UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA
Plaintiff,

v. **Case No. 17-CR-156**

JERRY SCOTT
Defendant.

DECISION AND ORDER

Defendant Jerry Scott moves for "compassionate release" pursuant to 18 U.S.C. § 3582(c)(1)(A). That statute permits the court to reduce a term of imprisonment, on the motion of the Director of the Bureau of Prisons ("BOP"), or upon motion of the defendant after he has exhausted administrative rights to appeal a failure of the BOP to bring a motion on his behalf or the lapse of 30 days from the receipt of such a request by the warden of his facility, whichever is earlier, if it finds that "extraordinary and compelling reasons" warrant such a reduction.

The government opposes release in this case, on procedural grounds and on the merits. For the reasons that follow, while I conclude that the "exhaustion" required by the statute may in some circumstances be excused or waived, defendant has not demonstrated that "extraordinary and compelling reasons" support a reduction of his sentence.

I. FACTS AND BACKGROUND

On September 19, 2017, the government obtained a three-count indictment charging defendant with felon in possession of a firearm, 18 U.S.C. § 922(g)(1); possession of methamphetamine and marijuana with intent to distribute, 21 U.S.C. §§ 841(a)(1), (b)(1)(C);

and possession of a firearm in furtherance of a drug trafficking offense, 18 U.S.C. § 924(c). On December 18, 2017, pursuant to an agreement with the government, defendant pleaded guilty to counts one and two. The government agreed to dismiss the § 924(c) count, which would have required a mandatory 5-year consecutive sentence.

The plea agreement set forth the following factual basis:

> On April 12, 2017, Milwaukee police officers executed a state search warrant at [xxxx] N 83rd St. in Milwaukee, Wisconsin. During the execution of the search warrant, Jerry Scott and a child came out of the west room in the basement, and Sheila Johnson and Raymond McClendon were found upstairs. Scott had $477 on his person. Jerry Scott has been previously convicted of two felonies (both for burglary in 2006 in Milwaukee County Circuit Court).
>
> In the search of the west room basement, officers found: two cell phones, which Scott stated belonged to him; a plate with marijuana residue with a box of latex gloves next to it; and 15 methamphetamine pills. Just outside of the west room in the basement, officers found a backpack, which contained: a box of sandwich bags; a digital scale; a bowl with marijuana residue; a jar containing marijuana; an orange bag with 34 individually wrapped corner cuts of marijuana; a loaded Hi Point, model JHP, .45 caliber pistol, bearing serial number 4211854, with a round in the chamber; a hair brush; and a Motorola cellular phone. A total of 264.3 grams of marijuana was found in the backpack. Scott intended to distribute the marijuana.
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> Case agents identified Scott's fingerprint on the jar containing marijuana that was in the backpack containing the gun. The Motorola cellular phone recovered in the backpack contained emails, text messages, photographs, and videos that indicate it is Jerry Scott's phone.
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> Case agents interviewed an individual who had recently purchased marijuana from the residence, and the individual provided a phone number for the person he called in order to arrange that purchase; that phone number was associated with one [of] Scott's phones. Case agents then executed a state search warrant on the two cell phones found in the west bedroom of the basement and found numerous text messages related to the sale of drugs.

(R. 16 at 3.)

The pre-sentence report ("PSR") calculated an advisory sentencing guideline range of 57-71 months. Grouping the two counts, the PSR set a base offense level of 20 under

U.S.S.G. § 2K2.1(a)(4)(A) based on defendant's prior conviction for a controlled substance offense; added 4 levels under U.S.S.G. § 2K2.1(b)(6)(B) based on his possession of the firearm in connection with another felony, i.e., drug trafficking; and then subtracted 3 levels for acceptance of responsibility under U.S.S.G. § 3E1.1, for a final offense level of 21.[1] The PSR further determined a criminal history category of IV, based on two prior burglary convictions, each of which scored 3 criminal history points; a prior conviction of possession with intent to distribute marijuana, which scored 1 point; and defendant's commission of the instant offense while on supervision, which added 2 points.

On April 6, 2018, on the parties' joint recommendation, I imposed a sentence of 36 months' imprisonment running concurrently with a state sentence after revocation defendant was then serving. Defendant took no appeal. According to the BOP's inmate locator, his release date is November 8, 2020, but defendant indicates that he is slated for release to a halfway house on July 1, 2020. (R. 38 at 1-2.)

On April 14, 2020, defendant filed a pro se request for compassionate release. I referred the motion to Federal Defender Services, which filed a § 3582(c)(1) motion on defendant's behalf on May 1, 2020. In that motion, defendant requests that his sentence be reduced to time served, followed by three years of supervised release with a condition of six months' house arrest. He generally relies on the COVID-19 pandemic in seeking this modification. (R. 38 at 1.) I ordered the government to respond, and on May 6, 2020, it filed a response opposing relief procedurally and on the merits. (R. 39.) Defendant filed a reply on

[1]The PSR based the offense level on the firearm count, as it produced a higher level than the drug trafficking count, which carried a base offense level of 14, U.S.S.G. § 2D1.1(c)(13), plus 2 for possession of a firearm, U.S.S.G. § 2D1.1(b)(1).

May 12 (R. 40), and the matter is ready for decision.

II. DISCUSSION

A. Compassionate Release Standards

Motions for "compassionate release" are authorized by 18 U.S.C. § 3582(c)(1), which provides, in pertinent part:

> The court may not modify a term of imprisonment once it has been imposed except that—
>
> > (1) in any case—
> >
> > > (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
> > >
> > > (i) extraordinary and compelling reasons warrant such a reduction; . . .
> > >
> > > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c).[2]

The statute does not define the term "extraordinary and compelling reasons." Rather, Congress provided that:

> The [Sentencing] Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling

[2]The statute also allows the release of certain elderly inmates, but that provision is not at issue here, so I do not discuss it further.

> reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

The Commission's policy statement provides:

> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—
>
> (1) (A) extraordinary and compelling reasons warrant the reduction . . .
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

U.S.S.G. § 1B1.13. The commentary to the policy statement provides that extraordinary and compelling reasons exist under these circumstances:

> (A) Medical Condition of the Defendant.—
>
> > (i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
> >
> > (ii) The defendant is—
> >
> > > (I) suffering from a serious physical or medical condition,
> > >
> > > (II) suffering from a serious functional or cognitive impairment, or
> > >
> > > (III) experiencing deteriorating physical or mental health because of the aging process,
> > >
> > > that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from

which he or she is not expected to recover.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. § 1B1.13 cmt. n.1.[3]

As indicated, the statute provides that a prisoner may seek relief from the court after he has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on his behalf or the lapse of 30 days from the receipt of such a request by the warden of his facility, whichever is earlier. Here, defendant concedes that he has not met either requirement. He filed a request for compassionate release with the warden on April 20, which

[3]Prior to December 2018, only the BOP could make a motion under § 3582(c)(1)(A). As part of the First Step Act of 2018, Congress allowed prisoners to seek sentence reductions on their own motion. The Sentencing Commission has not updated its policy statement since the Act passed. See United States v. Brown, 411 F. Supp. 3d 446, 449 n.1 (S.D. Iowa 2019) ("As district courts have noted often this year, the Sentencing Commission has not amended the Guidelines following the First Step Act and cannot do so until it again has four voting commissioners."); see also United States v. Garcia, No. 4:05-cr-40098, 2020 U.S. Dist. LEXIS 75335, at *6 (C.D. Ill. Apr. 28, 2020) ("As of the date of this Opinion, the Sentencing Commission still lacks a quorum."). Thus, as even those courts that continue to follow it concede, "the current policy statement is a relic." Id. at *12.

was denied on April 24. He has appealed that denial, and the appeal remains pending. Defendant further concedes that if the statute's exhaustion requirements are without exception, the court cannot consider his motion until the sooner of May 20 or when his appeal his denied. However, he contends that these requirements are not jurisdictional, and that they may be waived or excused in some circumstances. (R. 38 at 3.) The government disagrees. (R. 39 at 7.) I first discuss the procedural issues, before turning to the merits of defendant's motion.

B. Procedural Issues

1. Subject Matter Jurisdiction

If the statute's exhaustion requirement is "jurisdictional" the court must enforce it; it cannot be waived or excused. If, on the other hand, it constitutes a "claim-processing" rule it may be forfeited or waived. See, e.g., Eberhart v. United States, 546 U.S. 12, 15 (2005); see also Ortiz-Santiago v. Barr, 924 F.3d 956, 963 (7th Cir. 2019) ("Unlike a limitation on a court's subject-matter jurisdiction, a claim-processing rule is one that seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.") (internal quote marks omitted).

While the Seventh Circuit has not directly addressed this issue under § 3582(c)(1), it has held that "a district court has subject-matter jurisdiction to consider a motion for relief under 18 U.S.C. § 3582(c)(2) regardless of whether the moving defendant is actually eligible for such discretionary relief." United States v. Taylor, 778 F.3d 667, 671 (7th Cir. 2015).[4] There is no reason to treat § 3582(c)(1) any differently. As the Taylor court noted, in language that applies

[4]Section 3582(c)(2) permits the court to reduce a sentence based on a retroactively applicable amendment to the sentencing guidelines that lowers the defendant's guideline range.

equally here:

> § 3582 is not part of a jurisdictional portion of the criminal code but part of the chapter dealing generally with sentences of imprisonment. The section sets forth factors to consider when imposing a prison sentence and provides that a prison sentence is final and appealable. Nor is subsection (c) phrased in jurisdictional terms. It begins: "The court may not modify a term of imprisonment once it has been imposed," with exceptions then specified. Since Congress has not framed the issue in terms of jurisdiction, the statutory indicators point against jurisdictional treatment.

Id.

The government maintains that the time limitation in § 3582(c)(1) is jurisdictional, but it acknowledges Taylor is to the contrary and invokes the jurisdictional argument solely to preserve it. (R. 39 at 8.) Following Taylor, I conclude that § 3582(c)(1) sets forth a claim-processing rule. See United States v. Lacy, No. 15-cr-30038, 2020 U.S. Dist. LEXIS 76849, at *6-8 (C.D. Ill. May 1, 2020); see also United States v. Nazer, 2020 U.S. Dist. LEXIS 79527, at *11 (N.D. Ill. May 6, 2020) ("Every district court within this Circuit that has addressed the issue has found Taylor's rationale equally applicable to § 3582(c)(1)(A)'s exhaustion requirement and concluded that it is not jurisdictional."); United States v. Scparta, No. 18-cr-578, 2020 U.S. Dist LEXIS 68935, at *12-13 (S.D.N.Y. Apr. 20, 2020) (noting that the statute simply delineates the process for a party to obtain judicial review, not referring to the adjudicatory capacity of the courts).

2. Exceptions

A claim-processing rule generally must be enforced if properly raised by a party. See Eberhart, 546 U.S. at 19. However, enforcement of such rules may be subject to waiver, forfeiture, or other equitable exceptions. See Lacy, 2020 U.S. Dist. LEXIS 76849, at *9 (citing Fed. Ins. Co. v. United States, 882 F.3d 348, 361 (2d Cir. 2018)). As is pertinent here, the

Seventh Circuit has held that a district court may waive a statutorily-mandated exhaustion requirement where exhaustion would be futile, meaning "the attempt to exhaust administrative remedies would be useless or inadequate to prevent irreparable harm." Citadel Sec., LLC v. Chi. Bd. Options Exch., Inc., 808 F.3d 694, 700 (7th Cir. 2015), amended, 2015 U.S. App. LEXIS 22893 (7th Cir. Dec. 23, 2015); see also Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1174 (7th Cir. 2010) ("If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of some relief' and so nothing for the prisoner to exhaust.").

The government resists any judicial exceptions to the requirements of § 3582(c)(1)(A), including futility. The government relies primarily on Ross v. Blake, 136 S. Ct. 1850, 1855 (2016), in which the Court rejected a "special circumstances" exception to the exhaustion requirements of the Prison Litigation Reform Act ("PLRA"). (R. 39 at 9.) In so holding, the Court distinguished between judge-made exhaustion doctrines, which remain amenable to judge-made exceptions, and statutory exhaustion provisions, to which courts may create exceptions only if Congress wants them to. Id. at 1857; see also McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.") (internal citations omitted).

As courts have noted, the PLRA is a very different statute than § 3582(c)(1) as amended by the First Step Act. The PLRA provides: "No action shall be brought with respect to prison conditions under [42 U.S.C. 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The explicit purpose of the PLRA was to require prisoners

to exhaust available remedies before they could go to court. See Lacy, 2020 U.S. Dist. LEXIS 76849, at *11 ("With respect to the PLRA, Congress amended 42 U.S.C. § 1997e(a) to make 'exhaustion provisions mandatory.'") (quoting Historical and Statutory Notes, 42 U.S.C.A. § 1997e (West Supp. 1997)); see also Scparta, 2020 U.S. Dist LEXIS 68935, at *21 (noting that in Ross the Court considered the legislative history of the PLRA, which was specifically designed to replace the weaker, discretionary regime of an earlier prison litigation statute). "Quite the opposite is true for § 3582(c)(1)(A), as the First Step Act extended to inmates the ability to file motions for compassionate release," replacing the previous regime in which the agency acted as a gatekeeper in deciding who could go to court. Lacy, 2020 U.S. Dist. LEXIS 76849, at *11; see also Scparta, 2020 U.S. Dist LEXIS 68935, at *22 ("Unlike the PLRA, Congress specifically designed the First Step Act to result in expeditious review of prisoner applications and to improve the health and safety of inmates, prison staff, and the community."); id. at *19 (noting that the title of the First Step Act provision permitting judicial review on a defense motion is "Increasing the Use and Transparency of Compassionate Release").

More importantly,

> § 3582(c)(1)(A) does not contain an exhaustion requirement in the traditional sense. That is, the statute does not necessarily require the moving defendant to fully litigate his claim before the agency (i.e., the BOP) before bringing his petition to court. Rather, it requires the defendant either to exhaust administrative remedies or simply to wait 30 days after serving his petition on the warden of his facility before filing a motion in court.

United States v. Haney, No. 19-cr-541, 2020 U.S. Dist. LEXIS 63971, at *8 (S.D.N.Y. Apr. 13, 2020). While exhaustion requirements generally serve the twin purposes of protecting administrative agency authority and promoting judicial efficiency, the "hybrid requirement" in

this statute reflects a third purpose—congressional intent that prisoners have the right to a meaningful and prompt judicial determination of whether he should be released. Id. at *9-10; see also United States v. Soto, No. 1:18-cr-10086-IT, 2020 U.S. Dist. LEXIS 67912, at *12 (D. Mass. Apr. 17, 2020) ("This alternative to exhaustion suggests that Congress understood that some requests for relief may be too urgent to wait for the BOP's process."); United States v. Russo, No. 16-cr-441, 2020 U.S. Dist. LEXIS 59223, at *7 (S.D.N.Y. Apr. 3, 2020) ("In essence, the 30-day rule was meant as an accelerant to judicial review.").[5]

Finally, the 30-day period, rather than an exhaustion requirement, operates more like a filing deadline, and the Supreme Court has long held that such deadlines are subject to equitable exceptions. Scparta, 2020 U.S. Dist. LEXIS 68935, at *14-15 (citing Holland v. Florida, 560 U.S. 631, 645-46 (2010); Young v. United States, 535 U.S. 43, 49 (2002); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990)); see also Ortiz-Santiago, 924 F.3d at 963 ("The 'quintessential' example of a claim-processing rule is a filing deadline."). "[I]t would frustrate Congress's intent, and render Congress's deliberate choice to craft this exception differently, if the Court ignored the second half of Section 3582(c) and treated this like the traditional exhaustion scheme that the Supreme Court considered in Ross." Scparta, 2020 U.S. Dist. LEXIS 68935, at *19.

"In sum, the First Step Act's text, history, and structure all counsel in favor of concluding

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[5]The government contends that Congress imposed the exhaustion requirement in § 3582(c)(1) for good reason: the BOP conducts an extensive assessment for such requests. (R. 39 at 11.) But in these exceptional times, when the BOP is likely inundated with requests for release and where a delay of even 30 days could have fatal consequences, this is not a persuasive argument. What sense would it make to require an elderly, infirm inmate confined to a facility experiencing a COVID-19 outbreak wait up to 30 days for a response that may not come? See Haney, 2020 U.S. Dist. LEXIS 63971, at *11 (noting BOP's resistence to providing time frames for deciding pending applications).

that the statute's exhaustion requirement is amenable to equitable exceptions." Id. at *23-24. Thus, while a court may decline to consider a motion where the defendant has not waited 30 days, nothing in the statutory scheme suggests that Congress intended to preclude a district court from exercising judicial discretion and to take into account exigent circumstances related to why the defendant seeks compassionate release. Soto, 2020 U.S. Dist. LEXIS 67912, at *12.

The COVID-19 pandemic represents the sort of exigency that could justify an exception, depending on the circumstances of the case. As the court explained in Lacy:

> Mandating the exhaustion requirement in this case and other cases around the country during the COVID-19 pandemic cannot be what Congress intended. Based on the House Report for the First Step Act, the statute is designed to "enhance public safety" and "make . . . changes to Bureau of Prisons' policies and procedures to ensure prisoner and guard safety and security." Denying Defendant's motion without reaching the merits, only to order Defendant to wait to refile his request with this Court, would certainly frustrate these purposes. In that time, Defendant is at a high risk of contracting a potentially deadly illness based on the realities of BOP facilities, causing irreparable harm and rendering his request for compassionate release futile.
>
> The Court concludes that § 3582(c)(1)(A) does not require the Court to wait to consider a compassionate release request if there is a credible claim of serious and imminent harm from this pandemic. That does not mean the Court will waive the thirty-day period in all cases. The decision must be made on a case-by-case basis.

2020 U.S. LEXIS 76849, at *12-13; see also Haney, 2020 U.S. Dist. LEXIS 63971, at *11-12 (holding that the court has discretion to waive the 30-day waiting period to deal with an emergency before it is potentially too late).[6]

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[6]The government also cites United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020), amended, (Apr. 8, 2020), in which the court stated that the exhaustion requirement "presents a glaring roadblock foreclosing compassionate release at this point." The decision "provides no analysis beyond this statement, however." United States v. Sanchez, No. 18-cr-00140, 2020 U.S. Dist. LEXIS 70802, at *9 n.7 (D. Conn. Apr. 22, 2020). Further, the issue came

B. Merits

1. Effect of the Policy Statement

In order to grant relief on the merits, the court must find "extraordinary and compelling reasons." As indicated, Congress did not define the term, instead delegating that task to the Sentencing Commission. The Commission's policy statement references serious medical conditions, age, family circumstances, and "other reasons" as determined by the BOP. U.S.S.G. § 1B1.13 cmt. n.1. But as also indicated, the Commission has not updated the policy statement since the passage of the First Step Act.

> This leaves district courts in a conundrum. On the one hand, Congress unequivocally said it wishes to "[i]ncreas[e] the [u]se . . . of [c]ompassionate [r]elease" by allowing district courts to grant petitions "consistent with applicable policy statements" from the Sentencing Commission. § 3582(c)(1)(A) (emphasis added). On the other hand, the Commission—unable to take any official action—has not made the policy statement for the old regime applicable to the new one.

Brown, 411 F. Supp. 3d at 449.

While district courts have split on the issue, I agree with what appears to be the majority position—that the court in deciding a compassionate release motion is no longer confined to the specific examples enumerated in U.S.S.G. § 1B1.13. See Nazer, 2020 U.S. Dist. LEXIS 79527, at *13 (collecting cases); United States v. Maumau, No. 2:08-cr-00758-TC-11, 2020 U.S. Dist. LEXIS 28392, at *5-6 (D. Utah Feb. 18, 2020) (collecting cases).

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before the court in a peculiar procedural posture, as the defendant improperly presented his compassionate release motion to the court of appeals in the first instance. As noted by amici supporting rehearing in the case, the court issued a precedential exhaustion decision less than a week after Raia's initial three-page letter motion seeking compassionate release, without a district court decision or meaningful briefing from the parties on the exhaustion issue, raising "serious concerns regarding sound judicial practices in an emergency context such as the COVID-19 pandemic." Letter for Proposed Amici, United States v. Raia, No. 20-1033 (May 12, 2020). For these reasons, I do not find Raia persuasive.

First, § 3582(c)(1) refers to "applicable" policy statements issued by the Commission. By its terms, the current policy statement applies to motions filed by the BOP director, not by a defendant. See U.S.S.G. § 1B1.13 cmt. n.4 ("A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)."). Accordingly, there does not appear to be an "applicable" statement for motions brought by defendants. United States v. Redd, No. 1:97-cr-00006-AJT, 2020 U.S. Dist. LEXIS 45977, at *15 (E.D. Va. Mar. 16, 2020).

Second, even if the current statement could be considered "applicable," it cannot be given controlling weight without placing it in serious tension, if not conflict, with the First Step Act.[7] See Stinson v. United States, 508 U.S. 36, 38 (1993) (holding that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline"); United States v. Thomas, 11 F.3d 732, 737 (7th Cir. 1993) (noting that statutes trump guidelines where the two conflict). Plainly, the policy statement does not control to the extent it purports to require a motion by the BOP. While perhaps the court could continue to be guided by the first three examples given in the statement (serious medical condition, age, family circumstances), the final, catch-all category purports to limit the "other reasons" that might support release to those determined by the Director of the BOP. U.S.S.G. § 1B1.13 cmt. n.1(D). This is, "in substance, part and parcel of the eliminated requirement that relief must be

[7]Defendant contends that there is no reason to believe the policy statement is mandatory when the rest of the guidelines are advisory under United States v. Booker, 543 U.S. 220 (2005). (R. 40 at 4-5.) However, Booker does not resolve the question here. See Dillon v. United States, 560 U.S. 817, 829-30 (2010) (declining to apply Booker in § 3582(c)(2) proceedings given the fundamental differences between sentencing and sentence-modification proceedings).

sought by the BOP Director in the first instance, particularly since it would be unlikely that the BOP Director would determine that an extraordinary and compelling reason exists under Application Note 1(D) but then decline to file a motion for compassionate release based on that determination." Redd, 2020 U.S. Dist. LEXIS 45977, at *17-18; see also Maumau, 2020 U.S. Dist. LEXIS 28392, at *6-7 (noting that while nothing in the First Step Act necessarily requires the Commission to reevaluate the first three examples, the fourth is no longer appropriate given Congress's decision to remove the BOP's control over compassionate release motions).

Third, Congress amended § 3582(c)(1) "against the backdrop of a documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants," Redd, 2020 U.S. Dist. LEXIS 45977, at *16, listing these changes under the title "Increasing the Use and Transparency of Compassionate Release." Brown, 411 F. Supp. 3d at 450-51. It would be contrary to this clearly expressed legislative intent to continue to give the BOP control over what constitutes an extraordinary and compelling reason. Id. at 451 ("Therefore, if the FSA is to increase the use of compassionate release, the most natural reading of the amended § 3582(c) and § 994(t) is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it.").[8]

2. Defendant's Claims

Giving the statutory terms their ordinary meaning, a defendant seeking compassionate

[8]The government argues that because there is no plausible reason to treat motions filed by defendants differently than motions filed by the BOP, the policy statement applies to motions filed by defendants as well. (R. 39 at 6 n.1.) As indicated in the text, the First Step Act represents a congressional determination that the BOP no longer serve as gatekeeper for compassionate release motions. It would be inconsistent with that determination to permit the BOP alone to determine the permissible "other" grounds for such motions.

release would need to demonstrate that his situation is extraordinary, i.e., beyond what is usual, customary, regular, or common, and his need for release compelling, i.e., irreparable harm or injustice will result if relief is not granted. United States v. Cantu, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019) (citing Black's Law Dictionary (10th ed. 2014)). Whether I use this common sense approach or look to grounds "of similar magnitude and importance" to those enumerated in U.S.S.G. § 1B1.13, see United States v. Pinto-Thomaz, No. 18-cr-579, 2020 U.S. Dist. LEXIS 64444, at *5 (S.D.N.Y. Apr. 13, 2020), defendant's motion falls short.

Defendant makes three argument in support of release. First, while acknowledging that he is healthy and not in the class of people identified as high-risk for severe illness from COVID-19, defendant states that his father and stepfather are not healthy, and he and his family fear they may not survive another two months. Second, defendant notes that reducing jail and prison populations is paramount in battling the COVID-19 pandemic, and he is an ideal inmate to release now given the brief amount of time remaining on his sentence. Third, while defendant is serving his sentence at FCI Oxford, where the BOP has not reported cases of COVID-19, he contends that the outbreaks at other institutions reflect the BOP's overall inability to manage an infectious disease outbreak. (R. 38 at 2.)

While defendant would appear to be a good candidate for early transfer to pre-release custody by the BOP given the short time he has remaining, it is hard to see how any of the grounds he presents qualify as extraordinary and compelling. By his own admission, at age 34 and in good health, he is not particularly vulnerable to COVID-19, and his facility has no reported cases. See, e.g., United States v. Gold, No. 15 CR 330, 2020 U.S. Dist. LEXIS 79539, at *5 (N.D. Ill. May 6, 2020) (finding that general concerns about possible exposure to COVID-19 do not meet the criteria for extraordinary and compelling reasons, and noting that

courts have denied motions brought by inmates housed in facilities with no evidence of widespread transmission and whose individual risk factors were shared by a host of other prisoners). Circumstances at FCI Oxford could change, as defendant suggests based on events at other prisons (R. 38 at 17-18; R. 40 at 5-6), but I must decide the motion based on the facts currently before me.[9]

Defendant notes that persons in correctional facilities are at greater risk than those on the outside, who can practice social distancing and other hygienic measures to avoid infection. (R. 38 at 16.) But reliance on circumstances applicable to everyone in prison would appear to read the term "extraordinary" out of the statute. Defendant also notes that younger, seemingly healthy people have been killed by COVID-19. (R. 38 at 16; R. 40 at 7.) Consistent with the statutory text, however, courts considering compassionate release motions based on COVID-19 have typically granted relief to prisoners particularly vulnerable to the virus. E.g., United States v. Ramirez, No. 17-10328-WGY, 2020 U.S. Dist. LEXIS 83363, at *9 (D. Mass. May 12,

[9]In reply, defendant indicates that courts have released inmates lacking risk factors who were close to completing their sentences and/or who were confined at prisons with no confirmed cases of COVID-19. (R. 40 at 7-8, citing cases.) However, several of the cases he cites fail to support his argument. In United States v. Perez, 17 Cr. 513-3 (AT), 2020 U.S. Dist. LEXIS 57265, at *9, 2020 WL 154622 (S.D.N.Y. Apr. 1, 2020), for instance, the court found that "Perez's medical condition, combined with the limited time remaining on his prison sentence and the high risk in the MDC posed by COVID-19, clears the high bar set by § 3582(c)(1)(A)(i)." In United States v. Kelly, No. 3:13-CR-59-CWR-LRA-2, 2020 U.S. Dist. LEXIS 77080, at *16 (S.D. Miss. May 1, 2020), the court released a defendant from FCI Oakdale, despite his youth and lack of health issues, based on the high risk he faced, as "almost a quarter of COVID-19-related prisoner deaths reported by the BOP have occurred at Oakdale I." And in United States v. Ben-Yhwh, No. 15-00830 LEK, 2020 U.S. Dist. LEXIS 65677 (D. Haw. Apr. 13, 2020), the court released an inmate from a BOP medical facility with no reported cases, id. at *10-11, but he was 73 years old with serious medical conditions including Parkinson's Disease, asthma, and diabetes, which placed him at high risk. Ultimately, every case must be decided on its own facts, which may include the time remaining on the defendant's sentence, the conditions at the prison where he is housed, and the safety and stability of his release plan.

2020) (collecting cases). Defendant further notes the recommendation of public health officials that prison populations be decreased in order to decrease the risk to the general public. (R. 38 at 17; R. 40 at 6-7.) Again, this is a general concern, rather than one specific to this case. Finally, defendant reports having family members who may be vulnerable, and he would no doubt like to spend time with them, but that is also likely true of most prisoners. Defendant develops no argument that he is an essential care-giver, see Pinto-Thomaz, 2020 U.S. Dist. LEXIS 64444, at *9-10, nor does he establish that his desire to assist his fiancé and children during the crisis makes his situation extraordinary. (See R. 38 at 19.)

In sum, even taking a more expansive view of "extraordinary and compelling reasons" than did the Commission in U.S.S.G. § 1B1.13, I cannot find defendant eligible for sentence modification. Because I cannot find extraordinary and compelling reasons, I need not consider whether the 18 U.S.C. § 3553(a) factors would otherwise support a reduction.

That said, I do recommend that the BOP consider defendant for prompt release to home confinement under its administrative criteria. Hastening his release by less than two months would not create a danger to the community (or otherwise undermine the purposes of sentencing), and release may well be warranted under guidelines that are more lenient than the "extraordinary and compelling" standard applicable to the motion before the court. See Pinto-Thomaz, 2020 U.S. Dist. LEXIS 64444, at *11 (making a similar recommendation).

III. CONCLUSION

THEREFORE, IT IS ORDERED that defendant's motion (R. 38) is denied.

Dated at Milwaukee, Wisconsin, this 15th day of May, 2020.

s/ Lynn Adelman
LYNN ADELMAN
District Judge