

23-8037

To Be Argued By:
MEGAN LARKIN

United States Court of Appeals
For the Second Circuit

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UNITED STATES OF AMERICA,

Appellee,

– against –

LAN NGOC TRAN, MINH DO, DAT NGUYEN, TAM THANH DO, also known as JOHNNY, also known as LONG THANH, also known as SON, L.V. HONG, also known as LV HONG, TAN LAI, BAO HUNG TRAN, JIMMY NGUYEN, HOANG HUY NGO, QUANG VAN NGUYEN, NIGEL JAGMOHAN, TUAN LEE, also known as DURANIA MICHAEL, also known as LITTLE COBRA,

Defendants-Appellants,

DAVID THAI,

Defendant-Appellant.

On Appeal From the United States District Court
for the Eastern District of New York

BRIEF AND APPENDIX FOR THE UNITED STATES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 23-8037

UNITED STATES OF AMERICA,

Appellee,

-against-

LAN NGOC TRAN, MINH DO, DAT NGUYEN, TAM THANH DO, also
known as JOHNNY, also known as LONG THANH, also known as
SON, L.V. HONG, also known as LV HONG, TAN LAI, BAO HUNG
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NGUYEN, NIGEL JAGMOHAN, TUAN LEE, also known as DURANIA
MICHAEL, also known as LITTLE COBRA,

Defendants,

DAVID THAI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Defendant-Appellant David Thai appeals from a judgment
entered on December 1, 2023, in the United States District Court for the

Eastern District of New York (Amon, J.), denying his motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).

Thai has served approximately 33 years of a concurrent sentence of two life terms plus terms of 10 and 20 years' imprisonment for racketeering and racketeering conspiracy to murder, among other crimes, related to his years-long reign of terror as the leader of a street gang aptly named "Born to Kill." On appeal, he claims that the district court abused its discretion by improperly balancing evidence of Thai's current circumstances against the other factors set forth in 18 U.S.C. § 3553(a).

Thai's argument is without merit. The district court properly considered evidence of Thai's current condition, including his educational and rehabilitative efforts, lack of disciplinary infractions, and medical condition, in its analysis of the relevant § 3553(a) factors. The district court did not abuse its discretion in deciding that the § 3553(a) factors—in particular, the horrendous nature and circumstances of the crimes Thai committed as the leader of Born to Kill—overwhelmingly militated against his release.

STATEMENT OF FACTS

I. Offense Conduct, Trial, and Conviction

Thai was the leader of Born to Kill, also known as “BTK,” a New York street gang that engaged in violent, organized crimes in Chinatown’s Canal Street area in Manhattan (the “Chinatown area”). (PSR ¶¶ 25-27).¹ Thai founded Born to Kill in the late 1980s and recruited many of its members, most of whom were Vietnamese men in their late teens or twenties. (PSR ¶ 26). The gang’s criminal activities predominantly included armed robberies, systematic extortions of money and property from local businesses, and acts of assault and murder, either during the commission of robberies or in furtherance of the gang’s criminal affairs. (PSR ¶¶ 26-27). By design, Born to Kill targeted victims of Asian descent, given the gang’s belief that such victims would be most

¹ “A,” “Br.,” “GA,” and “DE” refer to the appellant’s appendix, the appellant’s brief, the government’s appendix, and entries on the district court’s docket, respectively. Except where otherwise indicated, docket entries are from Thai’s underlying criminal case, *United States v. Thai, et al.*, No. 91-CR-838 (CBA) (E.D.N.Y.). A copy of the Probation Department’s pre-sentence investigation report (“PSR”), dated August 6, 1992 and revised on October 15, 2015, has been filed with the Court under seal.

intimidated by the gang's violence and reluctant to report criminal activity to the police. (PSR ¶ 28).

Thai was not only a leader and founder of Born to Kill, but he was also its primary enabler and beneficiary. (PSR ¶¶ 25-37). Among other things, Thai maintained “safe houses” throughout the New York City area, including in Brooklyn and on Long Island, where many of the gang members lived. (PSR ¶ 26). Thai planned the robberies, selected the gang members who would carry out the crimes, assigned roles, and supplied guns that were used to terrorize victims during the crimes. (PSR ¶¶ 31-33, 35-37, 40). Thai often reaped the benefits of these crimes by receiving the robbery proceeds. (PSR ¶¶ 33, 36, 37).

As the leader of the gang, Thai personally inflicted violence on others and ordered Born to Kill members to do the same. In 1989, for example, Thai ordered the murder of two members of a rival Chinatown gang known as the Flying Dragons after Thai argued with them over gang territory. (PSR ¶ 54). Thai also supplied the guns for the murders, which several members of Born to Kill subsequently carried out. (PSR ¶ 54).

These were not the only murders committed at Thai's direction. In 1991, Thai also ordered the murder of a civilian witness to a robbery committed by Born to Kill members after the witness cooperated with the police and refused the gang's extortion attempts. (PSR ¶¶ 38-39). After Thai ordered the execution, another Born to Kill member walked into a store in which the witness's wife worked and executed the witness in cold blood as the witness's 12-year-old nephew looked on from just three feet away. (PSR ¶ 39).

Thai did not have to personally pull the trigger because he conditioned the members of his gang to know that disobeying his orders would result in physical violence. Thai himself beat Born to Kill members whom he suspected kept the proceeds of robberies for themselves. (PSR ¶ 42). For example, in 1991, Thai severely beat two Born to Kill members who had robbed a jewelry store in the Chinatown area after they failed to give him the proceeds of the robbery. (PSR ¶ 42).

Moreover, the robberies committed by Thai's Born to Kill disciples were shockingly violent, the products of Thai's planning, and committed at his behest. Innocent victims attempting to make a living, including owners and employees at restaurants and jewelry stores, were

often held at gunpoint and knifepoint, handcuffed, beaten, and shot. (PSR ¶¶ 29, 30, 32, 33, 36, 37, 40, 42). On one occasion in which Born to Kill members robbed a vegetable warehouse near Chinatown, the victims were tied up with telephone wire while one was shot in the neck, another was pistol-whipped, and a third was shot at but the bullet missed him and hit a member of Born to Kill, killing him. (PSR ¶ 30). On another occasion, Born to Kill members robbed an Asian market, during which they tied up the female owner with plastic tape, held her at gunpoint, stabbed a knife close to her legs as she sat on a bag of rice, and beat her so severely that she lost consciousness, had to be hospitalized, and continued to suffer headaches from the beating nearly two years later. (PSR ¶ 34). On another occasion, Born to Kill members robbed a jewelry store, during which they forced employees to lie on the ground, held them at gunpoint, and beat them when they did not turn over jewelry quickly enough. (PSR ¶ 37). On yet another occasion, while robbing another jewelry store, two Born to Kill members stabbed the storeowner several times in the arm and shoulder and then shot him in the head and left him for dead, while other gang members placed the owner's wife in

handcuffs and threatened to kill her and her two small children if she made any noise. (PSR ¶ 36).

Thai's vicious reign of terror finally came to an end on August 12, 1991, when he and several other Born to Kill members were indicted by a grand jury sitting in the Eastern District of New York, and Thai was detained. (DE:2, 4).²

On March 30, 1992, after an eight-week trial, a jury in the Eastern District of New York convicted Thai of a litany of serious crimes related to his participation in and leadership of Born to Kill. (DE:253). Specifically, the jury convicted Thai of racketeering and racketeering conspiracy, in violation of 18 U.S.C. §§ 1962(c) and (d) (Counts One and Two); eight counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Counts Four, Five, Six, Seven, Nine, Eleven, Thirteen, and Fourteen); conspiracy to commit murder in-aid-of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count Eight); conspiracy to commit assault with a dangerous weapon in-aid-of

² The grand jury subsequently returned three superseding indictments, the last of which was returned on November 6, 1991. (DE:92).

racketeering, in violation of 18 U.S.C. § 1959(a)(6) (Count 15);³ possession of an unregistered firearm and silencer, in violation of 26 U.S.C. § 5861(d) (Counts 16 and 18); and possession of a firearm and silencer without serial numbers, in violation of 26 U.S.C. § 5861(i) (Counts 17 and 19). (PSR ¶¶ 1-24; *see also* DE:92, 253).

II. Sentencing and Appeal

On October 23, 1992, the district court sentenced Thai principally to one term of life imprisonment as to the racketeering count in Count One; another term of life imprisonment as to the racketeering conspiracy count in Count Two, to run concurrently to the life sentence imposed in Count One; and concurrent terms of imprisonment ranging between 10 and 20 years on the other counts of conviction, to be followed by three years of supervised release. (DE:434). The district court also ordered Thai to pay \$413,285 in restitution, without interest, by October 1995. (DE:434; A:133).

³ Thai's conviction as to Count 15—conspiracy to commit assault in-aid-of racketeering—was subsequently dismissed by the district court pursuant to a mandate issued by this Court, dated July 11, 1994. (DE:534).

At sentencing, the district court expressly considered the nature and circumstances of the offenses and, among other things, concluded based on the trial testimony that Thai and his fellow gang members thought “that they were above the law in operating the way that they did, in extorting money from people simply to permit the people to go on with their businesses, in murdering people who dared to confront them.” (A:109, quoting Sentencing Transcript dated Oct. 23, 1992 (CBA) at 23:1–6). As to Thai specifically, the district court found:

Mr. Thai, obviously, is the most culpable, and in many ways it’s inexcusable conduct because it [is] also clear to me in listening to this case that Mr. Thai was a highly intelligent individual with real business skills...yet he chose to use his considerable mental abilities to lead this kind of life and to bring with him many more impressionable...younger men and corrupt them and lead them in this same life.

(*Id.*).

On July 11, 1994, this Court affirmed Thai’s sentences on direct review. *See United States v. Thai*, 29 F.3d 785, 817-21 (2d Cir. 1994). In its decision, this Court summarized the structure and operation of the gang, specifically noting Thai’s leadership role:

Thai was BTK's leader from 1988 until his arrest in August 1991. He oversaw BTK's operations, planned many of its crimes, and collected the proceeds of its activities....

The membership of BTK consisted almost entirely of young Vietnamese males. They lived in safehouses in groups of 5–10, with their living expenses paid by Thai and other gang leaders. Discipline was strict, and gang members who disobeyed orders or who were suspected of cooperating with the police or of keeping the proceeds of robberies for themselves, instead of turning [the proceeds] over to Thai, suffered violent retribution. Thai...often participated directly in these disciplinary actions....

The robberies were usually planned by Thai, who typically selected the participants and the victims, planned the timing and manner of the robbery, and provided weapons.

(*Id.* at 794-95).

III. Post-Conviction Motions

After this Court affirmed Thai's sentences, Thai sought post-conviction relief with the district court on numerous occasions, but was unsuccessful each time. A summary—just of Thai's most recent post-conviction motions—follows.

A. 2019 Compassionate Release Motion

On November 25, 2019, Thai filed a motion for a sentence reduction under the First Step Act (the "2019 Motion"). (GA:1-37). Thai

asserted that he was entitled to compassionate release due to his chronic medical conditions—which included, among other things, Shy Drager disease, severe dysautonomia, and heart disease—and his advanced age (then 63 years old). (GA:7-8, 22). Specifically, Thai asserted that he was “rapidly deteriorating and [would] soon die,” that he “suffered with reoccurring end of life trajectory illnesses for a few years and [was] nearing the end of life period estimate when the disease (Shy Drager) [wa]s medically predicted to be fatal,” that his condition had “progressively worsened,” and that, he was unable to “get out of bed or sit upright in his wheelchair without passing out” or otherwise “perform activities of daily living.” (GA:1, 6-7).

On April 27, 2020, the district court denied Thai’s 2019 Motion for a reduced sentence. (A:108-17). First, the court found that Thai’s medical conditions constituted “extraordinary and compelling” circumstances under United States Sentencing Guidelines (“U.S.S.G.”) § 1B1.13, App. Note (1)(A). The court specifically noted that Thai suffered from cardiac issues and Shy Drager disease, with which he was diagnosed in 2014, that the life expectancy for Shy Drager patients is 6-to-10 years, and that Thai was confined to a wheelchair or his bed.

(A:112-13). The court nevertheless concluded that “the relevant [18 U.S.C.] § 3553(a) factors overwhelmingly militate[d] against a modification of Thai’s life sentence and outweigh[ed] the current circumstances that Thai marshals in support of his release.” (A:117).

The court provided:

Thai merited the life sentence he received. “Born to Kill,” the gang Thai led, systematically targeted Asian individuals, on the assumption that Asian victims would be most intimidated by the gang’s violence and least likely to report its crimes to the police. (PSR ¶ 28.) Thai’s leadership role in the gang involved, among other things, maintaining “safe houses” for gang members, (*id.* ¶ 26); planning robberies and supplying weapons to gang members selected to carry them out, (*id.* ¶¶ 31–33, 35–37, 40), and ordering the violent acts themselves. Among the violent acts orchestrated by Thai was the murder of a robbery victim who had cooperated with the police; the victim was executed in front of his 12-year[-]old nephew. (*Id.* ¶ 39.) Thai also bore the responsibility for the violence perpetrated by the men that he led, which included, among other violent acts, shooting another robbery victim in the head after stabbing him and systematically tying up and brutalizing other robbery victims, who were often women. (*Id.* ¶¶ 30, 34, 36.)

(A:115).

The district court also noted that Thai's attempt at bettering himself by taking educational classes and doing well "is commendable and not surprising" given that, as the court noted during sentencing, Thai is a "highly intelligent individual with real business skills," but that Thai's "apparent lack of remorse for the crimes he committed" was "particularly troubling." (A:116). Additionally, the district court clarified that it did not "find compelling" or "rely on" the government's argument that Thai was a danger to the community under § 3142(g), which would make his release inconsistent with the applicable policy statement, "[b]ecause Thai's plan would be to move to Texas, and because of his undisputedly debilitated physical state." (A:117).

B. 2020 Compassionate Release Motion

On May 26, 2020, Thai filed another motion for a sentence reduction under the First Step Act (the "2020 Motion"). (A:118-21). Thai restated that he was in poor health due to his medical conditions and argued that he was therefore at a greater risk of serious complications if he were to contract COVID-19. (A:118-19). Thai also noted that, unlike his prior filings, there were now confirmed cases of COVID-19 in the facility in which he was housed. (A:118-19).

On June 1, 2020, the district court denied Thai's 2020 Motion, providing that "[t]he fact that there are now confirmed cases of COVID-19 at FMC Devens does not present circumstances different enough to overcome the § 3553(a) factors, which this [c]ourt has already found weigh strongly against Thai's release." (A:122-23).

C. 2023 Compassionate Release Motion

On August 16, 2023, Thai filed a third motion, dated August 9, 2023, seeking a sentence reduction under the First Step Act. (A:124-319). On August 31, 2023, Thai filed a supplement to the motion, dated August 28, 2023. (A:320-26). (These filings are referred to, collectively, as the "2023 Motion"). In the 2023 Motion, Thai largely repeated the same arguments that the district court previously rejected.

Regarding "extraordinary and compelling circumstances," Thai reasserted his prior argument that U.S.S.G. § 1B1.13, App. Note 1(A) applied based on the medical conditions detailed in his earlier motions for compassionate release (GA:1-37)—namely, Shy Drager disease and cardiac issues—and he added that he had "suffered countless falls and loss of consciousness" and that "his body [wa]s shutting

down...because his late-stage disease [wa]s critical” (A:124-25).⁴ In support of these assertions, he submitted a copy of his medical records. (A:146-305). Thai also argued that U.S.S.G. § 1B1.13, App. Note 1(B) applied based on his medical conditions and because he was over the age of 65 and, at that time, had served over 32 years in prison. (A:126-28).

Next, Thai once again asserted arguments already rejected by the district court regarding the § 3553(a) factors. Specifically, he asserted that the § 3553(a) factors supported release given his efforts at rehabilitation through educational and other programming and his lack of disciplinary infractions for the past 22 years. (A:127). He also argued that his status as a first-time offender and low-level recidivist counseled in favor of release, and he included a string cite of cases in which courts throughout the country granted compassionate release motions to defendants with life sentences based on health conditions. (*Id.*). Finally,

⁴ Thai also asserted that “prison medical staff have taken no steps to provide Mr. Thai proper supervision or convalescent care” that he would otherwise receive if released “because prison and medical officials are aware that Mr. Thai’s condition is terminal and his repeated appearances at medical after each time he falls unconscious have become routine because medical staff knows that Mr. Thai’s death is imminent.” (A:126).

for what appears to be the first time in his post-conviction motions—and only following the two previous denials of his applications for compassionate release—Thai claimed that he “regretted...his criminal conduct and the pain and suffering he caused.” (A:128). In an additional attempt to support his third effort at securing compassionate release, Thai submitted his educational records, disciplinary history, an FSA Recidivism Risk Assessment worksheet, letters from fellow inmates, and his own letters expressing regret for his criminal conduct (and appearing to offer a purported “language barrier” as an excuse for his previous lack of remorse). (A:130-38, 143-45, 309-10, 311-15, 316-19, 336).

On December 1, 2023, the district court denied Thai’s 2023 Motion. (A:339-42). The district court first ruled, as it had in its order denying the 2020 Motion, that Thai sufficiently exhausted his administrative remedies and met his burden of establishing “extraordinary and compelling circumstances” under 18 U.S.C. § 3582(c)(1)(A) based on his terminal illness. (A:340). The district court then analyzed the § 3553(a) factors in the light of the new information Thai presented in his motion to determine whether the court should alter

its earlier analyses. The district court concluded that it did not, and provided as follows:

Thai has not presented circumstances sufficiently different to overcome the § 3553(a) factors, which this [c]ourt has already twice found weigh strongly against Thai's release. In my prior order, I noted that the most relevant of these factors are "the nature and circumstances of the offense; the history and characteristics of the defendant; and the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." I maintain that "Thai merited the life sentence he received" for the violence he inflicted personally and through his leadership of the "Born to Kill" gang.

Thai re-asserts several arguments that I have already rejected. First, his continued educational and other rehabilitation programming and lack of disciplinary history infractions over 22 years do not warrant release. In fact, as I previously found, "[t]his is commendable and not surprising. As I noted at the time of sentencing, Thai is a 'highly intelligent individual with real business skills.'" His status as a first-time offender also remains unconvincing given the violent pre-conviction history in his probation reports.

After I noted in my prior ruling Thai's "particularly troubling...apparent lack of remorse for the crimes he committed," Thai has now expressed remorse through a letter. Thai also claims that his language barrier "created a misinterpretation of the essence of what he intended to convey" in his prior motions. Thai's

reflection and remorse come a bit too late, but even if sincere, his remorse fails to negate the immense violence perpetrated throughout New York under his leadership that precipitated his sentence.

(A:340-41).

The district court also noted that “[l]etters from prison staff and fellow inmates in support of Thai’s rehabilitation are admirable but ultimately do not overcome the other factors that I have previously found to substantially outweigh support for his release.” (A:341).

SUMMARY OF ARGUMENT

The district court properly denied Thai's motion for compassionate release based upon its analysis of the 18 U.S.C. § 3553(a) factors. As is clear from the record, the district court considered evidence of Thai's medical condition and post-sentence conduct along with the relevant § 3553(a) factors—including the nature and circumstances of the offense; the history and characteristics of the defendant; and the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment. Having presided over Thai's eight-week trial, the district court was exceptionally familiar with the "immense violence perpetrated throughout New York under [Thai's] leadership that precipitated his sentence" (A:340-41), and did not abuse its discretion in deciding that Thai had not presented circumstances sufficient to overcome the § 3553(a) factors and justify release.

ARGUMENT

I. Applicable Law

A. Legal Standard

“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 (2010) (quoting 18 U.S.C. § 3582(b)). One “exception to the general rule of finality,” *id.*, is set forth in 18 U.S.C. § 3582(c)(1)(A), which states that a court “may reduce the term of imprisonment...if it finds that...extraordinary and compelling reasons warrant such a reduction...and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A).

“[T]here are three requirements that must be satisfied before a court can grant such relief.” *United States v. Keitt*, 21 F.4th 67, 71 (2d Cir. 2021) (per curiam). First, “an inmate must exhaust administrative remedies by requesting such relief from prison authorities.” *Id.* “Second, a court must consider the factors set forth in 18 U.S.C. § 3553(a) to the

extent that they are applicable.” *Id.*⁵ “These factors include...the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from future crimes by the defendant; and the need to avoid unwarranted sentencing disparities.” *United States v. Roney*, 833 F. App’x 850, 852 (2d Cir. 2020) (summary order). “Third, the inmate must demonstrate that his proffered circumstances are indeed ‘extraordinary and compelling’ such that, in light of these § 3553(a) factors, a sentence reduction is justified under § 3582(c)(1)(A) and would not simply constitute second-guessing of the sentence previously imposed.” *Keitt*, 21 F.4th at 71.

A district court may reduce a term of imprisonment only where both extraordinary and compelling reasons warrant it and the § 3553(a) factors support it. *See United States v. Jones*, 17 F.4th 371, 374 (2d Cir. 2021) (per curiam) (“[E]xtraordinary and compelling reasons are

⁵ Unless otherwise noted, all case quotations omit internal quotation marks, citations, and footnotes and accept alterations.

necessary—but not sufficient—for a defendant to obtain relief under § 3582(c)(1)(A).... [A] district court must also consider ‘the factors set forth in section 3553(a)’ before granting relief.”); *see also Roney*, 833 F. App’x at 852. In other words, the district court may deny a defendant’s motion for a sentence reduction based on the § 3553(a) factors even when the defendant has presented an extraordinary and compelling reason for release. *See id.* at 853; *United States v. Pawlowski*, 967 F.3d 327, 330 (3d Cir. 2020). A defendant seeking a sentence reduction bears the burden of showing that the circumstances warrant the decrease. *See Jones*, 17 F.4th at 375 (citing *United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992)).

B. Standard of Review

A district court may not grant compassionate release based solely on a defendant’s rehabilitation, but the balancing of the facts and circumstances relevant to a compassionate release motion is otherwise “left to the sound discretion of the trial court.” *United States v. Brooker*, 976 F.3d 228, 238 (2d Cir. 2020). A court abuses its discretion when “it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located

within the range of permissible decisions.” *United States v. Borden*, 564 F.3d 100, 104 (2d Cir. 2009).

When a district court bases its denial of a compassionate release motion on its application of the sentencing factors under 18 U.S.C. § 3553(a), a court of appeals employs the same deference to the district court’s determination as it does in reviewing the district court’s imposition of sentence. *See, e.g., United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020); *see also United States v. Smith*, 982 F.3d 106, 111 (2d Cir. 2020) (per curiam). “[A]s in all sentencing matters,” a district court has “broad” discretion in deciding a motion for compassionate release, *Brooker*, 976 F.3d at 237, and this Court will not “substitute [its] own judgment for the district court’s on the question of what is sufficient to meet the § 3553(a) considerations in any particular case,” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc); *see also Chambliss*, 948 F.3d at 693.

II. The District Court Did Not Abuse Its Discretion in Finding that the § 3553(a) Factors Weighed Against Thai’s Release

Thai argues that the district court “did not fairly assess and balance” the mitigating factors presented by Thai and that the district

court's decision was unreasonable. (Br:13-15). To the contrary, the district court was well within its discretion in concluding that the mitigating factors Thai argued were present—including his educational and rehabilitative efforts, lack of disciplinary infractions, medical condition, lack of recorded criminal history, and claimed remorse—did not sufficiently diminish the serious and heinous nature of Thai's crimes, and that his life sentence remained justified.

As an initial matter, it is well-established that a district court has wide latitude to decide how much weight to afford aggravating and mitigating factors. *United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008) (“[T]he weight to be afforded any § 3553(a) factor is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable.”); *United States v. DiBiase*, 857 F. App'x 688, 689 (2d Cir. 2021) (summary order) (“For questions of the appropriate balancing of the Section 3553(a) factors, we provide wide latitude to district courts.”).

The district court's determination that the § 3553(a) factors did not weigh in favor of release was entirely appropriate given, among other things, Thai's heinous offense conduct. As detailed above, Thai led

and ran a murderously violent gang that was dedicated to victimizing vulnerable members of society to build Thai's own power, wealth, and status. As the founder and leader of the gang, Thai cynically recruited young men to join and, over a period of years, directed a campaign of violent crime that resulted in death and serious injury. The nature and circumstances of the offenses of which he was convicted—comprising more than a dozen crimes, including racketeering, conspiracy to murder, and armed robbery—are among the most serious contemplated by our criminal justice system. Indeed, the government showed that three people were executed at Thai's direction, at least one of whom was an innocent witness who did nothing more than speak to law enforcement officers about a robbery perpetrated by members of Thai's gang, Born to Kill. As a consequence of this violent, widespread conduct, the district court sentenced Thai to life imprisonment.

Although Thai has presented evidence of changed circumstances, this, alone, does not render the district court's denial of his 2023 Motion—his third such motion in as many years—unreasonable given the § 3553(a) factors discussed above. *See United States v. Davila-Gonzalez*, 595 F.3d 42, 49 (1st Cir. 2010) (“Merely raising potentially

mitigating factors does not guarantee a lesser sentence. A criminal defendant is entitled to a weighing of the section 3553(a) factors that are relevant to his case, not to a particular result.”); *see also United States v. Halvon*, 26 F.4th 566, 571 (2d Cir. 2022) (per curiam) (providing that this Court cannot require “that a particular factor be given determinative or dispositive weight”).

Indeed, courts regularly deny motions for compassionate release when defendants have presented similar mitigating circumstances if the balance of § 3553(a) factors does not weigh in favor of release. *See, e.g., United States v. Cargo*, No. 21-CR-395, 2022 WL 244083, at *2 (2d Cir. Jan. 27, 2022) (summary order) (holding that, for defendant who pleaded guilty to arson and conspiracy to distribute cocaine and heroin, his “rehabilitative strides, though commendable, do not diminish the seriousness of his criminal conduct”); *United States v. Amato*, 48 F.4th 61, 66 (2d Cir. 2022) (per curiam) (affirming district court’s denial of compassionate release for defendant with life sentence for racketeering and murder in-aid-of racketeering, and declining to accept defendant’s argument that the district court “should have placed greater weight on his health conditions” because “this court cannot

require that a particular factor be given determinative or dispositive weight”); *United States v. Redden*, No. 02-CR-1141, 2020 WL 9718872, at *2 (S.D.N.Y. July 21, 2020) (denying sentence reduction based on seriousness of offense conduct, which involved two murders, despite defendant’s good behavior and rehabilitative efforts), *aff’d*, 850 F. App’x 121 (2d Cir. 2021); *Simon v. United States*, No. 07-CR-474, 2020 WL 5764322, at *3 (S.D.N.Y. Sept. 28, 2020) (denying release for defendant who pleaded guilty to access device fraud and failure to appear where Bureau of Prisons (“BOP”) found he was “not at high risk for recidivism” and “the Court ha[d] no reason to doubt [his] comprehensive rehabilitation, family support, and reentry prospects,” because these factors did not outweigh the § 3553(a) factors); *United States v. Sabato*, No. 15-CR-52, 2021 WL 2223814, at *4 (D. Conn. June 2, 2021) (denying release for 63-year-old defendant who had been convicted of conspiracy and possession with intent to distribute cocaine with minimal disciplinary history and minimal health issues, and who BOP reported had a “low risk of recidivism,” because the § 3553(a) factors weighed against release).

Nor was it improper or unreasonable for the district court to give weight to the goals of the original sentence as part of its § 3553(a) analysis. *See United States v. Seshan*, 850 F. App'x 800, 802 (2d Cir. 2021) (summary order) (“[C]ourts regularly consider whether compassionate release would be consistent with § 3553(a) by considering how early release would impact the aims of the original sentence.”); *United States v. Ebbbers*, 432 F. Supp. 3d 421, 430-31 (S.D.N.Y. 2020) (summary order) (“In considering the section 3553(a) factors, [the court] should assess whether those factors outweigh the extraordinary and compelling reasons warranting compassionate release, particularly whether compassionate release would undermine the goals of the original sentence.”), abrogation on other grounds recognized by *United States v. Johnson*, No. 23-CR-6272, 2023 WL 6475329 (2d Cir. Oct. 5, 2023). Considering the aims of the original sentence is particularly important where, as here, a defendant’s offense conduct was especially serious. *See, e.g., United States v. Gioeli*, No. 08-CR-240, 2020 WL 2572191, at *5 (E.D.N.Y. May 21, 2020) (denying release in light of “defendant’s participation in multiple conspiracies to commit murder”; early release would be inconsistent with the need for adequate punishment and

deterrence); *United States v. Gotti*, 433 F. Supp. 3d 613, 619 (S.D.N.Y. 2020) (even if organized crime defendant were eligible for compassionate release, “reducing his sentence would undermine the goals of sentencing; among them, the need to provide just punishment”).

Here, the district court has repeatedly concluded that the § 3553(a) factors outweigh any basis for compassionate release for a key reason: the serious and heinous nature of Thai’s actions while leading the predatory and deadly Born to Kill gang. At the time of sentencing, and in the full light of the fact that the sentence would result in Thai’s incarceration even as an elderly and infirm inmate, the district court imposed a sentence of life imprisonment upon him. This Court then, on appeal, agreed with the district court that the sentence was reasonable. *Thai*, 29 F.3d at 817-21. After carefully weighing all the circumstances as they stand today, it was not error for the district court to give greater weight to the nature and circumstances of the offense conduct and the aims of the original sentence than to Thai’s purportedly mitigating circumstances when—for the third time—it declined to reduce his sentence. *See, e.g., Halvon*, 26 F.4th at 570-71 (not improper to emphasize “sentencing considerations that had not changed since [the

defendant's] original sentence” and give “greater weight to those unchanged factors than to changed circumstances on which” the defendant relied).

The cases cited by Thai in which district courts have reduced life sentences on the basis of health conditions, rehabilitation efforts, and other mitigating factors that Thai also presents do not render the district court's decision outside the range of permissible decisions. As detailed above, courts regularly deny motions for compassionate release under similar circumstances. Further, the analysis under § 3582(c)(1)(A) is fact-specific and, having presided over an eight-week trial detailing his atrocities, the district court was eminently familiar with the serious crimes committed by, and at the direction of, Thai, which were appropriate to consider in the § 3553(a) analysis. Thai's argument amounts to little more than disagreement with the district court's balancing of the § 3553(a) factors. And “[m]ere disagreement with how the district court balanced the § 3553(a) factors...is not a sufficient ground for finding an abuse of discretion.” *Halvon*, 26 F.4th at 569.

Moreover, to the extent Thai is asking this Court to substitute its own view of the § 3553(a) factors for the district court's well-reasoned

decision, this Court should decline to do so. *See United States v. Ingram*, 721 F.3d 35, 37 (2d Cir. 2013) (stating that the appellate court will not “substitute [its] own judgment for the district court’s on the question of what is sufficient to meet the § 3553(a) considerations in any particular case” (quoting *Cavera*, 550 F.3d at 189)); *United States v. Sisnero-Gil*, No. 20-CR-4102, 2022 WL 289319 (2d Cir. Feb. 1, 2022) (summary order) (providing that this Court “generally does not second guess the weight (or lack thereof) that the [district] judge accord[s]” mitigating and aggravating factors).

In sum, the district court carefully weighed Thai’s medical condition and post-sentence conduct against the “immense violence perpetrated throughout New York under his leadership” (A:340-41), and concluded that the seriousness of his conduct and other relevant § 3553(a) factors outweighed support for his release. While Thai may disagree with the district court’s analysis, he has failed to establish that the district court abused its discretion in reaching its conclusion. The district court’s order should therefore be affirmed.

CONCLUSION

For the reasons stated above, the order of the district court should be affirmed.

Dated: Brooklyn, New York
January 29, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE
STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Second Circuit Rule 32.1(a)(4) because the brief contains 5,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: Brooklyn, New York
January 29, 2025

/s/ WHITMAN G.S. KNAPP
WHITMAN G.S. KNAPP
Assistant U.S. Attorney

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

**Criminal Action 91-cr-00838-
CBA-1**

Plaintiff,

v.

DAVID THAI

NOTICE OF MOTION

Defendant.

PLEASE TAKE NOTICE that, upon the annexed affidavit of Defendant's counsel, Barry Levin, , together with the exhibits annexed hereto, and upon all prior pleadings and proceedings herein, Defendant David Thai, by his undersigned attorneys, will move this Court pursuant to Rule 47 of the Federal Rules of Criminal Procedure on the 24 day of November, 2019, or as soon thereafter as counsel can be heard, at the United States District Courthouse, 225 Cadman Plaza E, Brooklyn, Ny 11201, for an order directing the Bureau of Prisons (BOP) to release defendant David Thai from incarceration at the Federal Medical Center in Ayer MA, pursuant to the expanded Compassionate Release Provision of the First Step Act of 2018.

Case 1:91-cr-00838-CBA Document 694 Filed 11/25/19 Page 2 of 2 PageID #: 837

Dated: Garden City, New York

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

**Criminal Action 91-cr-00838-CBA-
1**

Plaintiff,

v.

DAVID THAI

Defendant.

**DEFENDANT’S MEMORANDUM OF LAW
IN SUPPORT OF COMPASSIONATE RELEASE**

The Honorable Court should grant the motion for compassionate release on the basis that his end of life trajectory illness, which has him confined to his bed or a wheelchair, which could result in death at any time, constitutes an “extraordinary and compelling” reason to modify a sentence within the meaning of 18 U.S.C. '3582©(1)(A)(i). As informed by Congress’s definition of a terminal illness in 18 U.S.C. '3582(d)(1) and the relevant Sentencing Commission guidance provided in U.S.S.G. 1B1.13.E. Thai has been convicted of a violent crime and has been sentenced to life in prison, the 18 U.S.C. '3553(a) factors, which this Court must consider in deciding whether to grant this request, do not weigh against allowing Mr. Thai to live out his remaining days with his family.

On October 3, 2019, General Counsel for the Federal Bureau of Prisons, Ken Hyle, issued a memorandum denying the request for compassionate release for Mr. Thai; Mr. Hyles finding, which are clearly erroneous are his life expectancy to be indeterminate and giving as reasons for the denial as follows:1) that he led a violent criminal organization that engaged in extortions,

robberies, and the use of firearms; 2) while incarcerated he has committed disciplinary infractions of high and greatest severity (this is greatly exaggerated as shown in exhibits attached); 3) he remains capable of performing the majority of ADLs and instrumental ADLs (This is false. As stated by Dr. Edinger in 2018, he cannot perform any of his activities of daily living, Exhibit 3); 4) his release at this time would minimize the severity of his offense and would pose a danger to the community (also false, as Mr. Thai cannot stand or sit up without passing out). See Hyle memorandum at Exhibit 1.

Mr. Thai has had only three incident reports in 25 years in prison. See Exhibit 2. Only one of those has been a greatest severity incident report. What this Court must recognize is two-fold: (1) MCC NY and USP Allenwood are dangerous places. (2) Mr. Thai is very small in stature and he is confined with dangerous predators. Had he not defended himself, had he not acted out when challenged, he would have been the unfortunate victim of those predators, a fate that has befallen many men of small stature in prison, who are basically sexually abused and made to fulfill the role of a woman. Mr. Thai has done his best not to be involved in confrontations since 1992. In 2000, when the inmate had him on the floor of a cell and told him not to move, having hit him and threatened him, had he not jumped on him and fought back, he would have been seen as a vulnerable victim and his life would have been devastatingly altered. In reality, he had no choice.

As a preliminary matter, The First Step Act of 2018 amended 18 U.S.C. § 3582(c)(1)(A) to allow defendants “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[.]” Prior to the “passage of the First Step Act of 2018, courts could grant compassionate release sentence reductions only upon a motion by the BOP Director.” *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *4 (M.D.N.C. June

28, 2019). In making a motion for compassionate release, the defendant must make his or her motion to the sentencing court. *Himmel v. Upton*, No. 18-804, 2019 WL 1112923, at *2 n. 6 (N.D. Tex. Mar. 11, 2019) (“any motion for compassionate release under the newly amended provision of 18 U.S.C. § 3582(c)(1)(A) should be filed in the sentencing court”).

Mr. Thai’s compassionate release application was rejected by the BOP and because he was sentenced in the Eastern District of New York, Mr. Thai’s motion is timely and the venue is proper.

The sentencing court has power pursuant to 18 U.S.C. § 3582(c)(1)(A) to 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 . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

In essence, “The First Step Act applies the same statutory requirements to a defendant’s motion for compassionate release as previously applied.” *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *5 (M.D.N.C. June 28, 2019). This means that the court must (1) consider whether “extraordinary and compelling reasons” warrant the reduction; (2) weigh the § 3553(a) factors; and (3) decide whether a reduction is “consistent” with any “applicable” policy statements issued by the Sentencing Commission. *Id.*; 18 U.S.C. § 3582(c)(1)(A)(i).

The “extraordinary and compelling” language in 18 U.S.C. § 3582(c)(1)(A)(i) has historically provided the statutory justification for BOP’s Compassionate release program. *See* BOP Program Statement 5050.50 dated January 17, 2019 at page 1 (noting that the BOP exercises its discretion under 18 U.S.C. § 3582(c)(1)(A) “in particularly extraordinary or compelling circumstances which could not have been reasonably foreseen by the court at the time of

sentencing.”). The first category of compassionate release requests – and the one that has been historically associated with compassionate release – is a request based on the medical circumstance that the inmate has a “terminal medical condition.” *Id.* at 4. In an effort to encourage the BOP to grant more compassionate release requests, Congress included in the First Step Act, under the subheading “Increasing the Use and Transparency of Compassionate Release,” a definition of “terminal illness.” Pub. L. 115-391, Title VI § 603(b), 132 Stat. 5194 (Dec. 21, 2018). Congress defined a terminal illness as a “disease or condition with an end-of-life trajectory.” 18 U.S.C. § 3582(d)(1). Following the passage of the First Step Act, the BOP has stated that it may move for a reduction in sentence when an inmate has a disease or a condition with an end of life trajectory *or* an inmate has a life expectancy of less than 18 months. BOP Program Statement 5050.50 dated January 17, 2019 at page 4.

The BOP’s Office of General Counsel seemingly does not dispute that Mr. Thai’s numerous medical issues have placed him on an end-of-life trajectory within the meaning of the statute. Instead, the BOP denied Mr. Thai’s request because it stated that it did not believe that he would die within 18 months. Exhibit B. The BOP further stated that Mr. Thai’s greatest risk factor is his case of conviction and disciplinary record in prison, which we have resoundingly disputed, as set out in the attached three (in 30 years) disciplinary reports and attorney’s affidavit.

The BOP’s assessment is wrong for several reasons. First, it directly contradicts the facts of Mr. Thai’s condition and the expert opinion of Dr. Varga (Exhibit 4) and Dr. Edinger (Exhibit 3, attached to Mr. Thai’s statement). Mr. Thai has suffered with reoccurring end of life trajectory illnesses for a few years and is nearing the end of life period estimate when the disease (Shy Drager) is medically predicted to be fatal, and during that time he has progressively worsened. As a result, he can no longer get out of bed or sit upright in his wheelchair without passing out, he can

no longer perform activities of daily living. Additionally, Mr. Thai has no further medical options. His Shy dragger is incurable, and it is complicated by heart disease. As Dr. Varga stated, Shy Drager coupled with other co-morbidities, shortens the stated life-span of Shy Drager disease. This and the other information contained in Mr. Thai's medical records led both doctors to conclude that Mr. Thai's condition will only continue to deteriorate. Since Dr. Edinger wrote his report, Mr. Thai's condition has worsened. In October 2019, he was hospitalized practically the entire month. Medical records are attached, Exhibit 6. Mr. Thai is rapidly deteriorating and will soon die.

Additionally, the BOP's development and implementation of the 18-month rule is misguided. Congress defined a terminal illness as disease or condition having an end-of-life trajectory. The 18-month time frame is the BOP's own creation. As numerous courts have noted, the "BOP's internal criteria for assessing when compassionate release is appropriate are stricter than U.S.S.G. § 1B1.13 and the application note." *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *12 (M.D.N.C. June 28, 2019) (Holding that the BOP's conclusion that the inmate's condition is not severe enough to warrant release "is entitled to little, if any, deference."); *see also United States v. McGraw*, No. 202CR00018LJMCMM, 2019 WL 2059488, at *4 (S.D. Ind. May 9, 2019) (conducting a *de novo* analysis of whether the defendant's medical condition qualified as extraordinary and compelling). Put simply, the BOP's assessment of the severity of Mr. Thai's condition is incorrect, BOP general counsel Ken Hyle's assessment contradicted by Dr. Edinger and by medical records since amassed in 2019. Its rule is arbitrary and detached from Congress's definition, and this Court is under no obligation to give its decision any deference. *See United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *12 (M.D.N.C. June 28, 2019) (noting that giving any deference to the BOP's decision is "inconsistent with the First Step

Act, which was enacted to further increase the use of compassionate release and which explicitly allows courts to grant such motions even when BOP finds they are not appropriate.”).

After determining that extraordinary and compelling reasons exist to release the inmate, Courts must next weigh the § 3553(a) factors and any relevant guidance from the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A)(i). The relevant § 3553(a) factors are the nature and circumstances of the offense and the need for the sentence imposed to sufficiently reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the defendant. Similarly, the relevant Sentencing Commission guidelines and accompanying comments look to whether the defendant poses a danger to another person or society, whether the defendant suffers from a terminal illness (which includes the “end of life” standard later adopted by Congress), the age of the defendant (specifically noting whether the defendant is at least 65 years old), and whether the basis for the reduction was foreseeable at the time of sentencing. U.S.S.G. 1B1.13. These factors weigh in favor of Mr. Thai given his dire medical circumstances and his spotless - for 19 years - prison record. Thai had one 100 series incident report in 1992, when he first entered prison and got into a fight. His second incident report was in 1992, when awaiting trial at MCC NY, and that was a minor incident report. The final incident report in 2000 took place when he was being bullied by another inmate and he fought back, again a less serious incident report. A CO witnessed what took place and there was no question that Thai, a very slight and small man, was threatened by a prison bully and it was either show defiance or become a perpetual victim in a penitentiary setting - which is a life of misery for a small sized man, who is prey for violent men seeking sexual slaves in prison. See Exhibit 2, incident reports, attached.

First, there is no *per se* rule against granting a compassionate release to Mr. Thai because of the length of his sentence or severity of his crime: compassionate release exists only to free inmates with extraordinary and compelling circumstances, and the factors are applied at the time the request is made. *See United States v. McGraw*, No. 202CR00018LJMCMM, 2019 WL 2059488, at *5 (S.D. Ind. May 9, 2019) (granting a compassionate release to an alleged organized crime leader who had served 17 years of a life sentence for running a multi-state methamphetamine ring); *see also United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *4 (M.D.N.C. June 28, 2019) (granting a compassionate release for a 47-year-old inmate who had served approximately five years of a lengthy sentence for distributing methamphetamines and an unlawful possession of a firearm). If Congress wished to limit Compassionate Release to non-violent offenders, it had the power to do so. For instance, the early release program for elderly prisoners, renewed and modified under The First Step Act, specifically applies only to non-violent offenders. *See* 34 U.S. Code § 60541(g)(5) (defining “eligible elderly offender” as an offender who has not been convicted of a crime of violence or a sex offense). Therefore, the severity of Mr. Thai’s crime is not dispositive, but instead serves as only one factor among many and can only be viewed in light of his current physical state and his record over the past 30 years.

Second, given that Mr. Thai, a first offender, has spent 30 years in prison, the last five of which have been spent in increasing agony, releasing him to die peacefully at home does not minimize the seriousness of the offense, respect for the law, the justness of his punishment, adequate deterrence, or protection to the public. *See* 18 U.S.C. § 3553(a)(2). Put simply: no one will commit serious crimes because, after more than a quarter-century in prison, that person may one day be released to spend his or her agonizing last months on the outside. Similarly, our system of justice is not tarnished by releasing a dying prisoner, especially one who has served a lengthy

sentence with an entirely spotless prison record for the last 19 years. This is especially true when this Court has the power to place additional restrictions against Mr. Thai to ensure that there is no chance that any further misconduct can occur. A recent district court decision with similar facts, where an alleged biker gang leader serving life in prison received compassionate release, perfectly illustrates how these factors can favor Mr. Thai:

“Ultimately, the Court agrees with the Government that Mr. McGraw’s conduct in this case and in the past was very serious. But Mr. McGraw has been in custody since September 2002—nearly 17 years. That is a significant sanction. And the Court will impose lifetime supervision following release, which will continue to serve as a sanction and general deterrent, appropriately recognizing the seriousness of Mr. McGraw’s conduct. But further incarceration is not needed to deter Mr. McGraw from further offenses; nor, for the reasons described above, is it necessary to protect the public from future crimes. Finally, Mr. McGraw has served much of his sentence while seriously ill and in physical discomfort. This means that his sentence has been significantly more laborious than that served by most inmates. It also means that further incarceration in his condition would be greater than necessary to serve the purposes of punishment set forth in §3553(a)(2).

United States v. McGraw, No. 202CR00018LJMCMM, 2019 WL 2059488, at *5 (S.D. Ind. May 9, 2019). Just like in *McGraw*, the § 3553(a) factors favor releasing Mr. Thai despite the severity of his crime.

Third, and turning to the Sentencing Commission factors (which are very similar to the § 3553(a) factors), Mr. Thai is 63 years old, has spent nearly half his life in prison, is certain to

die very soon from either Shy Drager, a fall, or from his severe cardiac disease, which could not have been foreseen at the time of sentencing, and poses absolutely no threat to society, particularly in his cancer-stricken state.

McGraw again proves insightful on these points:

Mr. McGraw's frail condition—he is dependent upon oxygen and a wheelchair— demonstrates that there are conditions the Court could impose to “reasonably assure ... the safety of any other person and the community.” The Government expresses concerns about Mr. McGraw conducting illegal business via telephone. The Court will order an updated version of the conditions of supervised release to ensure that Mr. McGraw does not have contact with those engaging in criminal activity and extend the term of supervision to life. With probation's oversight, this condition, along with the others imposed, will ensure the protection of the public. The seriousness of Mr. McGraw's offense and criminal history are wholly outweighed by Mr. McGraw's serious, deteriorating conditions and dependence upon oxygen and a wheelchair. *United States v. McGraw*, No. 202CR00018LJMCMM, 2019 WL 2059488, at *4 (S.D. Ind. May 9, 2019). Additionally, even if Mr. Thai were physically able to conduct any further misconduct, which he certainly is not, inmates who receive compassionate release have a virtually nonexistent recidivism rate. *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *11 (M.D.N.C. June 28, 2019) (“Sentencing Commission studies suggest that retroactive sentence reductions do not increase recidivism rates and that recidivism is extremely rare among inmates who qualify for BOP's compassionate release program.”) (citations omitted).

In the case of Wong Chi Fai, 93 Cr. 1340 (RR) (opinion attached at Exhibit 5), the Honorable Raymond Dearie reversed the BOP's denial of compassionate release on 07/30/2019. Wong suffered from terminal cancer and was confined at FMC Butner, NC. The Court compared

Wong's case to *Bellamy* 2019 WL 3340699), *Johns* (2019 WL 264663), *McGraw*, supra, and *York* (2019 WL 3241166), all who had been convicted of serious offenses, yet had served a significant number of years in prison and who were terminally ill. Judge Dearie found that in his state, Wong would not present a danger to the community and that any conceivable danger could be managed by supervision. The Court found his frail condition "demonstrates that there are conditions the Court could impose to reasonably assure the safety of any other person and the community." *Wong* at 7. The Court also cites '3553 factors which show that "[a]t this stage, to require Mr. Wong to serve out the rest of his life sentence would be "greater than necessary to serve the purposes of" 18 U.S.C. '3553(a)(2). *Wong*, at 9.

Accordingly, because none of the Sentencing Guidelines weigh against releasing Mr. Thai, and because the Court has the authority to place additional restrictions on Mr. Thai, compassionate release request should be granted.

Finally, the First Step Act passed with broad bi-partisan support (87-12) both because of its more humane treatment of prisoners and its promise to save taxpayers hundreds of millions of dollars by releasing prisoners that society no longer has an interest in incarcerating. See "First Step Act Was This Past Year's Second Example of Federalism at Its Finest," *Forbes*, December 31, 2018, available at <https://www.forbes.com/sites/patrickgleason/2018/12/31/enactment-of-the-first-step-act-was-the-past-years-second-example-of-federalism-at-its-finest/#4078d3ab184e>.

Expanding compassionate release was a natural centerpiece of The First Step Act both because it is cruel to keep the frail and imminently dying in prison and because providing end-of-life care is tremendously expensive. Mr. Thai has family members who are willing to take care of him on the outside and bear the burden of all medical costs. Mr. Thai is not returning to New York. He will be living with his brother and sister in law in the state of Texas, and another brother plans

to move to Texas, when he retires in six months, to assist with the care of Mr. Thai. They have made arrangements for his medical costs to be covered. He is precisely the type of person who Congress intended to release in spite of arbitrary BOP denials. Accordingly, and for all the reasons mentioned in this memorandum, this Court should grant Mr. Thai's request for compassionate release.

Conclusion

For the foregoing reasons, this Honorable Court should Order the BOP to release Mr. Thai from his confinement at the Federal Correctional Institution Medical Center Devens, in Ayer Massachusetts, subject to any conditions or restrictions this Court may deem appropriate.

Dated: 11/__/2019

Respectfully submitted,

Barry Levin

Linda Sheffield

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

**Criminal Action 91-cr-00838-
CBA-1**

Plaintiff,

v.

DAVID THAI

Defendant.

**AFFIDAVIT IN SUPPORT OF MOTION FOR REDUCTION IN
SENTENCE 18 U.S.C. '3582(C)(1)(A)**

Barry Levin, affirms under the penalty of perjury

I am an attorney in the private practice of law, with law offices at 1225 Franklin Avenue Garden City, New York. I along with Linda Sheffield represent David Thai in the above-entitled action, and I am familiar with all the facts and circumstances in this action.

I submit this Affidavit in support of the motion of David Thai for compassionate release/RIS (reduction in sentence) of David Thai, as modified by the First Step Act of 2018, and Rule 47 of the Federal Rules of Criminal Procedure. The Defendant, David Thai, through his undersigned counsel, hereby

moves this Honorable Court for an order directing the Bureau of Prisons (BOP) to release him from his sentence of incarceration at the Federal Medical Center Devens, in Ayer, Massachusetts.

On March 30, 1992, a jury convicted Petitioner of a host of crimes related to his participation and leadership in Born To Kill, a New York gang that consisted almost entirely of young Vietnamese males and committed violent acts—including the murder of a store owner who had helped law enforcement investigate the group and expressed interest in testifying against its members. *United States v. Thai* ("Thai "I"), 29 F.3d 785, 795-800 (2d Cir. 1994). Thai was convicted of 16 counts: one count of racketeering; one count of racketeering conspiracy; one count of murder conspiracy; one count of assault conspiracy; eight counts of robbery or extortion conspiracy; two counts of possession of an unregistered firearm; and two counts of possession of a firearm without serial numbers. *Thai*, 29 F.3d at 794. The jury found Petitioner to have committed multiple violations of four criminal statutes, including the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. Thai I, 29 F.3d at 794. Thai was sentenced to two concurrent terms of life imprisonment for two RICO counts with murder as an underlying predicate act. He was also ordered to pay \$413,285 in restitution, without interest, on or before October 1995. This restitution has not been paid. (No. 91-CR-838, D.E. # 434.) On July 11, 1994, the Second Circuit affirmed the

sentences on direct review. *United States v. Thai*, 29 F.3d at 817-19, 821. Mr. Thai, who has consistently maintained his innocence, unsuccessfully appealed his conviction and unsuccessfully sought post-conviction relief.

Thai is now serving his sentence at Federal Medical Center, Devens, in Ayer, Massachusetts, a medical facility in the District of Massachusetts.

In June of 2019 Thai filed a motion for compassionate release/RIS (reduction in sentence) to the warden of FMC Devens. It is believed, based on Thai's communications with the Warden, that RIS was recommended by the Warden to the director of the Federal Bureau of Prisons. On October 3, 2019, Ken Hyle, Assistant Director/General Counsel sent a memorandum to RADM Stephen S. Spaulding, stating the reasons for denial of RIS to David Thai. Mr. Hyle recognized the serious medical condition of David Thai, noting "he spends all his time in his bed or wheelchair, as he is unable to stand up without sudden loss of consciousness." Hyle incorrectly states that Thai is able to complete daily functions himself, stating "he also remains capable of performing the majority of his ADLs (activities of daily living) (bathing, feeding, toileting, grooming, dressing, using telephone and computer, doing laundry, keeping house, and managing his medications, *as long as he is sitting or lying down*") (Emphasis added. See 10/3/2019 denial attached) Hyle also seemed not to have all of Thai's medical records, as he was unaware of fall episodes after April 2019, and he was

also unaware that Thai spent most of the month of October in the hospital after a series of falls. (See medical records attached) Physician reports in medical records at FMC Devens and by an expert in Shy Drager disease, which is the disease suffered by Thai for years before it was diagnosed over five years ago. In direct contradiction to the statements of Mr. Hyle, on September 4, 2018, Dr. Andrew Edinger wrote, “As his condition progresses, he will lose the ability to be upright at all (if he has not reached that point already). At this point he requires full support with ADLs as he cannot get out of bed. Furthermore, there is little hope that this will improve. I am forwarding this note to the designators as this dramatically changes his care plan.” (See attached report of Dr. Edinger.)

Hyle stated Thai’s life expectancy is indeterminate at this time. This statement is in contradiction to the expert report of Dr. Varga, which stated that a fall could be fatal to Thai at any time. (See Dr. Varga report attached.)

In the denial Mr. Hyle relied on the case of conviction to deny his request for RIS. Hyle also cited “while incarcerated, he has committed disciplinary infractions of high severity.” Hyle’s characterization is again exaggerated and inaccurate. Thai has had three disciplinary infractions in the thirty (30) years he has been confined. Only one was a 100 series and that was in 1992. Attached is his disciplinary record supplied by his case manager. Thai’s disciplinary history is as follows (reports attached):

1. MCC NY March 1992. Disciplinary Code 329, 399¹. Thai and another inmate climbed on a pool table and threw pool balls in every direction in the unit. Thai claimed he threw the pool balls to calm his nerves. He hit a LT, but claimed he did not intend to hit him and did not throw a pool ball directly at him. Two windows were shattered and one light was broken. Found Guilty 30 days DS \$40 restitution for broken windows and light.
2. MCC NY October 1992. Disciplinary Code 101, 312. Thai was in the strip room and a CO ordered him to remove his sweat pants. Thai replied “F... you, I’ll kick your ass.” Thai then stated that the CO was a piece of s..., swung at him and hit the CO, with his closed fist on the left side of his face. Thai stated the officer called him a piece of s... and punched him in the face so he punched him back. Found Guilty 50 days DS.
3. USP Allenwood November 2000. Disciplinary Code 201. During the feeding of the noon meal BOP staff observed Thai on the floor of his cell. Another inmate was standing in front of him with closed fists stating “Stay the f... down. I don’t want to hit you again.” During an interview Thai stated, “We got into an argument and he hit me. I tried to fight back, but he kept hitting me. He turned away and I jumped on his back and bit

¹ Code 300 disciplinary infractions are the least serious. Code 200 is more serious and Code 100 is greatest severity.

him.” The other inmate sustained a non-penetrating bite mark on his back and a small superficial cut under his eye and several scratches. The report states Thai’s sustained cuts on his forehead, a cut on the right side of his lip, a cut behind his left ear, swelling below his left eye, various cuts to his upper and lower inside gums/lip. Guilty 201, 30 days DS.

Thai’s last disciplinary action was November 2000, 19 years ago. He had only one 100 series (greatest) disciplinary report and that was in 1992.

Since filing his initial request, Thai’s condition has worsened. He was hospitalized most of the month of October 2019. He is very weak and cannot perform any ADLs without assistance. He requires a 24-hour inmate helper to perform these tasks for him. Congress has defined “terminal” in the compassionate release context as a “disease or condition with an end-of-life trajectory. 18 U.S.C. '3582(d).

The First Step Act of 2018 amends 18 U.S.C. '3582©91)(A), the statute that dictates a court’s power to modify a term of imprisonment, to allow defendants “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.”

18 U.S.C. '3582©(1)(A) further states that a Court “may reduce the term of imprisonment....after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds thatextraordinary and compelling reasons warrant such a reduction....and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

Operations Memorandum 001-2919 entitled “Home confinement Under The First Step Act” provides for either home confinement or confinement in a nursing home or intermediate care facility for inmates who meet those requirements. Thai clearly meets those requirements, as his body is essentially vegetative, as it cannot operate on its own without his losing consciousness, causing him to black out and fall, if not sitting or lying down, and soon sitting will cause him to lose consciousness, if it hasn’t already. According to the language of the Operations Memorandum, a terminal illness is not a requirement for this placement.

Thai, upon release, will live in Texas with his brother and sister-in-law, Thuong Van Le and his wife Phuong. Another brother, Anh Thai, plans to move to Texas to assist in David Thai’s care.

This 22nd day of November, 2019.

_____/S/_____

Linda Sheffield

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_____/S/_____

Barry Levin

GA22

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U.S. Department of Justice

Federal Bureau of Prisons

Office of the General Counsel

Washington, DC 20534

OCT 03 2019

MEMORANDUM FOR RADM S. SPAULDING, WARDEN
FEDERAL MEDICAL CENTER DEVENS
AYER, MASSACHUSETTS

FROM:


Ken Hyle
Assistant Director/General Counsel

SUBJECT:

THAI, David
Federal Register No. 38263-053
Request for Reduction in Sentence

Please be advised that Mr. Thai's request for a reduction in sentence (RIS) pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and PS 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), section 3(b) ("Debilitated Medical Condition") is denied. We have carefully reviewed the documentation accompanying this request and have consulted with the BOP's Medical Director.

Section 3(b) provides that RIS consideration may be given to an inmate who has an incurable, progressive illness or who has suffered a debilitating injury from which he will not recover. An inmate is considered to be in a "debilitated medical condition" when he is: (1) completely disabled, meaning he cannot carry on any self-care and is totally confined to a bed or chair; or (2) capable of only limited self-care and confined to a bed or chair for more than 50 percent of his waking hours.

In addition, section 7 requires in all RIS cases consideration of factors such as the nature and circumstances of the inmate's offense; the inmate's institutional adjustment, including any disciplinary infractions; and whether release would minimize the severity of the offense or pose a danger to the safety of any other person or to the community.

Mr. Thai, age 63, has a history of dysautonomia, hypotension, syncope and collapse, hyperglycemia, and myocardial infarction status post coronary artery bypass grafting. His dysautonomia is possibly caused by Shy-Drager syndrome, a variant of multiple

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system atrophy dysautonomia. He spends all his time in his bed or wheelchair, as he is unable to stand up without sudden loss of consciousness. He is capable of completing the majority of his activities of daily living (ADLs) and instrumental ADLs such as bathing, grooming, dressing, toileting, feeding, using the telephone and computer, accessing the commissary, doing laundry, keeping house, and managing his medications, so long as he is sitting or lying down. Although he is capable of transferring independently, he is a significant fall risk. He also requires assistance with meal preparation and any heavy lifting or housekeeping. Given his tendency for syncopal episodes, he requires constant supervision, which is provided by an inmate companion. His most recent syncopal episode occurred in April 2019. As he is confined to a bed or chair for more than 50 percent of his waking hours and requires constant supervision to ensure his safety, he is considered to be in a debilitated medical condition. His life expectancy is indeterminate at this time.

However, Mr. Thai led a violent criminal organization that engaged in extortions, robberies, and the use of firearms. Additionally, while incarcerated, he has committed disciplinary infractions of high and greatest severity. He also remains capable of performing the majority of his ADLs and instrumental ADLs. Accordingly, although he otherwise meets the criteria for a RIS under section 3(b), his release at this time would minimize the severity of his offense and pose a danger to the community. His RIS request is therefore denied.

Please provide Mr. Thai with a copy of this decision.

cc: J. Ray Ormond, Regional Director, Northeast Region

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA,

MEMORANDUM & ORDER

- against -

93-CR-1340 (RJD)

WONG CHI FAI,

Defendant.

----- x
DEARIE, District Judge

Before the Court is Wong Chi Fai’s (“Mr. Wong”) Motion for Compassionate Release, ECF No. 799, filed pursuant to the First Step Act of 2018. Mr. Wong asks the Court to reduce his current life sentence to time served and order that he be released to the custody of his family in New York, who have remained supportive throughout Mr. Wong’s incarceration. For the reasons that follow, the Court grants Mr. Wong’s Motion.

BACKGROUND

On October 20, 1995, Mr. Wong was sentenced to life imprisonment after a jury found him guilty of extortion and racketeering conspiracies and related substantive charges, as well as involvement in certain murders in furtherance of those conspiracies. ECF No. 799-1, at 1-2. Mr. Wong’s conviction relates to his participation in the “Tung On Gang,” a gang located principally in Chinatown in New York City and composed of members of the Tung On businessmen’s association and other young “street thugs.” Br. of Def., 1997 WL 33782438, at *4 (2d Cir. Feb. 13, 1997). At trial, the Government argued Mr. Wong was a leader of the Tung On Gang and used his participation in businessmen’s associations to disguise his unlawful activity. *Id.* at *5.

Mr. Wong, who is now 65 years old, has served 26 years of his life term. He is incarcerated at FCI Butner in North Carolina; his family resides in New York, though they visit him regularly. ECF No. 799-2, at 1-2. Throughout his 26 years in prison, Mr. Wong has maintained a “spotless” record—he has had no disciplinary violations and consistently received “outstanding” evaluations for his work as an orderly. *Id.* at 2-3. Three years ago, in 2016, Mr. Wong was diagnosed with metastatic papillary thyroid cancer. ECF No. 799-1, at 2. Since then, Mr. Wong has undergone multiple surgeries, including a thyroidectomy and a partial esophagectomy, and received radiation treatment, all to no avail. *Id.* Two years after his diagnosis doctors discovered a new mass in his throat, obstructing his airway and creating a dangerous possibility of suffocation. ECF No. 801-1, at 3. Doctors recommended a tracheostomy, which Mr. Wong declined. *Id.* Currently, Mr. Wong is receiving palliative chemotherapy. *Id.* Mr. Wong regularly spits or coughs up blood as a result of the mass in his throat and can barely eat. ECF No. 799-4, at 4. Surviving on Ensure and milk, he has lost and continues to lose considerable weight. ECF No. 799-2, at 4. Mr. Wong is reportedly in frail condition and requires a walker to move from place to place. ECF No. 799-4, at 4.

A report prepared two months ago by a Bureau of Prisons (“BOP”) doctor described Mr. Wong’s condition as “terminal” and estimated a life expectancy of 12 months but, remarkably, declined to find that Mr. Wong’s condition met the medical criteria for a “Terminal Medical Condition” eligible for BOP-recommended Compassionate Release. ECF No. 801-1, at 3. The BOP takes the position that Mr. Wong’s 12-month life expectancy is the result of his voluntary decision to decline a tracheostomy and it is thus by choice, rather than medical necessity, that his life expectancy falls within the sub-18-month time frame the BOP deems appropriate for Compassionate Release. In other words, should Mr. Wong consent to a tracheostomy, his life

expectancy might exceed 18 months, rendering him a less compelling candidate, in the BOP's view, for Compassionate Release.

At the request of Mr. Wong's counsel, Mr. Wong's medical records were also evaluated by Dr. David M. Cognetti, Co-Director of Head and Neck Surgery at the Jefferson Center for Head and Neck Surgery in Philadelphia, PA. ECF No. 799-2, at 7. Dr. Cognetti reported that the cumulative impact of Mr. Wong's treatment "has had a significant impact on his function and quality of life" and he continues to have "great difficulty with swallowing" and struggles to maintain a healthy weight. *Id.* In Dr. Cognetti's medical opinion, Mr. Wong's condition "is terminal with an end-of-life trajectory" and his remaining time "will be measured in months." *Id.* at 8.

On July 11, 2019 Mr. Wong filed his Motion for Compassionate Release—just under two months after the BOP-issued medical report declining to find a "Terminal Medical Condition." ECF No. 799. The Government orally opposed the Motion during argument on July 29, 2019 citing Mr. Wong's voluntary decision to forego a tracheostomy.

DISCUSSION

Mr. Wong argues the Court should grant him Compassionate Release in light of his serious, terminal medical condition. To that end, Mr. Wong would be released to the custody of his family, who have supported him throughout his incarceration, and who are prepared to provide the demanding and expensive medical care Mr. Wong will require upon release. The Government, in consultation with the BOP, disputes the characterization of Mr. Wong's medical condition, arguing that it is Mr. Wong's voluntary decision to decline a tracheostomy that cuts his life short, and asserts that with the surgery he would likely live longer than 18 months—the

life expectancy landmark the BOP has informally adopted in recommending Compassionate Release candidates. The Government, however, does not argue that if Mr. Wong were released he would be a danger to the community or that his release would otherwise go against the 18 U.S.C. § 3553(a) sentencing factors.

18 U.S.C. § 3582(c), as amended by the First Step Act, Pub. L. 115-391, 132 Stat. 5194, provides in relevant part:

[T]he court, upon motion of the Director of the Bureau of Prisons, *or upon motion of the defendant*...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...and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A) (emphasis added).

The Sentencing Commission has promulgated a policy statement regarding Compassionate Release, contained in U.S.S.G. § 1B1.13, that provides guidance on the “extraordinary and compelling reasons” warranting a sentence reduction. United States v. York, 2019 WL 3241166, at *4 (E.D. Tenn. July 18, 2019) (citing United States v. McGraw, 2019 WL 2059488, at *3 (S.D. Ind. May 9, 2019)).

Accordingly, pursuant to the statutory directive in 18 U.S.C. § 3582(c)(1)(A) and in conjunction with the Sentencing Commission guidance provided in U.S.S.G. § 1B1.13, the Court must consider three issues in evaluating Mr. Wong’s Compassionate Release application:

(i) whether extraordinary and compelling reasons warrant a sentence reduction consistent with the Sentencing Commission’s policy statement, (ii) whether Mr. Wong is “a danger to the safety of any other person or to the community,” and (iii) whether the section 3553(a) factors “to the extent they are applicable,” weigh in favor of a sentence reduction. United States v. Bellamy,

2019 WL 3340699, at *2 (D. Minn. July 25, 2019); York, 2019 WL 3241166, at *5; United States v. Beck, 2019 WL 2716505, at *7 (D.N.C. June 28, 2019); United States v. Johns, 2019 WL 2646663, at *3-4 (D. Ariz. June 27, 2019); McGraw, 2019 WL 2059488, at *3.

I. Extraordinary and Compelling Reasons

The Court finds there are “extraordinary and compelling reasons” supporting Mr. Wong’s Compassionate Release. The Application Notes to § 1B1.13 provide that “extraordinary and compelling reasons” exist where “[t]he defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory),” though “[a] specific prognosis of life expectancy...is not required.” McGraw, 2019 WL 2059488, at *3 (citing § 1B1.13 Application Notes). The guidance lists “metastatic solid-tumor cancer” as a specific example of a “terminal illness.” Id. The Application Notes also provide that if the defendant “(i) is at least 65 years old, (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less” a sentencing reduction may be appropriate. Id. There are extraordinary and compelling reasons supporting Mr. Wong’s release under either approach.

First, Mr. Wong has been diagnosed with metastatic papillary thyroid cancer—a “metastatic solid-tumor cancer” that, unfortunately, more than qualifies as a terminal illness, regardless of Mr. Wong’s precise life expectancy. Indeed, it is undisputed that Mr. Wong’s cancer is a “serious and advanced illness” that will result in his death. Though the BOP claims that if Mr. Wong agreed to a tracheostomy his life expectancy would likely exceed 18 months—the break point at which point the BOP will consider Compassionate Release—this informal policy holds no weight for the Court. The Application Notes specifically consider, and then dispense with, a “specific prognosis of life expectancy” in determining whether “extraordinary

and compelling reasons” are present. Mr. Wong’s “metastatic solid-tumor cancer” causes him extraordinary pain and discomfort, making it virtually impossible for Mr. Wong to eat, rendering him weak and at times immobile and indisputably will result in Mr. Wong’s death. This surely constitutes an “extraordinary and compelling” medical condition. Compare with Beck, 2019 WL 2716505, at *7 (granting compassionate release to 47-year-old woman with metastatic breast cancer who served approximately 6 years of 13.75-year sentence)

Second, Mr. Wong recently turned 65 and, as a result of his cancer, regardless of whether it is classified as “terminal,” has experienced a “serious deterioration” in his physical health. There is no question that his quality of life is far from enviable. Mr. Wong has also served 26 years of his life sentence—more than the 10 years provided for in the Application Notes. Therefore, Mr. Wong’s age and current circumstances also make him a candidate for Compassionate Release independent of the fact that he suffers from a terminal medical condition.

II. Danger to the Community

The Sentencing Guidelines “provide that compassionate release is appropriate only where the defendant is not a danger to the safety of any other person or to the community.” Johns, 2019 WL 264663, at *3. Specifically, 18 U.S.C. § 3142(g) requires the Court consider (i) “the nature and circumstances of the offense charged, including whether the offense is a crime of violence...or involves a...firearm, explosive, or destructive device,” (ii) “the weight of the evidence against the person,” (iii) “the history and characteristics of the person,” and (iv) “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” York, 2019 WL 3241166, at *7 (citing 18 U.S.C. § 3142(g)). In making this assessment, the Court should also consider whether a term of supervised release would manage any potential risk to the community. Johns, 2019 WL 264663, at *3.

The Court is persuaded that Mr. Wong does not present a danger to the community in his current state, and that any conceivable danger would be easily mitigated by supervision conditions. First, Mr. Wong is frail, he requires a walker and can barely eat on his own. His “frail condition” “demonstrates that there are conditions the Court could impose to reasonably assure the safety of any other person and the community.” McGraw, 2019 WL 2059488, at *4; see also Bellamy, 2019 WL 3340699, at *6 (noting defendant was “wheelchair-bound and require[d] assistance to complete most of his daily activities” and thus did not pose a danger to the community). Second, any remote possibility of dangerousness will be further diminished because Mr. Wong will be released to the custody of his family, his whereabouts will be restricted and he will not be permitted to have contact with his co-defendants or any other associates from his former criminal life. Id. (granting Compassionate Release motion while imposing conditions to ensure the defendant would “not have contact with those engaging in criminal activity” and could not “conduct[] illegal business via telephone”). Third, though Mr. Wong was convicted of participating in serious and violent criminal conduct, at this point, his offenses are all almost 30 years old, if not older. Compare with Bellamy, 2019 WL 3340699, at *6 (“While Bellamy does have a significant criminal history, most of his offenses are more than 28 years old, and all of his violent offenses are more than 28 years old...[h]is most recent prior controlled substance offense is now more than 12 years old”). Finally, it is notable that the Government does not argue Mr. Wong’s application should be denied because he poses a danger to the community. The Government’s sole basis for opposing Mr. Wong’s application has to do with his decision to decline a tracheostomy, a decision the Court has already determined does not hold weight in its analysis. Therefore, like Bellamy, Mr. Wong’s “serious, deteriorating conditions,” combined with “[t]he age of his prior violent...offenses” “lead[s] the Court to

conclude that he presents little risk of danger to any person in the community” and any possible risk can be mitigated with appropriate conditions of release. Id.

III. Section 3553(a) Factors

Under section 3553(a), the Court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection,” considering:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (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;
- (3) the kinds of sentences available;
- (4) the kinds of sentence[s] and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines [issued by the Sentencing Commission ...;]
- (5) any pertinent policy statement guidelines [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). The Court finds that notwithstanding the seriousness of Mr. Wong’s criminal conduct, the sentence served, combined with the period of supervised release that will follow, appropriately “reflect[s] the seriousness of the offense,” “promote[s] respect for the law,” and “provide[s] just punishment for the offense.” Id. Indeed, Mr. Wong has already served 26 years of his life sentence, the last three of which have been spent in medical purgatory. Bellamy, 2019 WL 3340699, at *7 (“Bellamy has already served a significant portion of his sentence and has done so in extraordinary and compelling circumstances given his deteriorating health”); McGraw, 2019 WL 2059488, at *5 (serving 17 years of a life sentence is “a significant

sanction” particularly where health issues rendered sentence “significantly more laborious than that served by most inmates”). At this stage, to require Mr. Wong to serve out the rest of his life sentence would be “greater than necessary to serve the purposes” of 18 U.S.C. § 3553(a)(2).

CONCLUSION

The Court finds that extraordinary and compelling reasons warrant a reduction in Mr. Wong’s sentence, and that neither dangerousness to the community nor the 18 U.S.C. § 3553(a) factors sway in favor of a different result. Mr. Wong’s Motion for Compassionate Release is GRANTED and it is hereby ORDERED that Mr. Wong’s sentence of imprisonment be reduced to time served and it is further ORDERED that the BOP release Mr. Wong to the care of his family in New York, to be supervised for life.

The conditions of Mr. Wong’s release are as follows:

1. Mr. Wong must arrange his own transportation to New York and shall report to the U.S. Probation Office in the Eastern District of New York within 72 hours of his arrival in New York.
2. Mr. Wong cannot commit another federal, state or local crime.
3. Mr. Wong cannot unlawfully possess a controlled substance.
4. Mr. Wong cannot unlawfully use a controlled substance and must submit to one drug test within 15 days of release from imprisonment. Subsequent drug testing may be suspended if the Court determines that Mr. Wong poses a low risk of future substance abuse.
5. Mr. Wong must comply with all standard conditions imposed by the Probation Office of the Eastern District of New York.

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6. Mr. Wong may not have any contact with his co-defendants or other current or former members of the Tun On Gang.

SO ORDERED.

Dated: Brooklyn, New York

July 30 2019

s/Raymond J. Dearie

RAYMOND J. DEARIE
United States District Judge

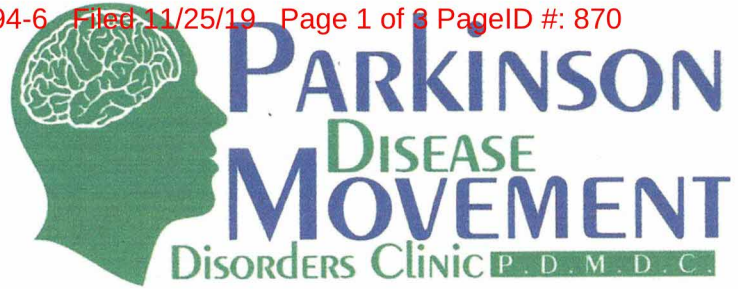
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EXHIBITS

1. October 3, 2019 Denial of Compassionate Release by BOP General Counsel Ken Hyle
2. Disciplinary Reports
3. Statement of David Thai
Attachments:
 1. Education Data Transcript
 2. Inmate Skills and Development Plan
 3. Custody Classification Form
 4. Offense Severity Scale for Incident Reports
 5. Dr. Edinger's Notes 09/04/2018
4. Report of Dr. Georgetta Varga
CV of Dr. Varga
5. Order Judge Dearie, July 19, 2019
6. October 2019 Medical Records David Thai

Georgeta Varga, M.D.

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www.movementdisorderclinic.com



Mr. David Thai is a 63 years old male Asian, American citizen, with a college degree earned during his detention years.

Patient used to be a very active person and ran 5 miles per day. His medical history focuses on his fainting episodes that began to be documented as early as December 17, 2014, with visits to medical facilities due to multiple falls and consequent injuries. The records also document nocturia episodes as early as of May 2015.

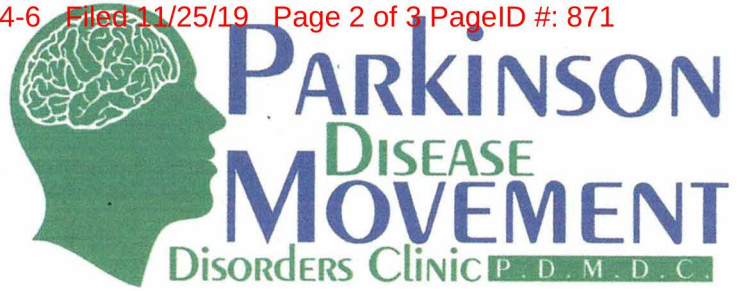
An extensive work up was done for the syncope evaluation, with a positive tilt test in 2016. An EKG Holter monitor displayed no arrhythmias and a heart echo study was unremarkable. A nuclear stress test was negative for ischemia and a carotid Doppler in December 2016 showed mild plaques in the carotid arteries without flow limiting. An MRI brain scan was unremarkable. The patient was started on a diet with increased Salt and fluid intake in August 2016, with a recommendation for compressive stockings, and 2016 physical examinations found orthostatic hypotension, constipation and nocturia, no dysphagia, no report of sleep abnormalities. His motor examination was remarkable for tremor and gait analysis during a brief exam, with the physician describing a wobbly "normal pattern."

In March 2018 the patient experienced his first documented chest pain and on August 22, 2018 was admitted to a cardiac telemetry unit to examine his chest pain and syncope. Three weeks prior to this admission he began pseudoephedrine in an attempt to help the worsening symptoms of severe orthostasis leading to nearly daily syncope, with traumatic falls notwithstanding the compression stockings and increased fluid and salt intake. During this hospitalization, blood work up and an EKG showed a non-ST MI Patient found to have severe three vessel's disease. The procedure was complicated by the cardiogenic shock, with critical care placing an intra-aortic balloon pump in order to sustain the low blood pressure.

A neurogenic cause of syncope was considered in differential diagnosis and a neurology consult in September 2018 raised the possibility of Shy Drager disease. All anti-hypertensive medications (beta adrenergic blockers, calcium channel blockers, angiotensin receptor blockers, ACR inhibitors blockers) were discontinued in December 2018 due to severe orthostasis. The patient was sent to rehab on fludrocortisone midodrine pseudo ephedrine, along with a continuation of increased fluids and sodium intake and compression stockings in order to prevent the orthostasis. The medical records indicate that orthostatic hypertension worsened after the cardiac event.

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In September 2018 the patient's vitals lying down measured 158/95 with a heart rate of 70. Sitting blood pressure dropped to 110/76 with a heart rate of 73. Physical therapy showed severe orthostasis on ambulation with inability to walk more than 5-6 feet.

In November 2018 during physical rehab therapy after the cardiac event the patient sought to gain strength and was able to do 45 minutes of stationary bike and ambulate for about 15 minutes. He was advised against further effort due to the recent cardiac surgery.

The assessment during recovery from the cardiac event was severe orthostasis treated with pharmacological and nonpharmacological therapies. Pseudoephedrine might have been a precipitating factor of the coronary artery disease that further complicated and worsened the symptoms of orthostasis and led to discontinuation of the anti-hypertensive medications prescribed to control the supine hypertension.

A second neurology consult in the beginning of 2019 again raised the possibility of Shy Drager disease and recommended testing for Dysautonomia .

A statement documented in March 23, 2019 by the caregiver Mr. Tommy Walker now assisting Mr. Thai in his daily activities mentions that the patient is unable to stand for more than 30 seconds due to the severe orthostasis and daily falls require full-time assistance.

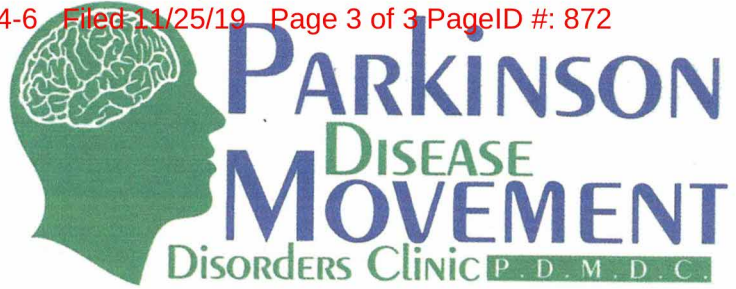
In summary

Mr. David Thai is 63-year-old Asian man with an unremarkable family history of movement disorders or sudden death. His past medical history is remarkable for GERD disease depression, sleep disorder hypertension, hypotension, and CAD status post 2 vessel CABG.

His last five years have been dominated by the increasing severity of dysautonomia, with the first documented syncope in December 2014, nocturia and sexual dysfunction in 2015, constipation. . The orthostatic hypotension was aggravated after the cardiac catheterization after three weeks of therapy with pseudoephedrine used in an attempt to correct his severe orthostasis. He was in critical condition due to cardiogenic shock during a cardiac catheterization requiring an intra-aortic balloon pump in order to sustain the blood pressure. An incomplete motor examination of the patient last one documented January 2019 showed mild hand tremor and a "normal pattern of gait during a brief examination." Despite intensive rehabilitation after the cardiac event and some gain in physical capacity, the patient is debilitated and requires assistance due to the inability to stand more than 30 seconds without having a syncope followed by falling. Current medication,

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with increased salt intake and fluids, includes midodrine, fludrocortisone, and Pseudoephedrine. The compression stockings are unable to sustain his blood pressure on standing.

The differential diagnosis of Shy Drager disease is a reasonable diagnosis. Dysautonomia can be the dominant feature in the very beginning of the disease, and is reflected in the patient's clinical presentation. A supine hypertension followed by a symptomatic orthostatic hypotension, with no change in the heart rate from laying down to sitting or standing, reflects dysautonomia of possible neurogenic cause. This was documented in the chart while the patient was off beta blocker medications. Further examination of the motor symptoms, cerebellar and extra pyramidal, by a Movement Disorder specialist would help differentiate between the dysautonomia of Shy Drager disease and that of a Pure Autonomic Failure, and a comprehensive evaluation of dysautonomia with further sleep studies and a swallowing evaluation are necessary to differentiate between them.

Sleep disorders with RBD behavior manifestation and central sleep apnea are major contributory factors increasing mortality risk in Shy Drager disease, as is dysphagia due to aspiration pneumonia. Constipation needs to be monitored because it can be a contributing factor to comorbidities and mortality especially in the context of this patient's cardiovascular disease. It risks ischemic bowel disease, perforation and sepsis. Orthostasis can also lead to falls, with traumatic brain injury obviously risking hemorrhage and death.

A comprehensive motor examination by Movement Disorder specialist can identify the presence of extrapyramidal and cerebellar systems signs and symptoms. A blood work up with measurements of catecholamines in lying and sitting positions can help in differentiating Shy-Drager disease from pure autonomic failure PAF and a brain MRI can identify changes specific to Shy Drager disease, though previous MRI reported unremarkable, images not available for reviewing.

The life expectancy of patients with Shy Dagger disease without other comorbidities is 6-10 years. The patient not only has a possible neurological condition fatal, but his condition is further complicated by the presence of heart disease

In my opinion Mr. David Thai is in fair clinical condition, but one that can become immediately critical and lead to fatality due to a severe dysautonomia documented as early as December 17, 2014.


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5/17/2019