UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v. CASE NUMBER: 1:05-CR-70

DION A. WALKER

Defendant.

MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)

Northern District of Indiana
Federal Community Defenders, Inc.
Jerome T. Flynn
2929 Carlson Drive Suite 101
Hammond, IN 46323
Phone: (219) 937-8020
Fax: (219) 937-8021
E-mail: Jerry_Flynn@fd.org

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The Defendant, Dion Walker, respectfully moves this Court pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) for an order reducing his sentence in Count 2 from life imprisonment to a term of 179 months imprisonment and supervised release for 8 years, concurrent to his sentence in Count 1, based on the "extraordinary and compelling reasons" discussed below.

INTRODUCTION

Dion Walker was born in Detroit, Michigan on February 11, 1974. His father died in a work accident shortly after his birth resulting in his mother raising him and his five siblings by herself. When Dion was 10 years old, the family move to Fort Wayne, Indiana. The strain on this fatherless family of six was apparent throughout Dion's childhood. His mother was a truck driver. As a result, she was forced to leave Dion and his siblings with various caregivers for consecutive days while she was on the road. At times, some of these so-called caregivers were neglectful and abusive to Dion. At times, Dion even went without food. When his mother found out about this neglect, she would fire the caregivers and hire new ones. For sure, Dion had a challenging upbringing beyond that of a normal American child in the 1970s and 1980s. [DE 132 (PSR), ¶ 97-100].

Dion Walker has 11 children. Despite being incarcerated for the past 16 ½ years, he has maintained contact and has a relationship with most of them. Dion has missed so much of their lives while in the Bureau of Prisons [hereinafter: "BOP"] including graduations, birthdays, and all of the other significant events that parents experience during the upbringing of a child. He dreams of the day that he may be able meet with them outside of the confines of a cell in a federal prison. [DE 132 (PSR), ¶ 102]. He has

previously provided to this Court photographs of him and his two daughters twelve years apart.

Although it may be a cliché, he is not the same person that this Court sentenced in 2008. Dion has grown as a person and truly rehabilitated himself since his arrest in this case in 2005. He has served 16 ½ years, and so much about Dion and the laws in which this Court relied upon to sentence him have changed.

I. Basis for Requested Relief

This motion is based on an individualized and holistic assessment of the circumstances of Dion Walker's case that include multiple reasons for a reduced sentence that are enumerated and explained below. An individualized review of Dion's case will substantiate his claim that "extraordinary and compelling reasons" exist for his

sentence to be reduced pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Indeed, this is precisely the type of individualized assessment that the Seventh Circuit recently affirmed in a case similar to this one. *See United States v. Black*, 999 F.3d 1071 (7th Cir. 2021).

Importantly, Dion Walker is not making this motion pursuant to Section 401 of the First Step Act and does not seek retroactive application of Section 401. Rather, he seeks a sentence reduction for "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i) where the changes brought about by Section 401 are one of many factors supporting a reduced sentence. Pursuant to § 603(b) of the First Step Act, this Court now has authority to review a defendant's motion "after the defendant has exhausted all administrative rights" within the BOP. *See United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020).

That being said, as many district courts around the country have recognized, Section 401 amended the penalty provisions of 21 U.S.C. § 841(b), among other changes, by redefining what constitutes a prior drug conviction that can used for the application of an enhanced sentence under 21 U.S.C. § 851. As a result of the aforementioned amendment, Dion would not be subject to a mandatory term of life in prison if he were sentenced today.

To be clear, Dion Walker is seeking relief based upon a review of his individual circumstances that include the following:

(1) his extraordinary commitment to rehabilitation while incarcerated;

(2) Congress has made clear that his conviction for possession of cocaine in 1991 when he was seventeen years old cannot be used post-First Step Act as a predicate to increase a sentence to a mandatory life term;

(3) His poor health that includes a recent diagnosis of stage 2-kidneydisease;

(4) This Court's failure to recognize its discretion in a non-covered count when considering and denying his previous motion pursuant to Section 404 of the First Step Act. *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020).

As will be more fully articulated below, numerous district courts and courts of appeals, including the Seventh Circuit, have determined that defendants similar to Dion have warranted a reduction in their sentences pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

II. Procedural History

On December 19, 2005, the government charged Dion Walker in a three-count indictment with possessing with the intent to distribute 50 or more grams of crack cocaine in Count 1, possessing with the intent to distribute five kilograms or more of cocaine in Count 2, and felon in possession in Count 3. [DE 13]. Seven months later on October 5, 2006, the government filed an information, pursuant to 21 U.S.C. § 851, alleging that Dion had been previously convicted of two "felony drug offenses" defined in 21 U.S.C. § 802(44). Based upon the quantities alleged in Counts 1 and 2 of the indictment as required by 21 U.S.C. § 841(b)(1)(A) at that time, he faced a mandatory term of life imprisonment in both counts. [DE 179, p. 2-3].

On April 9, 2007, Dion Walker pled guilty to Counts 1 and 2 pursuant to the terms of an Amended Plea Agreement. He inexplicably did so despite facing a mandatory term of life imprisonment in both counts. Although the government agreed to dismiss the felon in possession charge in Count 3[1], Dion received little else in his plea agreement with the government. [DE 110]. The government's promise to recommend acceptance of responsibility and a low-end sentence under the then yet to be determined

[1] Count 3 carried a maximum penalty of 10 years in prison.

guideline range amounted to a pyrrhic victory for Dion due the mandatory life sentence required in Counts 1 and 2 by the statute. The plea agreement also addressed the amount of controlled substances attributable to Dion. They included 5,416.3 grams of cocaine and 362.9 grams of crack cocaine. In addition, the plea agreement required that Dion waive his right to appeal and his right to contest his conviction pursuant to 28 U.S.C. 2255. [DE 110].

Throughout the early part of his case, Dion Walker was represented by a lawyer from Detroit, Michigan who had entered on his case pro hac vice and had been retained by his family. This lawyer negotiated Dion's plea agreement with the government. She withdrew prior to Dion's sentencing hearing due to a "potential", not actual, conflict of interest with another defendant charged in Indianapolis. [DE 122]. Although the undersigned counsel is reluctant to criticize the performance of another lawyer, any reasonable legal analysis of Dion's plea of guilty must conclude that he did so after receiving legal advice that rose to the level of malpractice. Dion gained virtually nothing by pleading guilty to two separate counts that mandated life sentences in each. The lawyer appears to have abandoned Dion after placing him in an untenable position with the lopsided plea agreement with the government.

Attorney Stanley Campbell, who represented Dion Walker at his sentencing hearing, summed up the circumstances of Dion's case perfectly. Attorney Campbell stated:

> I was sitting here, standing here reflecting upon the fact that in the 30, 35 years that I've been practicing, I've only heard those things said twice that a person has to spend the rest of their life in prison. One of those was an incidence in which my client shot to death and then burned the body of a 25-year old girl; and the other one was an incidence in which my client lured a Indiana State trooper into a -- a parking lot area, got out of his pickup

> truck with an automatic weapon and unloaded two banana clips full of shells into him. I understand what Mr. Geller said that this is what Congress has mandated. Insofar as Mr. Walker's situation is concerned, I think it's tremendously harsh. Not denying anything that Mr. Geller said, still all in all, this was a drug case. It didn't involve any element of violence towards other individuals, any threats of violence.
>
> *I think that, unfortunately with Mr. Walker, and with prior counsel, there were some miscalculations and some poor judgments made in terms of decision making in this case.* But Mr. Walker is sort of stuck with where he's at. And I hope that something may be able to be done to help his situation and get him out from under this life sentence in future proceedings. [emphasis added].

[Sent. Trans., pp. 18-19]. As required by the law, this Court sentenced Dion on May 23, 2008 to life imprisonment in Counts 1 and 2. [DE 133].

On May 2, 2019, this Court referred Dion Walker's case to the Federal Defender's Office to determine if Dion could benefit from Section 404 of the First Step Act of 2018. [DE 164]. On September 18, 2019, Dion filed a Motion for Reduced Sentence Under § 404(b) of the First Step Act. [DE 173]. In this motion, Dion's counsel argued that he was eligible for a reduced sentence on both Count 1 and Count 2 even though Count 2 was not a so-called "covered offense" because it charged an offense involving powder rather than crack cocaine.

On October 9, 2019, the government filed a response opposing Dion Walker's motion. [DE 174]. On March 9, 2020, this Court issued an Opinion and Order granting in part and denying in part Dion Motion for Reduced Sentence Under § 404(b) of the First Step Act. [DE 179]. Using the current Sentencing Guidelines, this Court determined that the updated guideline range was 188 to 235 months imprisonment. [DE 179, p. 9-10]. Exercising its rightful discretion, this Court settled on a sentence of 179 months imprisonment in Count 1. [DE 179, p.11]. However, this Court denied his

request for a reduced sentence in Count 2 believing incorrectly that it lacked the legal authority to review and consider a reduced sentence in a non-covered offense in conjunction with a covered offense in the same case. See *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020).

ARGUMENT

This Court has the authority to reduce Dion Walker's sentence based on the extraordinary and compelling circumstances presented by his case. The First Step Act's amendment to 18 U.S.C. § 3582(c)(1)(A)(i) now allows inmates serving unusually long sentences to seek sentence reductions from their sentencing courts upon a review of their individual circumstances even without the imprimatur of the BOP. The circumstances here warrant such relief, and the factors a court must consider in determining an appropriate sentence weigh strongly in favor of a reduction in sentence to time served.

I. This Court Has Jurisdiction to Reduce Dion Walker's Sentence for "Extraordinary and Compelling Reasons"

What has become known as the compassionate release statute was first enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat 1837. It provided that a district court has authority to reduce a defendant's term of imprisonment in four situations, one of which was the presence of "extraordinary and compelling reasons" warranting the reduction, as determined by the sentencing court. *See 18 U.S.C. § 3582(c)(1)(A)(i) (2002), amended by First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194.* Although district courts were given the authority to reduce a sentence, the statute imposed a gatekeeper—the court's authority could be invoked only upon a motion by the Director of the BOP. *Id.* Without such a motion,

sentencing courts were powerless to reduce a prisoner's sentence even if they concluded that extraordinary and compelling reasons warranted a reduction.

This process changed when Congress enacted the First Step Act in December 2018, which, among other things, amended § 3582(c)(1)(A). *See First Step Act § 603.* Under the amended § 3582(c)(1)(A), a district court can now reduce a sentence for "extraordinary and compelling reasons" upon motion of a defendant provided he has fully exhausted all administrative remedies within the BOP. 18 U.S.C. § 3582(c)(1)(A); see also *United States v. Gunn, 980* F.3d 1178, 1179 (7th Cir. 2020) ("[I]n 2018 the First Step Act created a judicial power to grant compassionate release on a prisoner's own request, provided that the prisoner first allowed the Bureau to review the request and make a recommendation (or it let 30 days pass in silence).").

On May 13, 2021, Dion Walker sought administrative relief with Warden Thomas J. Watson at United States Penitentiary Terre Haute. In his letter to Warden Watson, Dion requested that the warden file a motion to reduce Dion's sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). [Exhibit A]. On May 18, 2021, Warden Watson denied Dion's request. [Exhibit B]. Therefore, Dion has exhausted his administrative remedies, and this motion is properly before the Court that now has the jurisdiction to rule on the requested relief.

II. The Relief Requested Here Is Consistent with the Text of the Statute and the Sentencing Commission's Policy Statement

A. Congress Did Not Limit "Extraordinary and Compelling Reasons" to a Specific, Enumerated Set of Circumstances

Congress did not define what constitutes "extraordinary and compelling reasons" that warrant a sentence reduction under § 3582(c)(1)(A)(i). However, the legislative history confirms that Congress that sentencing courts have broad discretion to

determine on a case-by-case basis when such reasons exist, and to reduce fundamentally unfair sentences where they do. The goal of the Comprehensive Crime Control Act was to abolish federal parole and create a "completely restructured guidelines sentencing system." *S. Rep. No. 98-225*, at 52, 53 n.196 (1983). However, with the elimination of parole as a corrective measure in cases where early release was warranted, Congress recognized the need for an alternative review process. It therefore allowed for judicial reduction of certain sentences under 18 U.S.C. § 3582(c):

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

Id. at 55–56 (emphasis added). Put differently, rather than having the Parole Commission conduct its opaque review of every federal sentence, Congress decided to let sentencing courts decide, transparently and in a far narrower band of cases—that is, those presenting extraordinary and compelling reasons—whether "there is a justification for reducing a term of imprisonment." *S. Rep. No. 98-225*, at 56 (1983).

The circumstances listed in § 3582(c) were thus intended to serve as "safety valves for modification of sentences," authorizing reductions where justified by factors that previously could have been addressed through the (now abolished) parole system. *Id.* at 121. This approach was intended to keep "the sentencing power in the judiciary where it belongs," rather than with a parole board, and to permit "later review of sentences in particularly compelling situations." *Id.*

Because Congress chose not to restrict or specifically define what can constitute "extraordinary and compelling reasons," the mandate was simple: courts would exercise their discretion in particular cases to determine whether such reasons "justify a reduction of an unusually long sentence." *Id.* at 55–56. This judicial check on the exercise of prosecutorial discretion was critical as the federal criminal justice system moved from the old indeterminate regime to a determinate one, in which prosecutors assumed the power to invoke an array of mandatory sentencing provisions with many of them quite onerous.

Unfortunately, the establishment of the BOP as a gatekeeper within 18 U.S.C. § 3582(c)(1)(A) had the practical effect of eliminating the above-mentioned safety valve. The BOP, an agency of the Department of Justice, rarely opened the gate. As the Second Circuit recognized:

> "BOP used [its] power [to move for compassionate release] sparingly, to say the least. A 2013 report from the Office of the Inspector General revealed that, on average, only 24 incarcerated people per year were released on BOP motion. Of the 208 people whose release requests were approved by both a warden and a BOP Regional Director, 13% died awaiting a final decision by the BOP Director.
>
> As a result of this report and other criticisms, BOP revamped portions of its compassionate release procedures. . .. [I]n the first 13 months after these changes, 83 people were granted compassionate release. But these 83 were still only a small part of a potential release pool of over 2000 people who met the BOP's revised criteria...." [internal citations omitted]).

United States v. Brooker, 976 F.3d 228, 231-32 (2nd Cir. 2020). To address this defect, and for the express purpose of increasing the use of the power granted by 18 U.S.C. § 3582(c)(1)(A) to reduce sentences, Congress, through the First Step Act, provided direct

access to the sentencing court where, as in Dion Walker's case, the BOP affirmatively denies a defendant's request that such a motion be made.

B. The United States Sentencing Commission and Sentencing Guidelines Do Not Presently Limit This Court's Discretion in Determining What Constitutes "Extraordinary and Compelling Reasons" for a Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)

Upon enacting 18 U.S.C. § 3582(c)(1)(A)(i), Congress delegated the responsibility for expounding upon what constitutes "extraordinary and compelling reasons" to the U.S. Sentencing Commission (the "Commission"). *See 28 U.S.C. § 994(t)* ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."); *see also 28 U.S.C § 994(a)(2)(C)* (directing the Commission to promulgate general policy statements regarding "the sentence modification provisions set forth in section [ ] . . . 3582(c) of title 18"). Prior to the First Step Act in 2018, the Sentencing Commission complied with Congress' directive by promulgating "U.S.S.G. 1B1.13 - REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C § 3582(c)(1)(A) (POLICY STATEMENT)" that guided both the Director of the BOP and the reviewing district courts. However, the Sentencing Commission has been unable to update its policy statements for the past several years because it lacks a quorum of voting commissioners. *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

When recently addressing the issue of the Sentencing Commission's inability to updated its policy statements, the Seventh Circuit wrote:

> "Section 1B1.13 addresses motions and determinations of the Director, not motions by prisoners. In other words, the Sentencing Commission has not yet issued a policy statement "applicable" to Gunn's request. And because the Guidelines Manual lacks an applicable policy statement, the trailing

> paragraph of § 3582(c)(1)(A) does not curtail a district judge's discretion. Any decision is "consistent with" a nonexistent policy statement. 'Consistent with' differs from 'authorized by'."

Id. As articulated by the Seventh Circuit, district courts "must operate under the statutory criteria — 'extraordinary and compelling reasons' — subject to deferential appellate review."

Other circuit courts that have addressed this issue agree. See *United States v. Jones*, 980 F.3d 1098, 1110 (6th Cir. 2020) "In short, the policy statement's language does not reflect the First Step Act's procedural reforms to compassionate release; 'though motions by the BOP still remain under the First Step Act, they are no longer exclusive[.].' Thus, 'we read the Guideline as surviving [the First Step Act], but now applying only to those motions that the BOP has made.'" [internal citations omitted]; *United States v. Brooker*, 976 F.3d 228, 235-37 (2d Cir. 2020) (the Sentencing Commission's policy statement regarding what constitutes extraordinary and compelling reasons to justify compassionate release is "clearly outdated" and not "applicable" to compassionate release motions brought by defendants applying "only to those motions that the BOP has made," and concluding that in the absence of an applicable policy statement, district courts are free "to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release."); *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020) "A sentence reduction under the First Step Act must conform to any and all policy statements that apply. But where the Sentencing Commission fails to act, then courts make their own independent determinations of what constitutes an 'extraordinary and compelling reason'...as consistent with the statutory Language") *United States v. Maumau*, 993 F.3d 821, 836-37 (10th Cir. 2021) ("We conclude instead,

as have the Second, Fourth, Sixth, and Seventh Circuits, that the Sentencing Commission's existing policy statement is applicable only to motions filed by the Director of the BOP, and not to motions filed directly by defendants.").

Thus, none of the language in U.S.S.G. § 1B1.13 constrains this Court's discretion to determine whether extraordinary and compelling reasons warrant a reduction in Dion Walker's sentence because that section has little application to his motion. Until the Sentencing Commission obtains a quorum and modifies its policy statements, this Court has discretion to determine what constitutes "extraordinary and compelling reasons" in individual cases.

III. Extraordinary and Compelling Circumstances Warrant a Reduction in Dion Walker's sentence

A. Dion Walker's Extraordinary Commitment to Rehabilitation while Incarcerated

As reflected in his BOP's "Summary Reentry Plan-Progress Report" dated April 1, 2021, Dion Walker's conduct in the BOP for the past 16 years has been extraordinary. He has developed himself intellectually by successfully passing his GED and completing 21 classes in a wide array of topics. [Exhibit C, pp. 1-2]. Before prison, Dion was quick to blame others for his problems. However, he now recognizes that he made many decisions that led him to the cell in which he sleeps. On January 15, 2020, Dion wrote a letter to this Court explaining how he has changed over the past decade and a half. He wrote in part:

> "I want[] you to know that I have made a lot of mistakes in my life that I am truly sorry about and those mistakes which involve my two prior drug convictions and my present conviction that I am here for right now. Your Honor I have truly used these last 14 years to do nothing but to better myself. I have realized that drugs have ruined almost my entire life. Without drugs in my

> life, the other aspects of my life with family and friends have been really good.
>
> I made a decision that when I came here I was going to separate myself from my old lifestyle. This place presents a lot of the same things that society presents, and I have chosen to stay away from everything that was not positive and that did not lead to making myself a better person."

[Exhibit D].

As a testament to this growth, Dion Walker has also been a model prisoner. The "Discipline Summary" of his "Summary Reentry Plan-Progress Report" reflects, "Inmate Walker has never received an incident report during his term of incarceration." [Exhibit C, p. 2]. Inmates rarely have zero incident reports because even the most benign infractions are typically recorded by the BOP staff. The fact that Dion has had no disciplinary infractions is a testament to how much he has changed. In addition to his personal conduct, he has maintained an excellent work record and is currently in charge of inmate janitorial services a/k/a "green corridor orderly" in his section at the United States Penitentiary Terre Haute. [Exhibit C, p. 1].

Two employees at USP Terre Haute have taken the time to write letters on his behalf. Both Counselor Robert Orr and Plumbing Facilities Supervisor R. Thomson have written letters of support reflecting and further supporting the assertion that Dion Walker has been a model inmate who has focused on making himself a better person. [Exhibits E, F]. In fact, this Court recognized Dion Walker's progress in 2020 when reducing his sentence in Count 1 pursuant to Section 404 of the First Step Act. This Court wrote:

> In this case, Defendant has offered evidence of post-sentencing mitigation in the form of his excellent behavior during his incarceration. Defendant has been in federal custody since December 2, 2005. PSR ¶ 1. Defendant has served

> approximately 14 years of his life sentence, which he began serving at the age of 31. During the past 14 years in the Bureau of Prisons (BOP), Defendant has had an exemplary record with no sanctioned disciplinary incidents. [citation omitted]. Defendant has also availed himself of numerous educational opportunities while in the BOP, including completion of 11 classes. [citation omitted] To Defendant's credit, these accomplishments merit recognition because he exhibited model behavior, participated in courses, and continued to better himself despite facing a life sentence.

[DE 179, p. 10].

Congress has made clear that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" to reduce a defendant's sentence. *See 28 U.S.C. § 994(t)*. However, consideration of a defendant's rehabilitation can be one factor, along with others, when courts undertake an individualized review of a defendant's sentence. The Second Circuit highlighted that district courts have "broad" discretion when considering a motion pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and that a defendant's extensive rehabilitation can be a consideration among other factors. *United States v. Brooker*, 976 F.3d 228, 238. A defendant's "rehabilitative efforts and the lengthy sentence he received because of exercising his right to a trial may, in combination with the First Step Act's changes to the law in Section 403 can constitute an extraordinary and compelling reason for compassionate release." *United States v. Owens*, 996 F.3d 755, 764 (6th Cir. 2021). *See also United States v. Maumau*, 993 F.3d 821, 827 (10th Cir. 2021) (defendant's participation "in over 400 hours of educational and wellness courses" while in prison constituted one factor among many in the determination of whether the "extraordinary and compelling" standard had been met).

Numerous district courts have considered a defendant's conduct in the BOP as a compassionate release factor as part of an individualized review. *United States v.*

Kirschner, 472 F.Supp.3d 482, 487 (A defendant's "lack of disciplinary history in prison, and education and rehabilitation efforts taken while in prison" were factors for the district court in finding "extraordinary and compelling reasons" to grant compassionate release); *United States v. Cantu-Rivera*, 2019 WL 2578272, at *2 (considering rehabilitation and the "unwarranted [sentencing] disparities among [similarly situated] defendants" in determining resentencing was appropriate); *United States v. O'Bryan*, 2020 WL 869475, at *2 (considering the defendant's rehabilitation and conduct in prison to determine that extraordinary circumstances existed); *United States v. Chan*, 2020 WL 1527895, at *6 (N.D. Cal. 2020) (considering "rehabilitation efforts in combination with the amendments to Section 924(c)'s stacking provisions" to demonstrate extraordinary and compelling circumstances); *United States v. Marks*, 455 F.Supp.3d 17, 26 ("[T]he combination of changes to the 'stacking' provisions of § 924(c), coupled with the defendant's rehabilitation, establish extraordinary and compelling conditions warranting a sentence reduction."); *United States v. Hewlett*, 2020 WL 7343951, at *6 (N.D. Ala. 2020) ("[T]he court finds that Mr. Hewlett's extremely lengthy sentence, combined with his elevated risks from the current COVID-19 pandemic, support a finding of extraordinary and compelling circumstances warranting compassionate release."); *United States v. Clausen*, 2020 WL 4260795, at *7 (E.D. Pa. 2020) (finding extraordinary and compelling reasons based on "defendant's demonstrated rehabilitation" and the change in the law under Section 403 of the First Step Act.); c)"); *Bellamy v. United States*, 474 F.Supp.3d 777, 786 (E.D. Va. 2020) (finding that defendant's "relative youth at the time of the sentence, the overall length of the sentence, the disparity between his sentence and those sentenced for similar crimes after the First Step Act, and his rehabilitative efforts form an extraordinary and

compelling basis for relief"); *United States v. Stephenson*, 461 F. Supp. 3d 864, 874 (S.D. Iowa 2020) (finding that defendant's rehabilitation, the dangers of COVID-19 to defendant, and the First Step Act's amendments to § 924(c) together are extraordinary and compelling reasons for release); *United States v. Hope*, 2020 WL 2477523, at *4 (S.D. Fla. 2020) (holding that the defendant's health conditions, disparity between his sentence and the sentence that he would receive because of the First Step Act's amendments to 21 U.S.C. § 851, and his rehabilitation were extraordinary and compelling reasons for release).

Based upon the foregoing, this Court has authority to consider Dion Walker's extraordinary rehabilitation and good conduct in prison as a part of an individualized review of his motion for compassionate release. His self-improvement since being sentenced in this case and during his incarceration for the past 16 ½ years weight strongly in favor of a reduced sentence. This pattern of good behavior for a decade and half also supports the argument that Dion is not a danger to the community if released by this Court.

B. Congress has made clear that Dion Walker's conviction for possession of cocaine in 1991 when he was seventeen years old cannot not be used post-First Step Act as a predicate to increase a sentence to a mandatory life term

1. "Serious Drug Felony", 21 U.S.C. § 841(b), and 21 U.S.C. § 851

Section 401 of the First Step Act reflects Congress' recognition that too many defendants were being subjected to harsh mandatory minimum sentences in drug cases beyond what Congress now believes is appropriate. Dion Walker is one of those defendants. Section 401 made several changes to the penalty provisions of 21 U.S.C. §

841(b) including two that directly impact Dion. These two changes reflect that Dion received a sentence well beyond what Congress now deems appropriate.

The first change occurred when Congress added the definition of "serious drug felony" to Title 21, Chapter 13, as reflected within 21 U.S.C. § 802(57). The definition reads as follows:

> "The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense."

For decades prior to the passage of the First Step Act, Congress had defined a "serious drug felony" in 18 U.S.C. § 924(e)(2) as follows:

> "(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;"

The second change in Section 401 of the First Step Act affected the penalties that Dion Walker would face for the same conduct and same charges if prosecuted today. Congress reduced the length of the mandatory terms of imprisonment for violations of 21 U.S.C. § 841(b)(1)(A)(ii) and (B)(iii) where a defendant has prior qualifying conviction(s) pursuant to 21 U.S.C. § 851. For defendants like Dion with one prior

conviction defined as a "serious drug felony" for an offense in § 841(b)(1)(A)(ii)[2], they now face a mandatory minimum sentence of 10 years. If they have two prior convictions, they face a mandatory minimum sentence of 25 years.[3]

One prior conviction defined as a "serious drug felony" for an offense in 21 U.S.C. § 841(b)(1)(B)(iii)[4] now results in a mandatory minimum sentence of 5 years and a maximum of forty years. Two prior convictions in subsection (B) now results in a mandatory minimum sentence of 10 years.

The government used the following convictions to increase Dion Walker's sentence to a mandatory life term of imprisonment pursuant to 21 U.S.C. § 851:

1. Possession of cocaine (Class D Felony) in 1991 when he was seventeen years old (sentenced to three years imprisonment).

2. Conspiracy to commit dealing in cocaine in 1997 (sentenced to 15 years imprisonment).

[DE 67]. The change in the definition of "serious drug felony" and the application of that definition to 21 U.S.C. § 841(b)(1)(A)(ii) and (B)(iii) would substantially impact Dion's mandatory minimum penalties in both Count 1 and Count 2 if he had been sentenced after the passage of the First Step Act. This Court has previously recognized the effect on Count 1 by finding that his mandatory minimum sentence had been reduced to 10 years from life pursuant to § 841(b)(1)(B)(iii). [DE 179, p. 7-8].

In summary, if Dion Walker were sentenced today, his mandatory minimum sentences in Counts 1 and 2 would be impacted in two ways. First, the government

[2] "5 kilograms or more of .... cocaine....".

[3] At the time that Dion pled guilty, he was charged with two counts in Subsection (A). After the Fair Sentencing Act of 2010 and the passage of Section 404 of the First Step Act, Dion would be subject to the penalties within Subsection (A) for Count 2 and Subsection (B) for Count 1.

[4] "28 grams or more of.....cocaine base;

could only allege one prior conviction for a "serious drug felony" pursuant to § 851. This is because Dion's prior conviction for possession of cocaine, an offense that he committed when he was 17 years old, would no longer count under the definition of "serious drug felony" which requires "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(ii). In other words, possession offenses no longer qualify as predicates under § 851.

Second, with only one prior qualifying predicate under § 851, Dion Walker's mandatory minimum term of imprisonment would change dramatically in both counts. As noted by this Court in its Order granting in part and denying in part Dion's motion pursuant to Section 404, the mandatory minimum sentence in Count 1 fell to 10 years. This Court wrote, "Accounting for a prior felony conviction, Defendant's new statutory penalty range is 10 years to life with 8 years of supervised release under § 841(b)(1)(B)." In Count 2, Dion would now be facing a mandatory minimum sentence of 15 years, rather than life, because he only qualifies for one rather than two prior "serious drug felon[ies]".

2. Favorable Changes in the Law Can Be Considered as a Part of an Individualized Assessment Determining Whether Extraordinary and Compelling Reasons Exist for a Reduced Sentence Even if Those Changes are not Retroactive

When considering a motion pursuant to 18 U.S.C. § 3852(c)(1)(A)(i), a district court may consider a statutory change in the law in individual cases even though Congress did not make the change retroactive. *United States v. Black*, 999 F.3d 1071 (7th Cir. 2021). In *Black*, a defendant was serving a forty-year sentence based upon two ten-year conspiracy convictions that ran concurrent to each other and thirty consecutive

years on two counts of using and carrying a firearm in furtherance of a crime of violence pursuant to 18 U.S.C. § 924(c). *Id.* After the passage of Section 403[5] of the First Step Act, the defendant would only be facing a mandatory minimum of 10 rather than 30 years on the 18 U.S.C. § 924 counts. *Id.*

The defendant filed a motion for a reduced sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Specifically, he asserted that his health and Covid-19, lack of criminal history, his service of 1/3 of his sentence, and the change in the law reflected in Section 403 constituted "extraordinary and compelling reasons" for a reduction in his sentence. *Id.* The government opposed the defendant's motion. Although the government correctly recognized that Congress did not make Section 403 of the First Step Act retroactive, the government failed to consider that a court can recognized the change in the law on a case-by-case basis as a part of a holistic review of an individual defendant's case. The district court agreed with the government and denied the defendant's motion. *Id.*

On appeal, the defendant argued that the district court had not considered all of his arguments, including Congress' changes to 18 U.S.C. § 924(c) in Section 403 of the First Step Act, and that the district court did not fully understand its discretion. The government again argued that Congress had not made Section 403 retroactive and, therefore, the favorable change in the law for the defendant should not be considered.

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

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

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

The Seventh Circuit agreed with the defendant by finding that the district court did not appear to fully understand its discretion when considering the defendant's motion. The Seventh Circuit reversed and remanded the case to the district court. *Id.*

With regard to the changes brought forth by Section 403 and its dramatic impact on mandatory sentences under § 924(c), the Seventh Circuit found that district courts can consider a change in the law even though Congress did not make it explicitly retroactive. Although the Seventh Circuit acknowledged the government's argument that Congress had not made Section 403 retroactive, it wrote,

> "That feature of the First Step Act shows that the district Court was not required to reduce Black's sentence based on these changes. Congress's policy choice not to make the changes to § 924(c) categorically retroactive does not imply that district courts may not consider those legislative changes when deciding individual motions for compassionate release like this one. To the contrary, the purpose of compassionate release under § 3582 is to allow for sentencing reductions when there is no statute affording such a reduction but where extraordinary and compelling reasons justify that relief."

The Seventh Circuit also noted that other circuits have agreed with this reasoning. *See United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) ("affirming grant of compassionate release for defendant originally sentenced to fifty-five years with stacked convictions under § 924(c) where district court considered § 3553(a) factors"); *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020) ("Not all defendants convicted under § 924(c) should receive new sentences, but courts should be empowered to relieve some defendants of those sentences on a case by case basis."); *United States v. Owens*, 996 F.3d 755, 760–63 (6th Cir. 2021); *United States v. Cooper*, 996 F.3d 283, 288–89 & n.5 (5th Cir.). *Id.*

In the recent case of *United States v. Peoples*, 2021 WL 2414102 (N.D. Ind. June 14, 2021), Judge Miller in the South Bend Division recognized the significance of the Seventh Circuit's decision in *United States v. Black*, 999 F.3d 1071 (7th Cir. 2021). In *Peoples*, the defendant was serving a 110-year sentence imposed for four counts of bank robbery, four counts of using a firearm during a felony, two counts of destroying a vehicle by fire, and two counts of using fire to commit a felony. Fifty years of the sentence was the result of mandatory consecutive sentences under 18 U.S.C. § 924(c). The defendant moved for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

Over the government's opposition, Judge Miller granted the defendant's motion and reduced his sentence to "time served". *Id.* *10. After reviewing the Seventh Circuit's decision in *Black* and the decisions by several other Circuits[6], Judge Miller concluded, "An unreasonable sentence can constitute an extraordinary and compelling reason for compassionate relief" and that the defendant's sentence in 2021 was "so unreasonable under today's understanding of sentencing reasonableness to amount to an extraordinary or compelling reason for compassionate release." Id. at *4, *7.

Like the defendants in *Black* and *Peoples*, the law that was used to impose a mandatory life term of imprisonment on Dion Walker has changed in his favor. One of the two predicate convictions (i.e.-Possession of Cocaine) no longer counts under the definition of "serious drug felony." Therefore, if he were sentenced today for the exact

[6] Judge Miller wrote, "The court of appeals went on to cite with approval the decisions of sister circuits that reached the same conclusion. *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021); *United States v, Maumau*, 993 F.3d 821 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). The only court of appeals to differ was *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), which based its holding on the exclusivity of the factors in the application note to U.S.S.G. § 1B1.13 – a position at odds with our circuit precedent. *United States v. Gunn*, 980 F.3d 1178."

same conduct, Dion would be facing a mandatory minimum sentence of 15 years rather than life. *See Section 401, First Step Act*. Even if he had two qualifying convictions for a "serious drug felony", the mandatory minimum would now be 25 years rather than life. *Id*. From a policy perspective, Congress has made clear that the draconian sentence that Dion received is no longer be appropriate for defendants like him.

As it has done in similar cases at least in our district with regard to the 18 U.S.C. § 924(c) "stacking" cases in Section 403, the government[7] will undoubtedly argue that Congress did not make Section 401 retroactive. However, as the Seventh Circuit pointed out in *Black*, the failure of Congress to make Section 403, and by implication Section 401, retroactive does not preclude individual defendants from seeking relief. Rather, it only means that relief will not be automatic. 999 F.3d 1071 (7th Cir. 2021). That feature of the First Step Act shows that the district court was not required to reduce the defendant's sentence based on these changes. Congress's policy choice not to make the changes to § 924(c) categorically retroactive does not imply that district courts may not consider those legislative changes when deciding individual motions for compassionate release like this one.

C. Poor Health

In addition to his extraordinary rehabilitation and the favorable changes in law, this Court should also consider Dion Walker's health that is trending in the wrong direction. When Dion was arrested in this case at the age of 31, he did not have any serious health conditions though he was beginning to exhibit signs of having high blood pressure. [DE 132, (PSR) ¶ 107]. Sixteen years later in 2021, Dion is a 47-year old man

[7] It should be pointed out that some U.S. Attorney's Offices outside of the Northern District of Indiana have been agreeing in individual cases to a reduced sentence in Section 401 and Section 403 cases.

who has been diagnosed with stage two-kidney disease and hypertension. Although these medical conditions are being treated, they will undoubtedly present future health problems that should be considered by this Court in the totality of factors being presented in this motion. In response to these medical conditions, the BOP, as reflected in recent medical records from 2021, has prescribed Hydrocholorthiazide[8] for Dion's kidney disease and Lisinopril[9] for his hypertension. [Exhibit G].

D. Section 404 of the First Step Act

Section 404 of the First Step Act made retroactive the changes brought forth in crack cocaine offenses by the Fair Sentencing Act of 2010. Last year when Dion Walker sought relief pursuant to this retroactive change, this Court missed a wonderful opportunity to remedy Dion Walker's unjust sentence when it misapprehended its authority to reduce his sentence in Count 2. This Court wrote:

> "In his motion, Defendant also asserts, with no citation to law or legal analysis, that he is entitled to a reduction of his sentence on Count 2, which charged him with possessing with intent to distribute 5 kilograms or more of cocaine under 21 U.S.C. § 841. However, the Fair Sentencing Act did not modify the penalties for powder cocaine convictions because crimes involving substances other than crack cocaine are not "covered offenses" under the Fair Sentencing Act."

[DE 179, p. 8]. Unfortunately, this legal conclusion was incorrect thereby depriving Dion of an opportunity for relief from his extraordinary sentence. At the time of this Court's denial of Dion's motion, the law on the issue of whether courts could consider so-called "uncovered offenses" along with "covered offenses" had not yet been settled in

[8] Hydrochlorothiazide is a thiazide diuretic (water pill). It is used to help reduce the amount of water in the body by increasing the flow of urine.

[9] Lisinopril is used to treat high blood pressure. Lowering high blood pressure helps prevent strokes, heart attacks, and kidney problems.

the Seventh Circuit. In Dion's case, his conviction in Count 1 involving possession with the intent to distributed crack cocaine is a "covered offense" and his conviction in Count 2 involving possession with the intent to distribute cocaine is considered a "non-covered" offense because it does not directly allege that he distributed crack cocaine.

On July 9, 2020, the Seventh Circuit clarified this issue by holding that a district court has authority under Section 404 of the First Step Act to consider reducing a defendant's sentence for both covered offenses that involve crack cocaine and non-covered offenses that can include any other type of criminal offense including cocaine offenses. *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020). Therefore, this Court incorrectly believed that it did not have the legal authority to consider a reduction in Dion Walker's life sentence in Count 2 in conjunction with his sentence in Count 1. [DE 179].

Importantly, Dion Walker is not in this motion asking this Court to directly reconsider its ruling in his previous order considering his Section 404 motion. [DE 173, 179]. Rather, Dion is asking this Court to consider it, along with the other factors outlined in this motion, as a part of its individualized review of his sentence to determine if "extraordinary and compelling reasons" exist for a reduction in his sentence in Count 2.

IV. Dion Walker's Support Network

If this Court chooses to reduce Dion Walker's sentence to a term of 179 months imprisonment in Count 2, he will be eligible for immediate release from the BOP. If so, he has an abundance of family and friends ready to help him transition back to society. Some of them have written letters on his behalf. [Group Exhibit H]. Dion plans on living in Fort Wayne upon his release. He believes that he will be able to find

employment, reestablish positive relationships with those who care about him, and build a good life for himself.

CONCLUSION

In this motion, Walker articulated four separate reasons why "extraordinary and compelling reasons" exist that his sentence should be reduced. They include: (1) his extraordinary commitment to rehabilitation while incarcerated; (2) the fact that Congress has made clear that his conviction for possession of cocaine in 1991 when he was seventeen years old cannot be used post-First Step Act as a predicate to increase a sentence to a mandatory life term; (3) his poor health that includes, but is not limited to, a recent diagnosis of Stage 2-kidney disease; and (4) this Court's failure to recognize its discretion in a non-covered count when considering and denying his previous motion pursuant to Section 404 of the First Step Act. *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020).

With the passage of the First Step Act, Congress emphasized the imperative of reducing unnecessary incarceration and avoiding unduly punitive sentences that do not serve the ends of justice. The need to remedy excessively severe sentences—like the one in this case—has become especially acute. As Judge David Larimer in the Western District of New York wrote in a First Step Act case, one option now is to say to prisoners like Dion Walker "too bad, the [First Step Act] changes don't apply to you and you must serve the lengthy remainder of your [51.5]-year term, and perhaps die in jail." Earlier this year, Judge Larimer exercised another option, and joined the growing number of courts around the country by granting a motion just like this one, reducing a defendant's 40-year sentence to 20 years. *United States v. Marks*, 455 F.Supp.3d 17, 37 (W.D.NY 2020).

Like the Seventh Circuit in *Black* and Judge Miller in *Peoples*, this Court should conduct a holistic review of Dion Walker's individual circumstances. As Judge Miller reiterated in *Peoples*, "An unreasonable sentence can constitute an extraordinary and compelling reason for compassionate relief" and that the defendant's sentence in 2021 was "so unreasonable under today's understanding of sentencing reasonableness to amount to an extraordinary or compelling reason for compassionate release." Id. at *4, *7. Dion Walker respectfully urges this Court to exercise the power conferred by the First Step Act to reduce Walker's sentence in Count 2. He has served too much time already.

In its 2020 report entitled, "Overview of Federal Criminal Cases" which was published in April 2021, the United States Sentencing Commission determined that the average length of sentences for powder cocaine offenses is 66 months.[10] The average length of sentences for crack cocaine offenses is 74 months. Even accounting for the severity of Dion's offense and his criminal history, Dion has already served almost three times the length of the average sentence for crack cocaine defendants and more than twice as long as the average sentence for powder cocaine defendants.[11] He has paid his debt to society several times over.

Dion Walker has worked hard to turn his life around, and he has achieved extraordinary success in the BOP. Most importantly, Congress has provided this Court with the opportunity to give him a chance at a life outside of the BOP. An unjust sentence can now be remedied, and a man can be given a second chance at life. There is

[10] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf; p. 15

[11] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf; p. 15.

nothing more quintessential to the American experience than our citizens reinventing themselves and finding success after failure. Dion has spent 16 years preparing himself for this journey even though for most of the time he had no real hope of starting it. The First Step Act has removed the legal impediment to his freedom, and Dion is prepared to lead a successful life.

Date: 7/14/2021

Respectfully submitted,

Northern District of Indiana
Federal Community Defenders, Inc.

By: s/ Jerome T. Flynn
Jerome T. Flynn
2929 Carlson Drive Suite 101
Hammond, IN 46323
Phone: (219) 937-8020
Fax: (219) 937-8021

CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all parties of record.

s/ Jerome T. Flynn