BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CO-650

LEONARD BISHOP, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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TABLE OF CONTENTS

COUNTERSTATEMENT OF THE CASE 1

BACKGROUND 3

Bishop's Convictions 3

Bishop's Prison Disciplinary Record 6

The IRAA 9

Bishop's IRAA Motion 11

SUMMARY OF ARGUMENT 20

ARGUMENT 21

The Trial Court Did Not Abuse Its Discretion in Denying Bishop's IRAA Motion. 21

A. Standard of Review and Applicable Legal Principles 21

B. Discussion 23

1. The trial court did not "contravene [the IRAA's] purpose." 25

2. The trial court did not "commit legal error." 26

3. The trial court did not abuse its discretion in considering Bishop's crimes of conviction 29

4. The trial court did not "misinterpret" § 24-403.03(c)(10) by considering Bishop's individual circumstances. 32

5. The trial court did not "fail to consider" relevant mitigating factors. 34

6. The trial court did not abuse its discretion in finding that Bishop's BOP record "weigh[ed] against a finding of rehabilitation and non-dangerousness." 35

CONCLUSION 38

TABLE OF AUTHORITIES*

Cases

Bailey v. United States, 251 A.3d 724 (D.C. 2021) 22, 30

Bradshaw v. United States, 55 A.3d 394 (D.C. 2012) 23

Brooks v. United States, 993 A.2d 1090 (D.C. 2010) 22, 23

Brown v. United States, 934 A.2d 930 (D.C. 2007) 1, 3, 5

Griffin v. United States, 251 A.3d 722 (D.C. 2021) 23, 31

* *Johnson v. United States*, 398 A.2d 354 (D.C. 1979) 22, 23, 24, 28, 37

Pope v. United States, 739 A.2d 819 (D.C. 1999) 23

Robinson v. United States, 50 A.3d 508 (D.C. 2012) 37

Sharps v. United States, 246 A.3d 1141 (D.C. 2021) 23, 25, 29

* *Williams v. United States*, 205 A.3d 837 (D.C. 2019) 21-26, 28-29, 33-35

* Authorities upon which we chiefly rely are marked with asterisks.

OTHER AUTHORITIES

18 U.S.C. § 3771 10

D.C. Code § 23-110 5

D.C. Code § 23-1904 10

D.C. Code § 24-403 9

D.C. Code § 24-403.01 9

D.C. Code § 24-403.03(a) 9

D.C. Code § 24-403.03(a)(1) 15

D.C. Code § 24-403.03(a)(2) 22, 26

D.C. Code § 24-403.03(b)(2) 11, 30

D.C. Code § 24-403.03(b)(4) 11

D.C. Code § 24-403.03(c) 15, 19

D.C. Code § 24-403.03(c)(10) 21, 26, 33

D.C. Code § 24-403.03(c)(7) 35

D.C. Code § 24-403.03(d) 11

D.C. App. R. 4(b)(5) 3

D.C. Law 23-274, § 601 21

ISSUE PRESENTED

Whether the trial court abused its discretion in denying Bishop's motion for a sentence reduction under the Incarceration Reduction Amendment Act (IRAA).

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LEONARD BISHOP, Appellant,

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On November 25, 1994, two 19-year-old drug dealers, appellant Leonard Bishop and Rodney Brown, murdered Andre Newton, maimed Carrington Harley, and injured three others in a hail of gunfire. *Brown v. United States*, 934 A.2d 930, 935-37 (D.C. 2007). Following a jury trial, both men were convicted of first-degree murder while armed, mayhem while armed, four counts of assault with intent to kill while armed, and related gun crimes (Appendix (A.) 2). On July 10, 1996, the Honorable

Colleen Kollar-Kotelly sentenced Bishop to 101 years and eight months to life in prison (*id.*).

While incarcerated in federal prison between 2002 and 2018, Bishop incurred 18 disciplinary infractions, including for assault with serious injury, fighting, and weapons possession (A. 10). In July 2012, Bishop and several accomplices jumped another inmate to retaliate for a prison fight, and Bishop stabbed the victim several times in the chest and shoulder with a shank (A. 11-12). Even after Bishop completed a stint in a Special Management Unit (Record (R.) 20 at 13)—a prison unit designated for inmates posing enhanced security concerns—he continued committing violent infractions (A. 12). In February 2016, Bishop and another inmate assaulted a third inmate, and refused staff orders to stop—necessitating the deployment of OC gas (*id.*). After Bishop was transferred to the D.C. Jail in 2018, he reunited with his co-defendant Brown and incurred yet another infraction for fighting (A. 13).

Nevertheless, on March 14, 2022, Bishop filed a motion seeking a reduced sentence and "immediate release to the community" under the Incarceration Reduction Amendment Act (IRAA), claiming that he is now "a responsible adult" and "an ideal candidate for relief under the IRAA"

(R. 15 at 1-2, 38). The Honorable Jason Park held a hearing on Bishop's motion on June 16-17, 2022; and, on July 22, 2022, Judge Park denied Bishop's motion in a 24-page written order, finding that Bishop had not demonstrated that he was no longer dangerous and that it would not be in the interests of justice to grant him a sentence reduction (A. 1-24). Bishop now appeals the trial court's order (R. 27).[1]

BACKGROUND

Bishop's Convictions

Bishop and Brown were dealers in an open-air drug market located in an area of Southeast Washington, D.C., known as "Simple City" (R. 20 at 2). On November 25, 1994, Andre Newton and Carrington Harley came to Simple City to sell marijuana. *Brown*, 934 A.2d at 935-36. When somebody told them that police were nearby, Newton and Harley stashed their guns and began to leave the area. *Id.* As they walked away, Bishop and Brown ran through a "cut" and ambushed them. *Id.* Bishop fired first

[1] Although Bishop filed his notice of appeal on August 23, 2022, more than 30 days after entry of judgment, his appeal appears to be timely under D.C. App. R. 4(b)(5) (allowing five additional days to file notice of appeal where final order is "signed or decided out of the presence of the parties and counsel").

with his long-barreled .44 magnum revolver; both Newton and Harley were hit and fell. *Id.* Brown walked over to Newton and fired several more shots into his body. *Id.* Newton died from multiple gunshot wounds; post-mortem examination found that he "had been shot in the back of the leg (consistent with . . . running away from the shooters) and had a contact wound in the front of the neck (consistent with having been shot with the muzzle of the gun touching him)." *Id.* Bishop and Brown shot Harley multiple times, but Harley survived, although he required extensive emergency medical assistance and sustained medical care for years thereafter (R. 20 attachment (Carrington Harley Declaration)). *See Brown*, 934 A.2d at 936 ("Forensic evidence included medical testimony and records of injuries to Harley's hip, stomach, prostate, rectum, groin and urethra. A bullet found in the sole of his boot months after the shooting was consistent with bullets used in a .44 magnum revolver."). The hail of gunfire was so intense that Bishop and Brown also wounded three bystanders—Keith Williams, Joey Payne, and Michael Toland—who had been walking ahead of Newton and Harley. *Id.* at 935-36.

In March 1996, Bishop and Brown were tried together and both convicted of first-degree murder while armed, mayhem while armed, four

counts of assault with intent to kill while armed, five counts of possessing a firearm during a crime of violence, and carrying a pistol without a license (A. 2). Both men received the same sentence: 101 years and eight months to life in prison (A. 2, 83).

On July 27, 1999, while his direct appeal was pending, Bishop filed a D.C. Code § 23-110 motion alleging ineffective assistance of trial counsel (A. 3). The Honorable Russell Canan denied Bishop's motion following an evidentiary hearing on June 16, 2000 (*id.*), finding that Bishop had received "exemplary defense representation" at trial. *Brown*, 934 A.2d at 943.

On November 1, 2007, this Court affirmed the convictions of Bishop and Brown and the denial of Bishop's ineffective assistance claim in a published opinion. *Brown*, 934 A.2d 930.

More recently, Bishop and Brown filed a consolidated Innocence Protection Act (IPA) motion on January 17, 2020 (A. 4). In a sworn affidavit, Bishop avowed that he was "innocent of the crime in this case" (1/17/20 Bishop IPA Motion, Ex. 2). The IPA motion remains pending before Judge Park (A. 4). *See also* Sealed Appendix (SA) 17 ("Since being

sentenced, [Bishop] has utilized every legal option available to him to continue to assert his innocence and seek relief.").

Bishop also filed a motion for compassionate release during the COVID-19 pandemic, which Judge Park denied on July 19, 2021 (A. 4). Bishop appealed, and this Court affirmed on December 13, 2021, finding that the trial court "did not abuse its discretion in concluding that [Bishop] failed to demonstrate by a preponderance of the evidence that [he is] no longer dangerous." *Leonard E. Bishop v. United States*, No. 21-CO-540 (Dec. 13, 2021) (unpublished).

Bishop's Prison Disciplinary Record

Bishop has been incarcerated since his arrest in December 1994 (A. 10). After his 1996 conviction until his transfer to Bureau of Prisons (BOP) custody in 2002, Bishop was imprisoned at various facilities in D.C. and Virginia, principally the Lorton Correctional Complex and the D.C. Jail, with a brief stint at a correctional center in Ohio (A. 10). There are no known disciplinary records for Bishop during this period (R. 20 at 12).

From June 2002 until April 2018, Bishop was housed in various high-security federal prisons, including United States Penitentiary

(USP) Leavenworth, USP Big Sandy, USP Florence, Federal Medical Center (FMC) Lexington, and USP McCreary (A. 10). During this period, Bishop incurred 18 disciplinary infractions, including four "level 100" (the "greatest severity level" under BOP classifications) offenses and three "level 200" ("high-severity level") offenses (A. 11; R. 20 at 13). Bishop repeatedly violated prison rules against possessing dangerous weapons, assault, and fighting (A. 11).

On July 15, 2012, following a prison-yard fight at FMC Lexington, Bishop (who was then 37 years old) and several other inmates stalked and attacked another prisoner who had been involved in the fight (A. 11-12). Bishop stabbed the victim several times in the chest and shoulder with a shank (*id.*). Although Bishop asserted his innocence, a BOP hearing officer discredited his statement and found by a preponderance of the evidence that he committed the stabbing, resulting in a level 100 sanction for assault with serious injury (*id.*; R. 20 at 13). Bishop was transferred into a Special Management Unit (SMU) at USP Florence in 2013 (A. 10; R. 20 at 13). BOP designates inmates who "present unique security and management concerns" to SMUs, "where enhanced management is necessary to ensure the safety, security, or orderly

operation of [BOP] facilities, or protection of the public." BOP, Program Statement: Special Management Units (Aug. 9, 2016).[2]

Following completion of the SMU program, Bishop was transferred to USP McCreary in 2014 (A. 10). In February 2016, a BOP employee witnessed Bishop and another inmate punching a third prisoner in the head and upper torso area (A. 12). Prison guards ordered the men to stop and lay on the ground, but Bishop (who was 41 years old at the time) refused to comply and continued exchanging blows (A. 12). Guards had to deploy OC gas to quell the fight (*id.*). Bishop received a level 200 sanction for fighting (R. 20 at 13).

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[2] Available at https://www.bop.gov/policy/progstat/5217_02.pdf (last visited June 12, 2023). SMUs are reserved for those inmates "whose interaction requires greater management to ensure the safety, security, or orderly operation of [BOP] facilities, or protection of the public," and inmates receive a hearing before BOP designates them to an SMU. *Id.* SMU referral criteria include participating or having a leadership role "in disruptive geographical group/gang-related activity," "a history of serious or disruptive disciplinary infractions," committing "any 100-level prohibited act . . . after being classified as a member of a Disruptive Group," and participating in, organizing, or facilitating "group misconduct that adversely affected the orderly operation of a correctional facility." *Id.* Moreover, BOP policy indicates that inmates from lower security institutions will ordinarily be considered for designation to a higher security facility before recommending SMU placement. *Id.*

Bishop returned to the D.C. Jail in April 2018, where he was reunited with Brown (R. 20 at 13). Bishop and Brown both incurred a disciplinary infraction for fighting another inmate in December 2019 (A. 13; R. 20 at 13-14).

The IRAA

In its current form, the IRAA provides:

> (a) Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant for an offense committed before the defendant's 25th birthday if:
>
> > (1) The defendant was sentenced pursuant to § 24-403 or § 24-403.01,[3] or was committed pursuant to § 24-903, and has served at least 15 years in prison; and
> >
> > (2) The court finds, after considering the factors set forth in subsection (c) of this section, that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.

D.C. Code § 24-403.03(a).

Section 24-403.03(c) provides a list of factors the trial court "shall consider" when "determining whether to reduce a term of imprisonment":

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[3] D.C. Code § 24-403 governs indeterminate sentences imposed for felonies committed before August 5, 2000; § 24-403.01 governs sentences for felonies committed after that date.

(1) The defendant's age at the time of the offense;

(2) The history and characteristics of the defendant;

(3) Whether the defendant has substantially complied with the rules of the institution to which the defendant has been confined, and whether the defendant has completed any educational, vocational, or other program, where available;

(4) Any report or recommendation received from the United States Attorney;

(5) Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;

(6) Any statement, provided orally or in writing, provided pursuant to § 23-1904 or 18 U.S.C. § 3771 by a victim of the offense for which the defendant is imprisoned, or by a family member of the victim if the victim is deceased;

(7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;

(8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

(9) The extent of the defendant's role in the offense and whether and to what extent another person was involved in the offense;

(10) 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, and the defendant's personal circumstances that support an aging out of crime; and

(11) Any other information the court deems relevant to its decision.

The IRAA requires the trial court to "hold a hearing on the motion at which the defendant and the defendant's counsel shall be given an opportunity to speak on the defendant's behalf." D.C. Code § 24-403.03(b)(2). The court "may consider any records related to the underlying offense," and may also "permit the parties to introduce evidence." *Id*. The court must "issue an opinion in writing stating the reasons for granting or denying" an IRAA motion. § 24-403.03(b)(4).

A defendant whose initial IRAA motion is denied may file a second motion after three years; and a third motion three years after the second is denied. D.C. Code § 24-403.03(d). "No court shall entertain a 4th or successive" IRAA motion. *Id.*

Bishop's IRAA Motion

In his motion, Bishop presented himself as "a troubled youth born into adversity [who has matured] into a responsible adult who deserves a second chance at liberty" (R. 15 at 1). Although Bishop described "an incident that took place on November 25, 1994," where "[p]olice

arrived . . . [and] found multiple people suffering from gunshot wounds," he neither accepted responsibility nor expressed remorse for murdering Newton, maiming Harley, and injuring Williams, Payne, and Toland (*id.* at 2).[4] Bishop acknowledged but sought to minimize his disciplinary history at BOP and the D.C. Jail (*id.* at 16-18, 35-36), claiming (in a footnote) that he "maintain[s] his innocence" for the 2012 stabbing (*id.* at 35 n.39). He emphasized his tutoring and mentoring activities for other inmates at the D.C. Jail since 2018 (*id.* at 22-24, 31-33). A number of those inmates provided letters of support (*id.* at 32). Bishop also claimed that "[o]nce [back] in the [D.C. Jail], he took advantage of every educational and programming opportunity available to him" (*id.* at 37).

In its written opposition, the government explained that Bishop's "lengthy and concerning disciplinary history" weighed heavily against his IRAA claim (R. 20 at 1). The government also pointed out Bishop's minimal record of educational and vocational programming at BOP, which suggested "a lack of commitment to reform during this time frame" (*id.* at 15). Although the government acknowledged that, "[a]fter his

[4] Indeed, as noted *supra*, Bishop recently swore that he is "innocent of the crime in this case."

return to the D.C. Jail," Bishop's "focus on programming and self-improvement appeared to blossom" (*id.*), it argued that Bishop "has done too little, at this point, to earn the Court's confidence that he is sufficiently rehabilitated . . . to reenter civil society" (*id.* at 22). The government included sworn declarations from Newton's parents and Harley, all of whom opposed Bishop's release, emphasizing his failure to accept responsibility and lack of remorse (R. 20 attachments (Newton and Harley Declarations)).

Bishop called three witnesses at a hearing on June 16, 2022 (6/16/22 Transcript (Tr.) 2). Amy Lopez, a D.C. Jail official responsible for educational and vocational programming, testified that Bishop had been "a natural partner for any programming that [she had] implemented" at the D.C. Jail, including tutoring and mentoring other inmates, and that he was "a real go-to person for [her] staff" (*id.* at 10-11). Lopez testified that her "understanding" of Bishop's 2019 infraction for fighting was that he "was not an instigator" of the incident (*id.* at 19). On cross-examination, Lopez acknowledged that she had not reviewed Bishop's BOP disciplinary record, and that her information about the 2019 infraction was "secondhand" (*id.* at 23-24). Jack Donson, a former prison

guard and private consultant who "provide[s] expert witness testimony on [BOP] issues," testified that Bishop's BOP disciplinary record "might sound like a lot, but [is] not really atypical" for "how long he's been in" prison (*id.* at 32).

Finally, Katherine Robinson, a clinical and forensic psychologist retained by Bishop's counsel, testified that she reviewed certain D.C. Jail records—but no record of the 2019 fighting infraction (6/16/20 Tr. 37-38); "many records" from BOP; Bishop's social history; letters of support from friends and family; and the presentence investigation report; she also met with Bishop for five hours (*id.* at 36-37). Based on her evaluation, Robinson opined that Bishop was "at low risk" to "commit future criminal acts of violence that would constitute a serious threat to society" (*id.* at 36). On cross-examination, Robinson testified that her risk assessment "does not factor in a person's disciplinary record while confined" (*id.* at 48). Robinson equivocated when asked whether "a person could murder a fellow inmate while in prison and that would not affect [her] risk assessment," responding that "it [would] depend on the circumstances [of the murder]. . . . [A]s far as the future for risk of violence is concerned, that is not one of the risk factors that is taken into consideration in the

research" (*Id.*) Robinson acknowledged that Bishop's 2012 stabbing of another inmate was "a significant event" (*id.* at 52).[5]

On July 22, 2022, the trial court denied Bishop's motion in a written order (A. 1-25). Judge Park first found that Bishop met the IRAA's "threshold eligibility requirements" because he was 19 when he committed his crimes, was sentenced under D.C. Code § 24-403 (i.e., to an indeterminate sentence), and had served 27 years in prison (A. 7). *See* D.C. Code § 24-403.03(a)(1). The court then considered each of the factors enumerated in § 24-403.03(c) (A. 8-23). As to Bishop's "history and characteristics" (subsection (c)(2)), the court observed that, at the time of his crimes, Bishop was "seemingly lacking in family support, positive adult influence, or educational structure" (A. 9). The court engaged in a lengthy analysis of Bishop's disciplinary and programing history while incarcerated (subsection (c)(3)) (A. 10-16). The court found that "[t]he number of infractions" committed by Bishop while in BOP custody was "itself concerning"; but "more concerning" still was "the fact that of the eighteen infractions, seven were categorized as level 100 or 200 offenses,

[5] Robinson is identified elsewhere in the record as "Katherine Snably" (A. 19).

the highest severity levels in the BOP's categorization system, including repeated infractions for possession of dangerous weapons violations, as well as multiple infractions for fighting and assault" (A. 11). The court also noted that Bishop committed two level 100 or 200 offenses "within ten years of the filing of his motion" (*id.*). The court described the 2012 assault with serious injury and 2016 fighting offenses in detail (A. 11-12). The court found that Donson's testimony "offer[ed] context for [Bishop's] possession of dangerous weapons offenses . . . [but] d[id] not explain in what way an infraction for stabbing another inmate is typical of federal inmates" (A. 12 n.7). The court also assessed the evidence of Bishop's 2019 fighting infraction, finding that "it [wa]s unclear from the record . . . whether the altercation was indeed non-physical, as the defense claim[ed]" (A. 13-14). Noting "the conflicting information presented," the court "consider[ed] but [did] not place significant weight on" the 2019 infraction in evaluating Bishop's disciplinary record (A. 14).

In sum, however, the court "share[d] the government's concerns regarding [Bishop's] disciplinary record at" BOP (A. 16). The court found that "the facts and circumstances underlying" Bishop's offenses "within the last decade"—two "of which involved violence against another

inmate, including [Bishop's] direct participation in a premeditated retaliation stabbing—weigh[ed] against a finding of rehabilitation and non-dangerousness" (A. 16).

Evaluating Bishop's "institutional programming," Judge Park noted that Bishop earned his GED in 2001, but found that between 2002 and 2016, Bishop only completed approximately ten hours per year of educational courses (A. 14). The court found, however, that since transferring to the D.C. Jail in 2018, Bishop had "taken far greater advantage of educational, vocational, and other available programming" (A. 15). The court recognized that Bishop "ha[d] received notable recognition from both correctional staff and fellow inmates for his efforts and success as a mentor" (*id.*). But the court also found that Bishop's "recent record of achievement . . . st[ood] in contrast to [his] modest level of program participation and achievement in the preceding years at BOP" (A. 16).

Judge Park also found that "the record d[id] not currently establish a fitness to reenter society necessary to justify a sentence reduction" (subsection (c)(5)) (A. 16). The court observed that "much of the record supporting [Bishop's] rehabilitation [wa]s relatively recent," and that

"turning point moments identified by the defense pre-date serious disciplinary infractions, including the 2012 retribution stabbing of another inmate" (A. 17).

The court summarized Robinson's report and testimony (subsection (c)(7)), noting that the government "questioned [Robinson's] failure to inquire into the instant offense, to verify [Bishop's] recounting of his past criminal and disciplinary behavior, or to consider his past conduct in making a determination about [his] risk of dangerousness or future criminality" (A. 20).

Examining Bishop's "role in the offense" in comparison with other participants (subsection (c)(9)), Judge Park observed that "the evidence introduced against [Brown] was more substantial than the evidence against [Bishop][,] [b]ut the fact remain[ed] that the jury convicted both defendants of directly participating in extraordinarily violent acts after considering the testimony of numerous witnesses, who provided direct and circumstantial evidence that the defendants were the individuals responsible for the shooting" (A. 22).

The court also considered "the 'mitigating qualities of youth' that [we]re . . . the basis for the D.C. Council's enactment of the IRAA"

(subsection (c)(10)) (A. 22). The court found that Bishop's "age and circumstances at the time of the offense surely contributed to his actions that day"; but, "[o]n the other hand," Bishop's "record of violence and criminality before and, particularly, after the day of the offense weigh[ed], to some degree, against a finding of mere youthful impulsiveness" (A. 22-23).

After considering each of the factors in § 24-403.03(c), Judge Park found that Bishop "ha[d] not established his lack of dangerousness by a preponderance of the evidence at th[at] time" (A. 23). The court emphasized Bishop's concerning disciplinary record, particularly the 2012 "retaliation stabbing using a homemade shank" and the 2016 "fist fight . . . that required the deployment of OC spray in order to cease" (*id.*). Although "aspects of [Bishop's] record while incarcerated evidence[d] his rehabilitation," the court found "that the evidence, at least at th[at] juncture, [wa]s insufficient to outweigh the violence of the offenses for which he was convicted and his disciplinary history while incarcerated" (A. 23-24).

The court also found that "it would not be in the interests of justice to grant [Bishop] relief under the IRAA at th[at] time," because Bishop

"ha[d] not demonstrated that he [wa]s not presently a danger to society" (A. 24). The court acknowledged that Bishop had served "nearly his entire adult life in prison," but also noted the "continuing trauma" that Harley and Newton's parents "endure[d] as a result of" Bishop's "heinous, violent acts" (A. 24).[6]

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying IRAA relief to Bishop, a murderer with a lengthy prison disciplinary history including the commission of "a premeditated retaliation stabbing" in 2012 (A. 16). While Bishop's record appears to have improved since his transfer to the D.C. Jail in 2018, the trial court acted well within its discretion in finding that Bishop's recent efforts do not yet outweigh his long-term history of violence.

Bishop's various challenges to the trial court's measured opinion lack merit. First, the court did not "contravene [the IRAA's] purpose" by

[6] After finding that Bishop had not carried his burden "at th[at] juncture," the trial court explicitly "note[d] that [Bishop] w[ould] be eligible under the statute to apply for IRAA relief again in three years from the date of th[e] order" (A. 23-24 & n.11).

denying relief to a defendant who has continued committing violent offenses in his late 30s and early 40s. Second, the court engaged in the inquiry required by § 24-403.03(c)(10). Third, it properly considered Bishop's crimes of convictions as a baseline for assessing the extent of his rehabilitation. And finally, the court did not fail to consider Bishop's evidence of rehabilitation; it simply found that such evidence did not yet outweigh the evidence of Bishop's continuing dangerousness.

ARGUMENT

The Trial Court Did Not Abuse Its Discretion in Denying Bishop's IRAA Motion.

A. Standard of Review and Applicable Legal Principles

The IRAA "establishe[d] a sentence review procedure intended to . . . ensur[e] that all juvenile offenders serving lengthy prison terms have a realistic, meaningful opportunity to obtain release based on their diminished culpability and their maturation and rehabilitation." *Williams v. United States*, 205 A.3d 837, 846 (D.C. 2019). *See also* D.C. Law 23-274, § 601 (eff. April 27, 2021) (extending IRAA to cover adult offenders like Bishop who committed crimes "before [their] 25th birthday"). The defendant bears the burden to establish by a

preponderance of the evidence that they are "not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification." D.C. Code § 24-403.03(a)(2); *Williams*, 205 A.3d at 850; *Bailey v. United States*, 251 A.3d 724, 729 (D.C. 2021) ("the preponderance standard is the 'default rule'").

The trial court's ultimate decision under the IRAA is based on a "discretionary consideration of multiple factors without preordained weights assigned to them." *Williams*, 205 A.3d at 854. This Court reviews for abuse of discretion only. *Id.* at 848. That review entails evaluating a trial court's discretionary rulings to ensure that the trial court made "[a]n informed choice . . . drawn from a firm factual foundation." *Brooks v. United States*, 993 A.2d 1090, 1093 (D.C. 2010) (quoting *Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979)). *See also Johnson*, 398 A.2d at 365 (appellate court "must determine . . . whether the trial court's action was within the range of permissible alternatives").

Moreover, where "a defendant's dangerousness" is at issue, this Court "will not substitute its assessment . . . for the trial judge's determination of that essentially factual issue, and [ ] will therefore sustain the judge's decision so long as it is supported by the proceedings

below." *Sharps v. United States*, 246 A.3d 1141, 1159 n.90 (D.C. 2021) (quoting *Pope v. United States*, 739 A.2d 819, 824 (D.C. 1999)). *See also Griffin v. United States*, 251 A.3d 722, 723-24 (D.C. 2021) ("determination was firmly grounded in factors related to Griffin's dangerousness"; therefore, no abuse of discretion even though court also cited other "impertinent factors"); *Bradshaw v. United States*, 55 A.3d 394, 397 (D.C. 2012) ("We defer to the trial court's factual findings, including dangerousness, unless [those] findings lack evidentiary support.").

B. Discussion

The trial court did not abuse its discretion in denying Bishop's IRAA motion. In its lengthy opinion, the court carefully considered the record evidence as it related to each of the IRAA's multiple factors. *Williams*, 205 A.3d at 854. Its ultimate dangerousness determination—an "essentially factual issue," *Sharps*, 246 A.3d at 1159 n.90—rested "on a firm factual foundation." *Brooks*, 993 A.2d at 1093. Based especially on Bishop's history of violence at BOP, it was surely "within the range of permissible alternatives," *Johnson*, 398 A.2d at 365, for the trial court to find that a convicted murderer who committed "a premeditated

retaliation stabbing" in the last decade had not carried his burden to show that he is no longer a danger to the community (A. 16, 23). Moreover, while the trial court acknowledged Bishop's recent "steps to rehabilitate himself" at the D.C. Jail, it found that these "aspects of [Bishop's] record" were (at that point) "insufficient to outweigh" the record evidence of dangerousness, including "the violence of the offenses for which he was convicted and his disciplinary history while incarcerated" (A. 23-24). The trial court appropriately exercised its discretion in making an individualized assessment using the multi-factor test required by the IRAA, *Williams*, 205 A.3d at 854, and the "reasons [it gave] reasonably support [its] conclusion." *Johnson*, 398 A.2d at 365. In short, the court did not abuse its discretion in denying Bishop IRAA relief.

Bishop nonetheless claims that the trial court abused its discretion in six ways (Br. § I.A-F) and urges this Court to "reverse and remand" (Br. 26). As discussed below, Bishop's claims miss the mark. This Court should instead affirm the trial court's thoughtful and measured order.

1. The trial court did not "contravene [the IRAA's] purpose."

Bishop first accuses the trial court of "contravening [the] purpose" of the IRAA by denying his application, because the statute's "lodestar principles" are that "young adults are less culpable for offenses they commit, and they are capable of repetition and change" (Br. 26, 28-32). The trial court expressly "consider[ed]," however, "the mitigating qualities of youth that [we]re . . . the basis for the D.C. Council's enactment of the IRAA," the fact that Bishop "ha[d] served almost three decades and nearly his entire adult life in prison," and "relatively recent" evidence "supporting [Bishop's] rehabilitation" (A. 17, 22, 24). The court simply found that these factors were outweighed by other evidence that Bishop was not rehabilitated and remained dangerous—in particular, violent infractions committed by Bishop when he was in his late 30s and early 40s. That individualized assessment of rehabilitation and danger was precisely what the IRAA calls for. *Williams*, 205 A.3d at 854.

Moreover, the Council did not intend the IRAA to be a rubberstamp for release, as Bishop would apparently have it. The "primary and general rule" of statutory interpretation "is that the intent of the lawmaker is to be found in the language it has used," *Sharps*, 246 A.3d

at 1149 (cleaned up), and the Council explicitly required defendants to demonstrate that they are "not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification." D.C. Code § 24-403.03(a)(2). *See Williams*, 205 A.3d at 850 (defendants bear burden). The D.C. Council thereby placed the trial court's discretionary determination of present dangerousness at the core of the IRAA. It was thus entirely consistent with the IRAA's "purpose" (Br. 26) to deny relief to a defendant like Bishop, who has continued to commit violent acts in his late 30s and early 40s. *See* A. 23 (Bishop's "disciplinary record in the most recent decade includes four infractions, one of which involved an alleged retaliation stabbing using a homemade shank, and another which involved a fist fight with another inmate that required the deployment of OC spray in order to cease.").

2. The trial court did not "commit legal error."

Bishop next claims (at 32-33) that that the trial court "committed legal error" and "reversal" is "require[d]" because the court, in quoting D.C. Code § 24-403.03(c)(10) in a section heading (A. 22), appears to have omitted inadvertently its final clause ("and the defendant's personal

circumstances that support an aging out of crime"). Bishop argues that the court "failed to undertake a required factual inquiry" and did not consider his "rehabilitative successes in his 40s, his brain maturation, or that he is no longer facing the circumstances related to his adolescent offenses" (Br. 33).

Bishop errs, however, because the trial court did consider evidence of Bishop's "personal circumstances that support an aging out of crime"—and properly weighed it against evidence pointing the other direction. In its discussion of subsection (c)(10), the trial court specifically "f[ound] that [Bishop's] age and circumstances at the time of the offense surely contributed to his actions that day" (A. 22). But the court also found that Bishop's violent record "particularly [ ] after the day of the offense weigh[ed], to some degree against a finding of youthful impulsiveness" (A. 22-23). Moreover, the trial court adequately addressed the evidence that Bishop claims it ignored. As to Bishop's recent "rehabilitative successes," the court considered that evidence at length (A. 15-17). The court also considered Bishop's "trauma[tic]" circumstances at the time of the offense, which the court found "c[could not] be divorced from the violence that [Bishop] was convicted of committing as a nineteen-year-

old man" (A. 21-22). As for Bishop's "brain maturation," the only evidence he presented was Robinson's report, which included general observations about the brain development of "adolescents and young adults" (SA 47). The court considered Robinson's report, too (A. 19-20). Bishop may quibble that the court's opinion addressed this evidence in connection with other subsection (c)(10) factors, but the IRAA factors involve considerable overlap and Bishop has not demonstrated prejudice. *See Johnson*, 398 A.2d at 366 ("[W]e are prepared to countenance imperfections in the trial court's exercise of discretion to enjoy more fully the advantages of making the determination discretionary. Thus, at times we may find that the fact of error in the trial court's determination caused no significant prejudice and hold, therefore, that reversal is not required."). As this Court has pointed out, the IRAA "factors to be considered are too many and vary too greatly from individual to individual for any predetermined formula to govern their weighing and balancing[.]" *Williams*, 205 A.3d at 854.[7]

[7] Contrary to Bishop's suggestion (at 33), the trial court did not "fail[ ] to include [ ] amended language substituting 'another person' for 'adult'" in its discussion of subsection (c)(9) (A. 22).

3. The trial court did not abuse its discretion in considering Bishop's crimes of conviction.

Bishop complains that the trial court "abused its discretion when it placed substantial *weight* on the nature of Bishop's crimes of conviction to find that" he failed to show he was no longer dangerous (Br. 33 (emphasis added)). Because Bishop challenges the weight that the trial court placed on evidence of dangerousness in its overall balancing, he faces a daunting burden to show an abuse of discretion. *See Williams*, 205 A.3d at 854 (because "factors to be considered are too many and vary too greatly from individual to individual for any predetermined formula," the overall "weighing and balancing" is committed to trial judge's "discretionary consideration"). *See also Sharps*, 246 A.3d at 1159 n.90 ("It is not our function to engage in the discretionary balancing of relevant factors that is committed to the trial court" (cleaned up)).

Although Bishop argues that a trial court may not deny IRAA relief based solely "on the nature of the offense of conviction" (Br. 34), he acknowledges—as he must—that courts must consider defendants' crimes "as context and a baseline" to assess rehabilitation and dangerousness (Br. 36). The IRAA explicitly permits courts, in

considering a defendant's application, to "consider any records related to the underlying offense." D.C. Code § 24-403.03(b)(2). Moreover, several subsection (c) factors reference the underlying offense, including subsection (c)(6) ("any statement . . . by a victim of the offense for which the defendant is imprisoned"), and subsection (c)(9) ("the extent of the defendant's role in the offense and whether and to what extent another person was involved in the offense"). "The nature of a prisoner's past crimes—including the lasting harms those crimes have inflicted on victims and their family members and the fears those persons may continue to harbor—have predictive value in informing the degree of harm the prisoner might inflict if they reoffend." *Bailey v. United States*, 251 A.3d 724, 733 (D.C. 2021) (compassionate-release statute).[8]

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[8] The Council amended the IRAA in 2018 to remove "the nature of the offense" as a mandatory factor under subsection (c), but in 2020 added "explicit" language ("the court may consider any records related to the underlying offense") to make "clear that the facts and circumstances of the underlying offense are interwoven throughout the statute." Committee on the Judiciary and Public Safety, Report on B23-0127, the "Omnibus Public Safety and Justice Amendment Act of 2020," at 19 (Nov. 23, 2020). The Committee Report explains that "[a]s part of its 'second look' at a person's sentence, the [trial court] also considers the facts and circumstances surrounding the underlying offense," because "gauging a defendant's rehabilitation requires a baseline set of facts from which to assess personal growth, *and similarly for the defendant's role in the*

(continued . . .)

Bishop nevertheless criticizes the trial court for its purported overreliance on his crimes of conviction, selectively quoting the court's opinion: "In sum, while aspects of [Bishop's] record while incarcerated evidence his rehabilitation, the [c]ourt finds that the evidence, at least at this juncture, is insufficient to outweigh *the violence of the offenses for which he was convicted* . . ." (Br. 37 (quoting A. 23-24) (emphasis added by Bishop)). The ellipses give the game away, however, because Bishop omits the remainder of the sentence, in which the court emphasized Bishop's "disciplinary history while incarcerated" (A. 23-24). Indeed, it is clear from Judge Park's opinion that the court was most troubled by Bishop's disciplinary history, especially the 2012 stabbing and the 2016 fistfight—both of which the court cited explicitly in the first paragraph of its dangerousness finding (A. 23). Thus, even assuming that the court placed greater-than-warranted reliance on Bishop's crimes of conviction (which it did not), it "plainly had no effect on its decision" which was "firmly grounded" in Bishop's recent history of violent infractions. *Griffin v. United States*, 251 A.3d 722, 723-24 (D.C. 2021).

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offense—as well as to determine whether the defendant is a danger to the safety of another of the community." *Id.* at 18-19 (emphasis added).

Finally, although the trial court found that "the evidence introduced against" the co-defendant Brown at trial "was more substantial than the evidence against" Bishop (A. 22), the court granted Brown's IRAA motion several months before denying Bishop's (A. 82-115). It is implausible for Bishop to argue that the trial court treated "the nature of the offense as a significant basis for its ultimate conclusions" (Br. 37) in his case, but not in his arguably more culpable co-defendant's (A. 32-33). Rather, in granting Brown's motion, Judge Park relied on Brown's "nearly flawless" disciplinary history in the past decade, his lack of "any assaulting or violent behavior" in the decades since November 1994, and his consistent rehabilitative efforts at *both* BOP and the D.C. Jail throughout his decades of incarceration (*id.*). Unlike the nature of the offense, all of these factors distinguish Brown from Bishop.

4. The trial court did not "misinterpret" § 24-403.03(c)(10) by considering Bishop's individual circumstances.

Bishop claims that the trial court "misinterpreted" subsection (c)(10) by exercising "discretion" and considering Bishop's "personal circumstances" (Br. 37-43). That is an odd assertion in the context of a statute calling for an individualized assessment of "each [defendant's]

unique characteristics, degree of culpability, and prospects for reformation." *Williams*, 205 A.3d at 854. It is also incorrect. Subsection (c)(10) provides:

> [The court . . . shall consider] [t]he 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, and the defendant's personal circumstances that support an aging out of crime[.]

D.C. Code § 24-403.03(c)(10). Thus, subsection (c)(10) calls upon courts to (1) acknowledge that youth may play a mitigating role in even the most "brutal[ ]" and "cold-blooded" crimes; and (2) weigh the defendant's "personal circumstances" supporting rehabilitation and "aging out of crime."

The trial court took both those steps. First, it acknowledged "the mitigating qualities of youth" and found that Bishop's "age and circumstances at the time of the offense surely contributed to his actions that day" (A. 22). Then, it evaluated Bishop's personal circumstances, finding that his "record of violence and criminality before, and particularly, after the day of the offense weigh[ed], to some degree, against a finding of mere youthful impulsiveness" (A. 22-23). The court

did not abuse its discretion in declining to afford significant weight to subsection (c)(10) where the evidence did *not* "support an aging out of crime." *See Williams*, 205 A.3d at 854.

5. The trial court did not "fail to consider" relevant mitigating factors.

Contrary to Bishop's next claim (Br. 43-46), the trial court did not ignore relevant mitigating information. As Bishop acknowledges (at 44), the trial court specifically addressed each of the factors he cites—"age," "emotional trauma," "lack of family support, positive adult influence, and educational structure," Brown's role in the offense, and Robinson's forensic report—in its thorough opinion (A. 7-9, 19-22). The court was not required to restate its full analysis in the final section of its opinion, which recounted only evidence it considered most significant to dangerousness and the interests of justice (A. 23-24). Bishop's objections, therefore, go to the weight the trial court afforded these factors in its overall balancing, a determination that is firmly in the trial court's

discretion as part of its individualized assessment using a multi-factor test. *Williams*, 205 A.3d at 854.[9]

6. The trial court did not abuse its discretion in finding that Bishop's BOP record "weigh[ed] against a finding of rehabilitation and non-dangerousness."

Finally, Bishop claims that the trial court abused its discretion in "ignoring favorable facts relevant" to his BOP record (Br. 46-50). Bishop relies on an affidavit and testimony provided by Jack Donson, a former BOP corrections officer and private consultant. The court did not ignore Donson's evidence, however; it simply afforded it little weight (A. 12 n.7). The trial court did not abuse its discretion.

Bishop first argues that the court improperly discounted his "modest level of programming participation and achievement" at BOP (Br. 48 (quoting A. 16)), claiming that it was "not [his] fault" because of

[9] Bishop also criticizes the trial court for not making "necessary findings" about Robinson's report (Br. 45). But the IRAA simply requires the trial court to "consider . . . [a]ny reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals," D.C. Code § 24-403.03(c)(7), and trial court did so here (A. 19-20). The statute does not necessitate additional "findings," as Bishop would have it.

limited opportunities in the federal prison system. But the court was not required to credit Donson's generic explanation, particularly where Brown, Bishop's co-defendant, had a far more productive history during a similar period of BOP incarceration (A. 94-97 (explaining that Brown "has been a productive inmate throughout his period of incarceration" with "numerous letters" from "BOP [ ] staff speaking to his character")).

Similarly, the court did not "ignore[ ] favorable evidence" related to Bishop's SMU placement in 2013-14 (Br. 49). That Bishop was placed in an SMU within the last decade is itself evidence of continuing dangerousness. As discussed, *supra* note 2, BOP designates inmates like Bishop who "present unique security and management concerns" to SMUs, "where enhanced management is necessary to ensure the safety, security, or orderly operation of [BOP] facilities, or protection of the public." BOP, Program Statement: Special Management Units (Aug. 9, 2016). That Bishop was transferred out of the SMU "faster than the typical minimum time" (Br. 49) is better than the alternative, but it is not compelling evidence of rehabilitation—particularly where he participated in "a fist fight with another inmate that required the

deployment of OC spray in order to cease" *after* transfer out of the SMU (A. 23).

As he did in the trial court, Bishop also attempts to minimize the severity of his disciplinary history (Br. 50). But the court certainly had a "firm factual foundation," *Johnson*, 398 A.2d at 364, to find that Bishop "direct[ly] participat[ed] in a premeditated retaliation stabbing" in 2012 (A. 16). As the court explained, a BOP hearing officer found Bishop's "assertion of innocence not credible" and "found by a preponderance of the evidence that he had committed the stabbing" (A. 12). Other than his self-serving assertion of "innocence" in a footnote (R. 15 at 35 n.39), Bishop did not meaningfully contest that he committed this violent offense in the trial court. The trial court was not required to accept Dodson's "expert assessment" (Br. 50) that Bishop's disciplinary history was "typical." *See Robinson v. United States*, 50 A.3d 508, 523 (D.C. 2012) ("[T]he weight to be given an expert opinion is for the [fact-finder] to decide.").[10]

[10] Brown, for example, had a much less extensive, severe, and recent disciplinary history at BOP (A. 91-93).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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Court of Appeals

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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 or under evaluation for substance-use-disorder services.

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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I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Cecily Baskir, Esq., baskir@baskirlaw.com, on this 15th day of June, 2023.

/s/
MARK HOBEL
Assistant United States Attorney