DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 22-CO-650

Summary Calendar: October 18, 2023

Leonard E. Bishop,

Appellant

v.

United States of America,

Appellee

Appeal from the Superior Court of the District of Columbia
Criminal Division

APPELLANT LEONARD E. BISHOP'S REPLY BRIEF

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ARGUMENT

The 2016 Incarceration Reduction Amendment Act (IRAA), amended in 2019 and again in 2021, represents the D.C. Council's legislative recognition that juveniles and emerging adults who commit crimes are less culpable and less deserving of the most severe punishments. D.C. Code § 24-403.03 (as amended Apr. 2021); App. 43-46 (D.C. Council, Report on Bill 21-0683 at 3-4, 11-14 (Oct. 5, 2016)); App. 32-34 (Councilmember Charles Allen Mar. 2019 Ltr. to U.S. Attorney Jessie Liu); *see* App. 58-60 (D.C. Council, Report on Bill 23-0127 at 17-19 (Nov. 3, 2020)). As the legislature's words and actions show, the purpose of IRAA is to avoid the unjust waste of human capital by reducing the incarceration of individuals who as juveniles bore diminished culpability and as adults now show growth, maturity, empathy, and rehabilitation. App. 32-33 (Allen Mar. 2019 Ltr.). While not intended as a "rubberstamp for release," Gov. Br. 25, the Council did intend for IRAA to remedy constitutionally problematic and disproportionately harsh sentences that had been meted out to young offenders. *See Williams v. United States*, 205 A.3d 837, 846 (D.C. 2019). And as a remedial statute, IRAA "should be liberally construed for the benefit of the class it is intended to protect." *Maldonado v. Maldonado*, 631 A.2d 40, 42 (D.C. 1993); *see also McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983).

In his opening brief, Bishop argued that the trial court failed to construe

IRAA properly in his case, relied on reasoning inconsistent with the statutory text and policies meant to guide its discretion, and improperly ignored favorable facts in the record, thereby abusing its discretion. Bishop Br. 26-50. Among its errors, the trial court relied on an outdated version of the statute, failed to accord mitigating weight to the diminished culpability of young adults in general and of Bishop in particular, and improperly considered the violent, heinous nature of the crime. *See id.* at 32-46. That flawed analysis impermissibly distorted the trial court's ultimate determinations of whether Bishop is currently "a danger to the safety of any person or the community" and whether "the interests of justice warrant a sentence modification." D.C. Code § 24-403.03(a)(2) (2021). Bishop therefore requested that this court reverse and remand for resentencing.

Mischaracterizing several of Bishop's arguments and inappropriately importing legal standards from inapposite bodies of law, the government defends the trial court's order as a "thoughtful and measured" exercise of discretion while minimizing the significance of the trial court's errors. Its arguments do not survive closer scrutiny and cannot redeem the trial court's flawed ruling.

I. The proper burden of proof on IRAA applicants is a reasonable probability standard.

As an initial matter, the government is wrong about the defendant's burden of proof in IRAA proceedings. *See* Gov. Br. 21-22. This court has not held (and the D.C. Council has not legislated) that an IRAA applicant's burden of proof is by

a preponderance of the evidence. *See Williams, supra*, 205 A.3d 837; D.C. Code § 24-403.03. On the contrary, because *Williams* repeatedly equates the IRAA remedy to parole – an essential element of its holding that IRAA adequately remedies the problem of otherwise unconstitutional life without parole sentences for juveniles – the appropriate burden of proof on an IRAA applicant is the same reasonable probability standard as for parole. *Williams, supra,* 205 A.3d at 841, 847-48 & n.54, 849, 850, 851 n.66 (recognizing "the essential equivalency" of IRAA and parole judicial review and parole's statutory reasonable probability standard set forth in D.C. Code § 24-404(a)). As *Williams* observes, "the judicial hearing required by the IRAA is [not] inferior to a parole hearing from the defendant's point of view" and "compares quite favorably" with parole consideration. *Id.* at 852-53. The burden of proof on the defendant in an IRAA proceeding should therefore not be greater than the burden of proof for parole. Requiring a defendant to show a reasonable probability that he is "not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification" is also consistent with IRAA's legislative purpose of providing youth a "meaningful and realistic opportunity to obtain release before the end" of their lengthy sentences. D.C. Code § 24-403.03(a)(2); *Williams, supra*, 205 A.3d at 843 (quoting *Graham v. Florida*, 560 U.S. 48, 69 (2010)); *see also id.* at 849; *id.* at 840 (quoting *Miller v. Alabama*, 567 U.S. 460, 479 (2012)).

Although the government cites to *Williams*, it ignores the import of the court's analysis for Bishop's burden of proof and instead equates IRAA proceedings to compassionate release cases. Gov. Br. 22 (citing *Bailey v. United States*, 251 A.3d 724, 729 (D.C. 2021)). The preponderance of the evidence civil default standard may be appropriate for compassionate release applicants because it aligns with the burden of proof in comparable federal compassionate release cases, *Bailey, supra*, 251 A.3d at 729-30, but that civil default cannot trump the legislative purpose and effect of IRAA to provide a remedy at least as powerful as the remedy of parole. This court should thus reject the government's effort to impose a heightened burden of proof on Bishop and should instead explicitly adopt the reasonable probability standard identified in *Williams*.

II. The standard of review for expedited preventive detention appeals does not apply to IRAA appeals.

The government also errs in relying on preventive detention cases to describe this court's standard of review, including twice stating that the trial court's inquiry into dangerousness is essentially a factual issue. *See* Gov. Br. 22-23. Those cases are inapposite here, and the court's appellate review of IRAA decisions for abuse of discretion is more robust than the government claims.

First, unlike the remedial IRAA statute, the statute governing the expedited appeal from conditions of release explicitly limits this court's review of a preventive detention order, requiring affirmance "if it is supported by the

proceedings below." D.C. Code § 23-1324(b); *see, e.g., Sharps v. United States*, 246 A.3d 1141, 1159 n.90 (D.C. 2021); *Bradshaw v. United States*, 55 A.3d 394, 396-97 (D.C. 2012); *Pope v. United States*, 739 A.2d 819, 824 (D.C. 1999). That explicit limitation makes sense, given the nature of preventive detention appeals. Unlike IRAA, pretrial detention also requires a showing "by clear and convincing evidence that no condition or combination of conditions will reasonably assure … the safety of any other person and the community," D.C. Code § 23-1322(b)(2), and the government, not the defendant, bears that burden. *See Blackson v. United States*, 897 A.2d 187, 195-96 (D.C. 2006). And although the statute governing pretrial detention, like IRAA, requires the trial court to consider multiple factors, the factors are not the same in the two statutes, and the corresponding analyses of a defendant's dangerousness are therefore also not the same. *Compare* D.C. Code § 23-1322 *with* § 24-403.03. In other words, the statutory language, context, burden of proof, and analytic framework in IRAA proceedings are different, and the court should reject the government's effort to import into them law specific to preventive detention.

Instead, *Williams* clarifies that IRAA decisions require meaningful and effective appellate review for "compliance with constitutional and other legal requirements and for abuse under well-established standards of reasonableness; it is far more amenable to review, we would add, than a parole board decision to

deny parole." *Williams, supra*, 205 A.3d at 854; *see id.* at 848, 853. *Williams* does not suggest, nor would it have had a basis to suggest, that the effective appellate review of IRAA decisions for abuse of discretion is analogous to the limited scope of review of expedited pretrial detention orders.

Moreover, in distinguishing the review of IRAA decisions and parole determinations, *Williams* acknowledges the principle, also recognized in *Johnson v. United States*, that not all abuse of discretion review is the same: the appellate review of "a trial court's exercise of discretion … can be either more intrusive or more restrained, as the occasion requires." *Johnson v. United States*, 398 A.2d 354, 366 n.9 (D.C. 1979); *see Williams, supra*, 205 A.3d at 852-53 & n.76 (discretionary IRAA decisions more fully reviewable than discretionary parole assessments). *Cf. Davis v. Moore*, 772 A.2d 204, 221 (D.C. 2001) (recognizing abuse of discretion review of parole decisions); *Mason v. United States Parole Comm'n*, 768 A.2d 591, 594 (D.C. 2001) (same); *Stevens v. Quick*, 678 A.2d 28, 31 (D.C. 1996) (same). Here, the enumerated statutory criteria set forth by the Council combined with IRAA's remedial purpose of providing formerly-young offenders a realistic opportunity to obtain release based on their diminished culpability and their maturation mean that appellate review is less restrained than in preventive detention appeals. *See Williams, supra*, 205 A.3d at 854 ("IRAA itself clearly sets forth the criteria that the court must consider"); *see also Johnson,*

supra, 398 A.2d at 366 ("in reviewing a trial court's exercise of discretion, an appellate court should take cognizance of the nature of the determination being made and the context within which it was rendered.").

Thus, while the trial court's dangerousness finding here is a discretionary determination (not essentially a factual issue), that discretion is constrained by legislative guiderails and is subject to effective appellate review. As part of that review, this court "must determine whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion." *Johnson, supra*, 398 A.2d at 365 (internal quotation marks omitted). When, as here, "the trial court's decision is supported by improper reasons, reasons that are not founded in the record, or reasons which contravene the policies meant to guide the trial court's discretion or the purposes for which the determination was committed to the trial court's discretion, reversal likely is called for." *Id.* at 367. For the reasons identified in Bishop's opening brief and herein, the trial court abused its discretion in this case, and the court should not sustain its decision.

III. Relying on the wrong version of the statute, the trial court misinterpreted factor (c)(10) in contravention of IRAA's text and remedial purpose.

As amended effective 2021, factor (c)(10) of IRAA includes two distinct yet related parts, and contrary to the government's arguments, the trial court here

exercised its discretion erroneously with respect to both of them.

The first part of factor (c)(10) is a categorical directive to the trial court to consider the diminished culpability of juveniles "and persons under age 25, as compared to that of older adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to lengthy terms in prison, despite the brutality or cold-blooded nature of any particular crime."[1] D.C. Code § 24-403.03(c)(10) (2021). The plain language of the text, standing alone and in the context of the full statute, directs the trial court to weigh the diminished culpability and hallmark features of youth in favor of IRAA relief in all cases. *See* Bishop Br. 38-41. The language in this part of factor (c)(10) is not individualized, and a trial court thus has discretion only to determine how to balance the favorable weight of these features with the other factors of subsection (c). It may not decline to accord *any* favorable weight to factor (c)(10). *Id.*

Although the trial court here stated that it considered "the 'mitigating qualities of youth' that are … the basis for the D.C. Council's enactment of the IRAA," the only indication of any consideration is its neutral (at most) finding "that Mr. Bishop's age and circumstances at the time of the offense surely

[1] In his opening brief, Bishop – like the trial court – misquoted the first part of the amended factor (c)(10), omitting "and persons under age 25." Bishop Br. 20, 38. That inadvertent omission does not change Bishop's argument or analysis.

contributed to his actions that day." App. 22. But that language falls short of the consideration required by factor (c)(10): it does not recognize the mitigating effect of the diminished culpability of young people, including Bishop, by virtue of their age, and it gives no favorable weight to its "surely contributed" finding. In fact, contrary to the government's assertion, Gov. Br. 33, the trial court's order nowhere acknowledges the mitigating role that Bishop's youth played, "despite the brutality or cold-blooded nature of [his] crime." D.C. Code § 24-403.03(c)(10) (2021).

Instead, the trial court considered and answered the wrong question – whether Bishop personally demonstrated hallmark features of youth – for the first part of the factor (c)(10) analysis and in so doing relied on improper factors. The government does not (and cannot) argue that the trial court had any factual foundation for claiming that Bishop's "record of violence and criminality before" the 1994 shootings involved no "youthful impulsiveness," App. 22-23, and it does not (and cannot) defend the trial court's failure to acknowledge that the 1994 shootings themselves manifested other hallmark features of youth such as the failure to appreciate risks and consequences. *See* Bishop Br. 41-42 & n.164. Nor does the government try to explain how events in Bishop's record while incarcerated relevantly reflect on his culpability in 1994. *See id.* at 42. And the government does not try to explain how the same trial court can reasonably characterize the 1994 crimes here by two 19-year-olds as both evidencing and not

evidencing youthful impulsiveness. *See* Bishop Br. 41 n.161. The trial court's exercise of discretion with respect to the first part of factor (c)(10) was thus erroneous in multiple ways.

The second part of factor (c)(10) is a new clause added by the Council in 2020 that allows the trial court to further amplify the favorable weight of factor (c)(10) based on specific individualized consideration of "the defendant's personal circumstances that support an aging out of crime." D.C. Code § 24-403.03(c)(10) (2021). But the trial court's order does not include that new clause anywhere, an omission that the government calls inadvertent. Gov. Br. 26. Inadvertent or not, the trial court failed to apply the applicable version of the statute in its assessment of factor (c)(10), and that failure to undertake a required factual inquiry into Bishop's "personal circumstances that support an aging out of crime" is an abuse of discretion.

The plain text of the new clause ending factor (c)(10) is a one-way ratchet in favor of IRAA relief: it does not direct the trial court to consider personal circumstances that *do not* support an aging out of crime or permit it to weigh factor (c)(10) against granting IRAA relief.[2] *See* Bishop Br. 33, 40, 42. The government

[2] Based on the text of IRAA, those personal circumstances are more appropriately considered in the assessment of factors (c)(3) and (5): whether a defendant has substantially complied with institutional rules, and whether he "has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction." D.C. Code § 24-403.03(c)(3) & (5).

is thus wrong to suggest that the trial court properly applied the last clause of factor (c)(10) when it found that Bishop's record of violence after the 1994 crime weighed against finding youthful impulsiveness. Gov. Br. 27 (quoting App. 22-23). The trial court did not consider Bishop's later record as "personal circumstances that support an aging out of crime," only (improperly) to determine that Bishop was not impulsive in 1994. *See supra*.

That the trial court wrote about Bishop's childhood emotional trauma, its connection to his violent crime, his rehabilitative successes, and Dr. (Snably) Robinson's report[3] in the course of discussing other factors does not absolve the trial court of its failure to recognize or apply the new language of factor (c)(10). The failure to undertake the statutorily-required inquiry and the failure to favorably weigh factor (c)(10) prejudiced Bishop by distorting the legislature's statutory scheme, rendering it ineffective and impairing the trial court's ability to fairly weigh the mandated considerations. Because factor (c)(10) embodies one of IRAA's key animating principles, the trial court's disregard for it also contravened the Council's purpose. This court cannot be fairly assured that but for the trial court's factor (c)(10) and other errors, the outcome would have been the same.

[3] As Bishop noted in his opening brief, Dr. Snably's name changed to Dr. Robinson before the June 2022 hearing. To avoid confusion, Bishop referred to her in his brief as Dr. Snably, like the trial court did in its order. Bishop Br. 3 n.9. The government's brief, however, refers to her as Dr. Robinson.

IV. The trial court improperly relied on the violent, heinous nature of Bishop's 1994 offense as a reason to deny his IRAA motion.

The trial court further erred when it used the violent, heinous nature of Bishop's crime of conviction as a non-negligible reason for denying his IRAA motion, and the government's arguments to the contrary do not withstand scrutiny. First, the government defends the trial court's decision by using compassionate release caselaw to highlight the supposed "predictive value" of a prisoner's past crimes. Gov. Br. 30 (quoting *Bailey, supra*, 251 A.3d at 733). But whatever the nature of an offense may augur for a mature adult who later seeks compassionate release, IRAA is founded on the insight that what is past is not prologue for former youthful defendants decades out from their crimes. Bishop Br. 29-30. Given youth's great capacity for rehabilitation and growth, the nature of Bishop's 1994 crime lacks predictive value for his future behavior or dangerousness almost 30 years later. The trial court's reliance on the violent nature of Bishop's crime while overlooking the ways his youthful cognitive development diminished his culpability for even heinous, violent behavior impermissibly contravened the policies meant to guide the court's discretion here.

While the Council contemplated that trial courts would consider details about the crime of conviction as a baseline and context for gauging rehabilitation and current dangerousness, *see* Bishop Br. 36, App. 59-60, 80, that is not what the trial court here did, and the government does not claim otherwise. *See* Gov. Br. 30-

31 (not arguing that the trial court merely referred to Bishop's crimes as "a baseline set of facts from which … to determine whether [Bishop] is a danger to the safety of another or the community").

Criticizing Bishop's ellipses, the government asserts instead that any reliance by the trial court on Bishop's crimes of conviction "plainly had no effect on its decision," because the trial court was more troubled by Bishop's disciplinary history. Gov. Br. 31. The government is wrong. While the trial court did rely on Bishop's disciplinary history as another reason to support its dangerousness and interests of justice determinations (as Bishop acknowledged, Bishop Br. 37), it is far from plain that the violent, heinous nature of the 1994 crime played a negligible part in the court's reasoning. The trial court's emphasis on the 1994 crimes in both its dangerousness and interests of justice analyses cannot be so neatly divorced from its ultimate determination. *See* App. 23-24.

Moreover, *Griffin v. United States*, 251 A.3d 722, 723-24 (D.C. 2021), which the government quotes, is easily distinguishable here. Gov. Br. 31. In that compassionate release case involving an adult offender, the trial court's primary reason for denying compassionate release was that the defendant, appearing rehabilitated, had then committed a second murder more than thirty years after the first murder. *Griffin, supra,* 251 A.3d at 723. The "overriding weight" of that fact rendered the trial court's independent and irrelevant consideration of general

deterrence harmless. *Id.* Here, unlike the irrelevant consideration in *Griffin*, the trial court's improper reliance on the nature of the offense in its analysis represents the precise harm that the Supreme Court warned about in *Roper v. Simmons* and that the D.C. Council took to heart in its 2018 IRAA amendments: the "unacceptable likelihood… that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." *Roper v. Simmons*, 543 U.S. 551, 573 (2005); *accord*, D.C. Code § 24-403.03(c)(10); *see* Bishop Br. 40.

The government also mischaracterizes Bishop's argument. Bishop does not challenge the amount of weight that the trial court placed on the nature of his 1994 crime or any failure to apply some predetermined balancing formula. *See* Gov. Br. 29.[4] Rather, Bishop argues that the fact that the trial court placed some non-*de minimis* weight on the nature of Bishop's crime as a reason to deny his IRAA motion constitutes an abuse of discretion. In other words, the trial court's failure to use that crime only to provide context and serve as a baseline skewed its exercise

[4] The government again cites preventive detention caselaw to support its claim, positing that it is not this court's function to engage in discretionary balancing committed to the trial court. *See* Gov. Br. 29. The government's "cleaned up" quotation from *Sharps, supra*, 246 A.3d at 1159 n.90, neglects to indicate that the court was quoting another preventive detention case, *Blackson, supra,* 897 A.2d at 197-98. In *Blackson*, this court noted, "it is not our function *in a bail appeal* to engage in the discretionary balancing of relevant factors that is committed to the trial court," but it then proceeded to make an exception to that rule and reversed the trial court based on the facts before it. *Id*. (emphasis added).

of discretion to a degree that this court cannot ascertain on appellate review.

In addition, Bishop's arguments are not rendered "implausible" by the different outcome in his co-defendant Brown's IRAA proceeding. Gov. Br. 32. Reached separately at a different time and supposedly reflecting individualized considerations, the Brown decision does not reasonably lead to an inference that the trial court was not improperly motivated in Bishop's case by the violent, heinous nature of the 1994 crime.[5] The different outcome for Brown neither cures nor justifies the trial court's errors in this case.

V. The trial court wrongly failed to recognize Bishop's individualized lessened culpability for the 1994 crime and to incorporate it into the interests of justice determination.

In his opening brief, Bishop argued that the trial court improperly ignored the mitigating nature of his individualized diminished culpability, failing to incorporate it into the determination of the interests of justice. Bishop Br. 43-46. Although the trial court specifically addressed information about Bishop's age and emotionally traumatic history, it never acknowledged that the information reduced his culpability and should weigh in favor of IRAA relief, either in its discussion of the individual factors (c)(1), (2), or (8), or in its final assessment of the interests of

[5] Notably, the trial court did not treat the nature of that crime the same way in both orders. *Compare* App. 112 (characterizing Brown's 1994 offense as "evidenc[ing] the impulsiveness of youth") *with* App. 23 (refusing to find in Bishop's case that the same 1994 offense was "mere youthful impulsiveness").

justice.[6] *Id.* at 44-45. Nor did it acknowledge the diminishing effect on culpability of young adults "act[ing] in concert with others" with respect to factor (c)(9). *Id.* at 45.

The government mischaracterizes Bishop's argument and thus misses its point. Again, Bishop's objection goes not to the *amount* of weight the trial court afforded factors (c)(1), (2), (8), and (9) in its overall discretionary balancing, Gov. Br. 34. His objection goes to the lack of *any* weight afforded them, in contravention of the statute's mandate to consider all of the enumerated factors. Bishop does not argue that the trial court "was required to restate its full analysis in the final section of its opinion." Gov. Br. 34. But a reviewing court cannot be confident that, consistent with the policy animating IRAA, a trial court in fact has recognized the mitigating aspects of certain factors or their relevance to the interests of justice if the trial court does not acknowledge and give weight to them somewhere in its decision, whether in the discussion of the individual factors or in the ultimate analysis of the interests of justice.[7]

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[6] One could even read the trial court's order as reflecting an improper belief that Bishop's childhood adversities enhanced, rather than lessened, his culpability. *See* App. 8-9, 21-22.

[7] Similarly, without findings by the trial court to resolve the parties' dispute about Dr. Snably's forensic mental health report, this court cannot determine whether the trial court properly exercised its discretion by incorporating consideration of the report into its dangerousness and interests of justice analyses. The government's assertion to the contrary is thus wrong. *See* Gov. Br. 35 n.9.

VI. The trial court ignored favorable facts relevant to the consideration of factor (c)(3).

The trial court also exercised its discretion erroneously in its assessment of factor (c)(3) by ignoring favorable facts related to Bishop's institutional programming and disciplinary record. For instance, it ignored the record evidence of classes and counseling groups in which Bishop participated at FMC Lexington, an omission the government neither acknowledges nor defends. Bishop Br. 48; *see* Gov. Br. 35-36.

The government does try to defend the trial court's failure to consider evidence of Bishop's successful programming in the Special Management Unit (SMU) at USP Florence, asserting that Bishop's placement in an SMU "is itself evidence of continuing dangerousness." Gov. Br. 36. Although inmates who "present unique security and management concerns" are designated to SMUs, the SMU programming that Bishop successfully completed in a mere four months was a therapeutic program designed to help overcome those security concerns.[8] BOP,

[8] The government quotes a 2016 revised description of the SMU program that was not in effect when Bishop spent four months there. *See* Gov. Br. 7-8, 36 (quoting BOP, Program Statement P5217.02, *Special Management Units* (Aug. 9, 2016), https://www.bop.gov/policy/progstat/5217_02.pdf). In contrast to the 2016 version, the prior Program Statement P5217.01 that was in effect in 2014 sets forth a four-level non-punitive program consistent with the descriptions by John Fox and Jack Donson in this case. *See* BOP, Program Statement, P5217.01, Special Management Units (Nov. 19, 2008), https://www.bop.gov/policy/progstat/5217_001.pdf; *see also* S.R.3 (Exh. 1 at 28, Fox Report); S.R. 5 (Exh. 34 at 6, Donson Affidavit).

Program Statement, P5217.01, *Special Management Units* (Nov. 19, 2008), https://www.bop.gov/policy/progstat/5217_001.pdf (last accessed Sept. 29, 2023). Like the highly-regarded BOP Challenge Program,[9] the inmates who participate in this type of cognitive-behavioral therapeutic program do not enter the program as model inmates who have already completely mastered all the necessary skills for responsible, positive community behavior. Instead, the non-punitive programming helps inmates learn and grow so they no longer "present unique security and management concerns." *Id.* at 1.

At the time Bishop was assigned to the SMU, inmates were expected to complete the four-level program in 12 to 24 months, at the end of which they would return to the BOP general population. *Id*. Successful progression through the levels required compliance with behavioral expectations and positive community interaction, with "value-driven" counseling that "involve[d] cognitive restructuring, and emphasize[d] responsibility and accountability." *Id.* at 8-10. Contrary to the government's claim, the fact that Bishop successfully completed the program in one-third the minimum expected time is powerful evidence of his

[9] The BOP's "Challenge Program is a cognitive-behavioral, residential treatment program…. [that] provides treatment to high security inmates with substance abuse problems and/or mental illnesses. … In addition to treating substance abuse disorders and mental illnesses, the program addresses criminality, via cognitive-behavioral challenges to criminal thinking errors." BOP, *Directory of National Programs: A practical guide highlighting reentry programs available in the Federal Bureau of Prisons* at 10 (Sept. 13, 2017), https://www.bop.gov/inmates/custody_and_care/docs/20170913_Directory_of_National_Programs1.pdf.

"sustained ability to coexist and interact appropriately with other individuals and groups," his ability "to look toward the future, … and [his] ability to prepare [himself] for eventual reentry to society." *Id.* at 9-10. Despite this rehabilitation following (and likely occasioned by) the 2012 assault, the trial court ignored it.

In addition, although the government argues that co-defendant Brown's "far more productive history" in the BOP justifies the trial court's disregard of Jack Donson's expert evidence about limited programming opportunities, Gov. Br. 36, that argument also fails. Federal law requires an inmate "confined in a federal institution who does not have a verified General Educational Development (GED) credential or high school diploma … to attend an adult literacy program for a minimum of 240 instructional hours or until a GED is achieved." 28 C.F.R. § 544.70; *see* BOP, Program Statement, *Literacy Program (GED Standard)*, No. 5320.28 (Dec. 1, 2003), https://www.bop.gov/policy/progstat/5350_028.pdf (last accessed Sept. 29, 2023). The BOP was thus required to provide Brown access to educational programming until he earned his GED in 2010, nine years after entering BOP custody. App. 91, 99. Bishop, in contrast, earned his GED in prison in July 2001, before entering BOP custody. S.R.3 (Exh. 7). By virtue of that earlier educational success, Bishop became ineligible for the years of BOP prioritized programming available to Brown. Brown's more robust educational record at the BOP thus does not belie Donson's observations nor validate the trial

court's disregard for them.

Further, even if the court did not have to accept Donson's expert assessment of the typicality of Bishop's disciplinary history, the government makes no effort to justify the trial court's unfounded criticism that Donson did not "explain in what way an infraction for stabbing another inmate is typical of federal inmates." Bishop Br. 50, App. 12 n.7. As Bishop explained in his opening brief, Donson did explain the typicality of stabbings in the violent penitentiary environment, where inmates feel compelled to carry sharp instruments for self-protection. Bishop Br. 50 (citing S.R. 5 (Exh. 34 at 4-5)). The trial court thus relied in part on a flawed factual foundation for its assessment of factor (c)(3), which adversely skewed that assessment and resulted in an erroneous exercise of discretion.[10]

CONCLUSION

For the foregoing reasons and those set forth in Bishop's opening brief, Bishop respectfully requests that this court reverse the denial of his motion for sentence reduction and remand for further proceedings.

[10] To the extent that the government highlights that Bishop "neither accepted responsibility nor expressed remorse" for his crimes of conviction in an implicit effort to sway this court's review, the court should reject that effort. Gov. Br. 12; *see also id*. at 13. The IRAA statute does not include expressions of remorse or acceptance of responsibility among the enumerated factors for the trial court to consider, *see* D.C. Code § 24-403.03(c) (2021), and the trial court properly did not rely on them.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Reply Brief electronically using the Appellate E-Filing system on Chrisellen R. Kolb, Esq. and Mark Hobel, Esq., U.S. Attorney's Office, 601 D Street, NW, Washington, DC 20530, on this 4th day of October, 2023.

/s/ Cecily E. Baskir
Cecily E. Baskir

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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22-CO-650
Case Number(s)

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