Appeal No. 23-CO-374

DISTRICT OF COLUMBIA COURT OF APPEALS

NATHAN E. WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division
Case No. 1996-FEL-002349

BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

Nathan E. Welch is Appellant before this Court and is represented by Anne Keith Walton, Esq. Mr. Welch was represented in the Superior Court of the District of Columbia by Stephen LoGerfo, Esq.

The United States of America is Appellee before this Court and is represented by the United States Attorney's Office for the District of Columbia and Assistant United States Attorney Chrisellen R. Kolb, Esq. In Superior Court, the government was represented by Assistant United States Attorney Thomas Stutsman, Esq.

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STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion by finding that Mr. Welch has not been sufficiently rehabilitated after stating that it had "no reasons to doubt" a psychologist's conclusion that Mr. Welch had in fact been "successfully rehabilitated."

II. Whether the trial court abused its discretion by finding that immediate release is not in the "interests of justice" because Mr. Welch's release plan is "weak" and because the victim's family opposes release, and by leaving the release determination to the U.S. Parole Commission.

III. Whether the trial court erred by failing to base its findings regarding Mr. Welch's remorse, disciplinary history, and employment on a firm factual foundation.

IV. Whether the trial court abused its discretion by failing to acknowledge the relevance of Mr. Welch's physical health, and by failing to consider this enumerated factor.

V. Whether the trial court erred by failing to apply the correct legal standard, which is preponderance of the evidence.

STATEMENT OF THE CASE

In August 1996, Mr. Welch was indicted on one count each of First Degree Murder While Armed (Premeditated), First Degree Murder While Armed (Felony

Murder), Armed Robbery, Possession of a Firearm During the Commission of a Crime of Violence or Dangerous Offense, and Carrying a Pistol Without a License, in connection with the murder of Michael Tyson. In July 1997, a jury found Mr. Welch guilty of the charged offenses. The Honorable Franklin Burgess sentenced Mr. Welch to a total term of imprisonment of 46 years and 8 months to life in prison, which was later amended to 36 years and 8 months to life in prison.

In August 2022, Mr. Welch, through counsel, filed a Motion to Reduce Sentence Under the Incarceration Reduction Amendment Act, D.C. Code § 24-403.03 ("IRAA"), and requested immediate release from prison. R. at 81-107.[1] The government opposed immediate release but did not oppose a reduction in Mr. Welch's sentence that would make him immediately eligible for parole. *Id.* at 188-96. A hearing on Mr. Welch's IRAA motion was held on December 19, 2022. In May 2023, the Honorable Peter Krauthamer issued an order granting Mr. Welch's IRAA motion in part and issued a new Judgment & Commitment Order reducing his sentence to 30 years to life, which made him immediately eligible for parole. Appx. A at 1-23; Appx. B. However, the trial court declined to grant Mr. Welch's request for immediate release from prison. Appx. A at 22. Mr. Welch filed a timely notice of appeal. R. at 241-42.

[1] "R." refers to the record. This brief cites the pages of the record PDF, not the record index. "Tr." refers to the December 19, 2022, IRAA hearing transcript. "Appx." refers to the Limited Appendix.

STATEMENT OF THE FACTS

Motions Before the Trial Court

Mr. Welch argued in his IRAA motion that, after applying the statutory factors enumerated in D.C. Code § 24-403.03, it is clear that he merits a sentence reduction that grants immediate release from prison. R. at 81. First, Mr. Welch was 23 years old at the time of his offense, and he has been incarcerated for over 27 years.[2] R. at 89. Mr. Welch is now 50 years old. Over the course of his nearly 30 years in prison, Mr. Welch has transformed from a very troubled young man into a mature, rehabilitated adult who has demonstrated that he is fit to re-enter society. *Id.* at 89-101.

Unfortunately, Mr. Welch had an extremely difficult childhood, which contributed to his criminal behavior. R. at 89-93; 101-02.[3] As a child, Mr. Welch witnessed and suffered domestic violence at the hands of both his mother and his father, both of whom abused alcohol and became addicted to drugs. *Id.* at 89-90; 101-02. Mr. Welch's parents were arrested and incarcerated when he was 6 or 7 years old, and he was sent to live in a crowded, volatile home, where he was surrounded by drugs and was sexually abused by a male neighbor. *Id.* at 90-91; 101-

[2] At the time that Mr. Welch's IRAA motion was filed (August 2022), he had been incarcerated for 26 years.

[3] A full accounting of Mr. Welch's background is contained in the psychological and risk evaluation conducted by Dr. Matthew Bruce. R. at 111-138.

02. When Mr. Welch's parents returned from prison when he was 14 years old, they failed to provide him with a stable home, and he had no fixed address by the time he was 19. *Id.* at 92, 102. Mr. Welch's schooling was also unstable, but he did manage to earn his GED when he was 18 years old. *Id.* at 93. Mr. Welch was employed at several locations when he was young, but he eventually turned to selling drugs. *Id.* He became addicted to PCP, and, in the year prior to committing the homicide, he was arrested and incarcerated for 6 months, during which time he became a father, only to later find out that the child was not his. *Id.* at 93-94. Upon release from incarceration, Mr. Welch had no permanent address, experienced homelessness, and turned again to drugs. *Id.* at 94.

Mr. Welch's drug addiction played a significant role in the 1996 homicide. The night began with an exchange of sex for drugs (PCP and crack cocaine) and concluded with the shooting of Mr. Tyson, who resembled Mr. Welch's childhood abuser, after Mr. Tyson gave him and an associate a ride in his car. *Id.* at 94. Mr. Welch and his associate then disposed of Mr. Tyson's body and drove his car away. *Id.* at 94-95.

Mr. Welch is extremely remorseful for his crime. At his IRAA hearing in December 2022, Mr. Welch stated the following:

> I just want to say to the Tyson family, I am so sorry for what happened, but PCP played a major part in what happened that night. It was dreadful. It's a horrendous mistake that I made, and I never should have made. It's the constant reminder of me living in this prison situation of

> what I have done to your family, of what I have taken from you. I mean, it bears on me every day.
>
> I wanted to commit suicide so many times. I didn't know the mistake that I did. It took years for me to realize, and me back then denying it. I was still young, immature, and didn't want to accept accountability or responsibility.
>
> But today I am telling you from the bottom of my heart that God has used me as a vessel, and I want to apologize to your family wholeheartedly. I am so sorry for what happened, for what I have done, and I apologize from the bottom of my heart. And I just don't want you to live with that hate in your heart for me. I just want like God forgives; I want you to forgive me. I am so sorry.
>
> I'm sorry, Judge. I'm sorry to the Tyson family. I apologize.

Tr. at 16-17. Mr. Welch made similarly profound statements of remorse in a letter to the trial court, which was submitted with his IRAA motion, and in his psychological and risk evaluation, including that he was "devastated that he was responsible," and that he had "no excuse for what I did, I did it, [Mr. Tyson] should be alive with his family now." R. at 98, 108-110, 123. In a letter that Mr. Welch sent to the trial court after his IRAA hearing, he expressed anger and frustration at his lengthy prison sentence and the IRAA process, but he continued to acknowledge that his crime was a "horrible mistake," and nowhere did he express a lack of remorse. *Id.* at 213-16.

Mr. Welch's transformation from a troubled young man capable of committing murder into a mature, rehabilitated adult is exemplified by his impressive record in prison. In his nearly 30 years of incarceration, Mr. Welch has

incurred just 15 disciplinary infractions, the majority of which were classified as moderate severity, with only 2 classified as serious. *Id.* at 95. He has not incurred any infractions for violent conduct in over 18 years, and nearly half of his infractions occurred in 2004, which was nearly 20 years ago. *Id.* at 95, 103. This was a turning point for Mr. Welch, and it was the moment when he decided to become a different person. *Id.* at 96, 103.

During his time in prison, Mr. Welch has taken full advantage of the educational, vocational, and self-improvement programming offered to him. *Id.* His accomplishments include, but are not limited to, his training and employment as a Suicide Companion, his participation in an inmate mentorship program, his completion of many courses through the West Virginia University, including the "Inside Out" re-entry program and "Gaining Control," where he worked as a teacher's assistant, his completion of release preparation programs, and his participation in vocational classes, including graphic arts and leather work. *Id.* at 96-97; 120-21. In connection with his inmate mentorship program, Mr. Welch was praised for "his ability to be selfless in his thinking" and for showing "countless times that his empathy for others far out-weighs any need for self-recognition." *Id.* at 97. Mr. Welch has also completed a non-residential drug abuse program and has taken a victim impact class. *Id.* at 96-97. Impressively, Mr. Welch has become a prolific writer and has authored numerous books. *Id.* Given all of the above

information, it is not surprising that Mr. Welch's psychological examiner, Dr. Matthew Bruce, concluded that he "has successfully rehabilitated himself and minimized his risk of future violent reoffending." R. at 129.

Mr. Welch also presented a robust release plan. *Id.* at 98-101. He will have a tremendous amount of assistance from his friends and family members, which is evidenced by the plethora of letters of support submitted with his IRAA motion. *Id.* Upon release, Mr. Welch will reside with his adoptive sister's grandmother in the District. *Id.* at 208. Mr. Welch has also received several offers of employment, including working in landscaping and property development, as well as working as a busboy or host in a club. *Id.* at 99-100. Mr. Welch also submitted an action plan for release, including, but not limited to, his commitment to seeking employment, furthering his education, and mentoring youth. *Id.* at 208-10.

Government's Response to Mr. Welch's IRAA Motion

Significantly, the government concluded that it "does not oppose a sentence reduction that would make the defendant eligible for parole consideration." *Id.* at 191. However, the government opposed immediate release based on 3 factors – his "troubling" disciplinary history, his "lackluster" release plan, and the victim's family's opposition to early release. *Id.* at 191-92. In the government's opinion, making Mr. Welch eligible for parole will only be a "modest delay" in his release, and the U.S. Parole Commission "possesses unparalleled experience and expertise

in assessing and managing recidivism risks among individuals who committed offenses in the District of Columbia . . .” *Id.* at 195.

Trial Court’s Ruling

First, the trial court acknowledged that Mr. Welch’s threshold eligibility under the IRAA was not in dispute, and that the government conceded that he had met his burden to establish that a reduction in sentence under the IRAA was appropriate. Appx. A at 7 (citing *Williams v. United States*, 205 A.3d 837, 850 (D.C. 2019). Next, the trial court found that Mr. Welch’s history and characteristics and family and community circumstances at the time of his offense “counsels in favor of a reduction of sentence, but is neutral in terms of granting or denying immediate release.” Appx. A at 9. The trial court also acknowledged that the government did not dispute Mr. Welch’s narrative, and that there was no reason to discredit it. *Id.*

Turning to compliance with institutional rules, the trial court found that “Mr. Welch’s record counsels in favor of earlier parole, and not immediate release.” *Id.* at 11. The trial court noted that “Mr. Welch is still classified as a medium security risk as of 2015 and a medium recidivism risk as of 2021, both well after his streak of offenses subsided,” and that, “[n]early all of his infractions involve a concerning pattern of disrespect for authority, which concerns the Court when considering release to supervision.” *Id.* at 10-11. The trial court further stated that Mr. Welch’s “minimizations [of his infractions] are also concerning,” and that, despite his record

being "largely nonviolent," it did "not evince the highest level of rehabilitation and maturity insofar as it shows how he tends to authority or accept responsibility." *Id.* at 11.

Similarly, the trial court found that Mr. Welch's educational, vocational, and other programming in prison is "a net positive" but "counsels in favor of earlier parole and more time to complete programming." *Id.* at 14. The trial court noted a "turning point" in 2004 with programming hitting a "fever pitch" in 2008-2009, but curiously seemed to criticize Mr. Welch by stating that, "he spent most of his time in a few of these activities, such as Inside Out, and much less time on many others." *Id.* at 13. The trial court also noted Mr. Welch's "lack of employment" even though he was hired as a Suicide Companion in 2013, and his psychological evaluation lists several jobs, including working as a dishwasher, grass cutter, launderer, UNICOR painter, mess hall officer, and photographer. *Id.* at 13-14. Ultimately, the trial court concluded that Mr. Welch "can hold down employment," but that "his post-release employment plan remains vague." *Id.* at 14.

Turning to the recommendation of the United States Attorney's Office, the trial court explained that it "does not defer to the government, but in this case agrees with its assessment and recommendation for the reasons provided in the balance of this Order." *Id.* at 14. The trial court therefore agreed with the government's request for a "limited reduction" of Mr. Welch's sentence to 30 years to life, which would

make him immediately eligible for parole. *Id*. As for the victim impact statements of Mr. Tyson's family members opposing his release, the trial court found that, "the victims' positions lead the Court to conclude that immediate release would not be in the interests of justice." *Id.* at 19.

The trial court next found that it was "not convinced" that Mr. Welch had demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction, despite his history of expressing deep remorse for his crimes, including in his letters, pleadings, and IRAA hearing testimony. *Id*. Curiously, the trial court praised Mr. Welch for stating in his first letter that he was "remorseful" and "committed a horrendous crime that destroyed many lives," but then criticized him for, in the trial court's opinion, making "conclusory statements of remorse and maturation and desire for release, and not the details to back it up." *Id.* at 14-15. Focusing on a letter that Mr. Welch sent in April 2023 (following his IRAA hearing), the trial court stated that, "it is clear that he remains angry and refuses to fully accept his role in the offense." *Id.* at 15. The trial court further found that "whatever remorse he expressed is gone and replaced by entitlement." *Id.* The trial court characterized Mr. Welch's anger as "an example of an extreme reaction to an inconvenience," and found that Mr. Welch "does not appear to have done much while incarcerated to address that anger and his feeling, echoed throughout his motion and exhibits, that everything just happens to him – his underlying offense,

his incarceration, his disciplinary record." *Id*. Moreover, the trial court construed the indication in the psychologist's report that Mr. Welch should not be allowed near the scene of the offense to mean that "he has not sufficiently dealt with his emotional response to triggers," even though the report concluded that Mr. Welch was unlikely to reoffend upon release. *Id.* at 15. The trial court put very little emphasis on the fact that the 1996 homicide was "an immature reaction to a very real trigger," which was "not abnormal for a young man." *Id.* at 15-16.

The trial court then placed considerable emphasis on Mr. Welch's release plan, finding that, though it is full of "honest support from many friends and family," it was "as bare as could be regarding housing and employment," citing the lack of the "specific nature or location of the jobs or his ability to do them," the fact that work as a mentor might be unpaid, and the fact that he found a different location to live. *Id.* at 16-17. The court then faulted Mr. Welch for supplementing his release plan with "a one-week action plan that is overly ambitious and does not realistically account for how long certain processes take, or the future beyond his first week of release." *Id.* at 16. In conclusion, the trial court found that, "Mr. Welch needs much more structure, and not just the support of family, friends, and former IRAA recipients upon release for the Court to feel confident that a sentence reduction to immediate release is appropriate." *Id.* at 17.

With regard to physical, mental, and psychiatric reports, the trial court stated that "his medical record is a part of the record of this case from his Compassionate Release motion and is not of any relevance here." *Id.* at 19. As for Mr. Welch's psychological evaluation, the trial court noted the findings that he presents a "low risk of violent reoffending of any severity in the community" and that he "has successfully rehabilitated himself and minimized his risk of future violent reoffending." *Id.* at 19-20. Though the trial court "has no reasons to doubt Dr. Bruce's conclusions," it found that it is "not satisfied that this rehabilitation is sufficient to merit relief under IRAA." *Id.* at 20.

The trial court then turned to Mr. Welch's role in the offense and the extent to which another person was involved and found that "this is not a case of peer pressure or youth groupthink." *Id.* at 20. The trial court also made the finding that Mr. Welch's primary role in the offense "does not push the Court in either direction regarding release." *Id.* at 20-21. Finally, the trial court found that Mr. Welch has diminished culpability since he was under the age of 25 at the time of the homicide, but that it could not "reach a definitive conclusion as to his personal aging out of crime." *Id.* at 20-21. In conclusion, the trial court found that Mr. Welch was not a danger to the community, but that he was "not quite rehabilitated yet," and immediate release was not appropriate in the "interests of justice" given his "weak" release plan and the position of the victim's family members. *Id.* at 21-22.

SUMMARY OF THE ARGUMENT

In denying Mr. Welch's request for a reduction in sentence that affords immediate release from prison, the trial court erred in several ways. First, the trial court abused its discretion by finding that Mr. Welch has not been sufficiently rehabilitated after stating that it had "no reasons to doubt" a psychologist's conclusion that Mr. Welch had in fact been "successfully rehabilitated." Next, the trial court abused its discretion by finding that immediate release is not in the "interests of justice" because Mr. Welch's release plan is "weak" and because the victim's family opposes release, and by leaving the release determination to the U.S. Parole Commission. Additionally, the trial court erred by failing to base its findings regarding Mr. Welch's remorse, disciplinary history, and employment on a firm factual foundation. The trial court also abused its discretion by failing to acknowledge the relevance of Mr. Welch's physical health, and by failing to consider this enumerated factor. Finally, the trial court erred by failing to apply the correct legal standard, which is preponderance of the evidence. For these reasons, Mr. Welch respectfully requests that this Court reverse the portion of the trial court's order that denies immediate release from prison.

ARGUMENT

Following a series of Supreme Court decisions addressing the constitutionality of sentencing juvenile offenders to life without parole, the D.C.

Counsel adopted the Incarceration Reduction Amendment Act of 2016, D.C. Code § 24-403.03. *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment forbids the execution of juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 75 (2010) (holding that the Eighth Amendment prohibits sentencing juvenile offenders to life without parole for non-homicide crimes); *Miller v. Alabama*, 567 U.S. 460 (2012) (invalidating mandatory sentences of life without parole for juvenile homicide offenders); *Montgomery v. Louisiana*, 577 U.S. 190 (2016). The IRAA protects youthful offenders' Eighth Amendment right against cruel and unusual punishment and recognizes the Supreme Court's mandate that they must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

Since 2016, the Council has made several revisions to the IRAA. In 2021, relief under the IRAA became available to individuals who committed offenses prior to turning 25. D.C. Code § 24-403.03. This revision built upon the Supreme Court's finding that, "[b]ecause juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments'" even when they commit terrible crimes, as well as the increasing understanding that such

differences apply to young adults.[4] *Miller*, 567 U.S. at 471-72 (quoting *Graham*, 560 U.S. at 68).

Mr. Welch committed a homicide when he was 23 years old following a traumatic, unstable childhood and adolescence wrought with abuse and drug addiction. R. at 81-107. He is extremely remorseful for taking Mr. Tyson's life. *Id.* During his nearly 30 years in prison, Mr. Welch has dedicated his life to rehabilitation, exemplified by his commitment to education, vocational training, wellness, and mentorship. *Id.* As the government conceded, and the trial court correctly found, Mr. Welch is no longer dangerous. R. at 188-96; Appx. A at 21. Nonetheless, the trial court refused to grant Mr. Welch's request for immediate release from prison. *Id.* at 22. In so doing, the trial court erred in multiple ways.

I. The trial court abused its discretion by finding that Mr. Welch has not been sufficiently rehabilitated after stating that it had "no reasons to doubt" a psychologist's conclusion that Mr. Welch had in fact been "successfully rehabilitated."

A trial court abuses its discretion where its "decision is supported by improper reasons, reasons that are not founded in the record, or reasons which contravene the

[4] As noted by the D.C. Council's Committee on the Judiciary and Public Safety, "[e]merging adults generally display greater risk-seeking behaviors, susceptibility to peers, stress, and excitement, and diminished capacity for self-control. Developmental research shows that young adults continue to mature well into their 20s and exhibit clear differences from both juveniles and older adults." D.C. Council, Comm. on Judiciary & Public Safety, Rep. on Bill 23-127 *Omnibus Public Safety and Justice Amendment Act of 2020,* at 15 (Nov. 23, 2020) (internal citations omitted).

policies meant to guide the trial court's discretion or the purposes for which the determination was committed to the trial court's discretion." *Johnson v. United States*, 398 A.2d 354, 367 (D.C. 1979).

After a lengthy interview of Mr. Welch and a thorough review of his records, Dr. Bruce concluded in his psychological and risk evaluation that, "*I am of the clinical opinion that Mr. Welch has successfully rehabilitated himself and minimized his risk of future violent reoffending*." R. at 129 (emphasis added). The trial court acknowledged that Dr. Bruce made this specific finding, and stated that, "the Court has no reasons to doubt Dr. Bruce's conclusions." Appx. A at 20. Essentially, the trial court stated that it had no reasons to doubt Dr. Bruce's conclusion that Mr. Welch has been successfully rehabilitated. However, the trial court proceeded to state that, "the Court is not satisfied that this rehabilitation is sufficient to merit relief under IRAA." *Id.* at 20. The trial court not only contradicted itself but also proceeded to base its negative findings on reasons that are not founded in the record.

The trial court questioned Mr. Welch's "ability to maturely cope with release," indicated that he had not dealt with his anger issues, and made several findings that are wholly contradicted by the psychological and risk evaluation. *Id.* at 15. For example, the trial court found that, "the psychologist's report indicates that he should not be allowed near the scene of the offense once released, which the Court understands to mean he has not sufficiently dealt with his emotional response to

triggers." *Id.* To the contrary, Dr. Bruce found that, "Mr. Welch has engaged in extensive self-directed and group programming and no further specific psychosocial interventions are recommended at this time," and that "[s]upervision need only be routine in nature, without the need for elevated or urgent services to manage Mr. Welch's risk." R. at 131. The trial court's finding that Mr. Welch has not been "sufficiently" rehabilitated is clearly not founded in the record, and it contradicts the court's adoption of Dr. Bruce's finding that Mr. Welch has been "successfully" rehabilitated. Thus, the trial court's findings regarding Mr. Welch's rehabilitation constitute an abuse of discretion.

II. The trial court abused its discretion by finding that immediate release is not in the "interests of justice" because Mr. Welch's release plan is "weak" and because the victim's family opposes release, and by leaving the release determination to the U.S. Parole Commission.

The trial court concluded its order by stating that, "the Court is not convinced that immediate release is appropriate and in the 'interests of justice' given Mr. Welch's weak release plan, even after the Court requested a more detailed plan, and position of the victim's family." Appx. A at 21. While the position of the victim's family members is certainly a relevant factor, it should not be the determinant factor in deciding whether release is in the "interests of justice," but rather should be given "limited consideration." *See Bailey v. United States*, 251 A.3d 724, 731 (D.C. 2021) (explaining that, in the compassionate release context, "victim impact statements can inform the dangerousness assessment" and therefore merit "limited consideration"

by the trial court). Instead of giving the victim's family members' statements "limited consideration," the trial court elevated them to one of just two factors that it considered before denying immediate release in the "interests of justice."

Furthermore, the trial court improperly faulted Mr. Welch for having a "weak" release plan. Appx. A at 21. Following the IRAA hearing, the trial court issued an order requesting that "the defense file a more detailed release plan." R. at 206. Mr. Welch complied with this request and filed a detailed "Supplement to Release Plan." R. at 208-10. In this pleading, Mr. Welch reminded the trial court that he had an offer of employment, and that he would have financial assistance and housing upon release, as well as the support of his friends and family. *Id.* at 208. Mr. Welch also provided his exact address upon release, as well as the name of the person he would be living with, and his relationship with that person. *Id.* Mr. Welch also provided the court with a very detailed list of actions he will take upon release, including, but not limited to, obtaining identification and services, making sure to comply with his release conditions, seeking employment, furthering his education, and mentoring youth. *Id.* at 209-10. Rather than commending Mr. Welch on supplementing his release plan, the trial court faulted him for not accurately predicting the amount of time that it would take him to complete the "one-week action plan," calling it "overly ambitious." Appx. A at 16.

Furthermore, the trial court's finding that Mr. Welch's plan "is about as bare as could be regarding housing and employment" is not founded in the record, as he informed the court of exactly where he would be living and working. Appx. A at 16; R. at 208-10. In fact, a potential employer, Byron Meekins, testified at Mr. Welch's hearing. Mr. Meekins informed the trial court that he has his own landscaping and moving companies. Tr. at 10. The trial court specifically asked Mr. Meekins if he would be willing to employ Mr. Welch, and Mr. Meekins replied, "Oh, most definitely." *Id.* The trial court's findings regarding Mr. Welch's release plan are therefore not founded in the record. Furthermore, the trial court improperly considered a perceived lack of details in the release plan as one of just two factors pertaining to the "interests of justice."

As an additional matter, contrary to the trial court's findings, the "interests of justice" are not served by leaving the release decision to the U.S. Parole Commission. This Court found in *Williams* that, "[t]he IRAA judicial hearing is superior to a parole hearing." 205 A.3d at 882-53. This Court further explained that:

> In addition, the formal judicial hearing envisioned by the IRAA provides defendants significant procedural guarantees, in contrast to the "minimal" procedures that the Constitution requires in parole proceedings. These include a fuller opportunity to present relevant evidence (and, by implication, to challenge the government's evidence) with the assistance of counsel, and a written, structured decision by the judge that is subject to more stringent constitutional and statutory requirements and is more fully reviewable on appeal.

Id. at 853. The "interests of justice" therefore are not served by leaving the release

determination to the Parole Commission, which could give undue weight to such factors as the nature of the offense. Referring to D.C. Code § 24-403.03(c)(2), the trial court correctly noted:

> [The] D.C. Council "unanimously removed" the nature and circumstances of the offense from this factor in the 2021 revision "in response to the over-reliance on the underlying offense by the USAO as an argument for denying the petitions of potentially rehabilitated defendants."

Appx. A at 5, n. 2 (quoting D.C. Council, Comm. on Judiciary & Public Safety, Rep. on Bill 23-127 *Omnibus Public Safety and Justice Amendment Act of 2020*, at 19 (Nov. 23, 2020)).

The Parole Commission's potential over reliance on such factors as the nature of the offense and consideration of factors not contained in the IRAA could result in a *de facto* life sentence for Mr. Welch, which is exactly what the IRAA seeks to avoid. Leaving Mr. Welch exposed to a life sentence constitutes an abuse of discretion, as it "contravenes 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." *Johnson*, 398 A.2d at 367.

III. The trial court erred by failing to base its findings regarding Mr. Welch's remorse, disciplinary history, and employment on a firm factual foundation.

A trial court's findings must be "based upon and drawn from a firm factual foundation," and it is an abuse of discretion if "the stated reasons do not rest upon a

sufficient factual predicate." *Johnson*, 398 A.2d at 364. In Mr. Welch's case, the trial court abused its discretion by failing to base its findings regarding his remorse, disciplinary history, and employment on a firm factual foundation.

First, the trial court's findings regarding Mr. Welch's lack of remorse are contrary to the evidence of record. Mr. Welch has consistently and unequivocally expressed remorse for taking Mr. Tyson's life. In the letter he submitted to the trial court with his IRAA motion, Mr. Welch stated, "I committed a horrendous crime that destroyed many lives," "I'm a very remorseful man who has replaced that old angry and immature person I used to be," and "a man died and I am responsible for this and I am very remorseful, and I think about it every day." R. at 108-110. The trial court correctly found that, in his letter, Mr. Welch "states several times that he is 'remorseful' and that he was an immature person who 'committed a horrendous crime that destroyed many lives,'" but incorrectly stated that "[m]uch of the letter focuses on his conclusory statements of remorse and maturation and desire for release, and not the details to back it up." Appx. A at 14-15.

"Conclusory" means "consisting of or relating to a conclusion or assertion for which no supporting evidence is offered."[5] Far from conclusory, Mr. Welch's

[5] Merriam Webster, "Conclusory" (*available at* https://www.merriam-webster.com/dictionary/conclusory#:~:text =Legal%20Definition-,conclusory,no%20supporting%20evidence%20is%20offered (last visited Oct. 27, 2023).

statements were all supported by evidence. Mr. Welch explained that he was remorseful because he "destroyed many lives," including those of Mr. Tyson's family members, and for the lasting pain he has caused them. R. at 108. Mr. Welch provided evidence of his maturation as well, explaining that he has spent his many years in prison taking advantage of opportunities for education and rehabilitation, including his participation in the Inside Outside program. *Id.* at 108-09. As for his desire for release, Mr. Welch explained that it is not just so that he could be free, but also so that he could mentor at-risk youth so that they do not commit the same horrible mistakes that he did. *Id.*

It appears, at the very least, that the trial court failed to grasp the meaning of the word "conclusory," as it also suggested that Mr. Welch made "similar" conclusory remarks at his IRAA hearing. Appx. A at 15. On the contrary, Mr. Welch stated the following at his hearing:

> I just want to say to the Tyson family, I am so sorry for what happened, but PCP played a major part in what happened that night. It was dreadful. It's a horrendous mistake that I made, and I never should have made. It's the constant reminder of me living in this prison situation of what I have done to your family, of what I have taken from you. I mean, it bears on me every day.
>
> I wanted to commit suicide so many times. I didn't know the mistake that I did. It took years for me to realize, and me back then denying it. I was still young, immature, and didn't want to accept accountability or responsibility.
>
> But today I am telling you from the bottom of my heart that God has used me as a vessel, and I want to apologize to your family

> wholeheartedly. I am so sorry for what happened, for what I have done, and I apologize from the bottom of my heart. And I just don't want you to live with that hate in your heart for me. I just want like God forgives; I want you to forgive me. I am so sorry.
>
> I'm sorry, Judge. I'm sorry to the Tyson family. I apologize.

Tr. at 16-17. This is not a "conclusory" remark, but rather a clear and unequivocable in-person apology to the people that Mr. Welch hurt.

In a letter that Mr. Welch sent the trial court after his IRAA hearing, he referred to his crime as a "sin" and "something very awful" that he wishes he "could go and take back." R. at 216. However, the trial court took issue with Mr. Welch's complaints about the prison system and the length of the IRAA process and incorrectly found that "he refuses to fully accept his role in the offense," and that "whatever remorse he expressed is gone and replaced by entitlement." Appx. A at 15. Nowhere in Mr. Welch's letter did he refuse to accept his role as the person who took Mr. Tyson's life. R. at 213-15. Nowhere did Mr. Welch state that he is not remorseful for what he did. *Id.* What Mr. Welch did do is explain what led to the homicide, which was his youth, immaturity, childhood trauma and drug addiction. *Id.* Mr. Welch also explained his frustration with the justice system, his life sentence, and the length of the IRAA process, none of which revoked his expressions of remorse. *Id.* In summary, the trial court's finding that Mr. Welch is not remorseful is completely unsupported by the record.

The trial court also found that Mr. Welch "minimized" his disciplinary infractions, which it characterized as a failure to accept responsibility. Appx. A at 10-11. As the trial court did in the context of remorse, it faulted Mr. Welch for every attempt to explain his actions, and it misconstrued his explanations as "minimizations." *Id.* With regard to his most violent disciplinary infraction (punching a BOP officer in 2004), the trial court faulted Mr. Welch for explaining that the punch was facilitated by officers who had removed his handcuffs to resolve an ongoing dispute with a particular officer. Appx. A at 10; R. at 96. This is not a minimization, as evidenced by Mr. Welch's further explanation that he was learning antisocial behaviors from others, and that he had hit "rock bottom" in 2004, which became a "turning point" for changing his life for the better. R. at 96. The trial court's finding that Mr. Welch minimized his disciplinary infractions is not firmly rooted in the evidence of record.

As for Mr. Welch's vocational development, the trial court made the following incorrect findings:

> Notable is the lack of employment from this record, where in the Court's experience it is usually included. The only employment mentioned in the Motion is Mr. Welch's hiring as a Suicide Companion in 2013 (it is unclear how long he performed this job). Without corroboration, Mr. Welch's psychiatric report lists that he was dishwasher, grass cutter, launderer, UNICOR painter, mess hall officer, and photographer, receiving positive work reviews at each.

Appx. A at 13-14 (internal citations omitted). On the contrary, the psychological evaluation cites Mr. Welch's BOP records (specifically his Individualized Needs plan – Program review, 11/13/2020). R. at 121. Citing the BOP records, Dr. Bruce noted that Mr. Welch "has received consistently 'satisfactory' evaluations," and that his work assignments "reflect increasing[] levels of challenge, complexity, responsibility, and trust." *Id.* The trial court was therefore unequivocally wrong in finding that Mr. Welch's employment record is uncorroborated. In summary, the trial court failed to base multiple findings on a firm factual foundation, which constitutes an abuse of discretion.

IV. The trial court abused its discretion by failing to acknowledge the relevance of Mr. Welch's physical health, and by failing to consider this enumerated factor.

The trial court abused its discretion by failing to acknowledge and consider the relevant, enumerated factor of Mr. Welch's physical health. The trial court stated that it "did not receive any physical health reports in this matter," but that "[Mr. Welch's] record is a part of the record of this case from his Compassionate Release motion" and "is not of any relevance here." Appx. A at 19. On the contrary, one of the IRAA factors that courts "shall" consider is "[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). Given the fact that the trial court

considered Mr. Welch's previously submitted medical records to be part of the IRAA record, it was required to consider Mr. Welch's entire medical history.

Dr. Bruce's psychological and risk evaluation includes a brief summary of Mr. Welch's physical health disabilities and notes that Mr. Welch's BOP Health Services records document the following conditions: diabetes mellitus, type 2 (adult-onset), obesity, round hole of retina without detachment, lattice degeneration, myopia, hypertension, tinea unguium, and hyperlipidemia. R. at 118. Under the IRAA, these physical health conditions are factors that the trial court was required to consider. D.C. Code § 24-403.03(c)(7).

This Court has consistently found that a trial court abuses its discretion where it fails to consider the relevant factors regarding an issue. *See Dumas v. Woods*, 914 A.2d 676, 679 (D.C. 2007) ("A failure by the trial court to make findings as to each of the relevant factors requires remand."); *Caldwell v. United States*, 595 A.2d 961 (D.C. 1991) (remanding for resentencing where the trial court failed to consider relevant factors related to the principle of proportionality); *see also Benn v. United States*, 978 A.2d 1257, 1273 (D.C. 2009) (remanding where the trial court failed to consider any of the three *Dyas* factors before excluding expert evidence). Following this line of cases, it is clear that the trial court in Mr. Welch's case abused its discretion by failing to consider the relevant factor of his physical health. Mr. Welch's physical health is particularly relevant to the "interests of justice" prong of

the statute, as his health conditions may shorten his lifespan and make it more likely that he ultimately serves a life sentence.

V. The trial court erred by failing to apply the correct legal standard, which is preponderance of the evidence.

This Court has held that, in the context of compassionate release, the preponderance of the evidence standard applies to the moving party. *See Bailey,* 251 A.3d at 728. As this Court explained in *Bailey*, "the preponderance standard is the 'default rule.'" *Id.* (citing *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011). Furthermore, "[w]here no standard is specified in the statute and due process does not compel a different result, it ordinarily applies." *Id.* (citing *Raphael v. Okyiri*, 740 A.2d 935, 957 (D.C. 1999) ("[A] party with the burden of persuasion on an issue must ordinarily establish the relevant facts by a preponderance of the evidence[]" and "[e]xceptions to this standard are uncommon") (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989))).

It follows that the preponderance of the evidence standard should apply to IRAA motions. The "preponderance of the evidence" standard has been described as whether a fact is "*more likely than not*." *In re T.J.,* 666 A.2d 1, 16 n. 17 (D.C. 1995) ("A preponderance of the evidence is proof which leads the fact finder to find that the existence of the contested fact is more plausible than its non-existence.") (emphasis added)). It makes sense to apply the preponderance of the evidence standard to IRAA cases because the D.C. Council did not indicate that the IRAA is

reserved for only the most exemplary individuals. Instead, it directed trial courts to balance a myriad of factors. Rather than applying the preponderance of the evidence standard, the trial court held Mr. Welch to an impossibly high standard even where the government conceded that he is not dangerous. This is evidenced by the trial court's finding that Mr. Welch has not reached the "*highest level* of rehabilitation and maturity." Appx. A at 11 (emphasis added). It is further evidenced by the trial court's finding that Mr. Welch's detailed release plan is too "weak" and not sufficient to merit immediate release. Holding Mr. Welch to a higher standard than preponderance of the evidence constitutes yet another abuse of discretion.

CONCLUSION

Mr. Welch respectfully requests that this Court reverse the portion of the trial court's order that denies immediate release from prison and remand the case to the trial court for the purpose of amending his sentence to afford immediate release rather than mere parole eligibility.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 27, 2023, a copy of the foregoing Appellant Brief and the accompanying Limited Appendix were served via the court's e-filing system to: Chrisellen R. Kolb, Esq., Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia.

/s/ Anne Keith Walton
Anne Keith Walton, Esq.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed April 3, 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.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, filed April 3, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

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

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(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.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

Signature

23-CO-0374

Case Number(s)

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10/27/23

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