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

UNITED STATES,	:	
	:	Case No. 2:00-cr-385-1
v.	:	
	:	Judge Padova
KERRY MARSHAL,	:	
Defendant	:	

BRIEF IN SUPPORT OF MOTION REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)

INTRODUCTION

Mr. Kerry Marshall's circumstances are exactly those for which Congress designed the First Step Act. This Court sentenced Mr. Marshall to a 110-month sentence in June of 2001—more than 20 years ago. Technically, that sentence only started running nine months ago, because Mr. Marshall was until February 2021 incarcerated in the Pennsylvania prison system. In total, however, Mr. Marshall has been in prison continuously since 1988, when he was a teenager. Although federal sentences stemming from in-(state)-prison conduct that run consecutive to state sentences are rare but not unheard of, Mr. Marshall's full factual context makes this case extraordinary. First, Mr. Marshall's underlying state sentence was unconstitutional; second, the events giving rise to the sentence in this case stem from exactly the problems the Supreme Court identified with the now-unconstitutional type of sentence he was serving; and third, Mr. Marshall's laudable in-facility conduct

over the last fifteen years reflects such profound rehabilitation that he was resentenced in state court to nearly immediate parole eligibility and very shortly thereafter received parole. As the state court and parole board recognized, his rehabilitation began prior to legal reforms that would ultimately benefit Mr. Marshall—he worked on himself without any hope that it would benefit him within the criminal justice system. Those enormous changes in Mr. Marshall's life, his well-considered home plan and bright future prospects, the more than twenty years that he has already served since his sentencing in this Court, and the ongoing threat posed by the delta variant of COVID-19 in light of Mr. Marshall's high-risk medical conditions, all make out extraordinary and compelling circumstances that support this motion for compassionate release.

FACTS

Mr. Marshall has been imprisoned since 1990, when he received a mandatory sentence of life without parole for conduct that took place when he was 17 years old. As with many juveniles sentenced to life imprisonment in adult prisons at very young ages, Mr. Marshall had a difficult adjustment to prison and to the idea that he would never leave it. The first decade of his incarceration was marked by disciplinary problems, long periods of time in solitary confinement that fostered major depression, paranoia, and anxiety, and, ultimately, grandiose and desperate letters that gave rise to this case—which resulted in this Court imposing a 110-month sentence in June 2001, more than twenty years ago. Since that time, Mr. Marshall's rehabilitation has gained the attention of all those around him—correctional staff, advocates,

prosecutors for the Commonwealth, a state court Judge, the Parole Board, and numerous outside advocates. In order to provide the full context of Mr. Marshall's extraordinary circumstances, this fact section includes facts of his prior sentence and related process, the history of this proceeding, and his subsequent rehabilitation.

Mr. Marshall serves now-unconstitutional mandatory life without parole in the custody of the Commonwealth

In 1990, Mr. Marshall received a mandatory sentence of life without the possibility of parole for conduct he engaged in when he was 17 years old in 1988. As commonly happens with young people serving open-ended sentences of incarceration who believe they will never leave prison, Mr. Marshall experienced several years of difficult adjustment after entering the Pennsylvania DOC. Also similar to other juveniles who enter adult prisons at young ages, Mr. Marshall's problems manifested in misconduct—which in his case led to discipline that the Third Circuit and other courts now recognize is unconstitutional. During the first decade of his incarceration, Mr. Marshall estimates, and extant records corroborate,[1] that he spent more than 90% of his time in solitary confinement. *See* Ex. A (State Court Resentencing Transcript) at 39. And like other juveniles whose brain and emotional development takes place in solitary confinement, during this period of his incarceration, Mr. Marshall's health suffered and prison staff ultimately categorized him as a mental health stability code D, the least stable rating in the DOC. *See* Ex. B (Medical Records) (filed under seal with consent). Mr. Marshall's mental health records

[1] Mr. Marshall's DOC records are incomplete in this regard, lacking misconduct and cell history documents for certain periods during this time.

indicate numerous documented issues. He was diagnosed as suffering from major depression, paranoia, and anxiety; as a result of these diagnoses, he was prescribed anti-psychotic and anti-depressant medications, and spent years on the DOC's mental health roster. *See id.*

Besides his underlying sentence being unconstitutional, Courts now recognize that his long stretches in solitary, and the harms that he experienced as a result, are *also* unconstitutional. Years after Mr. Marshall's time in solitary, the Third Circuit recognized the "scientific consensus" around the harms of solitary confinement, noting that solitary confinement can "trigger devastating psychological consequences, including a loss of a sense of self." *Williams v. Wetzel*, 848 F.3d 549, 563 (3d Cir. 2017). The Third Circuit further observed "[there] is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects." *Id.* at 566 (internal quotation and citation omitted). Another study cited by the Court found that "all [individuals subjected to solitary confinement] will . . . experience a degree of stupor, difficulties with concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli." *Id.* And indeed, Mr. Marshall experienced exactly the harms described by the experts cited by the Third Circuit.

Charges on this docket

Mr. Marshall's mental health issues—fostered by now-unconstitutional long-term solitary during a now-unconstitutional mandatory life without parole sentence—contributed directly to the events giving rise to his prosecution on this

docket. Mr. Marshall was originally charged on June 29, 2000 via a one-count indictment alleging that he conspired with his mother to receive explosives in order to effectuate an escape from custody in violation of 18 U.S.C. § 844(n). Doc. 1 (Sealed Indictment). Those charges arose from letters he sent to a friend and his mother that were intercepted by an officer from the Bureau of Alcohol, Tobacco, and Firearms (ATF). The Government considered the letters to be evidence of his intent to solicit guns and explosives. An ATF officer then conducted an undercover operation that facilitated a meeting between an undercover agent and Mr. Marshall's mother, Patricia Vickers.[2] After Ms. Vickers met the agent and was given a number of firearms and fake explosives, Mr. Marshall was charged with conspiracy to receive explosives in violation of 18 U.S.C. § 844(n) on June 29, 2000. Doc. 1. His mother was also charged. *Id.* (Ms. Vickers proceeded to trial and was acquitted on all charges.)

The sentence in this case reflects Mr. Marshall's circumstances at the time of sentencing. Mr. Marshall entered a guilty plea on June 7, 2001, *see* Doc. 39 (Guilty Plea Agreement), years before either *Miller* or *Montgomery*. This Court sentenced him to 110 months of imprisonment, as well as 3 years of supervised release, a $1,000 fine, and a $100 assessment. Doc. 62. Crucially, that sentence was to run consecutive to his state sentences rather than concurrent with them—a distinction which at the time made no difference to Mr. Marshall, who was serving life without parole. No

[2] This factual summary is based upon the investigative file provided to the Defendant's trial counsel via the discovery process in this case.

sentence imposed by this Court would have then changed Mr. Marshall's certainty of dying in state prison.

Mr. Marshall's profound rehabilitation and changes in law

Since this Court's imposition of a 110-month sentence more than 20 years ago, Mr. Marshall's life has changed substantially. In the years following the imposition of his sentence in this case, Mr. Marshall continued to serve the life without parole sentence imposed in 1990. In the last 15-20 years, Mr. Marshall demonstrated increasing maturity and made a complete transformation. His accrual of misconducts precipitously declined, and ultimately ceased entirely; he has remained misconduct-free since 2010. That success reflected an overall sea change in Mr. Marshall's attitude and state of mind. As Mr. Marshall's misconduct record improved, he made other changes, too: he started participating in rehabilitative, educational, and pro-social programming and community involvement, which made enormous differences in his life and helped him improve the lives of others. Notably, those changes—including participating in programming and reengaging with his education—predated important legal reforms that ultimately benefitted him; his behavior changed even when he still believed he would die in the custody of the Pennsylvania Department of Corrections.

But the law has changed substantially since Mr. Marshall's life turned around, and those jurisprudential changes have in fact benefitted Mr. Marshall. Many aspects of Mr. Marshall's story reflect the considerations that led the Supreme Court to recognize the unconstitutionality of his underlying sentence. After ruling that the

death penalty, and then, life without parole for non-homicide offenses were each unconstitutional punishments when imposed on defendants who were younger than 18 years of age at the time of the offense, *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile death penalty unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (juvenile LWOP for non-homicide offenses unconstitutional), the Court determined that mandatory life without parole sentences for homicide offenses were unconstitutional as well. *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory LWOP for juvenile offenders unconstitutional). Four years later, the U.S. Supreme Court held that *Miller* applied retroactively in the case of *Montgomery v. Alabama*. 136 S.Ct. 718 (2016). This decision opened the door for Mr. Marshall, and a few thousand like him, to be re-sentenced to constitutional terms of confinement.

Mr. Marshall's resentencing and (state) parole

Subsequent to *Montgomery*, Mr. Marshall filed a Post-Conviction Relief Act petition and his state case proceeded to re-sentencing. On May 17, 2018, the LWOP sentence imposed in 1990 was vacated, and he was re-sentenced to 29 years to life by the Honorable Jeffrey Minehart. Ex. A at 16-17. The sentence was ordered to run concurrently with all previously imposed (state) sentences, which made Mr. Marshall immediately parole eligible. *See* Ex. A, at 90-91. The Philadelphia District Attorney's Office supported that sentence, because it agreed with Mr. Marshall and his counsel that a sentence allowing for immediate parole eligibility was appropriate in light of his trajectory of maturity, rehabilitation, transformation, and community service. *Id*. at 7.

Miller and *Montgomery* discuss a number of factors to explain why sentences like Mr. Marshall's initial sentence are unconstitutional. Mr. Marshall reflects nearly all of them, as the Court recognized when setting out the grounds for Mr. Marshall's new state court sentence. Those facts included:

- **Mitigating evidence pertaining to exposure to violence as a child, his age and immaturity at the time of the offense, and the circumstances of the offense**:

Dr. Gerald Cooke, an expert forensic psychologist, testified at Mr. Marshall's re-sentencing that his childhood and adolescence were marked by "violence and negative peer influence," including the "negative role models" of his two older brothers. *Id*. at 26; *see also* Ex. C (Mitigation Packet, Narrative) at 6.[3] Mr. Marshall witnessed violence among his peers and domestic violence in his home. *Id*. at 7. He also witnessed his step-father being shot by police when he was 8 years old. *Id.* Mr. Marshall's early childhood exposure to violence, adolescent exposure to antisocial behavior, and the impulsive and reckless nature of the decision to commit the robbery resulting in his homicide conviction are all factors within the core of concerns identified by the U.S. Supreme Court in *Miller*. *See* 567 U.S. at 471.

- **Mitigating evidence regarding solitary confinement and serious mental health conditions**:

[3] The Mitigation Packet included here as Exhibit C was submitted to the re-sentencing court and reviewed by Judge Minehart prior to the re-sentencing proceeding. *See* Ex. A at 12 ("For the record, I've reviewed Dr. Cooke's evaluation. I've reviewed the material concerning the defendant from the Abolitionist Law Center, which is very detailed and covered a lot of ground.").

Evidence before the state court also explained the context in which the conduct giving rise to the charges in this case arose. At the time of the events leading to this offense, Mr. Marshall had spent the vast majority of his first decade of incarceration in solitary confinement. Ex. A at 39 (testimony of Dr. Cooke that Mr. Marshall spent approximately 13 years in solitary confinement, the majority of which occurred early in his incarceration). Such conditions of isolation are well-documented to exacerbate existing mental illness and generate feelings of depression, anxiety, impulsivity, aggression, and anti-social tendencies. As testified to by Dr. Cooke at the re-sentencing, "It's hard for somebody in solitary to sometimes distinguish what's real and what's fantasy. . . . They tend to develop frustration, anger, rage," which results in people in solitary confinement "get[ting] involved in further misconducts." Ex. A at 40.

- **Positive adjustment trajectory and no misconducts since 2010**

Like other juveniles who eventually adjust to adult facilities and mature, Mr. Marshall's life changed substantially during the course of his incarceration. He has not had a misconduct in DOC custody since 2010. His behavioral trajectory has conformed to the expectation of the *Miller* court. Dr. Cooke further testified that Mr. Marshall now "feels with education and hard work, he can accomplish positive things and be successful," as has been borne out by his DOC record. *Id*. at 45.

- **Extensive participation in and completion of educational, vocational, and rehabilitative programming**:

As Mr. Marshall's misconducts diminished precipitously, his involvement in and completion of programs increased dramatically. Prior to 2005, Mr. Marshall

completed just two programs during his incarceration. Since 2005, Mr. Marshall completed 15 programs. At the time of his 2018 resentencing, Mr. Marshall had recently been accepted into Villanova University's college of liberal arts and sciences, demonstrating his commitment to continue educating and improving himself. Ex. A at 56; *see also* Ex. D (Certificates and Programming Records). Among other programming, he has completed classes in violence prevention (where he was "an outstanding member of the group" who participated in a "deliberate manner that was both beneficial and thought provoking for the class"), training as a library clerk, numerous skills classes in business law and administration, and programs to promote personal growth through victim awareness and character development. *See generally* Ex. D. With the exception of the GED that he obtained shortly after entering DOC custody, the vast majority of this programming has taken place since 2005—around the time that Mr. Marshall's transformation began.

- **Role as a peer educator and mentor and work with community advocacy and human rights organizations**:

Dr. Cooke testified that Mr. Marshall has been "trying to be an educator and a role model throughout much of his incarceration." Ex. A at 24. Mr. Marshall was involved with several initiatives to educate and assist fellow prisoners since early in his incarceration. Following his sentencing in this case, his participation in these activities and commitment to helping has increased substantially. During his time at SCI Houtzdale between 2004-2008, Mr. Marshall, founded a book club, a performing arts program, taught fellow prisoners vocational skills, facilitated courses on restorative justice and social justice issues, and facilitated rehabilitative programs.

At his final state facility, SCI Rockview, reflecting even the state DOC's recognition of his profound rehabilitation, Mr. Marshall was hired by the DOC as a Peer Educator to conduct rehabilitative courses for other prisoners that are often pre-requisites for obtaining grants of parole. Ex. C at 2-3.

In addition to educational work inside the prisons, Mr. Marshall has worked with a wide array of advocacy organizations and prison reform groups, including Citizens United for the Rehabilitation of Errants (CURE), Books Through Bars, the Human Rights Coalition, Real Cost of Prisons, Decarcerate PA, and Prison Radio. *Id.* at 3. He co-founded the Human Rights Coalition, an organization that empowers prisoners' families to advocate on behalf of their incarcerated loved ones, and he has for more than a decade served as Editor in Chief of that organization's magazine, *The Movement*.[4] He informally helped lead Decarcerate PA since that organization's founding in 2011, and became an Advisory Board member in 2016. He has contributed to Prison Radio on a regular basis since 2014. Most recently, he co-founded the Coalition to Abolish Death by Incarceration in 2015. Mr. Marshall has played key roles in each of these coalitions and organizations, and his community advocacy and engagement far surpasses that of many people who live in freedom.

- **Extensive community and family support**:

Finally, the Court was presented with extensive testimony and support letters from Mr. Marshall's family and community. Dr. Cooke opined that if Mr. Marshall is "released to the community, it's my opinion that he has the potential for a very good

[4] *Available at*: https://www.hrcoalition.org/the-movement-magazine

adjustment. He has a lot of family support. He's already been – he has a lot of . . . employment opportunities. He's already demonstrated his involvement of trying to help others and be in a teaching and mentoring role." Ex. A, at 22, 25, and 46. The sentencing court also heard testimony from Gary John, a childhood friend Mr. Marshall has kept in contact with, and his sister, Chenell Vickers, as well as his mother, Patricia Vickers. *Id*. at 62-82.

Mr. Marshall's mitigation packet also included 18 character reference letters recommending a sentence that would allow him to return to his family and community**.** Ex. E (Character Letters). These included letters from family, formerly incarcerated people he has mentored or worked with, mental health professionals, professors, a pastor, and his employment supervisor within the DOC.

At the close of the sentencing proceeding, in recognition of all the foregoing facts, Judge Minehart agreed to impose a sentence of time-served-to-life, making Mr. Marshall immediately parole eligible. In doing so, Judge Minehart sentenced Mr. Marshall to a shorter term than the 35 years to life term set out in the Commonwealth's post-*Miller* sentencing statute, 18 Pa. C.S. § 1102.1(a)(1). Although that statute does not apply retroactively, the Supreme Court of Pennsylvania has instructed courts conducting resentencing proceedings to "seek guidance" from it. *Commonwealth v. Batts*, 163 A.3d 410, 457-58 (Pa. 2017). Judge Minehart set Mr. Marshall's minimum term, in light of his transformation, at 29 years rather than 35 years.

Befitting that sentence, his profound rehabilitation, and the reforms that recognize our collective failure regarding former juvenile lifers, Mr. Marshall received parole not long after becoming eligible. In 2020, Mr. Marshall was granted parole by the Pennsylvania Board of Parole (PBP). As part of his parole approval, the PBP reviewed his home plan, visiting his mother and approving the release plan for Mr. Marshall. Due to his federal detainer, however, he was not released to his home plan, but was instead transferred to Columbia County Prison. He has since been formally transferred to custody of the Bureau of Prisons, and is currently incarcerated at FCI Williamsburg in Salters, South Carolina.

To be clear: Mr. Marshall has only continued this trajectory since entering BOP custody. At FCI Williamsburg, Mr. Marshall has engaged in the same behaviors that led the state court and the PBP to resentence and parole him. He has already taken classes in drug education, he volunteers as a peer facilitator for people experiencing psychological issues, and he is employed through UNICOR. He has also not received a single misconduct or otherwise had a disciplinary incident in BOP custody. Outside community groups also continue to benefit from Mr. Marshall's efforts. The co-founders of G.R.O.W.N., a community mentoring program that partners with the Philadelphia District Attorney, the School District of Philadelphia, and others, have described Mr. Marshall as "instrumental in resolving conflicts with groups of youth through his extensive contacts and community relationships," and "profoundly impactful" as an advocate. Ex. F (G.R.O.W.N. letter). Mr. Marshall continues to exhibit exceptional rehabilitation, despite the stress inherent to switching

environments, the BOP moving him further from his family, and learning that he would not receive federal credit for time served in state custody.

Mr. Marshall has filed this motion because of the extraordinary and compelling circumstances described above, and because of a different change in federal law: the First Step Act.

JURISDICTION

Mr. Marshall has filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c). He has exhausted the required pre-motion administrative procedures under the statute because he submitted a request for compassionate release to Warden George Nye, and the Warden denied that motion. *See* Ex. G (Denial).[5] Because § 3582(c) provides that a person in federal custody may move for compassionate release after making that request and being denied, or making that request and receiving no response after 30 days, whichever comes first, Mr. Marshall's motion is properly before this Court and is ripe for adjudication. *See, e.g.*, *United States v. Harris*, 812 F. App'x 106, 107 (3d Cir. 2020) (per curiam).

LEGAL BACKGROUND

Congress enacted 18 U.S.C. § 3582(c)(1) as part of the Comprehensive Crime Control Act of 1984 to serve as a "safety valve" for Courts to assess whether a sentence reduction is warranted by factors previously addressed by the now-abolished parole

[5] Mr. Marshall submitted his request for Compassionate Release while in BOP custody at Columbia County Jail, prior to his ultimate placement at FCI Williamsburg. Although Warden Nye does not work for the BOP, the Warden's denial specifically noted that he had "been refused by the Bureau of Prisons" to file on Mr. Marshall's behalf. Ex. G at 1.

system. S. Rep. No. 98-225, at 121 (1983). "This legislative history demonstrates that Congress, in passing the Comprehensive Crime Control Act of 1984, intended to give district courts an equitable power to employ on an individualized basis to correct sentences when 'extraordinary and compelling reasons' indicate that the sentence initially imposed on an individual no longer served legislative objectives." *United States v. Millan*, No. 91-CR-685 (LAP), 2020 WL 1674058, at * 5 (S.D. N.Y. Apr. 6, 2020). That statute tasked the BOP with sole authority to bring such motions in the district courts.

Under the Act, Congress delegated to the U.S. Sentencing Commission the responsibility of defining "extraordinary and compelling reasons." *See* 28 U.S.C. § 994(t) ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."). The Commission issued a guideline defining "extraordinary and compelling reasons" to include medical conditions, age, family circumstances, and "other reasons." U.S.S.G. § 1B1.13, app. n.1(A)-(D).

Rather than apply that guidance, the Director of BOP adopted a program statement governing compassionate release that narrowed eligibility. *See* BOP Program Statement 5050.49. The BOP filed motions on behalf of prisoners in its custody only very rarely. In response, the Office of the Inspector General for the Department of Justice eventually concluded that "[t]he BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* (April 2013), at 11, *available at*: https://oig.justice.gov/reports/2013/e1306.pdf. *See also* Dep't of Justice, Office of the Inspector General, *The Impact of an Aging Inmate*

Population on the Federal Bureau of Prisons (May 2015), at 51, *available at*: https://oig.justice.gov/reports/2015/e1505.pdf#page=1 ("Although the BOP has revised its compassionate release policy to expand consideration for early release to aging inmates, which could help mitigate the effects of a growing aging inmate population, few aging inmates have been released under it."); U.S.S.G. § 1B1.13, app. n.4 (admonishing BOP for its past failure to pursue relief on behalf of eligible inmates).

In 2018, Congress passed, and the President signed, the First Step Act to resuscitate compassionate release by, *inter alia*, allowing defendants to directly petition courts for relief, rather than leaving that power solely in the hands of the BOP. *See* 18 U.S.C. § 3582(c)(1)(A). The title of Section 603(b) of the First Step Act—"Increasing the Use and Transparency of Compassionate Release"—leaves no doubt as to Congress' intent in modifying 18 U.S.C. § 3582(c)(1)(A). Indeed, "under the amended statute, a court may conduct such a review also 'upon motion of the defendant,' if the defendant has exhausted all administrative remedies to appeal the BOP's failure to bring a motion, or if 30 days has lapsed 'from the receipt of such a request by the warden of the defendant's facility,' whichever is earlier." *United States v. Decator*, 452 F. Supp. 3d 320, 322 (D. Md. Apr. 6, 2020) (quoting 18 U.S.C. § 3582(c)(1)(A)(i); Pub. L. 115-391, Title VI, § 603(b), Dec. 21, 2018, 132 Stat. 5239); *see also Harris*, 812 F. App'x at 107. In other words, "a prisoner must exhaust the administrative appeal process, or wait 30 days, before his claim may be considered" by the court. *United States v. Underwood*, No. TDC-18-0201, 2020 WL 1820092, at *2 (D. Md. Apr. 10, 2020) (citing cases).

The compassionate release statute empowers courts to reduce a defendant's sentence, now directly upon motion of a defendant, whenever "extraordinary and

compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). Although the Sentencing Commission could have issued new guidance since passage of the First Step Act, it has not done so. Absent updated guidance from the Sentencing Commission, prior Sentencing Commission policy statements do not apply to bind District Courts. *United States v. Andrews*, -- F.4th --, No. 20-2768 (3d Cir. Aug. 30, 2021). Although most circuits allow consideration of "any potentially extraordinary and compelling reasons that a defendant might raise" for compassionate release,[6] the Third Circuit has excepted long, statutorily-mandated sentences and nonretroactive sentencing reductions, as stand-alone facts, from justifying release—although even those facts still bear on a total "sentence-reduction inquiry." *Andrews*, Slip Op. at 13. Instead, the total inquiry must include other stand-alone factors or a combination of facts that in total amounts to extraordinary and compelling circumstances.

In considering motions under the resuscitated First Step Act, Courts have analyzed individual circumstances to find "extraordinary and compelling" circumstances in a variety of ways. Most notably, Courts across the country have held that they are authorized to define "extraordinary and compelling reasons" for release under § 1B1.13 app. n. 1(D) to include the risk of contracting COVID-19, or the elevated risk of suffering severe complications if contracting COVID-19 because of particular medical vulnerabilities. *E.g. Gunn*, No. 20-1959 at *2. But as the Courts of

[6] *United States v. Brooker*, 976 F.3d 228, 230 (2d Cir. 2020); *see also United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, --- F. 3d --- , No. 20-40543 at *8 (5th Cir. Apr. 7, 2021); *United States v. Jones*, 980 F.3d , 1109 (6th Cir. 2020); *United States v. Gunn*, --- F.3d ---, No. 20-1959 at *4 (7th Cir. Nov. 20, 2020) (holding that District Courts may cite any extraordinary and compelling reason to support release absent applicable guidance); *United States v. Aruda*, --- F.3d ---, No. 20-10245 (9th Cir. Apr. 8, 2021) (per curiam); *United States v. McGee*, --- F.3d --- , No. 20-5047 at *14 (10th Cir. Mar. 29, 2021).

Appeals have made abundantly clear, COVID-19 is not the *only* extraordinary circumstance possible—indeed, the Congress that passed the First Step Act could hardly have contemplated the global pandemic, specifically. In the foregoing cases, Courts of Appeals have held that "extraordinary and compelling" circumstances can encompass a number of factors, including "relative youth . . . at the time of their offenses," the amount of time already served, "excellent institutional records," and "substantial steps toward rehabilitation." *McCoy*, 981 F.3d at 286; *see also Brooker*, 976 F.3d at 230 (discussing petitioner having joined drug trafficking conspiracy at age 17 and been indicted at 20); *see also Andrews*, Slip Op. at 13-14 (recognizing youth at time of arrest, substantial rehabilitation, and seven years of no in-facility discipline). They can encompass motions by prisoners serving sentences that are now eliminated, if relief deeming those sentences unconstitutional applies retroactively. *Andrews*, Slip Op. at 12. *See also, e.g.*, *United States v. Maumau*, --- F.3d ---, No. 20-4056, *1 (10th Cir. Apr. 1, 2021); *Brooker*, 976 F.3d at 231; *see also McCoy*, 981 F.3d at 273 (all allowing extraordinary and compelling to encompass prisoners serving sentences later eliminated even non-retroactively). It also includes the existence of a mandatory life sentence with other unique circumstances. *McGee*, No. 20-5047 at *22-23.

Where a District Court finds extraordinary and compelling circumstances, the statute presumes release. The statute presumes that District Courts cannot modify existing sentences unless extraordinary and compelling circumstances warrant a reduction—but once a petitioner makes that showing, "the presumption then effectively shifts in favor of [the petitioner's] release. *United States v. Greene*, No. 71-cr-1913, Doc. 19 at *42 (D.D.C. Feb. 2, 2021) (citing *United States v. Johnson*, 464 F. Supp. 3d 22, 30-31) (D.D.C. 2020)). In light of such a showing, the Court presumes

release and determines whether the factors "set forth in section 3553(a) require keeping [the petitioner] incarcerated nevertheless; that is, notwithstanding the extraordinary and compelling circumstances that would otherwise justify releasing him." *Id*.

ARGUMENT

A. Mr. Marshall's unconstitutional state sentence and long-term solitary confinement, profound rehabilitation, and recognition of suitability for release by the state court and state parole board, together amount to extraordinary and compelling circumstances warranting release.

Mr. Marshall's unique circumstances are extraordinary and compelling. He has been confined for more than 32 years, since he was 17 years old. His conduct that gave rise to the sentence in this case—conduct for which he took full responsibility and for which he pleaded guilty—follows directly from the unconstitutional solitary confinement in which the Pennsylvania DOC kept him confined for almost the entire first decade of his incarceration. The underlying sentence was unconstitutional; the solitary confinement was too. On an unconstitutional sentence, he has served more than 20 years in custody since this Court sentenced him to 110 months. During that time, he has achieved profound rehabilitation, as recognized by DOC employees, prosecutors for the Commonwealth, state court, the Pennsylvania Parole Board, and virtually everyone who has encountered him. These extraordinary and compelling circumstances warrant relief in the form of resentencing pursuant to compassionate release.

First, Mr. Marshall's underlying state sentence contributes to extraordinary and compelling circumstances. Mandatory life without parole for juveniles is

unconstitutional because juveniles "have diminished culpability and greater prospects for reform," *Miller*, 567 U.S. 460, 471 (2012), and only rarely "develop entrenched patters of problem behavior." *Id*. But notably, even at the time *Miller* issued, people serving such unconstitutional sentences were extraordinarily rare—"approximately 2,500" people total out of a total U.S. prison population of more than 2 million people. *See* Nellis, A., *Still life: America's increasing use of life and long-term sentences*, The Sentencing Project (May 3, 2017) at 17. From the very time he started serving that sentence, Mr. Marshall's circumstances were extremely uncommon. And as the Supreme Court has written in both *Miller* and *Montgomery*, those extraordinary circumstances compelled relief.

Second, *Montgomery*'s retroactive application of *Miller* contributes to extraordinary and compelling circumstances here. Retroactive application of substantive criminal justice precedents is extremely rare. *Montgomery* itself only held for the first time that state collateral review courts were "require[d] . . . to give retroactive effect to" new substantive rules announced by the Supreme Court. *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016). In giving it to Mr. Marshall and his more than 2,500 similarly-situated prisoners across the country, the Court did so where it had previously done so only on extraordinarily rare occasions. *See id.* at 747-48 (Thomas, J., dissenting) (describing historical practice and retroactivity doctrine only even dating to 1987). And, as in describing the rule in *Miller* itself, the Court only applied it retroactively in *Montgomery* because extraordinary circumstances compelled that.

Retroactivity also explains why Mr. Marshall's extraordinary situation diverges substantially from the facts of *Andrews*. In *Andrews*, the Third Circuit held that a someone serving a sentence subsequently made shorter by statute, where the statute operates non-retroactively, cannot alone justify compassionate release. *Andrews*, Slip Op. at 10. Mr. Marshall's case diverges from *Andrews* in no small part because he asserts other facts in support of release. But even if he did not, the *Andrews* holding applies to "nonretroactive changes to the § 924(c) mandatory minimums" because "*ordinary practice* is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Andrews*, Slip Op. at 11 (quoting *Dorsey v. United States*, 567 U.S. 260, 280 (2012) (emphasis added). *Miller* is a substantive rule of law located in the constitutional rights of an individual, not a statutory change of the sort the Circuit discussed in *Andrews*. But even if it were only a statutory change, the Supreme Court applying it retroactively in *Montgomery* itself differs from the *Andrews* distinction between retroactive and nonretroactive reforms. Retroactively-applied Supreme Court procedural rights are extraordinary, and they differ entirely from the "ordinary practice" of Congress declining to apply mandatory minimum changes to those already sentenced when it updates statutes.

Third, Mr. Marshall's experience in custody while serving that unconstitutional sentence contributes to the extraordinary and compelling circumstances. Mr. Marshall served nearly the entirety of his first decade in prison in solitary confinement. That solitary confinement is exactly the sort that the Third

Circuit later recognized might "trigger devastating psychological consequences, including a loss of a sense of self." *Williams v. Wetzel*, 848 F.3d 549, 563 (3d Cir. 2017). "[A]ll individuals subjected to solitary confinement will … experience a degree of stupor, difficulties with concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli." *Id*. Mr. Marshall suffered exactly these effects—receiving the most unstable mental health categorization from the state DOC and formal diagnoses for major depression, paranoia, and anxiety, all coextensive with the events giving rise to this case.

Mr. Marshall's solitary confinement contributes to extraordinary and compelling circumstances here both because of what it was, and because of what it was not. Juveniles in adult facilities, like Mr. Marshall, do not typically have access to education resources relevant to their age and background. *See* Equal Justice Initiative, "All Children Are Children: Challenging Abusive Punishment of Juveniles" (2017), at 8.[7] They often cannot see their families, much less engage in age-appropriate socialization with peers. *See id*. And although incarcerated children often end up in prison because of issues with mental health in the first instance, they do not typically have access to the resources available on the outside to treat and manage those issues, either. *Id*. at 12-13. In fact, to the contrary, they often face additional punishment for issues with rule-following and impulse control that are normal to their age group but anathema in prison settings. *See* Campaign for Youth Justice,

[7] *Available at*: https://eji.org/issues/children-in-prison/

"Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America" (Nov. 2007). As with many juveniles who go through adolescence while incarcerated, Mr. Marshall's disciplinary history in his first decade in state DOC custody reflects just those issues.

Fourth, despite all of that, Mr. Marshall's profound rehabilitation over the last two decades contributes to his extraordinary and compelling circumstances. In a complete transformation from his early incarceration, Mr. Marshall has not received a misconduct of any kind in the last eleven years, and virtually none in the five years before that. That shift tracks with other positive changes, including—until interrupted by institutional transfer—his taking college classes with Villanova while in state DOC custody. His record demonstrates his participation in a plethora of rehabilitative, educational, and behavioral programming, 15 programs in all. His participation in those classes has helped change his behavior.

Extraordinarily, Mr. Marshall has not only transformed his own behavior, but has worked to help others. Mr. Marshall long served as a peer educator and mentor to fellow prisoners in the state DOC. He founded a book club and a performing arts program, facilitated courses on restorative justice, and taught vocational skills. Staff at SCI Rockview even hired him as a Peer Educator to work with those seeking state parole. Mr. Marshall's work extends beyond prison walls, as well—he has worked with groups on the outside including Citizens United for the Rehabilitation of Errants (CURE), Books Through Bars, the Human Rights Coalition, Real Cost of Prisons,

Decarcerate PA, and Prison Radio. He has made compelling contributions to advocacy and reform that has benefitted Pennsylvanians across the Commonwealth.

Mr. Marshall has had the time to transform and rehabilitate himself in this extraordinary way in no small part because of the nature of his sentence and the timeline of this case. The underlying acts giving rise to this sentence occurred more than 20 years ago. *See, e.g.*, Doc. 1. Typically, a person filing a motion for compassionate release just nine months after the start of his or her sentence would not have had time to credibly assert profound rehabilitation. But here, the consecutive nature of the state and federal sentences meant that Mr. Marshall has had more than 20 years of rehabilitation time despite a sentence of 110 months in this case. Virtually no person who would seek compassionate release after nine months in federal custody can say the same—and indeed, counsel has not found anyone else so situated.

Fifth, Mr. Marshall's resentencing in state court confirms his extraordinary and compelling circumstances. At his resentencing, the state court imposed a sentence of time-served-to-life—which, because Mr. Marshall had then served 29 years, fell below the guideline minimum of 35 years to life. *See Commonwealth v. Batts*, 163 A.3d 410, 457-58 (Pa. 2017) (instructing resentencing Courts to look to 18 Pa. C.S. § 1102.1(a)(1)). It did this because the Court recognized Mr. Marshall's extraordinary circumstances. In addition to the rehabilitation described above—the decade-plus of clean disciplinary history, his substantial education and programming, his mentorship and work within and outside of prison—the Court's

new sentence reflected Mr. Marshall's bright future prospects. Mr. Marshall has maintained or rebuilt ties with his family and community, including formerly incarcerated people, mental health professionals, professors, the clergy, and non-profit organizations. His robust community support, sensible home and employment plans, and generally bright prospects all make him a compelling candidate for release.

Statistics about the extraordinary group of *Miller* juveniles strongly suggest that Mr. Marshall warrants release, as well. Since *Miller* and *Montgomery*, as resentencings and parole grants have unfolded, people who have won their release have lived up to the social science research that predicted success outside of prison. Their recidivism rate has been almost nonexistent. The state of Michigan recently announced that of 142 juvenile lifers who had been released, there had been *only one* known arrest from within that group. Susan Samples, *Crime by 'juvenile lifers' after prison 'very rare,' state says*, Nexstar Media Group (Aug. 9, 2021). The same is true in Philadelphia, where researchers found a 1.14% recidivism rate among juvenile lifers released after *Miller*. Philadelphia District Attorney's Office, New Study Finds 1% Recidivism Rate Among Released Philly Juvenile Lifers (Apr. 30, 2020) (describing two post-release convictions among 174 juvenile lifers, one of which was for Contempt). These extraordinary statistics are compelling evidence that someone with Mr. Marshall's profile, recognized by state authorities as suitable for release, presents a vanishingly small risk of recidivism.

For all of these reasons, Mr. Marshall's circumstances are extraordinary and compelling, and support this Court's consideration of resentencing pursuant to compassionate release.

B. Mr. Marshall's serious risk of severe complications from the delta variant of COVID-19 independently warrant compassionate release.

The ongoing threat posed to prisoners by the delta variant of COVID-19, combined with Mr. Marshall's advanced age and high-risk health conditions, independently—or in combination with his other extraordinary circumstances—warrants compassionate release. Although Mr. Marshall is vaccinated, Courts have recognized that the delta variant in congregate prison settings presents enormous danger to even vaccinated federal prisoners, if those prisoners have high risk medical conditions. Mr. Marshall, who has asthma and hypertension, CDC-recognized conditions that place him at elevated risk, faces exactly that enhanced risk if he experiences a breakthrough infection.

Courts continue to grant COVID-19 based compassionate release for vaccinated prisoners. In one case, the Court granted compassionate release to a prisoner who had similar CDC-recognized underlying health conditions that placed him at high risk if he experienced a breakthrough infection, 20 years of no misconducts, a commitment to "self-development and personal growth[,] having completed many hours of classes and programs in an array of subjects," and dedicated his efforts to "the rehabilitation of himself and others. *United States v. Cavely*, -- WL --, No. 00-cr-157 (N.D. Okla. July 7, 2021) (Slip Op. at 6-8). In another case, a

vaccinated prisoner with hypertension and diabetes won compassionate release after the court found that he "has demonstrated exceptional rehabilitation" based upon having worked for UNICOR, "furthered his education," having "served as an inmate tutor," and had a chance at "meaningful employment in the future." *United States v. Ford*, -- WL --, No. 10-cr-292-1 (W.D. La. July 2, 2021) (Slip Op. at 4-6). "Being vaccinated does not automatically preclude a defendant from demonstrating 'extraordinary and compelling reasons' justifying as sentence modification." *United States v. Darby*, 2021 WL 2463841, at *2 (N.D. Ohio June 17, 2021) (granting release to vaccinated prisoner). This is especially true in places, like South Carolina, experiencing high levels of breakthrough infections. *United States v. Sweet*, 2021 WL 1430836 (E.D. Mich. Apr. 15, 2021) (describing risk of breakthrough infections).

Mr. Marshall's circumstances are extraordinary in this manner, too. His medical records reflect a history of asthma and hypertension. Those conditions are difficult to control in the prison setting. His prison is in South Carolina, an area experiencing substantial breakthrough infections in no small part because the state is less than half vaccinated. *See* Mayo Clinic, U.S. COVID-19 vaccine tracker: See your state's progress (documenting 50.1% vaccination rate in South Carolina as of Nov. 4, 2021).[8] The national BOP staff vaccination rate—just 52% as of October 4th, according to the BOP, and lower for officers than office staff—is lower than the vaccination rate across the country, and varies across facilities based upon regional and other influences. Courtney Buble, *COVID-19 Vaccine Mandate Could Exacerbate*

[8] *Available at*: https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker/

Understaffing in Federal Prisons, Union Warns, Government Executive (Oct. 5, 2021).[9] In South Carolina, which has a lower rate than the nation as a whole, the percentage of vaccinated officers is likely lower than both 52% and 50.1%, which leaves Mr. Marshall at enormous risk of transmission of the highly infectious delta variant.

The federal government's own information confirms the risk posed to vaccinated prisoners by the delta variant. A recently released CDC study of a COVID outbreak in a federal prison found that transmission rates in the BOP facility were "high, even among vaccinated persons." Liesl M. Hagan, et al., *Outbreak of SARS-CoV-2 B.1.671.2 (Delta) Variant Infections Among Incarcerated Persons in a Federal Prison – Texas – July-August 2021*, MMWR Morb. Mortal Wkly Rep. ePub: 21 September 2021. DOI: http://dx.doi.org/10.15585/mmwr.mm7038e3external. In that facility, even vaccinated prisoners contracted COVID-19 at a rate of 70%. *Id*. The outbreak owed in part to the low vaccination rate of BOP staff, and in fact apparently began when an unvaccinated staff member introduced COVID-19 into the facility. *Id*. While vaccinated prisoners fared better than unvaccinated ones, vaccinated prisoners with high-risk medical conditions like Mr. Marshall nevertheless still face significant danger of contracting symptomatic cases COVID-19, including possibly dying from it.

[9] *Available at*: https://www.govexec.com/management/2021/10/covid-19-vaccine-mandate-could-exacerbate-understaffing-federal-prisons-union-warns/185864/

Given these circumstances, either alone or in addition to his extraordinary and compelling non-medical facts, Mr. Marshall warrants resentencing pursuant to compassionate release.

C. The sentencing factors in 18 U.S.C. § 3553(a) support reducing Mr. Marshall's sentence to time served.

None of the § 3553 factors here justify keeping Mr. Marshall incarcerated despite his extraordinary and compelling circumstances. Resentencing Mr. Marshall to time served would not undermine the seriousness of the offense. No impartial observer would lose respect for the law if this Court released Mr. Marshall. Mr. Marshall's cumulative time served has given him time for profound rehabilitation and has well served society's interest in punishing him. Decisions of the United States Supreme Court, the Philadelphia Court of Common Pleas, and the Pennsylvania Parole Board all reinforce Mr. Marshall's suitability for release. And Mr. Marshall's decade-plus of no misconducts and extensive rehabilitation, as well as his thoughtful and detailed home plan, reflects the likelihood that he would not only succeed at reentry, but would thrive individually and enrich his community.

First, Mr. Marshall has already served an enormous amount of time in prison. He has served more than two decades in prison since this Court sentenced him to 110 months in 2001. If the Government's interests in punishment include promoting respect for the law, Mr. Marshall's long incarceration since the events giving rise to this case have certainly had the desired effect in him—as reflected by his profound rehabilitation. To the extent that the Government's interests in punishment include deterring similar conduct by others, those interests have been served by not only Mr.

Marshall's long subsequent incarceration, but by in-facility punishments more likely to have the desired effect on other prisoners—by definition the only people who might commit the same offense to which Mr. Marshall pled guilty in 2001. Additionally, the legal changes that limit long-term solitary confinement and that mitigate long-term hopelessness and despair in life-without-parole sentenced juveniles will combine to further protect the government's interest in preventing others from engaging in the conduct that gave rise to Mr. Marshall's conviction in this case.

If anything, resentencing Mr. Marshall to time served might go further to *promote* respect for the law. Society now recognizes that mandatory life without parole sentences are contrary to our constitutional norms and greatest ideals, because they put juveniles who have been failed by other societal institutions in impossible situations while in prison. Many of the juveniles serving mandatory LWOP sentences committed offenses resulting in institutional discipline or even other criminal charges while in prison on those now-unconstitutional sentences. *Miller* and *Montgomery* have effected a long-overdue sea change in criminal law, and declining to allow people who should benefit from it to leave prison decades later risks undermining impartial observers' confidence in the justice system and the courts. This is especially true in situations like Mr. Marshall's, where the events giving rise to this sentence included both the foreseeable emotional and inter-personal effects of putting a juvenile in an adult prison with no possibility of parole, *and* the inevitable mental health effects of putting that juvenile in long-term solitary confinement.

Second, Mr. Marshall's rehabilitation has been profound. Accordingly, his existing time served already serves the purposes of § 3553(a)(2)(D). Mr. Marshall's circumstances are unique in that although he has only served nine months of his federal sentence, changes during the 20 years since his sentencing allowed him to heed § 3553's call for rehabilitation. As discussed, Mr. Marshall did exactly what the Courts ask people to do at sentencing. He completed 15 programs on various topics. He completely eliminated in-prison conduct that would lead to discipline, and has received no misconducts in over a decade. He has enrolled at Villanova to further his education. And he has not only helped other prisoners in numerous capacities—including at the behest and in the employ of the Pennsylvania Department of Corrections—but he has engaged with numerous community and advocacy groups on the outside and provided invaluable perspective with unfailing generosity. If Mr. Marshall had been the same person in 2001, this Court would likely have gotten a different PSR and would have imposed a different sentence in the first instance.

Third, Mr. Marshall's well-considered home plan sets him up for success if this Court orders release. If he is released, Mr. Marshall will live with his mother, and will have not only her support, but the support of his sister, his friends, and many other people in the community—people who he has maintained or built ties with during the course of his three-plus decades in prison. The Eastern District of Pennsylvania Probation Office can inspect Ms. Vickers' home, and would find a clean, well-kept space that includes a bedroom for Mr. Marshall. Mr. Marshall also has an offer of employment at the Abolitionist Law Center if he is released, and an invitation

from G.R.O.W.N. to "facilitat[e] classes and becom[e] a frontline advocate in our efforts to decrease violence in the community." Ex. F. These offers will not only help him support his material needs and access healthcare on the outside, but will also allow him to continue work that he finds fulfilling and that serves a vital purpose in our shared communities.

CONCLUSION

Mr. Marshall has experienced what we now recognize as some of the gravest injustices of our criminal justice system. He received an unconstitutional sentence, and experienced exactly the harm to adolescents in adult prisons predicted by research. He was held in unconstitutional solitary confinement for a full decade, and developed exactly the mental health issues predicted by research. Despite all of this, Mr. Marshall has managed an extraordinary feat of rehabilitation and personal growth since the events giving rise to this case more than 20 years ago. He has bettered himself, and served others, inside and outside of the prison walls. The state court and state parole board have recognized his extraordinary transformation and the compelling nature of his journey. This Court should do the same, and grant his motion for compassionate release.

Respectfully submitted,

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Dated: Nov. 5, 2021

CERTIFICATE OF SERVICE

I certify that on Nov. 5, 2021 this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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