

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA : **CRIMINAL ACTION**
 :
 v. : **NO. 14-652-6**
 :
 ALEJANDRO SOTELO :

MEMORANDUM

KEARNEY, J.

August 7, 2019

Undoubtedly knowing of his 2010 gastrointestinal cancer diagnosis, contractor Alejandro Sotelo continued to co-manage and lead a heroin trafficking and multi-million-dollar money laundering organization in the United States through mid-November 2014. Following our grand jury's superseding indictment, he proceeded to trial in April 2016 during ongoing cancer treatments. The jury convicted him of several heroin trafficking and money laundering crimes based on overwhelming evidence. He immediately asked for release pending sentencing based on his cancer diagnosis. He then sought a downward departure from a life sentence under the Sentencing Guidelines due to a medical diagnosis of six to twelve months to live. We denied release and varied from the Guidelines' life sentence but imposed a 210-month sentence setting his release for July 16, 2031 followed by five years of supervised release. He then twice moved *pro se* for compassionate release without the Bureau of Prisons' consent. We denied his requests lacking the Bureau of Prisons' consent to compassionate release under the law before December 2018. But in December 2018, Congress allowed a district court to reduce a sentence based on compassionate release regardless of the Bureau of Prisons' consent so long as the prisoner exhausted his remedies inside the Bureau of Prisons. With appointed counsel from the Federal Defenders' Office, he now moves for compassionate release under the Formerly Incarcerated

Reenter Society Transformed Safely Transitioning Every Person Act (“First Step Act”) enacted in December 2018. With consistent medical records, he demonstrates a life expectancy of six months or less as the metastasized cancer is no longer being treated by medicine and he requires a wheelchair and almost constant bedrest to assuage the pain. His prognosis is grave. The United States recognizes Mr. Sotelo’s grave illness with a short time left to live. It instead argues release is too soon as he has served a little over thirty-nine months and release will send the wrong message on deterrence.

If Congress’ December 2018 grant of discretion for federal judges to independently review compassionate release of a deathly-ill younger federal inmate regardless of the Bureau of Prison’s consent is to have any meaning, it must allow us to release a felon who undoubtedly committed serious non-violent crimes but is now undeniably in his last days suffering in a bed and wheelchair taking Morphine and limited pain medications to mitigate the pain caused by metastasized solid tumor cancer where both his and the Bureau of Prisons’ doctors agree his prognosis is grave and he has less than six months to live. In this unique fact pattern developed during an evidentiary hearing and review of extensive medical evidence, we disagree with the United States’ singular focus today on the nature of the offense. We exercise the discretion Congress afforded us in December 2018 to reduce the sentence of incarceration to permit compassionate release with special conditions on supervised release until his sentence ends on July 16, 2031.

Mr. Sotelo presents an exceptional case. He is a non-violent felon in jail for a sentence of 210 months arising from a first offense. Records from every medical professional evaluating him, including those from the Bureau of Prisons, confirm the terminal nature of his metastatic cancer. His family will welcome him to home detention supervised release until July 2031. He is rapidly dying of metastatic cancer with no hope of recovery. He is not eating for days at a time and now

takes Morphine. Unlike at his 2016 sentencing, we now have medical confirmation of his approach to the terminal cliff. After his initial efforts to rehabilitate through programs offered by the prison, he is now physically unable to rehabilitate in prison. He has expressed a change in his view of his culpability; he now expresses detailed remorse. We see no reason to ignore the “compassionate” in compassionate release because we intended him to serve a full sentence in prison, or at least longer than thirty-nine months in prison. We do not expect this fact pattern will lend itself to many other prisoners looking for an early exit from prison.

I. Facts adduced at an evidentiary hearing.

Doctors diagnosed Alejandro Sotelo with metastatic gastrointestinal stromal tumor cancer in 2010. Doctors treated the disease since then.¹ As we described in several memoranda and detailed at sentencing, from 2008 until 2013, contractor Alejandro Sotelo served as a co-manager and a United States leader of a multi-million-dollar heroin trafficking and money laundering organization headquartered in Mexico. We credit the overwhelming evidence he led the United States’ operations for brothers Antonio and Ismael Laredo from Mexico who are presently awaiting trial for their alleged conduct. After an eight-day trial, a jury found Mr. Sotelo guilty on April 22, 2016 of conspiracy to distribute and import one kilogram or more of heroin, conspiracy to commit money laundering, and aiding and abetting. We knew of Mr. Sotelo’s illness in pre-trial hearings and during trial. He manifested his illness during trial. His cancer diagnosis did not stop or frustrate his co-manager or leadership role in this criminal enterprise.

Consistent with the statutory mandate of immediate incarceration, we immediately committed Mr. Sotelo to the custody of the United States Marshal Service pending sentencing.² Two weeks later, Mr. Sotelo moved for release pending sentencing citing his doctor’s opinion “[w]ithout any treatment his prognosis is very poor and most likely less than 6 to 12 months.”³

We denied his request under the law requiring the Bureau of Prisons' consent to compassionate release. Mr. Sotelo continued to receive treatment through the Federal Bureau of Prisons.

On August 29, 2016, Mr. Sotelo's counsel sought a downward departure from the life sentence recommended under the Sentencing Guidelines alleging he then had "at best – six months to live."⁴ On September 8, 2016, we sentenced Mr. Sotelo to 210 months in prison followed by five years of supervised release.⁵ After extensive consideration of the counselled motion for downward departure given his illness, we varied downward from life imprisonment with the reminder we may consider a reduction based on worsening condition. By the time of Mr. Sotelo's sentencing, we had sentenced several of his co-defendants, most of whom provided the United States with substantial assistance or a plea and warranted lower sentences. We also addressed the possibility Mr. Sotelo may be deported as a legal alien following his felony conviction. Mr. Sotelo filed an appeal and our Court of Appeals affirmed our judgment.

The United States has held Mr. Sotelo in custody since the April 22, 2016 verdict. The Bureau of Prisons transferred Mr. Sotelo to its medical facility in Butner, North Carolina. Mr. Sotelo has served approximately thirty-nine months of his prison sentence.⁶ Mr. Sotelo's projected release date is July 16, 2031.⁷

Mr. Sotelo's current medical condition.

The undisputed evidence confirms Mr. Sotelo's medical condition is dire. Mr. Sotelo's cancer metastasized in his liver and abdomen despite chemotherapy treatment to abate the disease.⁸ His doctor, Dr. Carden, stopped chemotherapy treatment on April 22, 2019, and recommended hospice care.⁹ Dr. Carden opines Mr. Sotelo's liver "could shut down at any time."¹⁰ Mr. Sotelo estimates he spends eighty percent of a day in bed due to pain associated with the malignancy and relies on a wheelchair to ambulate.¹¹ Physician Assistant Margaret Hale corroborates this account,

noting, “[h]is ability to function independently has been significantly reduced as his disease has progressed.”¹² Dr. Duchesne prescribed methadone to help reduce Mr. Sotelo’s “chronic unrelenting pain.”¹³

On February 26, 2019, Physician Assistant Hale completed a “Reduction in Sentence/Compassionate Release Comprehensive Medical Summary” form noting Mr. Sotelo’s condition is terminal and he experiences “chronic, unrelenting abdominal pain that is reduced, but not relieved, by optimal medical management,” which pain may be contributing to hypertension not responsive to appropriate medical therapy.¹⁴ Physician Assistant Hale estimated Mr. Sotelo’s life expectancy of less than twelve months based on examination by a medical oncologist.¹⁵

In February 2019, the Bureau of Prisons Tumor Board estimated Mr. Sotelo’s life expectancy of less than six months.¹⁶ Mr. Sotelo had a five-centimeter tumor removed, but he still has multiple “large liver masses, omental masses, retroperitoneal masses, and duodenal mass.”¹⁷ His prognosis remains poor. Mr. Sotelo is not interested in hospice care, despite Dr. Carden’s strong recommendation to stop treatment and receive supportive care instead.¹⁸

On April 22, 2019, Dr. Carden examined Mr. Sotelo and listed Mr. Sotelo’s “general constitutional symptoms” in the medical report as “anorexia, easily tired, fatigue, and weakness.”¹⁹ At this appointment, Mr. Sotelo complained of a dull pain in his chest exacerbated by his coughing symptoms.²⁰ Dr. Carden stopped chemotherapy treatment and strongly recommended hospice care, explaining “[F]urther therapy would not likely be beneficial and would likely lead to more toxicity.”²¹ Dr. Carden advised Mr. Sotelo his liver “could shut down at any time.”²² Mr. Sotelo remained uninterested in hospice care, despite Dr. Carden’s strong recommendation.²³

By May 13, 2019, the medical records report “[u]nfortunately, Mr. Sotelo has progressed after several regimens... therapy would not likely be beneficial and would likely lead to more

toxicity.. [p]rognosis is grave.”²⁴ He has “maxed out” on methadone and “cannot tolerate Fentanyl, gabapentin, or Morphine.”²⁵ By May 23, 2019, the medical records reported “Mr. Sotelo is approaching the terminal cliff.”²⁶ Further records confirm he did not eat for four days at a time and most recently resorted to Morphine.²⁷ Our probation officers confirm his family home, with his wife and family in the Chicago area, is sufficient to monitor him during supervised release.

Mr. Sotelo’s petition for compassionate release to the Bureau of Prisons and Motion with this Court.

After we denied his request for releases shortly after the April 22, 2016 verdict, Mr. Sotelo next applied for compassionate release to the Bureau of Prisons within a year of custody. The Bureau of Prisons denied Mr. Sotelo’s application for compassionate release on April 5, 2017.²⁸

On January 7, 2019, after the President signed the First Step Act into law, Mr. Sotelo filed a *pro se* Motion for modification of his sentence and compassionate release.²⁹ Mr. Sotelo also filed a *pro se* Motion to compel the Bureau of Prisons to release his medical records.³⁰

We denied Mr. Sotelo’s petitions without prejudice to provide the Bureau of Prisons with medical authorization to produce medical records and ordering the United States to respond to Mr. Sotelo’s Motion for reduction of sentence and compassionate release under the First Step Act.³¹

After the United States responded to Mr. Sotelo’s motion,³² we denied Mr. Sotelo’s motion on January 30, 2019, without prejudice to be renewed after “(1) submitting a fulsome request to the Bureau of Prisons allowing it to evaluate his current circumstances; and, (2) seeking relief from this Court should the Bureau of Prisons deny his new request or not respond within thirty days after presenting his new request.”³³

On April 8, 2019, after being counselled by the United States Attorney, the Bureau of Prisons denied Mr. Sotelo’s request for reduction in sentence.³⁴ Having exhausted his administrative remedies with the Bureau of Prisons,³⁵ the Federal Community Defender Office for

the Eastern District of Pennsylvania moved for appointment to represent Mr. Sotelo. We granted the appointment and Mr. Sotelo moved to reduce his sentence under the First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i).³⁶

II. Analysis.

Mr. Sotelo argues: 1) his terminal illness constitutes an extraordinary and compelling reason warranting sentence reduction; 2) his time served constitutes a sentence sufficient but not greater than necessary to accomplish the goals of sentencing; and, 3) the conditions of supervised release should be modified to accommodate the reasons for the sentence reduction.³⁷ The United States Attorney, having earlier advised the Bureau of Prisons on its denial of Mr. Sotelo's *pro se* administrative petition for compassionate release, now defends its advice, arguing today's issues are not a close call and compassionate release should not be granted "where the defendant committed a grievous offense, in a leadership role, during the time he suffered from the illness on which he now premises his request."³⁸ The United States concedes Mr. Sotelo's terminal solid tumor cancer constitutes an extraordinary and compelling reason for compassionate release but argues the thirty-nine months of Mr. Sotelo's actual incarceration is not sufficient given the nature of his non-violent offenses. The United States argues we should require him to spend longer in jail.

We evaluate compassionate release based on three factors.³⁹ First, we address whether "extraordinary and compelling reasons warrant the reduction" and whether the reduction is consistent with the Sentencing Commission's policy statements in effect before the First Step Act.⁴⁰ Second, we determine whether Mr. Sotelo is "a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)."⁴¹ Third, we must consider the factors listed in 18 U.S.C. § 3553(a), "to the extent they are applicable."⁴²

The Sentencing Guidelines in existence before the First Step Act include a policy statement and Application Notes which provide guidance on the extraordinary and compelling reasons which may warrant a sentence reduction. As Judge Phillips found in *United States v. York*, we see no reasons “the identity of the movant (either the defendant or [Bureau of Prisons]) should have any impact” on the factors we must consider.⁴³ The policy statement provides:

(A) Medical Condition of the Defendant. —

- (i)** The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
- (ii)** The defendant is--
 - (I)** suffering from a serious physical or medical condition,
 - (II)** suffering from a serious functional or cognitive impairment, or
 - (III)** experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.--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.⁴⁴

In the same policy statement, the Sentencing Commission offers direction on the argument today raised by the United States:

Foreseeability of Extraordinary and Compelling Reasons. —For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

While federal judges have only been able to directly review contested claims for compassionate release since late 2018, we have the benefit of several decisions evaluating motions to reduce sentences based on compassionate release when the United States opposes the relief. We are not aware of a judge denying compassionate release in a situation as dire as Mr. Sotelo especially mindful he served his entire jail sentence under a metastatic cancer diagnosis which never triggered the Bureau of Prisons' permission for compassionate release but he now has a definite short-term life expectancy.

In *United States v. Beck*, Ms. Beck plead guilty to conspiracy to distribute methamphetamine and possession of firearm during a drug offense.⁴⁵ Serious crimes lead the district court to sentence her to 189 months later reduced to 165 months due to a retroactive Sentencing Guideline amendment. While incarcerated, she developed invasive breast cancer. The prison doctors delayed seventeen months in seeking treatment. The delays allowed the cancer to spread to Ms. Beck's lymph nodes and precluded the use of medical modalities which may have impeded the cancer's progress. She moved for compassionate release after serving approximately seventy-two months of her 165-month sentence. She battled cancer for approximately twenty-four months of her incarceration. Judge Eagles reviewed extensive medical records. The judge then detailed her concerns with the prison's inadequate medical treatment and the likelihood, absent continual court oversight, of continuing delays in medical care. She found this lack of care both now and into the future constituted a compelling reason for compassionate release. The judge rejected the United States' promises of better medical care in the future and Ms. Beck is not ill enough to warrant release. In turning to the sentencing policy statements, Judge Eagles relied on Congress' identification of compelling reasons as including metastatic solid tumor cancer as an example of grounds for compassionate release. Unlike Mr. Sotelo, Ms. Beck did not have a

terminal diagnosis. But Judge Eagles found the likelihood of recurring cancer and worsening condition constituted extraordinary and compelling reasons for compassionate release. The judge then found the applicable section 3553(a) factors warranted release. While the judge recognized (like us) the seriousness of the offense, she also found Ms. Beck's characteristics and lack of criminal history, compounded by little or no risk of recidivism, warranted supervised release with an additional condition of home detention and no contact with a co-defendant other than her spouse.

In a situation with substantial illness but not at the level of Mr. Sotelo's grave prognosis, Judge Jorgenson in *United States v. Johns* granted compassionate release after considering extensive medical evidence from a prisoner who served a significant portion of his sentence.⁴⁶ The United States did not take a position on his apparent *pro se* motion. Mr. Johns offered evidence from a person who agreed to house him upon release. The judge found Mr. Johns is "on the cusp of or is suffering from a serious physical or medical condition and is experiencing deteriorating physical or mental health because of the aging process that substantially diminishes his ability to provide self-care within the [Bureau of Prisons] and from which he is not expected to recover. ...Further, [Mr.] Johns is 81 years old and has served almost 23 years of his sentence. He has been a model inmate."⁴⁷ Judge Jorgenson balanced the section 3553(a) factors finding little risk of recidivism and, citing Congress, applied conditions on supervised release to mitigate danger to the community.

In *United States v. McGraw*, Chief Judge Magnus-Stinson granted compassionate release to a man who served approximately sixteen years of a life sentence for conspiracy with intent to possess methamphetamine while he led a motorcycle gang.⁴⁸ He suffered from a variety of severe chronic illnesses including diarrhea and diabetes but could take care of himself in the same medical center housing Mr. Sotelo in North Carolina. The United States argued Mr. McGraw had not

demonstrated grounds for compassionate release. Chief Judge Magnus-Stinson disagreed: “ Mr. McGraw’s chronic, serious conditions, including those that are mitigated when properly treated by medical professionals, demonstrate a substantially diminished ability to provide self-care from which he is not expected to recover.”⁴⁹ Applying the section 3553(a) factors, the chief judge cited Mr. McGraw’s years of time already served with a long time suffering illness. Mindful of the seriousness of the offense, the chief judge imposed a lifetime of supervised release to be served following compassionate release from the prison medical center.

Even if a younger prisoner can demonstrate serious illness which a judge may find constitutes extraordinary and compelling reasons for compassionate release, the judge may find the section 3553(a) factors do not warrant release. For example, in *United States v. Willis*, Chief Judge Johnson denied compassionate release to a wheelchair-bound white-collar fraud defendant sentenced to twenty-four months who sought release within five months of beginning incarceration.⁵⁰ Defendant remained out of prison for over eight months before reporting to prison already ill. Doctors delivered a prognosis of eighteen months to live from January 2019. The chief judge found Mr. Willis demonstrated the required level of illness and the purposes of sentencing would be met by compassionate release followed by supervised release. But the chief judge found releasing Mr. Willis after serving only five months of the twenty-four-month sentence would minimize victim impact and the extent of his fraud upon senior citizens. In sum, granting Mr. Willis the requested release ignored the seriousness of his offense and would place him far outside the range of sentences for similarly-sentenced persons for his serious frauds.

Chief Judge Tunheim in *United States v. Bellamy* denied compassionate release based on the age qualification as Mr. Bellamy had not served the qualifying seventy-five percent of his sentence but granted compassionate release even though he had not served close to fifty-percent

of his sentence.⁵¹ Like Mr. Sotelo, Mr. Bellamy distributed heroin and his chronic medical condition existed at sentencing. After evaluating the medical issues to find extraordinary and compelling reasons (even without a terminal diagnosis) and finding release met the policies underlying sentencing, the chief judge found the section 3553(a) factors satisfied by Mr. Bellamy served his sentence in a manner “significantly more laborious than that served by most inmates” and “[w]hile shorter than expected, [Mr.] Bellamy’s time in prison under these circumstances provides just punishment and adequate deterrence.”⁵² Chief Judge Tunheim also found “any disparity resulting from a reduced sentence is not unwarranted given the special circumstances he faces in prison as a result of his health and age [with] [a]ny disparity ...mitigated by an extended period of supervised release.”⁵³

By comparison to Ms. Beck’s (and Mr. Sotelo’s) extensive medical records, the elderly prisoner in *United States v. Gutierrez* sought compassionate release after serving 80% of his sentence by offering general laments of prostrate issues leading to frequent urination, a cataract, and broken teeth.⁵⁴ Mr. Gutierrez argued he could receive better care at home. Senior Judge Brack denied his motion for compassionate release but welcomed a motion to reconsider based on medical evidence. Judge Malouf Peterson similarly denied compassionate release for a prisoner who had served fifteen years of a twenty-year sentence arguing extraordinary and compelling reasons arose from a detached retina.⁵⁵

Judge Dearie focused on the length of incarceration as warranting compassionate release in *United States v. Wong Chi Fai*.⁵⁶ Like Mr. Sotelo, the Bureau of Prisons held Mr. Wong in its Butner, North Carolina medical facility for treatment of a 2016 onset of metastatic papillary thyroid cancer. Unlike Mr. Sotelo, Mr. Wong had served twenty-six years of his life sentence arising from a guilty verdict for violent crimes (including murder) as a leader of New York

Chinatown gang. Disagreeing with the United States' arguments he could be treated in prison and have a longer life, Judge Dearie relied on a doctor's medical opinion of "terminal with an end-of-life trajectory" and only months to live.⁵⁷ The judge further found Mr. Wong's frail condition demonstrated he does not pose a danger and he supervised release conditions will mitigate risk. Judge Dearie further found compassionate release did not discount the seriousness of Mr. Wong's violent crimes as he had served twenty-six years of a life sentence, "the last three of which have been spent in medical purgatory."⁵⁸

In *United States v. York*, Judge Phillips faced a similar argument as to a perceived discount on the offense level of the sentence in allowing a time served sentence especially when the prisoner would serve only thirteen months of a consecutive sentence.⁵⁹ The judge granted compassionate release reducing a 106-month sentence to time served (approximately seventeen months earlier than scheduled) plus modified supervised release concluding continued incarceration given the prisoner's medical condition of congestive heart failure would not serve the sentencing goals under section 3553(a). We recognize Mr. Sotelo is a way from the end of sentence. But we agree with Judge Phillips as to no further service of the sentencing goals.

Guided by our Sentencing Commission's policy statements, the reasoning of the federal judges already reviewing compassionate release *de novo* and applying this same test, we find Mr. Sotelo presents "extraordinary and compelling reasons" justifying a reduction of his sentence and we grant Mr. Sotelo's motion to reduce sentence under 18 U.S.C. § 3582(c)(1)(A)(i). All agree he is fatally ill. He specifically meets one of the Sentencing Commission's examples of an extraordinary and compelling reason for compassionate release as he suffers from metastatic cancerous solid tumor. We also follow the Sentencing Commission's guidance we should not be deterred from compassionate release because we sentenced Mr. Sotelo knowing of his cancer.

There is no evidence, nor argument, he is a danger to the safety of another person or community. To the extent we could find a concern, the special conditions of his supervised release more than fully address this highly unlikely danger. Considering the factors listed in 18 U.S.C. § 3553(a), including promoting respect for the law, providing punishment, providing a sentence reflecting the seriousness of the offense, deterring criminal conduct, protecting the public, and providing Mr. Sotelo with necessary training, care, or other correctional treatment, there are no grounds which compel us to ignore the compassion mandated by Congress in allowing compassionate release. He is a first-time offender, presents no risk to the public, there is no rehabilitative purpose left in prison, and he has genuinely changed his view to express remorse for his significant role in a large drug and money laundering conspiracy. He has served almost thirty-nine months with serious illness which only recently required almost full-time bed rest and wheelchair. He will serve the balance of his sentence in home confinement with no contact with a co-defendant other than his spouse. We face no risk of a sentencing disparity as he will not leave his home nor have contact with co-defendants until July 2031.

A. Mr. Sotelo’s terminal illness presents “extraordinary and compelling reasons” justifying a reduction of his sentence under 18 U.S.C. § 3582(c)(1)(A)(i).

We have discretion to reduce the term of imprisonment under 18 U.S.C. § 3582(c)(1)(A)(i) if we find “extraordinary and compelling reasons warrant such a reduction. ... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”⁶⁰ Even if an “extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court, [that fact] does not preclude consideration for a [sentence] reduction.”⁶¹ “Extraordinary and compelling reasons” do not need to be based on changed circumstances unforeseen at the time of the initial sentencing.

Under 28 U.S.C. § 994(t), Congress delegates the authority to “describe what should be considered extraordinary and compelling reasons for sentence reduction” to the Sentencing Commission.⁶² In the Federal Sentencing Guidelines, the Sentencing Commission lists terminal illness, regardless of life expectancy, as an example of an “extraordinary and compelling reason[.]”⁶³ Mr. Sotelo’s counsel mistakenly notes our sentencing discretion will depend on “Mr. Sotelo’s current medical condition and service of a substantial portion of his sentence.”⁶⁴ These factors are only considered with respect to the first category of prisoners considered for compassionate release: prisoners over age sixty-five who have served at least ten years or seventy-five percent of their sentences.⁶⁵ The second distinct category applies to prisoners suffering from a terminal illness or “a serious ... medical condition that substantially diminishes the ability ... to provide self-care within the environment of the correctional facility.”⁶⁶ Because Mr. Sotelo fits into the second category, we need not consider whether he served a substantial portion of his sentence.

Mr. Sotelo suffers terminal stage IV gastrointestinal stomal tumor with metastasis to the abdomen and liver and has been given a life expectancy of six months.⁶⁷ Mr. Sotelo’s medical condition substantially diminishes his ability to provide self-care in prison, as he requires the support of a wheelchair to ambulate and spends most of his time in bed.⁶⁸ If Mr. Sotelo’s motion is granted, his wife, Camerina Sotelo, plans to enroll Mr. Sotelo in Access DuPage and to “ensure the continuity of his medical care.”⁶⁹

B. Mr. Sotelo does not pose a danger to the safety of another person or the community.

A reduction in sentence must be consistent with Sentencing Commission policy.⁷⁰ The Sentencing Guidelines provide “compassionate release is appropriate only where the ‘defendant is not a danger to the safety of any other person or to the community.’”⁷¹ The Guidelines provide in

application note 1(D) of U.S.S.G. § 1B1.13 “a reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A).”⁷² This policy statement is now inconsistent with the First Step Act’s amendment of § 3582(c)(1)(A), allowing courts to grant sentence reductions despite potentially contrary Bureau of Prisons determinations.⁷³ “In evaluating compassionate release motions filed by defendants, the old policy statement does not bind the Court’s interpretation of § 3582(c)(1)(A)(i)...but it does provide useful guidance.”⁷⁴ Applying the rule of lenity and giving preference to the most recently enacted statute, we may now find a sentence reduction is warranted without the Bureau of Prisons’ initial determination, and we will not be acting inconsistent with the Sentencing Commission’s policy statements.⁷⁵

The United States repeatedly highlights Mr. Sotelo’s central role in the drug trafficking scheme even after his 2010 metastatic cancer diagnosis.⁷⁶ Although admittedly “extreme” behavior, Mr. Sotelo’s conduct following his diagnosis has little bearing on today’s decision. The Sentencing Commission states in § 1B1.13 application note 2: “For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment.”⁷⁷

We must incorporate the 18 U.S.C. § 3142(g) factors when making the determination of whether a defendant poses a danger to the community, considering the nature and circumstances of the offense charged, characteristics of the defendant, and nature and seriousness of the danger.⁷⁸ Mr. Sotelo does not pose a danger to community safety. In its response, the United States emphasizes Mr. Sotelo’s “central role” in the Mexico-based Laredo Drug Trafficking Organization and the “substantial and significantly harmful” nature of his crimes.⁷⁹ We do not minimize the severity of his offenses, as his role in the distribution of heroin may have contributed to the current

epidemic of opioid addiction in our community. Mr. Sotelo's offenses are non-violent drug crimes, and he did not possess illegal firearms in connection with these crimes.⁸⁰ Since his arrest, Mr. Sotelo's condition has progressed to the point where he can no longer ambulate independently and must spend a majority of his day in bed to cope with the pain.⁸¹ His current physical condition makes it highly unlikely he could recidivate or take part in any dangerous activities.

Mr. Sotelo expressed remorse for his crimes and a desire to return to his family. He "reflected on his actions and acknowledged the mistakes he made and the harm his involvement in the narcotics trade caused."⁸² He immersed himself in several Bureau of Prisons programs, including the self-study GED program, music theory classes, horticulture, chess, religion, and bible studies.⁸³ Mr. Sotelo has a supportive family waiting for him at home, including his wife and two children.⁸⁴ His mother and wife hope Mr. Sotelo can "come home and die a serene and Peaceful Death surrounded by his love[d] ones."⁸⁵ Mr. Sotelo's remorse for his crimes, immersion in positive prison programming, and marital status reduce the likelihood of recidivism.

C. Mr. Sotelo's time served constitutes a sentence "sufficient but not greater than necessary" to accomplish the goals of sentencing.

Under 18 U.S.C. § 3553(a), Congress requires we impose sentences "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)," including promoting respect for the law, providing punishment, providing a sentence reflecting the seriousness of the offense, deterring criminal conduct, protecting the public, and providing the defendant with necessary training, care, or other correctional treatment.⁸⁶ Under the First Step Act, Congress permits us to determine whether conditions such as terminal illness make a sentence reduction "sufficient, but not greater than necessary" to accomplish the goals of sentencing under 18 U.S.C. § 3553(a). We make this determination using the section 3553(a) factors:

(a) **Factors to be considered in imposing a sentence.** -- 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. The court, in determining the particular sentence to be imposed, shall consider—

- (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 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—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(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.

Congress requires we consider “the need for the sentence imposed...to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”⁸⁷ A lenient sentence could “threaten[] to promote disrespect for the law.”⁸⁸ When the Bureau of Prisons denied Mr. Sotelo’s compassionate release request in April 2019, they based their denial on a concern the reduction would “minimize the severity of his offense and pose a danger to the community.”⁸⁹

We disagree a sentence reduction would minimize the severity of his offense at this stage. Congress expanded compassionate release under the First Step Act with the express intent of “increasing the use and transparency of compassionate release.”⁹⁰ In the case of someone who has a terminal illness and a life expectancy of less than six months, a sentence of imprisonment “may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.”⁹¹

Mr. Sotelo served approximately thirty-nine months of his sentence, and he has approximately 171 months remaining. Given his prognosis of a six-month life expectancy, he will

not come close to serving the entirety of his sentence. A sentence reduction under these circumstances will not undermine in any way the severity of the sentence imposed for his crimes. Mr. Sotelo does not pose a significant threat to the public. The typical sentencing goal of deterrence is largely irrelevant given Mr. Sotelo's condition and short life expectancy. Mr. Sotelo's release plan includes care provided by his wife and medical professionals through either Access DuPage or Medicaid.⁹²

We are also persuaded by the lack of further rehabilitation for Mr. Sotelo in prison. He is not receiving services. Rehabilitation towards securing employment or further education appears futile given Mr. Sotelo's anticipated end of life. The United States does not specifically relate this fact to any of the section 3553(a) factors. To the extent it speaks to the need for us to afford adequate deterrence, Mr. Sotelo's continued role in the drug trafficking scheme after his cancer diagnosis is unlikely to occur again given Mr. Sotelo's significantly worsened condition since 2010. We also limit Mr. Sotelo's continuing role under the terms of supervised release for the balance of his sentence.

After considering the factors listed in 18 U.S.C. § 3553(a), we find Mr. Sotelo presents "extraordinary and compelling reasons" justifying a reduction of his sentence.

D. We modify Mr. Sotelo's conditions of supervised release.

Congress authorizes us "to modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release."⁹³ Mr. Sotelo argues his conditions of supervised release should be modified to accommodate the reasons for the sentence reduction.⁹⁴ We determined continued incarceration is "greater than necessary" for purposes of punishment.⁹⁵ Similarly, "special conditions of supervised release must cause no

greater deprivation of liberty than reasonably necessary to achieve the goals of supervised release, including the need to provide effective medical treatment.”⁹⁶

But we will not modify his conditions of supervised release. We find grounds for release but remain concerned with his access to the Laredo brothers and other fugitive defendants in this multi-million-dollar conspiracy. We want to ensure he does not voluntarily return to Mexico to escape our supervision.⁹⁷ We require he remain on home detention, except for hospital/medical appointments and religious services, until the end of his sentence in July 2031. He must refrain from contact directly or indirectly with his co-defendants. Evidence of contact with them by any medium or through an intermediary may result in a hearing to revoke supervised release. Mr. Sotelo demonstrated remorse and we are presently persuaded his grave prognosis will focus his attention on his remaining days at home. Conduct contrary to this understanding warrants our review of his continued home detention.

III. Conclusion.

We are not aware of a sentencing purpose based solely on the length of time served in prison. What is too soon? Or too late? How do we measure rehabilitation or genuine remorse? We are ever aware of deterrence as a sentencing purpose. We do not want to excuse criminal conduct. We also cannot ignore the possibility some defendants may engage in criminal conduct after a terminal medical diagnosis figuring they have nothing to lose and, should their health get much worse in prison, a judge may release them. But we are also aware of the rehabilitative purposes of federal sentencing and the low risk of recidivism for a first time offender with months to live. We cannot preclude compassionate release because of illness at the time of the criminal conduct when a medical diagnosis significantly worsens to the extent the prisoner’s diagnosis is grave and all agree he will not live beyond six months.

We grant Mr. Sotelo's Motion to reduce his sentence having found "extraordinary and compelling reasons" justifying reducing his 210-month sentence and the goals of sentencing are not furthered by requiring Mr. Sotelo to serve his last days in a federal medical center. Our balancing of section 3553(a) factors further compels compassionate release. We enter an amended judgment order requiring he serve the balance of his sentence under supervised release with the standard conditions as well as home detention, reporting, no contact with co-defendants, and no travel outside of the Northern District of Illinois. We tailor these conditions to Mr. Sotelo's prognosis of terminal illness with less than six-months to live as represented by varied medical professionals both in and out of the prison system.

¹ Mr. Sotelo received his diagnosis in 2010. ECF Doc. No. 1200, at p. 4.

² ECF Doc. No. 564.

³ ECF Doc. No. 630, at p. 2.

⁴ ECF Doc. No. 904, at p. 13.

⁵ ECF Doc. No. 927.

⁶ ECF Doc. No. 1200, at p. 1.

⁷ *Id.* at p. 4, n.1. This release date may possibly be modified for good time credits.

⁸ *Id.* at p. 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Before his condition worsened, Mr. Sotelo enrolled in several classes focused on music and Bible studies. He learned to play the piano and participated in musical therapy. *Id.* at p. 4. He contends he is no longer able to take part in such activities because of the severe pain due to the malignancy, which increased in size over time. *Id.* He also failed to express public remorse until his condition significantly worsened.

¹² *Id.* at p. 21.

¹³ *Id.* at p. 31.

¹⁴ *Id.* at pp. 20-21. We use the pagination assigned by the CM/ECF system.

¹⁵ *Id.* at p. 21.

¹⁶ *Id.* at p. 23.

¹⁷ *Id.* at p. 5.

¹⁸ ECF Doc. No. 1221, at p. 1.

¹⁹ *Id.* at p. 2.

²⁰ *Id.* at p. 1.

²¹ *Id.* at pp. 1, 5.

²² ECF Doc. No. 1200, at p. 5.

²³ ECF Doc. No. 1221, at p. 1.

²⁴ ECF Doc. No. 1228-1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at p. 2.

²⁹ ECF Doc. No. 1173.

³⁰ ECF Doc. No. 1174.

³¹ ECF Doc. No. 1175.

³² ECF Doc. No. 1179.

³³ ECF Doc. No. 1180.

³⁴ ECF Doc. No. 1200, at pp. 17-18. We use the pagination assigned by the CM/ECF system.

³⁵ The Bureau of Prisons' denial constitutes a "final administrative decision" under 28 C.F.R. § 571.63(d). Section 571.63(d) provides "[b]ecause a denial by the General Counsel or Director,

Bureau of Prisons, constitutes a final administrative decision, an inmate may not appeal the denial through the Administrative Remedy Procedure.” 28 C.F.R. § 571.63(d).

³⁶ ECF Doc. No. 1200. The United States agrees the First Step Act now allows us to review Mr. Sotelo’s denied claim for compassionate release. We begin with the First Step Act, a federal prison and sentencing reform bill passed by Congress and signed by the President in December 2018. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 Yale L.J. Forum 791 (Feb. 25, 2019). “The First Step Act requires [the Bureau of Prisons] to provide meaningful rehabilitation programs for federal prisoners and ties those programs to earned credit time that federal prisoners can use to serve out some of their prison sentence in a halfway house or home confinement.” *Id.* at 795 (citing First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, at § 101). The First Step Act “also includes a number of provisions aimed at reforming” the Bureau of Prisons including, as relevant here, “improving accountability in the [Bureau of Prison’s] use of compassionate release.” *Id.* (citing First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, at § 403(b)).

Before the First Step Act, a sentencing court could only reduce a sentence if the Bureau of Prisons initiated and filed a motion in the sentencing court. Under the First Step Act, “upon motion of the Director of the Bureau of prisons, *or* upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such request by the ward of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—(i) extraordinary and compelling reasons warrant such a reduction; . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A)(i) (emphasis added). Even if we reduce the period of incarceration, we may still consider whether supervised release for the unserved portion of incarceration meets the goals of sentencing.

³⁷ ECF Doc. No. 1200, at pp. 9-13.

³⁸ ECF Doc. No. 1216, at p. 12.

³⁹ *United States v. McGraw*, No. 02-18, 2019 WL 2059488, at *3 (S.D. Ind. May 9, 2019).

⁴⁰ *Id.*

⁴¹ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13(2) (2018).

⁴² *McGraw*, 2019 WL 2059488, at *3; U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2018).

⁴³ No. 11-76; 12-145, 2019 WL 3241166, * 4 (E.D.Tenn. July 18, 2019).

⁴⁴ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13(2) (2018).

⁴⁵ No. 13-186-6, 2019 WL 2716505 (M.D.N.C. June 28, 2019).

⁴⁶ No. 91-392, 2019 WL 2646663 (D. Ariz. June 27, 2019).

⁴⁷ *Id.* at *3.

⁴⁸ *McGraw*, 2019 WL 2059488, at *1.

⁴⁹ *Id.* at *4.

⁵⁰ No. 15-3764, -- F.Supp.3d --, 2019 WL 2403192 (D.N.M. June 7, 2019).

⁵¹ No. 15-165(8), 2019 WL 3340699, at *7 (D.Minn. July 25, 2019).

⁵² *Id.* (quoting *McGraw*, 2019 WL 2059488, at *5).

⁵³ *Id.*

⁵⁴ No. 05-217, 2019 WL 1472320 (D.N.M. Apr. 3, 2019).

⁵⁵ *United States v. Gross*, No. 04-32, 2019 WL 2437463, *3 (E.D. Wash. June 11, 2019).

⁵⁶ No. 93-1340, 2019 WL 3428504 (E.D.N.Y. July 30, 2019).

⁵⁷ *Id.* at * 1.

⁵⁸ *Id.* at *4 (citing *Bellamy*, 2019 WL 3340699, at *7).

⁵⁹ 2019 WL 3241166, at *8.

⁶⁰ 18 U.S.C. § 3582(c)(1)(A)(i).

⁶¹ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2018).

⁶² 18 U.S.C. § 994(t).; *See* ECF Doc. No. 1200, at p. 3.

⁶³ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13, cmt. n.1(A)(i) (2018). “The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.”

⁶⁴ ECF Doc. No. 1200, at p. 3.

⁶⁵ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2018); *Willis*, 2019 WL 2403192, at *2.

⁶⁶ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2018); *Willis*, 2019 WL 2403192, at *2.

⁶⁷ ECF Doc. No. 1200, at pp. 4, 23.

⁶⁸ *Id.* at p. 10.

⁶⁹ *Id.* at p. 11.

⁷⁰ *Willis*, 2019 WL 2248650, at *2.

⁷¹ *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.13(2) (2018)).

⁷² U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2018).

⁷³ Pub. L. No. 115-391, 132 Stat. 5194.

⁷⁴ *Beck*, 2019 WL 2716505, at *8.

⁷⁵ *United States v. Cantu*, No. 05-458, 2019 WL 2498923, at *4 (S.D. Tex. June 17, 2019). “Applying the rule of lenity, U.S.S.G. § 1B1.13 cmt. n.1(D) no longer describes an appropriate use of sentence-modification provisions and is thus not part of the applicable policy statement binding the court.”

⁷⁶ ECF Doc. No. 1216, at pp. 10-11, n.2. “This case . . . presents a much more extreme and disturbing situation, in which the extraordinary reason—the petitioner’s illness—was known not just at the time of sentencing but while he committed the years-long crime.”

⁷⁷ U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (2018).

⁷⁸ 18 U.S.C. § 3142(g).

⁷⁹ ECF Doc. No. 1216, at p. 10.

⁸⁰ ECF Doc. No. 1200, at pp. 8-9.

⁸¹ *Id.* at pp. 9-10.

⁸² *Id.* at p. 8.

⁸³ *Id.* at p. 9.

⁸⁴ *Id.* at p. 10.

⁸⁵ ECF Doc. No. 1217; ECF Doc. No. 1218.

⁸⁶ 18 U.S.C. § 3553.

⁸⁷ 18 U.S.C. § 3553(a)(2)(A).

⁸⁸ *Gall v. United States*, 552 U.S. 38, 54 (2007).

⁸⁹ ECF Doc. No. 1200, at pp. 17-18. We use the pagination assigned by the CM/ECF system.

⁹⁰ *Willis*, 2019 WL 2248650, at *2 (quoting Pub. L. No. 115-391, 132 Stat. 5194, at 5239).

⁹¹ *Gall*, 552 U.S. at 54.

⁹² ECF Doc. No. 1200, at p. 11.

⁹³ 18 U.S.C. § 3583(e)(2).

⁹⁴ ECF Doc. No. 1200, at p. 10.

⁹⁵ *See McGraw*, 2019 WL 2059488, at *5.

⁹⁶ *United States v. Dimasi*, 220 F. Supp. 3d 173, 198 (D. Mass. 2016).

⁹⁷ The Federal Defender confirmed Mr. Sotelo is aware of, and consulted immigration counsel on, his immigration status and possible deportation. ECF Doc. No. 1231. Nothing in today's Memorandum affects the Executive Branch's ability to pursue its remedies under the immigration laws should it deem necessary in the exercise of seasoned discretion.