United States*, No. 21-767, 2022 WL 217947, at *2 (Jan. 24, 2022); Mem. for the U.S. in Opp'n to Grant of Cert., *Thacker v. United States*, No. 21-877, 2022 WL 467984, at *2 (Feb. 14, 2022); *see also* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28257–59 (May 3, 2023).

The Supreme Court denied the petitions, and the Sentencing Commission took up the issue, citing not just the statute but also the government's position opposing certiorari. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28258. The Commission did what § 994(t) instructed it to do: "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Amendment 814 includes a nonexhaustive list of examples, one dealing with temporal disparities:

> (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.

Guidelines Manual § 1B1.13(b)(6). The Commission simultaneously provided that except as authorized by § 1B1.13(b)(6), a change in the law could not be considered in determining whether there were extraordinary and compelling reasons for a sentence reduction. *Id*. § 1B1.13(c).

The government acknowledges that Congress directed the Commission to address the meaning of extraordinary and compelling. But the government asserts the Commission went too far, because, the government says, a temporal disparity, no matter how great or how unusual, can never provide an extraordinary and compelling reason for a sentence reduction.

The very fact that the circuits split on this issue suggests the meaning of "extraordinary and compelling" is not as clear as the government now asserts. Instead, this is precisely the kind of issue Congress called on the Commission to resolve. Indeed, in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), the Eleventh Circuit held binding the Sentencing Commission's prior policy statement on this very issue, emphatically explaining that Congress left it to the Sentencing Commission to define "extraordinary and compelling," subject only to the requirement that rehabilitation alone is not enough. *Id*. at 1249. The court said relying on the Commission promotes uniformity, thus minimizes unwarranted sentence disparity, and that defining these terms is "not a task that the statute

allocates to courts." *Id*. at 1255. The court said a district court's job is "simply" to apply the Commission's policy statements and, as required by the statute, consider the § 3553(a) sentencing factors in deciding whether to reduce an eligible defendant's sentence. *Id.* at 1254.

Even without the Commission's entry into the fray, the better view is that a temporal disparity can, in unusual circumstances, be an extraordinary and compelling reason for a sentence reduction. *See Ruvalcaba*, 26 F.4th at 24–28; *see also United States v. Cotrell*, No. 4:01-cr-11 (N.D. Fla. Dec. 1, 2020). *Bryant* is not to the contrary, because there the court did not reach this issue.

"Extraordinary" is an adjective addressing matters of degree, not kind. Sunsets occur every day, but some are extraordinary. Thousands of individuals have played in the National Basketball Association, hundreds have won championships or been all-stars, dozens have been most valuable players. But Bill Russell was extraordinary. Nothing about the word "extraordinary" suggests it could not apply to an unusually long sentence or an unusual temporal disparity—a disparity caused by an otherwise nonretroactive change in the law. *See Ruvalcaba*, 26 F.4th at 25–26.

Similarly, the need to correct an unjust, abnormally disparate sentence—even if the injustice becomes clear only as our understanding of just sentences evolves or the more favorable treatment of similarly situated others becomes

widespread—can be "compelling." *See Compelling need,* Black's Law Dictionary (11th ed. 2019) (defining this term to include a "need so great that irreparable harm or injustice would result if it is not met"). The notion that Congress elevated finality over justice in all instances cannot be squared with § 3582(c)(1)(A)(i)—the provision Congress adopted to allow relief in rare but existing circumstances.

The government also asserts that reducing a sentence based on a statutory change that Congress did not make retroactive is inconsistent with Congress's decision not to make the change retroactive. Not so. When Congress chooses not to make a change retroactive, it means the change cannot be invoked by every affected defendant. It does not repeal § 3582(c)(1)(A)(i) or prevent an affected defendant whose circumstances are extraordinary and compelling from invoking that provision. *See Ruvalcaba*, 26 F.4th at 27–28. Congress could rationally decide to change a statute—by changing the criteria for or length of minimum mandatory sentences, for example—and not to make that change a basis for a sentence reduction in a typical case, while still allowing a reduction in extraordinary and compelling circumstances. And indeed, that is precisely what Congress has done. Congress has said rehabilitation alone cannot be an extraordinary and compelling reason for a sentence reduction, but Congress has imposed no other limits on those terms. *Id.* at 25–26. Neither the Sentencing Commission nor the courts are obligated to read into the statute an exception Congress did not enact. *Id.* at 26.

Like many disputes, this one turns on the question of who gets to decide. There are three decisionmakers for three different parts of the process.

First, on whether there should be determinate sentences and finality, the decisionmaker is Congress, subject only to the constitutional limit on suspending the writ of habeas corpus, which is not at issue here. Congress has done its part by opting for determinate sentences and finality but with an exception to finality in extraordinary and compelling circumstances.

Second, on the meaning of extraordinary and compelling, Congress explicitly delegated primary responsibility to the Sentencing Commission, whose duly enacted policy statement thus is "entitled to more than mere deference or weight." *Compare Batterton v. Francis*, 432 U.S. 416, 426 (1977) (adopting this standard when Congress explicitly delegates to an agency "the primary responsibility for interpreting a statutory term") *with United States v. LaBonte*, 520 U.S. 751 (1997) (holding, in a case not involving such a delegation, that a sentencing guideline is invalid if contrary to the plain meaning of the statute it implements). The Commission did its part by adopting § 1B1.13(b)(6), which would survive scrutiny under *LaBonte*, and even more clearly survives scrutiny under *Batterton*. In *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), the Eleventh Circuit repeatedly said that this was indeed a role Congress assigned to the Commission.

Third, on whether there are extraordinary and compelling reasons, as validly defined by the Sentencing Commission, to reduce a specific defendant's sentence, the decisionmaker is the district court, subject to appropriate appellate review.

III

Mr. Padgett pled guilty to six counts: conspiracy to distribute or possess with intent to distribute methamphetamine (count one); possessing methamphetamine with intent to distribute (counts two through five); and possessing firearm in furtherance of the methamphetamine conspiracy charged in count one (count seven). Counts two through five resulted from controlled buys, each for less than an ounce, but the conspiracy involved 46 grams of actual methamphetamine plus 922 grams of substances containing methamphetamine. Count seven involved multiple firearms—all rifles or shotguns—in a residence in a rural county where ownership of rifles and shotguns is commonplace. The offenses occurred in 2005, and Mr. Padgett was sentenced in 2006.

Under 21 U.S.C. §§ 841 and 846 as in effect at that time, the minimum sentence for an offense involving at least 50 grams of actual methamphetamine or at least 500 grams of a substance containing methamphetamine was 10 years, and the maximum was life. But if the defendant had a prior drug felony conviction, the minimum was 20 years, and if the defendant had two or more prior drug felony convictions, the minimum was life.

Mr. Padgett had two prior state-court convictions for simple possession of methamphetamine. On the first, he pled nolo contendere, adjudication was withheld, and he was sentenced to community control and probation. He was later sentenced to just under a year in custody for a violation of community control. On the second, he again pled nolo contendere, adjudication was again withheld, and he was sentenced to probation.

Nonetheless, these were felonies, so in the case at bar, Mr. Padgett's minimum mandatory sentence on count one was life. On counts two through five, which involved a lower drug quantity, the minimum was ten years, and the maximum was life. On the firearm offense, count seven, the minimum was five years, the maximum was life, and the governing statute, 18 U.S.C. § 924(c), required the sentence to run consecutively to any other sentence. The district judge who was presiding over the case at that time sentenced Mr. Padgett to the minimum mandatory sentence of life plus five years.

The First Step Act made two changes in the penalty range for drug offenses that are important here. First, the Act made changes in the kinds of prior convictions that can subject a defendant to an increased range—to an increased minimum and, in some instances, an increased maximum. Second, the Act lowered the minimum for defendants with qualifying prior convictions.

The change in qualifying prior convictions also had two parts. First, under the prior law, any "felony drug" conviction—including one for mere possession—could increase the penalty range, regardless of the sentence actually imposed or how old the conviction was. *See* 21 U.S.C. § 841(b)(1)(A) & (B) (2005). But under the First Step Act, only a prior conviction for a "serious drug offense" can trigger an increase. This is defined to include only trafficking, not simple possession, and even then, only if the statutory maximum sentence was ten years or more, the defendant actually served more than one year, and the defendant was released not more than 15 years before the new offense began. *See* First Step Act § 401(a)(1), 132 Stat. at 5220 (codified at 21 U.S.C. § 802(57)). Second, the First Step Act added a new category of prior offenses that can trigger an increase: a "serious violent felony" meeting specified conditions, including that the defendant actually served more than one year in prison. *Id*. (codified at 21 U.S.C. § 802(58)).

The change in minimum sentences was this: a prior 20-year minimum became a 15-year minimum, and a prior life minimum became a 25-year minimum. *See* First Step Act § 401(a)(2)(A), 132 Stat. at 5220.

Mr. Padgett's prior simple-possession convictions do not qualify as "serious drug offenses" because they were not trafficking offenses and he did not serve more than a year in prison on either of them. He also had a prior burglary and prior concealed-firearm conviction, but they do not qualify as "serious violent felonies"

because they were not violent felonies at all and he did not serve more than a year on either of them.

In sum, today Mr. Padgett's minimum sentence on the drug counts would be 10 years, not life. A defendant whose offense involved this amount of drugs and who had two qualifying prior convictions for serious drug offenses or serious violent felonies—this does not include Mr. Padgett—would face a minimum of 25 years, not life. Mr. Padgett's minimum on the drug counts would be 10 years, and the combined minimum on the drug and firearm counts would be 15 years. He already has served substantially longer.

The guideline range also colors the 1B1.13(b)(6) analysis. As the provision's text makes clear, nonretroactive guideline amendments cannot be considered on whether there are extraordinary and compelling reasons for a sentence reduction. But changes in caselaw governing application of the guidelines, even if otherwise nonretroactive, *can* be considered.

Because of the minimum mandatory, Mr. Padgett's guideline range was life plus five years. But as is standard practice, the court also determined the otherwise-applicable guideline range. In doing so, the court treated Mr. Padgett as a career offender.

A defendant is a career offender if (1) the defendant was age 18 or more at the time of the offense of conviction, (2) the offense of conviction is a felony and

either a crime of violence or controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or controlled substance offense. U.S. Sentencing Guidelines Manual § 4B1.1(a).

For purposes of the career-offender provision, simple possession was not (and still is not) a "controlled substance offense." But under the (erroneous) law of the circuit at that time, Mr. Padgett's prior convictions for burglary and carrying a concealed firearm were crimes of violence. Later decisions make clear they are not. *See United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016); *United States v. Matthews*, 466 F.3d 1271 (11th Cir. 2006); *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

As a career offender, Mr. Padgett's base offense level on the drug counts was 37. His total offense level, after a three-level reduction for acceptance of responsibility, was 34. His criminal history category was automatically VI. The guideline range, calculated without regard to the minimum mandatory, was 262 to 327 months. The range on the firearm offense was the statutory minimum: 60 months. The overall range was 322 to 387 months.

Today, Mr. Padgett's base offense level on the drug counts would be 30, taking into account retroactive Guidelines Amendment 782. The total offense level would be 27. The criminal history category, taking into account nonretroactive Guideline Amendment 742 (deleting the increase based on recency of any prior

conviction) and retroactive Amendment 821 (reducing the increase based on status—based on being under a criminal sentence at the time of the offense of conviction), would be IV. The guideline range on the drug counts, calculated without regard to the minimum mandatory, would be 100 to 125 months. The combined guideline range on the drug and firearm counts would be 160 to 185 months.

This is not, however, the range that should be considered in determining whether a "gross disparity" exists under Guidelines Manual § 1B1.13(b)(6). This is so because, under that provision, a nonretroactive guideline change cannot be considered. Leaving in place the recency points addressed by nonretroactive Amendment 742, Mr. Padgett's criminal history category would be V. The guideline range on the drug counts would be 120 to 150 months. The combined guideline range on the drug and firearm counts would be 180 to 210 months.

Mr. Padgett has served 216 months even without taking into account the gain time he could have earned had he not been serving life. This is above even the high end of the properly calculated range. And even though a nonretroactive guideline change cannot be considered in deciding whether a defendant presents an extraordinary and compelling reason for a sentence reduction, the change can be considered in deciding whether to reduce the sentence of an eligible defendant and, if so, by how much. *See* U.S. Sentencing Guidelines Manual § 1B1.13(c); *see also*

Concepcion v. United States, 597 U.S. 481 (2022). For the same offense today, with the same criminal history, Mr. Padgett would be sentenced to 180 months.

IV

Mr. Padgett has presented extraordinary and compelling reasons for a sentence reduction. He meets the criteria in Guidelines Manual § 1B1.13(b)(6), as the government apparently concedes. The governing statute, § 3582(c)(1)(A), explicitly requires the court to consider the § 3553(a) sentencing factors to the extent applicable. The government says a reduction should be denied based on those factors, but as a matter of discretion, I disagree. No sentencing judge, facing these circumstances in a new case today, would impose a sentence as long as Mr. Padgett already has served. A longer sentence is not necessary to achieve the 3553(a) sentencing purposes. Leaving in place Mr. Padgett's sentence would constitute unwarranted sentence disparity writ large.

In reaching this conclusion, I have overlooked neither the seriousness of Mr. Padgett's drug and firearm offenses nor his criminal history. The history includes ten cases, but none resulted in an original custodial sentence exceeding time served. The history was compiled long ago, and Mr. Padgett now has served a long prison sentence. I find that Mr. Padgett is not a danger to any other person or the community. *See* Guidelines Manual § 1B1.13(a)(2).

This order reduces the sentence to time served not as of today but as of 30 days from today. This will provide the Bureau of Prisons and Probation Department time to implement an orderly transition plan and will afford the government an opportunity, if it wishes, to appeal and seek a stay. This order directs the clerk to provide copies of the order to the following: Mr. Padgett, who filed the motion pro se; the attorneys of record; the Federal Public Defender, as is routinely done on 3582(c)(1)(A)(i) motions in this court; and specific attorneys who appeared pro hac vice on at least one other 3582(c)(1)(A)(i) motion in this court and may, if they wish, contact Mr. Padgett about representing him in any further proceedings.

VI

For these reasons,

IT IS ORDERED:

1. The motion to reduce the sentence, ECF No. 154, is granted.

2. The judgment is amended to reduce Mr. Padgett's prison sentence to time served as of February 29, 2024.

3. The judgment remains the same in all other respects.

4. The clerk must provide copies of this order to Mr. Padgett himself by mail, to the attorneys of record and the Federal Public Defender through the electronic filing system, and to the attorneys who appeared pro hac vice for the

defendant Donte J. Smith in No. 4:99cr66 by email or through the electronic filing system.

SO ORDERED on January 30, 2024.

s/Robert L. Hinkle
United States District Judge