UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	CRIM. NO. 3:94CR112(JCH)
LUIS NOEL CRUZ	:	October 24, 2020

MEMORANDUM IN SUPPORT OF COMPASSIONTE RELEASE UNDER SECTION 603(b) OF THE FIRST STEP ACT

Luis Noel Cruz asks this Court to reduce his sentence under Section 603(b) of the First Sept Act or 2018, 18 U.S.C. § 3582(c)(1)(A)(i), and to order his immediate release after more than 25 years of imprisonment. The Court has the power to grant this relief because extraordinary and compelling reasons support a reduction in sentence:

First, the Court has *already* determined—in resentencing Mr. Cruz after vacating his previous life sentence under *Miller v. Alabama*, 567 U.S. 460 (2012)—that a sentence of 35 years is sufficient, but not greater than necessary to serve the interests of sentencing under 18 U.S.C. § 3553(a). The Court's habeas judgment has since been vacated, *see Cruz v. United States,* No. 19-989-CR, 2020 WL 5494486 (2d Cir. Sept. 11, 2020),[1] but the Government never appealed from the Court's sentencing judgment. Accordingly, when the Second Circuit's mandate issues, this Court will be faced with the extraordinary circumstance of having to impose an effectively *illegal* sentence on Mr.

[1] Mr. Cruz intends to file petitions for rehearing and rehearing en banc on or before October 26, 2020, and will, if necessary, pursue relief through certiorari in the U.S. Supreme Court. However, this Court retains concurrent jurisdiction to consider this motion and the separate motion for reduction of sentence under Section 404 of the First Step Act, also filed today, because they raise grounds for relief entirely independent of those raised in Mr. Cruz's § 2255 motion.

Cruz—that is, one that it has already determined is greater than necessary to serve the interests of sentencing. This unusual—indeed, apparently unprecedented—circumstance is rendered even more extraordinary by the Government's recent concession that Mr. Cruz should never have been subjected to a mandatory life sentence to begin with. The statutes he was sentenced under—18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 1962(c), (d)—did not in fact mandate a life sentence at the time of his offense, and the Sentencing Guidelines, which did mandate life, have been rendered advisory. Although the Second Circuit has instructed this Court to reimpose that suspect life sentence, the First Step Act permits the Court to take account of these troubling and extraordinary circumstances in determining whether there are grounds for a sentence reduction under § 3582(c)(1)(A)(i).

Second, and relatedly, Mr. Cruz's youth at the time of his offense, combined with his extraordinary and undisputed record of rehabilitation, provide further compelling reasons for a reduced sentence. Although "rehabilitation . . . *alone* shall not be considered an extraordinary and compelling reason" for a reduction in sentence, 28 U.S.C. § 994(t) (emphasis added), the Second Circuit has recently made clear that a prisoner's "age at the time of his crime and the sentencing court's statements about the injustice of his lengthy sentence" might weigh in favor of a sentence reduction. *United States v. Brooker*, No. 19-3218-CR, 2020 WL 5739712, at *6 (2d Cir. Sept. 25, 2020). That is undoubtedly the case here, where this Court has already remarked on the injustice of Mr. Cruz serving out a life sentence given his youth at the time of his offense and his complete and uncontested rehabilitation.

Third, as *Brooker* confirms, the coronavirus pandemic provides an independent compelling reason for granting a sentence reduction, and "may also interact" with other

arguments regarding youth and rehabilitation to provide extraordinary and compelling grounds for release. *See Brooker*, 2020 WL 5739712, at *7. Currently, the country is bracing for a "second wave" of infections and, as before, prisoners are among the most vulnerable. Indeed, the Coleman Federal Correctional Complex, where Mr. Cruz is currently incarcerated, is already in the midst of a major COVID-19 outbreak, with 67 active inmate cases and 103 active staff cases. *See* U.S. Bureau of Prisons, *COVID-19 Coronavirus* (updated daily), https://www.bop.gov/coronavirus/ (last accessed Oct. 23, 2020). Mr. Cruz, who suffers from hypertension and is overweight, is at heightened risk of severe infection if he remains in custody. This extraordinary circumstance—which numerous other courts have taken into account in granting sentence reductions under the First Step Act—warrants not only a reduction in Mr. Cruz's sentence, but his immediate or imminent release from prison.

Finally, compelling family circumstances warrant relief. Mr. Cruz's mother, who faithfully visited him in prison weekly for years but can no longer see her son due to COVID-19 restrictions. She herself is elderly and extremely frail and at serious risk of succumbing to the pandemic or another illness. Mr. Cruz's elderly father lives in a nursing home. During the period of time in which it appeared Mr. Cruz would be released after serving 35 years, he and his family made plans for him to be the primary caregiver for his ailing parents. Without a reduction in sentence, however, he may never see them again.

These factors—independently and certainly in combination—present extraordinary and compelling reasons to reduce Mr. Cruz's sentence to a period of time served. This Court has the power to reduce Mr. Cruz's sentence and—consistent with its earlier findings that he has been completely rehabilitated—the Court should exercise its

power to permit Mr. Cruz to leave the dangerous confines of FCI Coleman, take care of his elderly parents, and continue to atone and make amends for the crime he committed as a teenager.

I. Background

A. Offense and Initial Sentencing

At the age of 16, Mr. Cruz joined a branch of the Latin Kings in Bridgeport, seeing it as an opportunity to be part of a "brotherhood family." As a low-ranking member of the gang, Mr. Cruz learned that if he refused to follow orders and carry out "missions," including murder, the same mission would be carried out against him as punishment. In May 1994, h was ordered to carry out the murder of Arosmo Diaz, a suspected informant. In a heated action that he will forever regret, Mr. Cruz and a co-defendant took the life of Mr. Diaz and a second person, Tyler White, who was with Diaz at the time.

Mr. Cruz was later arrested and—along with nineteen other members of the Latin Kings—and charged with racketeering, violence in aid of racketeering, and drug trafficking. In September 1995, a jury found him guilty of as the following counts:

Count 1, racketeering, under 18 U.S.C. § 1962(c) (RICO);

Count 2, racketeering conspiracy, under 18 U.S.C. § 1962(d) (RICO conspiracy);

Count 24, violent crime in aid of racketeering under 18 U.S.C. § 1959(a)(5) (conspiracy to murder Arosmo Diaz) (VICAR conspiracy);

Count 25, violent crime in aid of racketeering/aiding and abetting under 18 U.S.C. § 1959(a)(1) and (2) (murder of Arosmo Diaz) (VICAR);

Count 26, violent crime in aid of racketeering/aiding and abetting under 18 U.S.C. § 1959(a)(1) and (2)(murder of Tyler White) (VICAR);

Count 27, conspiracy to distribute narcotics under 21 U.S.C. § 846.

(ECF 945) (verdict form); *see also* (ECF No. 625) (Second Superseding Indictment).

Ahead of sentencing, the probation office prepared a presentence investigation report (PSR), which erroneously stated that "Title 18, USC § 1959(a)(1) *requires* a sentence of life imprisonment." PSR ¶ 81 (emphasis added).[2] In fact, life was not required on Counts 25 or 26 because Mr. Cruz's conduct occurred before § 1959(a)(1) was amended to mandate a life sentence. The statute in effect at the time of Mr. Cruz's offense permitted "imprisonment for any term of years of for life." *See generally* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 60003(a)12), 108 Stat. 1796 (Sept. 13, 1994) (changing penalty prescribed under § 1959(a)(1) from "imprisonment of any term of years or for life" to "death or life imprisonment, or a fine"). Nor was a life sentence required for the RICO and RICO conspiracy counts (Counts One and Two); the statutory sentencing range on those counts was zero to twenty years' imprisonment. *See infra* pages 16 - 20.

At sentencing, the PSR's assumption that Mr. Cruz was subject to a statutorily mandated life sentence went uncorrected. Indeed, Mr. Cruz's lawyer did not even submit a sentencing memorandum or offer any argument for a sentence less than life at the hearing, believing that the judge had no discretion to sentence Mr. Cruz to anything other than a life term

[2] The PSR also noted that the Guidelines range for Mr. Cruz's offenses was life. PSR ¶ 82. The Government has only recently acknowledged that the sentencing court was not statutorily required to impose a life sentence. *See Cruz v. United States*, Docket No. 19-989, Doc. # 113 at *1 ("correct[ing] a mistake in its briefs," where it had "argued that Cruz was sentenced to mandatory life sentences for his convictions," when in fact the relevant statues "authorized—but did not mandate—a life sentence").

The court imposed a sentence of life imprisonment on Counts 1, 2, 25 and 26, a sentence of 10 years' imprisonment on Count 24, and a sentence of 20 years' imprisonment on Count 27—all concurrent to each other. (ECF No. 1072)

In imposing sentence, the court made no mention of Mr. Cruz's youth at the time of the offense or other mitigating circumstances. Instead, the court simply remarked: "I heard and I listened carefully to what you said, but the jury has spoken and the jury has found you guilty of an unspeakable crime; that crime being murder, as the last speaker said, in the most cold blooded fashion." T. 1/30/1996, 22.

B. Habeas Grant and Resentencing

Despite having been condemned to die in prison, Mr. Cruz turned his life around. As the Government has conceded, he has—over more than 25 years in prison—been a "model inmate." A forensic social worker who evaluated Mr. Cruz in 2019 testified that he "st[ood] out" from other inmates she had evaluated, such that she had "complete confidence" "that he's rehabilitated." One of Mr. Cruz's unit managers (among eight BOP officials who wrote letters on his behalf at resentencing) similarly stated that he had "fully dedicated himself to a new path in life and rehabilitation."

On June 25, 2012, the United States Supreme Court issued its decision in *Miller v. Alabama*, holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. 460, 480 (2012). In light of the *Miller* decision, the Second Circuit granted Mr. Cruz leave to file a successive motion challenging his sentence under 28 U.S.C. § 2255. This Court held an evidentiary hearing, at which Dr. Laurence Steinberg, a leading expert in adolescent brain development, testified (without contradiction) that there is no meaningful different between the brains of 17-year-old offenders (who cannot be

sentenced to life in prison without a particularized finding of incorrigibility) and 18-year-old offenders like Mr. Cruz. *See generally* T. 9/13/17. In particular, Dr. Steinberg testified that he was "[a]bsolutely certain" that the same traits that the Supreme Court found relevant in prohibiting life sentences for juveniles in *Miller* applied to 18-year-old offenders. *Id.* at 71. In light of this unchallenged expert testimony and of its own exhaustive review of the Supreme Court's authority on juvenile sentencing, this Court granted Mr. Cruz's § 2255 petition and vacated his life sentence.

Mr. Cruz was resentenced on February 26, 2019. In advance of the hearing, the parties submitted supplemental briefing and data "concerning sentences imposed on defendants aged 17 years old in re-sentencing under *Miller*, as well as sentences imposed in state and federal courts for murder convictions upon defendants aged 17, 18, 19, 20, and 21 years old." Doc. 2100 (court order dated 12/27/2018); Doc. #2110 (Mr. Cruz's response filed 1/29/2019).

Relying on these submissions, as well as testimony at the sentencing hearing, this Court weighed the seriousness of the crime against the numerous mitigating circumstances, especially Mr. Cruz's youth and circumstances at the time of the offense and his extraordinary record of rehabilitation since then. While this Court stated that Mr. Cruz's crimes were "the most serious that I can imagine," T. 9/13/17, 103, it also observed that his rehabilitation had been "extraordinary." *Id.* at 106. Mr. Cruz, this Court observed, is "an individual who for 24 years has demonstrated and acted in a way that evidences that he turned away from his past ways and has embraced a different more productive life even in the face of initially having no chance of release." *Id.* at 110. This Court addressed each of the sentencing factors set forth in 18 U.S.C. § 3553(a)(2) at

length, and determined that a sentence of 35 years' imprisonment was sufficient, but not greater than necessary, to fulfill the purposes of sentencing.

The Government did not appeal from, or otherwise contest the reasonableness of, this Court's sentencing judgment. It did, however, appeal from the underlying judgment granting Mr. Cruz's § 2255 motion. While that appeal was pending, the Second Circuit decided, in *United States v. Sierra*, 933 F.3d 95 (2d Cir. 2019), that the rule in *Miller* does not apply to individuals over the age of 17 at the time of their offense. Though Mr. Cruz maintained that this Court's decision was distinguishable, the Second Circuit in a summary order vacated this Court's § 2255 judgment and remanded for reimposition of the original life sentence.

Mr. Cruz is continuing to defend this Court's habeas decision, and will be filing a petition for rehearing and rehearing en banc on or before October 26, 2020. However, this Court retains concurrent jurisdiction to hear this separate challenge to Mr. Cruz's continuing incarceration.[3]

II. This Court has the authority to reduce Mr. Cruz's sentence.

The First Step Act of 2018 grants sentencing courts the authority to reduce an otherwise final term of imprisonment for "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A)(i).

Before 2018, a court could only grant a sentence reduction upon a request from the Bureau of Prisons. But with the First Step Act, Congress amended § 3582 to permit inmates to petition directly for a sentence reduction. *See* First Step Act of 2018, Section

[3] Mr. Cruz has separately filed a motion for sentence reduction under Section 404 of the First Step Act.

603(b), Pub. L. 116, 391, 132 Stat. 5194 (2018). As amended, the statute provides in relevant part:

> (c) Modification of an imposed term of imprisonment. -- The court may not modify a term of imprisonment once it has been imposed except that--
> (1) in any case--
> (A) **the court**, 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 a request by the warden 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**; or
> ...
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;
> . . . .

18 U.S.C. § 3582(c).

When Congress eliminated parole in 1984, it put in place the predecessor to today's § 3582(c)(1)(A)(i)—providing a narrow safety valve by permitting courts to reduce sentences for "extraordinary and compelling reasons." Pub. L. No. 98-473, 98 Stat. 1987 (1984). Congress's goal with the 1984 legislation was to end parole but it recognized the importance of having a mechanism for "later review of sentences in particularly compelling situations." Although Congress placed the authority to modify sentences in the hands of the judiciary under § 3582(c), it initially determined that the BOP should serve as gatekeeper to sentence reductions under this provision.

The First Step Act removed BOP as the gatekeeper. The legislative intent of Section 603(b) is embedded in its full title: Increasing the Use and Transparency of Compassionate Release. 164 CONG. REC. H10358 (daily ed. Dec. 20, 2018). The Act grants to prisoners the power to move for compassionate release, because Congress found that the Bureau of Prisons' use of it was too rare, "resulting in inmates who may be eligible candidates for release not being granted." *U.S. Dep't. Justice, The Federal Bureau of Prisons' Compassionate Release Program*, p. 11 (2013).[4] The FSA addressed these concerns by amending "numerous portions… to unwind decades of mass incarceration." *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019). The changes to the Act give the "district judge… the ability to grant a prisoner's motion for compassionate release even in the face of BOP opposition or its failure to respond to the prisoner's compassionate release request in a timely manner." *United States v. Young*, NO. 2:00-cr-00002-1, 2020 WL 1047815, at *5 (M.D. Tenn. Mar. 4, 2020).

The statute directs that before granting a sentencing reduction under 18 U.S.C. § 3582(c)(1)(A)(i), in addition to finding that extraordinary and compelling reasons support the reduction, the court must consider the factors set forth in 18 U.S.C. §

[4] A 2012 report revealed that BOP had filed only thirty motions for early release in the previous year, despite housing 218,000 prisoners. Families Against Mandatory Minimums and Human Rights Watch, *The Answer Is No: Too Little Compassionate Release in US Federal Prisons* (Nov. 30, 2012), https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federalprisons. A 2013 report from the U.S. Department of Justice's Office of the Inspector General concluded that "the existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided." U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Division, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013), https://oig.justice.gov/reports/2013/e1306.pdf; *see also* Stephen R. Sady & Lynn Defferbach, *Second Look Resentencing under* 18 U.S.C. § 3582(c) *as an Example of Bureau of Prisons Policies that result in Overincarceration*, 21 Fed. Sent'g Rep. 167 (2009); Shon Hopwood, *Second Looks and Second Chances*, 41 Cardozo L. Rev. 83 (Oct. 2019).

3553(a) and also determine that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The relevant sentencing guideline provision is § 1B1.13, which provides that reasons supporting a reduction may include the defendant's medical condition, age, or family circumstances, and also, per Application Note 1(D), where "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with" the other three circumstances listed (i.e., medical condition, age, or family circumstances). U.S.S.G. § 1B1.13.

This Court concluded in *United States v. McCarthy*, 453 F. Supp. 3d 520 (D. Conn. 2020), that because the policy statement in U.S.S.G. § 1B1.13 had not been updated since the enactment of the FSA, the statement did not constrain the court's independent assessment of whether "extraordinary and compelling" reasons support reduction in a sentence.

The Second Circuit recently affirmed this view in *United States v. Brooker*, No. 19-3218-CR, 2020 WL 5739712, at *6 (2d Cir. Sept. 25, 2020), reasoning that the statute's text requires courts to consider only "applicable" guidelines when adjudicating compassionate release motions. The text of the § 1B1.13 "is clearly outdated and cannot be fully applicable" given that its first words are "'[u]pon motion of the Director of the Bureau of Prisons.'" *Id.* at *6 (quoting U.S.S.G. § 1B1.13). Rather than reading the Guideline as abolished, the Second Circuit read the Guideline as surviving but "now applying only to those motions that the BOP has made." *Id.* Accordingly, "[b]ecause Guideline § 1B1.13 is not 'applicable' to compassionate release motions brought by defendants, Application Note 1(D) cannot constrain district courts' discretion to consider whether any reasons are extraordinary and compelling." *Id.* Thus, "the First

Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release" and "[n]either Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court's discretion." *Id.* at *7.

The Second Circuit stressed in *Brooker* that "a district court's discretion in this area—as in all sentencing matters—is broad" and "the only statutory limit on what a court may consider to be extraordinary and compelling is that '[r]ehabilitation . . . alone shall not be considered an extraordinary and compelling reason.'" *Id.* at *8 (quoting 28 U.S.C. § 994(t)). The Court observed that § 3582(c)(1)(A) speaks of sentence reductions, and, in addition to granting a release, a court could reduce but not eliminate a defendant's prison sentence, or end imprisonment but impose a significant term of probation or supervised release in its place. *Id.*

Regarding the case before it, the Second Circuit in *Brooker* rejected the government's argument that the district court's decision denying the motion for compassionate release should be affirmed because granting the motion would have been an abuse of discretion. The Court reasoned:

> In the instant case, Zullo does not rely solely on his (apparently extensive) rehabilitation. Zullo's age at the time of his crime and the sentencing court's statements about the injustice of his lengthy sentence might perhaps weigh in favor of a sentence reduction. Indeed, Congress seemingly contemplated that courts might consider such circumstances when it passed the original compassionate release statute in 1984. *See* S. Rep. No. 98-225, at 55-56 (1984) (noting that reduction may be appropriate when "other extraordinary and compelling circumstances justify a reduction of an unusually long sentence" (emphasis added)); see also United States v. Maumau, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *6-*7 (D. Utah Feb. 18, 2020) (further discussing this history and collecting cases where district courts have reduced sentences in part because they were overly long).

> Moreover, these arguments may also interact with the present coronavirus pandemic, which courts around the country, including in this circuit, have used as a justification for granting some sentence reduction motions. *See, e.g.*, *United States v. Zukerman*, 451 F. Supp. 3d 329, 336 (S.D.N.Y. 2020) (granting compassionate release because of the risk of Covid-19); *United States v. Colvin*, 451 F. Supp. 3d 237, 241-42 (D. Conn. 2020) (same); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 406-07 (E.D. Pa. 2020) (same).
>
> We list these possibilities not to indicate that Zullo should be granted compassionate release, or even to suggest that they necessarily apply—we state no opinion either way on these questions. We merely believe that the consideration of these factors and of their possible relevance, whether in isolation or combination, is best left to the sound discretion of the trial court in the first instance. We therefore vacate and remand to allow the district court to consider the possible relevance of these and any other factors, and then to exercise the discretion that the First Step Act gives to it.

Id. at *8-9.

Thus, as the Second Circuit has recently held, district courts have broad discretion to determine if extraordinary and compelling reasons support modifying a federal sentence. Where such reasons exist, the court must also consider whether the factors set forth in 18 U.S.C. § 3553(a) support a modified sentence.

On July 27, 2020, the warden of Mr. Cruz's facility denied compassionate release. That denial is attached as an exhibit to the motion for compassionate release. This Court thus can consider this motion under § 3582(c)(1)(A)(i).

III. Extraordinary and compelling reasons warrant a reduction in sentence.

Extraordinary and compelling reasons support a reduction of Mr. Cruz's sentence. To begin with, this Court has already determined—upon a careful weighing of factors under § 3553(a)—that a sentence in excess of 35 years is greater than necessary to serve the purposes of sentencing. That the Court could nevertheless be compelled to

reimpose what is effectively an illegal (because greater than necessary) sentence is itself an extraordinary circumstance warranting relief. This concern is amplified by the fact (as the Government now concedes) that Mr. Cruz should never have been given a mandatory life sentence to begin with. Moreover, as this Court has already recognized, Mr. Cruz's youth and immaturity at the time of his offense, combined with his remarkable record of rehabilitation in the quarter-century since, are themselves "extraordinary," together, they provide a compelling justification for a reduced sentence.

While these factors warrant a modification of Mr. Cruz's initial life sentence, two additional factors warrant the imposition of a new sentence of time served. First, the coronavirus pandemic—by any definition, an "extraordinary" circumstance, without parallel in the last century—poses a unique threat to Mr. Cruz, who suffers from hypertension and other comorbidities that make him extremely vulnerable to deadly infection. Second, and relatedly, the pandemic has heightened Mr. Cruz's "compelling family circumstances," in that it has made it likely that Mr. Cruz may never be able to see his elderly and infirm parents—who had already begun to prepare for his release—again.

A. The extraordinary posture of this case warrants re-sentencing.

The extraordinary posture of Mr. Cruz's case provides a compelling reason for a reduction in sentence. The Court has already determined that a term of more than 35 years imprisonment would be greater than necessary under 18 U.S.C. § 3553(a), and the Government has not challenged that finding. The First Step Act allows the Court to take account of these circumstances in deciding whether to reduce his sentence.

Mr. Cruz was initially sentenced to a term of life without the possibility of release by a judge who did not believe he had any discretion to impose a lesser sentence. As

such, until this Court re-sentenced Mr. Cruz after granting his § 2255 motion, no sentencing judge had ever truly considered the § 3553(a) factors—including Mr. Cruz's youth at the time of his offense—in arriving at a just sentence. When this Court did consider those factors, it concluded that a term of 35 years sufficient, but not greater than necessary to serve the purposes of sentencing. A necessary implication of that conclusion—which was not challenged by the Government—is that a sentence greater than 35 years would be greater than necessary to serve the purposes of punishment, and therefore impermissible. *See* 18 U.S.C. § 3553(a)(1) ("The court *shall* impose a sentence . . . not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.").

The Second Circuit has nevertheless ordered this Court to "reinstate the prior judgment and sentence." *Cruz v. United States,* No. 19-989-CR, 2020 WL 5494486 (2d Cir. Sept. 11, 2020). While the Second Circuit's mandate has not yet issued and is still subject to review, it places this Court in an extraordinarily difficult position. The Court has already determined that any sentence in excess of 35 years would be greater than necessary under § 3553(a), yet it has been ordered to reinstate a sentence of life imprisonment. While the Court must follow the Second Circuit's mandate, the First Step Act provides it with independent authority to reduce Mr. Cruz's sentence to a term that does not violate § 3553(a). In light of the additional factors discussed below, the Court should exercise this authority to sentence Mr. Cruz to time served.

B. The initial sentencing court's treatment of life as mandatory—and failure to consider Mr. Cruz's youth as mitigating—are extraordinary and compelling reasons for sentence reduction

Mr. Cruz's original life sentence was the product of a sentencing procedure that failed to account for any mitigating circumstances, including his youth and immaturity and capacity for rehabilitation. The sentencing court believed it had no choice but to impose a life sentence, and therefore did not evaluate whether a lesser term might be warranted. But in fact, a life sentence was not mandated by statute and the Sentencing Guidelines that required a life sentence have since been held to be unconstitutional and rendered advisory. The sentencing court's treatment of life as mandatory, and imposition of the sentence on Mr. Cruz without giving mitigating effect to his youth, is an extraordinary and compelling reason for modifying the sentence to one that reflects Mr. Cruz's lessened culpability and his demonstrated capacity for change. As the Government now acknowledges, none of Mr. Cruz's offenses of conviction required a life sentence by statute. Mr. Cruz was convicted of RICO (18 U.S.C. § 1962(c)), RICO conspiracy (18 U.S.C. § 1962(d)), VICAR conspiracy (18 U.S.C. § 1959(a)(5)), two counts of VICAR (18 U.S.C. § 1959(a)(1) and (2)); and conspiracy to distribute narcotics (21 U.S.C. § 846). In a letter to the Court of Appeals submitted May 20, 2020, the Government stated:

> The government writes to correct a mistake in the briefs it filed in this case. Specifically, the government argued that Cruz was sentenced to mandatory life sentences for his convictions under 18 U.S.C. § 1959(a)(1), see, e.g., Gov't Br. at 3-4, but at the time of Cruz's crimes (May 1994), section 1959(a)(1) authorized—but did not mandate—a life sentence. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(12), 108 Stat. 1796 (Sept. 13, 1994) (changing penalty prescribed under 18 U.S.C. § 1959(a)(1) for murder from "imprisonment for any term of years or for life" to "death or life imprisonment").

Cruz v. United States, Docket No. 19-989, Doc. # 113 at *1. The murders occurred on May 14, 1994. Thus, Mr. Cruz was subject to the VICAR statute in effect prior to September 13, 1994, when it was amended to require death or life imprisonment for

murder. *See* Pub. L. 103-322, Title VI, § 60003(a)(12), Title XXXIII, §§ 330016(1)(J), (2)(C), 330021(1), Sept. 13, 1994, 108 Stat. 1969, 2147, 2148, 2150.[5] It is clear by the plain language of the statute that Mr. Cruz's VICAR convictions did not mandate a life term.

It is also clear that Mr. Cruz was not subject to a mandatory life sentence on the RICO counts. The penalty provision for his RICO convictions provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both . . . .

18 U.S.C. § 1963(a); *see also, e.g.*, *Martinez v. United States*, 803 F.3d 878, 888 (7th Cir. 2015) (observing that "§ 1963(a) sets only *maximum* sentences," not *mandatory* sentences) (emphasis added). Although Mr. Cruz was sentenced to life on his RICO counts, the maximum was actually 20 years on these counts because his predicate racketeering act—murder, under Conn. Gen. Stat. § 53a-54a—was not a racketeering activity for which the maximum penalty includes life imprisonment. While the penalty for murder under § 53a-54a is "a term not less than twenty-five years nor more than

---

[5] The statute in effect at the time of Mr. Cruz's offense provided:

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires to do so, shall be punished—
>
> (1) for murder or kidnapping, by imprisonment for any term of years or for life or a fine of not more than $50,000, or both[.]

18 U.S.C. § 1959(a)(1) and (2).

life," *see id.* § 53a-35a, a sentence of "life imprisonment" under Connecticut law actually "means a definite sentence of sixty years," *id.* § 53a-35b.[6] The predicate racketeering activity therefore did not include a maximum penalty of "life imprisonment," as that term is more commonly understood under § 1963(a).

Though neither the VICAR nor RICO statutes mandated a life sentence, the then-mandatory Sentencing Guidelines did. But even under the old Guidelines regime, a mandatory sentence could be lowered by departures from the mandated sentencing range. During Mr. Cruz's sentencing, however, neither the parties nor the sentencing court discussed whether a departure might be appropriate. Instead, all assumed that the sentencing court had no choice but to impose a life sentence, regardless of what it might have thought to be an appropriate sentence under all the circumstances. Mr. Cruz's lawyer, apparently under the impression that life was required, offered no mitigating information or argument for a lesser sentence by way of a sentencing memorandum or comments at the hearing.

Whether Mr. Cruz would have been eligible for a Guidelines departure at his original sentencing is an academic question, for the mandatory Guidelines regime in place at that time is no longer. *See United States v. Booker*, 543 U.S. 220 (2005). Moreover, the sentencing guidelines were amended in 2010 to reflect that youth may now be considered in determining whether to depart from the guidelines, at least in some circumstances. *See* U.S.S.G. 5H1.1. ("Age (including youth) may be relevant in

[6] A "life" sentence can be outlived, especially with the good time system in place at the time of Mr. Cruz's crime. *See Velez v. Commissioner of Correction*, 250 Conn. 536, 537 (1999) (describing good-time statutes that in place for those who committed crimes prior to October 1, 1994, which operated "to release inmates and persons granted community placement from the authority of the department and to release parolees from the authority of the board after completion of only a portion of their court-imposed sentences").

determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."). Indeed, the Sentencing Commission has observed that "[r]ecent studies on brain development and age, coupled with recent Supreme Court decisions recognizing differences in offender culpability due to age, have led some policymakers to reconsider how youthful offenders should be punished." United States Sentencing Commission, *Youthful Offenders in the Federal System*, (May 2017). In issuing its report on youthful offenders in the federal system, the Commission decided to include youth adults, noting that its "inclusion of young adults in the definition of youthful offenders is informed by recent case law and neuroscience research in which there is a growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average." *Id.*

In sum, Mr. Cruz was sentenced to life without the possibility of release by a judge who believed he had no discretion in the matter. This Court, however, does have authority, and discretion, to consider Mr. Cruz's youth at the time of his offenses and his extraordinary transformation since in fashioning a new sentence.

Following the enactment of the First Step Act, courts have recognized that circumstances including the severity of an initial sentence, changes in sentencing guidelines that have not retroactively benefited a defendant, and unfairness surrounding the original sentencing proceeding are among grounds that may support modifying a sentence under § 3582(c)(1)(A)(i). *See, e.g.*, *United States v. Parker*, No. 2:98-CR-00749-CAS-1, 2020 WL 2572525, at *10 (C.D. Cal. May 21, 2020) (granting compassionate release to petitioner serving life sentence, observing that the defendant

"was not eligible for resentencing in light of *Booker* and is currently serving life in prison, pursuant to a judgment rendered under a sentencing regime that is no longer in effect and has since been declared unconstitutional" and concluding that "the severity of Parker's life sentence, imposed under a sentencing regime that is longer valid, and Parker's medical conditions, which the government acknowledges make Parker even more vulnerable in light of the COVID-19 pandemic, present 'extraordinary and compelling' circumstances that justify a reduction in Parker's sentence"); *United States v. Cantu-Rivera*, No. H-89-204, 2019 WL 2578272, at *4 (S.D. Tex. June 24, 2019) (granting relief to petitioner serving life sentence based on "fundamental change to sentencing policy carried out in the First Step Act's elimination of life imprisonment as a mandatory sentence solely by reason of a defendant's prior convictions" in combination with other factors including the petitioner's extraordinary degree of rehabilitation, age, and medical condition); *United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391 (D. Neb. Nov. 14, 2019) (reducing sentence where the petitioner "poses no current danger" and reduction "is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed").[7]

[7] Many sentence reductions under § 3582(c)(1)(A)(i) around the country have involved defendants serving life sentences. *See, e.g.*, *United States v. McGraw*, No. 202CR00018LJMCMM, 2019 WL 2059488, at *5 (S.D. Ind. May 9, 2019) (ordering the compassionate release of a defendant with serious medical conditions who had served 16 years of his life sentence for drug offense); *United States v. Heffington*, No. 1:93-cr-05021-NONE, 2020 WL 4476485, at *22-23 (E.D. Cal. Aug. 3, 2020) (ordering compassionate release of a defendant with serious medical conditions who a had served 27 years a mandatory life sentence in drug case); *United States v. Mondaca*, No. 89-CR-0655 DMS, 2020 WL 1029024, *8–9 (S.D. Cal. Mar. 3, 2020) (compassionate release to a defendant with serious medical conditions who had served 10 years of life sentence in drug case).

This Court should likewise recognize that the severity of Mr. Cruz's initial sentence, combined with erroneous assumptions surrounding statutory mandates and the impact of an unconstitutional Guidelines regime, all provide extraordinary and compelling reasons to revisit and reduce Mr. Cruz's sentence.

C. Mr. Cruz's youth and immaturity at the time of the offense, combined with his remarkable rehabilitation since, present extraordinary and compelling reasons for reducing his sentence.

Since the time of Mr. Cruz's original sentencing, society's understanding of adolescent brains and criminal conduct by youth has evolved considerably. A life sentence is plainly excessive for Mr. Cruz given the mitigating circumstances of his youth and his demonstrated rehabilitation since the time of the crime. Mr. Cruz's youth and capacity for change—not accounted for at his original sentencing—provide extraordinary and compelling reasons for sentence modification.

1. Mr. Cruz's youth and immaturity at the time of his offense are extraordinary and compelling reasons for sentence modification.

Mr. Cruz joined the Latin Kings when he was 16 years old. Around the time of his 18th birthday, Mr. Cruz was trying to withdraw from the gang, and thought that he had. But the gang's leadership had other ideas. Gang leaders sent his childhood friend—the same person who brought him into the gang—to order Mr. Cruz to kill a suspected informant or be killed himself. The events that rapidly unfolded that night are unspeakably tragic. Mr. Cruz and his friend took the lives of Arosmo Diaz and Tyler White, both young men themselves.

What occurred that night is consistent with what modern psychology tells us about the teenage brain. As Dr. Steinberg testified during the § 2255 hearing, teenagers, even in late adolescent, have "problems with impulse control and self-regulation and

heightened sensation-seeking," as well as heightened susceptibility to peer pressure. This is in part because the prefrontal cortex—the portion of the brain that governs impulse control, among other things—is still developing into late adolescence. Although a child's ability to think when she is calm and emotionally neutral ("cold cognition") is developed by around age 16, her ability to regulate her thoughts when emotionally aroused ("hot cognition") is not mature until her early- to mid-20s. In moments of hot cognition, the brain's social and emotional center (the Limbic System) competes with the brain's center of logic and planning (the Cognitive Control System). Because the Limbic System develops more quickly than the Cognitive Control System during adolescence, emotions and social pressure overwhelm decision-making in adolescents more often than in adults. "[W]hen hot cognition is operating," said Dr. Steinberg, "adolescents are less likely to pay attention to the downside of a risky decision, and they're more focused on the rewards of it, so it means that the prospect of being punished for something . . . is less salient than it is to an adult." AA610. In fact, risk-seeking behavior and susceptibility to peer pressure reaches its apex between the ages of 17 and 19.

These forces were at their peak in the moments leading up to Mr. Cruz's crime. This uncontested scientific understanding of adolescent brain development helps to explain how a teenager like Luis Noel Cruz could completely turn his life around: His character was not fully formed. Indeed, it is "the rare juvenile offender whose crime reflects irreparable corruption." *Graham v. Florida*, 560 U.S. 48, 68 (2010).

The takeaway from the science, and of the line of Supreme Court case law including *Roper* and *Miller*, is that most teenagers will reform, but we cannot predict which ones will. Therefore, sentencing teenagers without considering their youth in

mitigation results in disproportionate punishment. It results in reformed men dying in prison decades after crimes they committed as troubled children. "[G]reat harm would be done if we upheld a sentence that imposed long years in prison on an offender who no longer presents a danger, when a lesser sentence would better serve the purpose of the criminal law. . . ." *United States v. Preacely*, 628 F.3d 72, 85 n.* (2d Cir. 2010) (Lynch, J., concurring). No person has proved this more than Mr. Cruz.

The science and the law have evolved since Mr. Cruz was sentenced to life in 1996. There has been a revolution of decency—perhaps an evolution of our standards of decency—in the sentencing of teenagers. In 1996, the youth of homicide offenders was seen as aggravating: if you're this bad this young, then we better lock you up forever, now. This rhetoric may have persuaded many, but it was tragically far from the truth.

In 1996, the court said little at Mr. Cruz's original sentencing. But what the court *did* say is consistent with a lack of understanding of how hot cognition relates to overwhelmed teenagers ordered to carry out terrible "missions." "[T]he jury has found you guilty of an unspeakable crime; that crime being murder, as the last speaker said, in a most cold blooded fashion." T. 1/30/96, 22 (Exhibit 12). Judge Nevas cannot much be faulted for this. The term hot cognition was not in the language then. Sentencing teenagers today has a constitutional dimension, informed by developments in science, that it did not have in 1996.

This Court properly took note of the science when it granted Mr. Cruz's § 2255 motion. Though the Second Circuit has insisted on enforcing a stark line at age 18 for the application of *Miller*, nothing prevents this Court from taking account of Mr. Cruz's youth in determining whether a sentencing reduction is warranted under the First Step Act.

District courts across the country have held that changes in relevant sentencing law may support a finding of extraordinary and compelling circumstances justifying compassionate release. *See, e.g.*, *United States v. Jones*, No. 94-CR-20079-EJD-1, 2020 WL 5359636, at *7 (N.D. Cal. Aug. 27, 2020) (citing changes in governing sentencing law—and the resulting disparity between the sentence the defendant was serving and the "gross disparity" between the defendant's sentence "and the sentence that Congress now deems appropriate" in concluding that "changes in sentencing law weigh strongly in favor of compassionate release"); *United States v. Maumau*, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *5 (D. Utah Feb. 18, 2020) (citing, *inter alia*, changes in the applicable sentencing law to support a finding of extraordinary and compelling circumstances warranting a reduction of sentence); *Bellamy v. United States*, No. 2:03-CR-197, 2020 WL 4208446, at *6 (E.D. Va. July 22, 2020) (citing as a factor warranting relief the "disparity of over 200 months" between the defendant's stacked sentence and the likely term that he would face if sentenced today).

Courts have similarly cited a defendant's young age at the time of the crime—and, sometimes, evolving scientific understanding of youth and crime—in supporting a finding of extraordinary and compelling circumstances for a sentence reduction. *See, e.g.*, *Jones*, 2020 WL 5359636, at * 7 ("[B]ecause Mr. Jones was only 22 years old when he began serving his sentence, he has spent more than half his life in prison. Under these conditions, Mr. Jones's continued incarceration is unjust."); *Maumau*, 2020 WL 806121, at *5 (citing the defendant's youth (20 years old) at the time of the crime as among the extraordinary and compelling grounds warranting sentence reduction); *Bellamy*, 2020 WL 4208446, at *7 (citing the defendant's "relative youth at the time of the sentence"—age 21—as among the reasons forming an "extraordinary and compelling

basis for relief"); *see also Brooker*, 2020 WL 5739712, at *6 (noting that defendant's "age at the time of his crime and the sentencing court's statements about the injustice of his lengthy sentence might perhaps weigh in favor of a sentence reduction").

2. Mr. Cruz extraordinary rehabilitation supports sentence reduction.

Combined with his youth at the time of the offense, Mr. Cruz's extraordinary transformation and rehabilitation during his time in prison supports a reduction of his sentence.

Luis Noel Cruz's extraordinary prison transformation supports his immediate release. The Court is familiar with Noel's rehabilitation. To summarize: He has remained discipline ticket free throughout his incarceration, has participated in nearly every program offered at whatever facility he has been in, and has served as a leader in the prison community, including translating several programs into Spanish to make them more accessible for other inmates. As the Court knows, he has been translating reentry classes since long before his own reentry was a possibility. Indeed, this Court has already acknowledged that Mr. Cruz's rehabilitation is "extraordinary" T. 2/26/29, 106 and "indisputabl[e]," *Id*. at 118.

Since he was last before the Court, Mr. Cruz has continued his remarkable progress. When he left Coleman for his habeas hearing, he left behind a manual for others to follow in UNICOR. See Exhibit 11. He has since been able to return to work for UNICOR. He has worked consistently for supervisor, Jennifer Telfare, for the past 18 years. He is no longer the head of the clerks because he was moved to the low security facility—his role now is as trouble shooter, special projects worker, and helper with work

overload. During the pandemic, he has been given a spot with a computer, where he does his work. His boss is right next door. He is trusted.

Course offerings have been limited during the pandemic, but he takes whatever classes that he can. [Exhibit One includes several latest Bible study certificate, and his grades (A+ of course).] Mr. Cruz's custody classification form (Exhibit Two) and PATTERN risk scoring sheets (Exhibit Three) show his low recidivism risk. Based on these assessments, he would be eligible for placement at a camp, if not for the offense itself.

Should Mr. Cruz be released, he will follow the release plan that he has presented to his BOP case manager. He will live with and take care of his mother in Tampa, Florida, while working for Ron Mitchell of MB Drywall Solutions, Exhibit Four. This will allow him to continue to pay restitution to the family of Tyler White. He will join the community of the Iglesia Misionera Casa de Oracion, with Pastor Joseph Rivera, who wrote a letter on his behalf at the resentencing. *See* Ex. #3, Doc. 2111.

Although rehabilitation of a defendant is not, "by itself, an extraordinary and compelling reason" for a sentence reduction, *see* U.S.S.G. § 1B1.3 cmt n.3 (citing 28 U.S.C. 994(t)), "'rehabilitation *is relevant* to the question of whether a sentence should be reduced and that rehabilitation, when considered together with other equitable factors, [can] constitute extraordinary and compelling reasons" for a sentence reduction.'" *United States v. Torres*, No. 87-Cr-593 (SHS), 2020 WL 2815003, at *22 (S.D.N.Y. June 1, 2020) (emphasis in original) (citing *United States v. Torres*, No. 87-Cr-593 (SHS), 2020 WL 1674058, at *7 (S.D.N.Y. June 1, 2020)). *See also United States v. Cantu-Rivera*, No. H-89-204, 2019 WL 2578272, at *2 n.2 (S.D. Tex. June 24, 2019); *see also United States v. Almonte*, No. 3:05-cr-58 (SRU), 2020 WL 1812713, at *8 (D.

Conn. Apr. 9, 2020); *United States v. Millan*, 2020 WL 1674058, at *10; *United States v. Walker*, No. 1:11 CR 270, 2019 WL 5268752, at *3 (N.D. Ohio Oct. 17, 2019).

The Second Circuit recently confirmed that rehabilitation may properly be considered—in combination with age at the time of the offense and other factors—in determining whether a sentence reduction is warranted. *See Brooker*, 2020 WL at *8; *see also Maumau*, 2020 WL 806121 at *7 (D. Utah Feb. 18, 2020) ("Based on the above, the court concludes that a combination of factors—Mr. Maumau's young age at the time of the sentence, the incredible length of the mandatory sentence imposed, and the fact that, if sentenced today, he would not be subject to such a long term of imprisonment—establish an extraordinary and compelling reason to reduce Mr. Maumau's sentence.").

Here, too, Mr. Cruz's complete rehabilitation, in combination with his age at the time of the offense, the "incredible length of the mandatory sentence imposed," the fact that, were he sentenced today he would very likely not receive such a long sentence, and other factors discussed below, combine to provide extraordinary and compelling grounds for relief. *Id.; see also*, *Millan*, 2020 WL 1674058 at *8, citing rehabilitation as among the extraordinary and compelling circumstances supporting sentence reduction, reasoning: "Mr. Millan is no longer the immature and irresponsible young man who committed his offenses in his early 20s. Rather, today he is a more mature and evolved adult of 57 years. In the almost three decades that have passed since he was arrested (and detained) in 1991, and despite having had no realistic hope of release, Mr. Millan has done everything in his power to rehabilitate himself, as demonstrated by his genuinely exceptional accomplishments and meritorious prison record. He is remorseful and contrite and has fully accepted responsibility for his crimes. In the almost three decades that he has been incarcerated, Mr. Millan has conducted himself as a model

prisoner and demonstrated exceptional character." **D. Mr. Cruz's vulnerability to severe illness from the coronavirus outbreak at Coleman FCI provides an extraordinary and compelling reason for reducing his sentence to time served.**

While the foregoing factors provide compelling reasons for modifying Mr. Cruz's sentence, his vulnerability to COVID-19 provides a compelling basis for his immediate release.

Mr. Cruz's medical records are being filed under seal along with this motion. He suffers from hypertension and has been overweight since 2016, among other issues. He takes Hydrochlorothiazide and Metoprolol Tartrate to control his blood pressure, which is consistently high. According to the Mayo Clinic, "[t]he latest evidence shows that people with uncontrolled or untreated high blood pressure may be at risk of getting severely ill with COVID-19."[8] The Centers for Disease Control and Prevention (CDC) confirms that people with hypertension "might be at increased risk for severe illness from COVID-19."[9] CDC also recently announced that people who are overweight—not

[8] https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-high-blood-pressure/faq-20487663
[9]https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

only people who are obese—are more vulnerable to COVID-19 than individuals of a healthy weight.[10] Mr. Cruz is considered overweight, with a Body Mass Index of 27.

In light of this increased risk of severe illness from COVID-19, courts have granted compassionate release to people suffering from hypertension. *See, e.g.,* U*nited States v. Robinson,* No. 3:10-CR-261, 2020 WL 4041436, at *5 (E.D. Va. July 17, 2020) (rejecting government's arguments that defendant's hypertension is "controlled" and that his risk of contracting COVID-19 in the community would be just as high as in prison); *United States v. Chesney*, No. 3:18-CR-257 (VAB), ECF No. 54, at 6 (D. Conn. May 20, 2020) ("Ms. Chesney's hypertension places her in a higher risk category for COVID-19 complications, should she contract the virus."); *United States v. Pena*, No. 15-cr-551 (AJN), 2020 WL 2301199, at *4 (S.D.N.Y. May 8, 2020) ("This Court has repeatedly recognized that COVID-19 presents a heightened risk for individuals with hypertension[.]")*; United States v. Soto*, No. 1:18-CR-10086-IT, 2020 WL 2104787, at *2 (D. Mass. May 1, 2020) ("Defendant's medical records show that he suffers from hypertension. This condition increases his risk for serious complications from contracting COVID-19, including death."); *United States v. Salvagno*, 456 F. Supp. 3d 420, at 437-446 (N.D.N.Y. Apr. 23, 2020) (summarizing recent scientific research and

[10] *Id.*; *see also* Caryn Rabin, "Extra Pounds May Raise Risk of Severe Covid-19", *The New York Times*, October 10, 2020, available online at https://www.nytimes.com/2020/10/10/health/coronavirus-obesity-weight.html (last viewed 10/12/20); Barry M. Popkin, et al, Individuals with obesity and COVID-19: A global perspective on the epidemiology and biological relationships, *Obesity Reviews*, Volume 21, Issue 11, August 26, 2020, available online at https://doi.org/10.1111/obr.13128 (last viewed 10/12/20); Hamer M, Kivimäki M, Gale CR, Batty GD. Lifestyle risk factors, inflammatory mechanisms, and COVID-19 hospitalization: A community-based cohort study of 387,109 adults in UK. Brain Behav Immun. 2020 Jul;87:184-187. doi: 10.1016/j.bbi.2020.05.059. Epub 2020 May 23. PMID: 32454138; PMCID: PMC7245300.

finding not only a "well-established correlation between hypertension and severe manifestations of COVID-19," but also a "substantial chorus of experts who have found that there is a causal relationship"); *United States v. Scparta*, No. 18-CR-578 (AJN), 2020 WL 1910481, at * 9 (S.D.N.Y. Apr. 20, 2020) (finding hypertension to be a comorbidity that increases the risk of death from COVID-19, and "reject[ing] the Government's contention that Mr. Scparta's general good health before the pandemic speaks to whether he should now be released."); *United States v. Sawicz*, No. 08 CR-287 (ARR), 2020 WL 1815851 (E.D.N.Y. Apr. 10, 2020) (granting compassionate release to a defendant who suffers from hypertension).

As the Court is aware, the coronavirus risk is higher for prisoners, who are unable to practice social distancing and are limited in their ability to take other precautions necessary to reduce likelihood of transmission. District courts in this Circuit have recognized that "a congregate prison environment is inherently unsuited to protecting against the COVID-19 virus" and that the pandemic may thus present an "extraordinary and compelling reason" for release. *See, e.g.*, *United States v. Hill*, No. 3:19-cr-00038 (JAM), 2020 WL 2542725, at *3 (D. Conn. May 19, 2020) (holding that pandemic presented "extraordinary and compelling reasons" for a sentence reduction, reasoning: "[w]hen I sentenced Hill to a term of imprisonment, I did not intend to sentence him to a significant risk of lethal infection at a federal facility"); *United States v. Gileno*, 455 F. Supp. 3d 1 (D. Conn. 2020) (granting compassionate release for defendant who "has demonstrated that he suffers from asthma and respiratory conditions that place him at greater risk from COVID-19, and that he is unable to properly guard against infection while incarcerated"); *United States v. Canini*, No. 04 CR. 283 (PAC), 2020 WL 4742910, at *2 (S.D.N.Y. June 8, 2020) (noting, in finding that the defendant's medical conditions

in the context of the pandemic constituted "extraordinary and compelling circumstances" warranting release, that "[t]he nature of prisons has made recommended social distancing difficult to achieve"). As multiple courts have observed, "[p]risons are 'powder kegs for infection' and have allowed 'the COVID-19 virus [to] spread[] with uncommon and frightening speed.'" *United States v. Salvagno*, 456 F. Supp. 3d 420 (N.N.N.Y. Apr. 23, 2020) (quoting *United States v. Skelos*, 2020 WL 1847558, at *1 (S.D.N.Y. Apr. 12, 2020)).

FCC Coleman, where Mr. Cruz is incarcerated, there has been a recent coronavirus outbreak. FCC Coleman comprises several facilities in close proximity, including USP Coleman I, USP Coleman II, FCI Coleman Medium, and FCI Coleman Low, where Mr. Cruz is housed. Overall, the Coleman complex currently has 67 active inmate cases and 103 active staff cases. *See* U.S. Bureau of Prisons, *COVID-19 Coronavirus* (updated daily), https://www.bop.gov/coronavirus/ (last accessed Oct. 23, 2020). While there are no current inmate cases at FCI Coleman Low, 202 inmates have previously been infected. There are currently 19 active inmate cases at FCI Coleman Medium, where Coleman Low inmates are transferred when they are infected. *Id.*

Throughout the Coleman complex, there are 590 inmates and 30 employees who have reportedly recovered from the virus. *Id.* Three inmates and one staff member have died, prompting a review of the facility by the Office of Inspector General. *See* Stephanie Coueignoux, *Watchdog: Feds Inspect Coleman Prison Following 2nd Coronavirus Inmate Death*, BAY NEWS 9 (Aug. 12, 2020). Moreover, FCC Coleman is located in Sumter County, in an area of central Florida experiencing a widespread community outbreak of COVID-19. Sumter County is currently reporting 2,802 cases of COVID-19, a rate of 2,116 cases per 100,000 people. Florida Coronavirus Map and Case Count, N.Y.

TIMES (updated daily), https://www.nytimes.com/interactive/2020/us/florida-coronavirus-cases.html (last accessed Oct. 23, 2020). And the County borders many areas where the COVID-19 outbreak is even more severe. Given the State of Florida's utter inability to curb the spread of COVID-19, and its Governor's recent decision to fully reopen the State,[11] these numbers will continue to rise.

Mr. Cruz's experience demonstrates the extreme risk to his wellbeing at FCI Coleman. At the Coleman Low, prisoners live in an open cubicle design, with cubicles, rather than cells. The cubicles are eight by ten feet. The space between the top and bottom bunk is three feet. The space between the bunks is 66 inches. In three-man cubicles, it is 24 inches. There are about 150 people in each of the 12 units where he is. It is impossible to socially distance in these circumstances. People who try to bring up the inadequacy of protective measures are threatened by staff to be "sent to the hole or transferred." Mr. Cruz observed that a complaint box for the Office of the Inspector General was mounted for a week, and then taken down.

Accordingly, Mr. Cruz's vulnerability to COVID-19 and the risk presented by his confinement at FCI Coleman constitute extraordinary and compelling circumstances for his release.

E. Compassion and compelling family circumstances warrant a reduction in sentence.

The last reason for ordering release is the first word of the Act. Congress's purpose in enacting Section 603(b) of the First Step Act is revealed in its title:

[11] See Konstantin Toropin & Amir Vera, Florida Governor Signs Order Clearing Restaurants and Bars To Fully Open, CNN (Sept. 25, 2020), https://www.cnn.com/2020/09/25/us/florida-ron-desantisrestaurants-open-trnd/index.html.

"Increasing the Use and Transparency of Compassionate Release." *See United States v. Rodriguez*, No. 03-cr-271-AB (E.D. Pa. Apr. 1, 2020), at 5; *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019).

Compassion for Mr. Cruz and his family provides a compelling reason to reduce his sentence. Compassion is not a zero-sum game: Acting on compassion for Mr. Cruz and his family does not reduce compassion for the White and Diaz family. It simply allows a man who has atoned and reformed to care for his family and continue to pay back society outside of prison.

Mr. Cruz is exceptionally close with his mother, Nitza. Her residence in Tampa is the reason why he is designated at Coleman and, before the pandemic changed everything, she visited him every week. Even though he was serving a life sentence, Mr. Cruz was his mother's rock, and she never stopped praying that someday, somehow, he would be able to care for her in her old age.

Mrs. Cruz's prayers were answered when this Court granted Mr. Cruz's § 2255 motion and re-sentenced him to a term of 35 years. For the first time, they both had an actual calendar date to look forward to, when he would be able to walk out of prison and resume a life with his family. Mr. Cruz has developed two release plans this year. See Exhibits Five (reentry plan of May 3, 2020) and Exhibit Six (reentry plan of August 27, 2020).

When the pandemic struck in March, Mrs. Cruz was no longer able to visit her son, but she still had that release date to look forward to. Then, after Congress passed the CARES Act, it briefly appeared that Mr. Cruz would be permitted to go home even sooner. On the morning of April 3, 2010, Mr. Cruz's case manager, Mr. Felton, called him into his office and informed him he was eligible for release under the CARES Act.

The case manager instructed him to provide, by lunchtime, information about where he would be released to, who he would live with, and who would pick him up. See Exhibit Seven (First Step Act eligibility as of 1/30/2020).

This meant that Mr. Cruz had to call his mother unusually early. She has a respiratory condition which flares up when she is emotionally aroused. He asked her to be calm, and she tried, but she gasped for air and nearly choked when she heard the news. Noel gave his mother his shoes and clothes sizes so that the next time they could go out in the pandemic, they could get him something to wear. Mr. Cruz gave Mr. Felton his release plan. The next few weeks were full of anxious anticipation. On April 29, Mr. Felton called Noel into his office and informed him he would not be released, after all. Noel's first thought was how to tell his mother. Then he asked what the reason was for the change. The answer, given not unsympathetically, was the severity of his crime.

Noel went back to his cube and cried. He told his mother when he could; now, she says, every time he calls at an unusual time, she things it might be because he is coming home.

In an affidavit, Mrs. Cruz tells her side of the story:

> I first heard about inmates coming home because of the pandemic on the news. And then I talked to Noel about it. The next day he called me and told me they told him he's the only one on the list. They made him fill some papers about where he's going to be when he gets out.
>
> We made arrangements for him. We got everything ready. We got his room ready. My son Freddy (Wilfredo) installed an air conditioning unit in the room, because it did not have a connection.
>
> My son Angel set up his own house, too. He already has air conditioning. Noel knew he was going to be allowed at my house because they need two places he's going to be.
>
> We bought him clothes. We got a job ready. We were expecting him to come home.

> After some time I asked him what happened, and he said, "I don't know, Mom, they changed their minds."
>
> We did a lot of work, but it's not just that. It's also mental. I thought my son was coming back. I was waiting, and then it didn't happen. My condition started getting worse. I had to go to the hospital for a few days.
>
> My husband lives in a nursing home. During the time I thought Noel was coming home, he told me, someone visited him. I said, who? He said, "Noel. He came here, and he gave me some food." I started crying and told him it's not true, but that it's going to happen soon. My husband talks about Noel all the time now.
>
> I don't think that I'm going to see him again, and I don't want that. Before they told him he could go home, I couldn't see him because of the virus. Then, I had hope. Now, I just want him to be with me.

Exhibit Eight. Needless to say, the emotional toll of coming so close to having her son home with her has only been exacerbated by the Second Circuit's decision to vacate this Court's § 2255 judgment, which cast doubt on whether Mr. Cruz would *ever* be released.

Mrs. Cruz needs her son. She suffers from Chronic Obstructive Pulmonary Disease (COPD), which makes her particularly vulnerable to severe illness from the coronavirus. She has not been able to see her son for more than seven months. Even if BOP were to reopen visiting at FCI Coleman, Mrs. Cruz would be unable to visit given the grave dangers to her health. (Mrs. Cruz's medical records are being filed under seal.) Previously, one of her nephews had been helping to take care of her, but he has since enlisted in the military and can no longer help. Mr. Cruz wants nothing more than to be able to be with his mother and take up the burden of caring for her. But if his life sentence is reimposed without modification, there is a significant risk that he may never see her in person again.

In 2016, the Sentencing Commission recognized compelling family circumstances as a ground for compassionate release. U.S.S.G. § 1B1.13. Since the First Step Act was

passed, district courts have followed Congress's instruction to *"[i]ncrease* the [u]se . . . of [c]ompassionate [r]elease." In considering these motions, courts have weighed a combination of factors including rehabilitation, acceptance of responsibility, and the petitioner's ability to care for his family and help society outside of prison. *See, e.g.,* U*nited States v. Walker,* No. 1:11 CR 270, 2019 WL 5268752 (N.D. Ohio Oct. 17, 2019) (concluding that the petitioner's "history; the circumstances leading up to his crime; his acceptance of responsibility not just with regard to the conviction but as demonstrated through the meaningful use of his time in prison; the failing health of his mother; his extraordinary job opportunity and the good that it would allow him to do for his family and his community; and, the minimum time left remaining on his sentence" qualify as "extraordinary and compelling reasons" warranting relief pursuant to the First Step Act); *United States v. Bucci*, 409 F. Supp. 3d 1, (D. Mass. Sept. 16, 2019) (concluding that the petitioner's "role as the only potential caregiver for his ailing mother" coupled with the existence of the petitioner's "rehabilitation through his substantial time in prison" which has included "devoting much of his time to care for terminally ill inmates" qualify as "extraordinary and compelling reasons" warranting relief pursuant to the First Step Act). This Court should likewise take account of Mr. Cruz's compelling family circumstances and, in an exercise of compassion, reduce his sentence to a period of time served.

As for Mr. Cruz and his unique situation, there might, before all of this, have been some refuge in the sublime finality of a life sentence. It meant that every good deed he had performed, every act of self-improvement or of charity, if it had any measurable quality to it, had to be measured on a spiritual scale. "This [reform] is commendable for any inmate, but particularly so for an inmate initially sentenced to a lifetime of

imprisonment with no hope for life outside confinement." *United States v. Mondaca*, No.: 89-CR-0655 DMS, 2020 WL 1029024, at *11 (S.D. Cal. Mar. 3, 2020).

As he nourished his soul and steadily turned away from the gang entanglements of his youth, Mr. Cruz discovered that he has a good mind, and life energy left in him to work. This led to a study of the law, which paradoxically brought about the dim faith that some day he might find real relief in a court in this lifetime.

And so he did. He received an end of sentence date, and now shifting dates of release. Because of these changes, his security classification changed. He was transferred from the medium security facility at Coleman—that in itself was a rarity, because most homicide lifers are high security—to the low security facility.

The limbo into which the reversal of this has thrown Mr. Cruz is profound. Now he is in the opposite situation as he was when he began the sentence. He is reformed, yet uncertain whether he will be released soon, or die in prison decades from now. As of August 27, his projected date for home detention eligibility was 9/23/23. Exhibit Nine. Many eyes are on him, on his case, on the authenticity of his atonement.

Even so, Mr. Cruz today is doing what he has done his entire adult life: Pray, work, study, sleep on a cot. He renewed his driver's license. He still works, still translates Christian services, still takes what programs he can. See Exhibit Five, 5/3/20 reentry plan; Exhibit Six, 8/27/20 reentry plan; Exhibit Ten, 8/27/20 Inmate Education Data

III. A sentence of time served is consistent with the sentencing factors under 18 U.S.C. 3553(a).

The 3553(a) factors weigh heavily in favor of Mr. Cruz's release.

The nature and circumstances of the offense are nightmarish: Two young men lost their lives. Both of their families remain grieving. But the Court must also look to the nature and circumstances of the offense as they are reflected in the teenage actions of the offender. Mr. Cruz had tried and failed to leave the Latin Kings. He was ordered at gunpoint by a friend/associate to carry out the mission moments before it was carried out. If he hadn't done as he was told, he would have been the next victim.

The history and characteristics of the defendant are sadly common to most serious felony sentencings. Mr. Cruz grew up violated and disadvantaged by his neighborhood and his father, with a struggling mother. He was shuffled between underdeveloped Connecticut and underdeveloped Puerto Rico. He was as smart as he was influenceable, and his behavior was highly context-dependent.[12] When nourished emotionally and intellectually, the teenager thrived. When fed poison, he was venomous.

What is remarkable about Mr. Cruz—what is extraordinary and compelling—is the direction he took after his first sentencing. In a word, he reformed. This shows characteristics of inner fortitude and morality that were totally obscured at his first sentencing by the phantasmagoria of the Latin Kings trial.

Time served would reflect the seriousness of the offense, because time served is 26 years. The median term of months for murder in the fourth quarter of fiscal year 2019 was 240 or 20 years, according to the Sentencing Commission.[13] A sentence of

---

[12] For a thorough study of how context influences human behavior, see: Robert Sapolsky, *Behave*: The Biology of Humans at Our Best and Worst, Penguin, May 2, 2017.

[13] United States Sentencing Commission, Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2019 Data, Through September 30, 2019, available online at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY19.pdf (last viewed 10/12/20).

time served would promote respect for the law because 26 years is serious, and 26 years acknowledges society's evolving standards of decency. *See United States v. Olhovsky*, 562 F.3d 530, 552-53 (3d Cir. 2008) ("The hideous nature of an offender's conduct must not drive us to forget that it is not *severe* punishment that promotes respect for the law, it is *appropriate* punishment." (emphasis in original)).

If released, Mr. Cruz will strive with all of his strength to be a good citizen. He has already consumed and benefitted from all of the educational and vocational training the BOP has to offer. He trains others now. *See also United States v. Gonzalez*, No. 3:17-cr-00062 (JAM), 2020 WL 2511427, at *3-4 (D. Conn. May 15, 2020) (observing that "[t]he interests of rehabilitation are not advanced by his continuation in BOP custody. Because of the COVID-19 crisis, there are no more prison programs for him.").

Mr. Cruz is now 44 years old. He is, therefore, statistically unlikely to reoffend. Many courts have relied upon recidivism statistics from the Commission in deciding to impose a non-guideline sentence. Using statistical analyses in numerous categories over a fifteen-year period, the Commission has found that recidivism rates are strongly correlated with various factors, including age. *See* U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004). The Commission's Report found that "[r]recidivism rates decline relatively consistently as age increases. Generally, the younger the offender, the more likely the offender recidivates." *Id.* at *12; *see also, e.g.,* U*nited States v. Tucker,* No. 3:00-cr-00246-2, 2019 WL 324423, at *2 (S.D. Iowa Jan. 23, 2019) (granting relief under the First Step Act and noting that "defendant turned fifty last year, an age at which the Sentencing Commission has found that recidivism rate begins to decline substantially" and rejecting the government's concerns because a sentence reduction is

"in the interests of justice and furthers the purpose set forth in 19 U.S.C. § 3553(a)" (citation omitted)).

As for the kinds of sentences available, the range is open. Neither VICAR nor RICO were mandatory, so "[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced," 18 USCS Appx § 1B1.11, and those guidelines are advisory now.

There are no policy statements to consider. Twenty-six years, as discussed, would not be disparately low. And as for restitution, Mr. Cruz has been paying it voluntarily and will continue to do so. [14] It was never ordered at the first sentencing, because he

[14] Mr. Cruz has been voluntarily paying $25 per month to the White family, encompassing upwards of 64% of his gross monthly income. Here is an example of his schedule:

Month	Gross	Payment	% of Gross	Req. 10%	Extra $
Aug-19	$ 127.38	$ 25.00	20%	$ 12.74	$ 12.26
Sep-19	$ 108.10	$ 25.00	23%	$ 10.81	$ 14.19
Oct-19	$ 184.77	$ 25.00	14%	$ 18.48	$ 6.52
Nov-19	$ 122.31	$ 25.00	20%	$ 12.23	$ 12.77
Dec-19	$ 134.42	$ 25.00	19%	$ 13.44	$ 11.56
Jan-20	$ 175.15	$ 25.00	14%	$ 17.52	$ 7.49
Feb-20	$ 127.74	$ 25.00	20%	$ 12.77	$ 12.23
Mar-20	$ 152.33	$ 25.00	16%	$ 15.23	$ 9.77
Apr-20	$ 39.27	$ 25.00	64%	$ 3.93	$ 21.07
May-20	$ 66.84	$ 25.00	37%	$ 6.68	$ 18.32

On October 10, 2020 he informed the undersigned that "today another payment of $25 was sent for the funeral expenses. I was paid $217.90 (I was paid my accumulated vacation time) so I still sent a bit more than the required 10%."

The sentencing court did not order restitution at his original sentencing. When this Court re-sentenced him, it granted a government motion for restitution, but that order has never taken effect. If and when the Second Circuit's mandate is returned, requiring this Court to reinstate the original sentence, the more recent restitution order will be vacated. Suffice it to say, however, that Mr. Cruz is willing to pay restitution to the extent he can and will be in a better position to do so if he is able to work outside of prison.

was expected never to contribute to society again. Now, he can. He has paid, and he will keep paying.

CONCLUSION

For the foregoing reasons, Mr. Cruz respectfully asks this Court to reduce his sentence under the First Step Act and re-sentence him to time served.

Respectfully Submitted,

The Defendant, Luis Noel Cruz

/s/ *W. Theodore Koch III*
W. Theodore Koch III
Fed. Bar #ct26854
CJA Counsel
Koch, Garg & Brown
8 W. Main Street
Suite 3-11
Niantic, CT 06357
Phone: 860-452-6860
Fax: 860-452-6865
ted@kgb-law.com

s/ *Tadhg Dooley*
Tadhg Dooley
WIGGIN AND DANA LLP
One Century Tower
265 Church Street, P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
tdooley@wiggin.com

CERTIFICATION OF SERVICE

I hereby certify that on October 24, 2020, a copy of the foregoing motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent via e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CV/ECF Filing System.

/s/_____
W. Theodore Koch III
Fed. Bar #ct26854
CJA Counsel
Koch, Garg & Brown
8 W. Main Street
Suite 3-11
Niantic, CT 06357
Phone: 860-452-6860
Fax: 860-452-6865
ted@kgb-law.com

21896\82\4840-2042-1583.v3