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December 12, 2022

BY ECF
Honorable Kiyo A. Matsumoto
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. Charles Watts*, No. CR 92-767 (KAM)

Dear Judge Matsumoto:

Petitioner, Charles Watts, respectfully submits this supplemental letter in support of his Petition for Compassionate Release, to address the Court's inquiry raised in the December 5, 2022 hearing regarding Mr. Watts's sentence in a post-FSA sentencing regime.

The government contended in its December 6, 2021 letter, that under current sentencing protocols, and because he has no criminal history, Mr. Watts would receive a sentence of 47 years, 7 months, based on an asserted offense level of 32 (and choosing, without explanation, the highest sentence of the 121-151 month sentencing range) and the seven years' enhancement for "brandishing" under the revised 924(c) for each of the five 924(c) counts. Petitioner disagrees with the government's assessment of the combined offense level and its application of the brandishing enhancement under the revised stacking provision, and believes if sentenced today, his sentence would range from 37 years, 7 months (10 years lower than the government's calculation) to 34 years (13 years, 7 months lower than the government's calculation).

Critically, however, because the Guidelines are no longer mandatory, the Supreme Court has clarified that a sentencing court – and therefore this Court in reviewing the justness of Mr. Watts's sentence – has discretion to sentence a defendant to *one day* on the non-924(c) counts. *See Dean v. United States*, 137 S. Ct. 1170, 1177 (2017).

In any event, for reasons demonstrated at the December 5, 2022 hearing and the largely unrebutted evidence submitted in Mr. Watts's petition, there is no societal, penological let alone humanitarian purpose to Mr. Watts serving additional time in prison and away from loved ones and a productive role in society. Case law in this circuit fully supports this outcome.

A. The Government's Sentencing Calculations Are Incorrect

1. Mr. Watts Would Not Today Receive 35 Years For Brandishing

The government contends that today, Mr. Watts would receive an additional mandatory seven years for each of the five Section 924(c) counts, served consecutively, resulting in a 35-year minimum enhancement to his base sentence. Petitioner disagrees with this analysis. 18 U.S.C. § 924(c) currently provides that one who (i) "uses or carries a firearm" during a crime of violence shall be subject to a five-year sentence enhancement for each count and that (ii) "if the firearm is brandished" the enhancement is seven years for each count – and that under either subsection, the enhancements must be served consecutively. *See* 18 U.S.C. § 924(c)(1)(A)(i)-(ii)

The problem with the government's calculation is that the five 924(c) counts actually charged to the jury during Mr. Watts's trial do not contain elements referencing brandishing. Each of the 924(c) counts Mr. Watts was then-charged with asked the jury to find whether the "defendant *used* a firearm during the commission of a crime." *See* Watts Presentence Report at 4, Dkt. 103-12 (identifying counts upon which Mr. Watts was convicted) (emphasis added). Because the jury in Mr. Watts's case would not have been asked to find, as part of his then-924(c) charges, that Mr. Watts "brandished" the guns he admittedly possessed, it would be inappropriate under current law to apply the brandishing enhancement today.[1] *See United States v. Waite*, 2022 U.S. Dist. LEXIS 23382, at *8 n.2 (LAP) (S.D.N.Y. Feb. 9, 2022) ("Although Waite's superseding indictment alleged that a gun was either brandished or fired in the commission of each of the four predicate crimes of violence . . . the jury was not asked to issue a special verdict finding that the guns were brandished or fired. Consequently, the mandatory minimum consecutive sentence for each would now be five years"); *United States v. Ezell*, 518 F. Supp. 3d 851, 857, n. 5 (E.D. Pa. 2021) (rejecting seven-year brandishing enhancement based on sentencing court's conclusion because "such judicial factfinding would not be permitted today and, because the jury did not find that Ezell had brandished a firearm, he would have been sentenced to only five years on each" and ordering petitioner released for 18 years of time served of a 132 year sentence); *United States v. Mills*, 2022 U.S. Dist. LEXIS 12237, at *9 n.4 (D. S.C. Jan. 24, 2022) (rejecting seven-year brandishing enhancement because judicial determinations cannot displace jury findings). In addition, the spirit of *Alleyne v. United States*, 570 U.S. 99, 116 (2013) supports Petitioners' view. *See Bias v. United States*, 2020 WL 6263187, at *5 (D. Md. Oct. 22, 2020) ("*Alleyne* requires that allegations supporting a mandatory minimum term of imprisonment must be alleged in an indictment, and either admitted by a defendant at a guilty plea or found by a jury at trial.").

Accordingly, only the five-year statutory enhancement for use/possession – and not the seven-year enhancement for brandishing – could be consecutively added to Mr. Watts offense under current law. Mr. Watts' sentencing enhancement under the five 924(c) counts would be 25 years, not 35 years.

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[1] Petitioners' counsel currently do not have access to the jury instructions or verdict forms, but respectfully suggest that there would have been no reason for the jury to receive an instruction regarding brandishment, given that the counts at issue only required a finding of "use."

2. The Government's Baseline Sentencing Calculation is Too High and Merely Advisory At Best

Petitioner likewise disputes the government's calculation of the baseline offense. The government assesses Mr. Watts's offense level to be 32,[2] which carries a sentence of 121-151 months, and then settles on the higher end of that sentence – albeit without explanation. First, Petitioner contends that the one-level enhancement under 2B3.1(b)(7)(B) calculated by the government for a monetary crime exceeding $20,000 should not apply. The government appears to base its judgment on subjecting the $16,380 value of the robbery committed in August 1990 to an inflationary metric and calculating the present value to be about $34,000. But it does not necessarily follow that Mr. Watts would have stolen more today simply because of inflation; what is in the record is that he stole $16,000. A level 31 offense level produces a Guideline range of 108-135 months. Second, even if the court agreed with the government's level 32 guideline calculation, it need not accept the government's demand to impose the highest end of that 121-151 month range. The lower end of the range of 121 months, would make the baseline sentence to 10 years (for a total of 35 years with the correct 924(c) enhancement), while the middle-point of 136 months, would make the baseline sentence 11 years and 4 months (for a total sentence of 36 years four months).

Critically, the Guideline ranges the government conclusively relies upon are merely advisory. Thus, no sentencing court – and likewise no court considering a compassionate release petition – need even undertake such mechanical calculations. This Court has the discretion to even denominate a predicate sentence of one day, upon which to add the 25-year 924(c) stacking enhancements. *See Benitez v. United States*, No. 17-CR-0572(JS), 2022 U.S. Dist. LEXIS 55707, at *9 (E.D.N.Y. Mar. 28, 2022) ("where it must impose a mandatory minimum sentence under Section 924(c), nothing in Section 924(c) prevents a district court from imposing a just, but minimal, one-day sentence for the predicate crime, so long as the terms run consecutively.") *United States v. Facey*, No. 96-cr-912 (ERK), 2021 U.S. Dist. LEXIS 135236, at *3 (E.D.N.Y. July 20, 2021) (granting compassionate release based on 924(c) sentence disparity and noting that after the defendant was sentenced, "the Supreme Court held that a court is free to sentence a defendant to one day on the non-924(c) counts") (citing *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017)).

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At a more fundamental level, these technical and discretionary – and to some extent metaphysical – assessments about a hypothetical sentence reveal that this should not be the guiding question in evaluating Mr. Watts's petition for compassionate release. This Court should do what Congress has fully authorized it to do: look at the totality of Mr. Watts's extraordinary and compelling circumstances *today* and ask, would additional prison time serve any significant penological, societal or rehabilitative purposes? For the reasons explored in court, in Mr. Watts's supporting evidence and as summarized below, principles of justice and compassion compel his release today, so he can reunite with his family and become a productive member of society.

[2] Petitioner notes that the offense level calculated in 1993 was 30.

B. Additional Prison Time Is Not Warranted

The court revealed that it understood that there are compelling reasons supporting Mr. Watts's Petition. What was also starkly revealed in the hearing is that the government – even after moving away from its demand that Mr. Watts die in prison and conceding it would accept a 47-year sentence – relies upon nothing but a narrow punitive reflex rather than analysis, evidence or reason, to subject Mr. Watts to more prison time. Indeed, if the question before the court is a question of justice and social good, as it must be in sentencing, the government's position would actually do *damage* to Mr. Watts, his family, and society.

Proportionality. As this Court observed, thirty years is a very long time and exceeds on average sentences for murder, kidnapping and terrorism. Looking at Mr. Watts's today, why is thirty years not enough?[3] The government is unable to say, other than elevating comparatively minor prison infractions that it concludes – without a shred of analysis – suggests a current disposition to unlawful conduct.[4] The government brushes aside the reality that it found it perfectly acceptable the imposition of only a 15-year sentence on a co-defendant, who committed exactly the same crimes and whose cooperation was strategically (not ethically) motivated so as to point a finger at Mr. Watts' – who otherwise chose to exercise his constitutional right to a jury trial. Under today's re-calibrated social norms and in light of the remarkable transformation Mr. Watts has undergone in his time in prison, 30 years is a sentence that is sufficient but not greater than necessary to serve the purposes of sentencing.

Recidivism. The court noted that the parties disputed the role of increased age in considering recidivism for gun-crimes. But, this debate was largely at the margins. There is no dispute, as the Supreme Court has repeatedly affirmed, that brain science explains much of the impulsive and reckless behavior of those, like Mr. Watts, who commit crimes in their early 20s.[5]

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[3] Numerous cases show that Judges continue to drastically reduce harsh sentences caused by the 924(c) stacking provision, without assessing the length of sentence under revised provisions. *See United States v. Reid*, 2021 WL 837321 at *5 (E.D.N.Y. Mar. 5, 2021) (Judge Ross reduced petitioner's 119.5-year to 18 years served based on the change in 924(c) stacking provision, rehabilitation, and COVID19 risks); *United States v. Sessoms*, 2021 WL 4592522 (E.D.N.Y. Oct. 6, 2021) (Judge Block reduced petitioner's sentence to 21 years for series of violent robberies because "Mr. Reid was subject to a mandatory 100-year sentence enhancement—tantamount to a death-in-prison sentence—that would not be imposed under today's law"); *United States v. Millan*, 91-CR-685 (LAP) (S.D.N.Y. Apr. 6, 2020) (reducing petitioner's sentence from life to time served of 28 years).

[4] The government revealed that the disciplinary incident referenced in court was for "Possession of an Unauthorized Tool." It involved wires and nail clippers which Mr. Watts, in admitting responsibility, noted is "a stinger to warm up food." *See* https://www.thrillist.com/eat/nation/the-fine-art-of-cooking-in-prison-ingenious-jailhouse-cooking-hacks.

[5] Mr. Watts himself reflects this reality, ECF No. 103-1 ¶ 10 ("Watts Decl.") ("I didn't understand the seriousness of it all."); *id.* at ¶ 13 ("Every day I think about it and can't believe how young, foolish, and selfish I was. It . . .was foolish of me to not understand how terrifying that would be regardless of my intentions"), as do courts considering compassionate release petitions. *United States v. Ramsay*, 538 F. Supp. 3d 407, 417 (S.D.N.Y. May 11, 2021) (reducing sentence from life to 30 years for triple murder at age 18); *cf. United States v. Viola*, 2021 WL 4592768 at *4 (E.D.N.Y. Oct. 6, 2021) (SJ) (denying relief

There is also little dispute that age bears a strongly inverse relationship to recidivism.[6] If the government seemed unconcerned with recidivism risk of Mr. Watts's co-defendant when it agreed to a 15-year sentence for him, what is it about Mr. Watts, still 15 years hence, that poses a greater recidivism risk? Objectively, there is nothing: as the government's latest production to Petitioner reveals, the BOP this year assessed him – even without an understanding of his recidivism-reducing family support or the stable job that awaits him – a "low" recidivism risk.

Rehabilitation. As the court stressed, despite a 90+ year sentence, Mr. Watts did not give into hopelessness, but focused on learning, reflection and supporting his family. He has mustered the strength and resolve many of us must admit we might not have ourselves. Mr. Watts' connection to his family, evidenced in loving and supportive letters the court referenced repeatedly, was put profoundly on display in the courtroom. Given that he has accepted responsibility, exhibited empathy toward his victims and reflected deeply on how his future path will be a confirmed rejection of all the behaviors that led him to his earlier crimes, there is no more to learn or to be punished for by continued incarceration. *Pepper v. United States*, 562 U.S. 476, 477 (2011) ("The extensive evidence of Pepper's rehabilitation since his initial . . . provides the most up-to-date picture of his "history and characteristics." (citing 18 U.S.C. § 3553(a)(1))).

* * *

What purpose would 17 more years of institutionalization serve? Or even 5? In 17 years, even Mr. Watts's grandchildren will be grown and Mr. Watts will not be able to work. Perhaps family would become sick or pass away; Mr. Watts' himself would be 69 years old and potentially dependent on social services provided by the state. Even in 5 or 7 years, his guarantee of a job may disappear; he would have been unable to care for the infants the court heard cooing in the courtroom; his own children would lose additional years of direct support, mentorship and transcendent power of physical embrace. Additional time will only produce additional pain and loss. *See United States v. Bannister*, 786 F. Supp. 2d 617, 653 (E.D.N.Y. 2011) (Weinstein, J.) (documenting destructive ramifications of incarceration on families and communities, particularly Black families and communities). His family has been speaking with Mr. Watts every day while at MDC, buoyed by the possibility of his homecoming.

After 30 years in prison, Mr. Watts has earned his freedom. This Court is empowered by law – and by justice – to grant it to him.

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in part because "Viola was not a youth at the time of his offenses, nor were they momentary lapses in judgment").

[6] For those under thirty, the recidivism rate is 54.8%; for ages 50-59, it drops to 26.8%. U.S. Sentencing Commission, The Effects of Aging on Recidivism Among Federal Offenders (2017); *see also* U.S. Sentencing Commission, Recidivism of Federal Firearms Offenders Released in 2010 (2021) (observing age-based reduction for those convicted under 924(c) stacking).

Respectfully submitted,

/s/ *Baher Azmy*

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