

pornography under 18 U.S.C. § 2251(a), transportation of child pornography under 18 U.S.C. § 2252(a)(1), and possession of child pornography under 18 U.S.C. § 2252A(5)(B). Doc. #43. As described in the Presentence Investigation Report (PSR), Doc. # 34, in 2012, Defendant used the internet to communicate with an undercover investigator in New Zealand.

During the course of these communications, Defendant sent child pornography to the undercover investigator. Defendant also produced child pornography of an individual referred to in the PSR as CV1. Defendant also acknowledged engaging in play with CV1 during which his hand touched CV1's clothed groin region. Defendant also acknowledged sending child pornography to individuals in the Netherlands and Russia, including the produced imagery of CV1. Defendant also amassed a significant-sized collection, totaling 8,996 images of child pornography. The imagery was possessed across numerous electronic devices and it depicted prepubescent children and sadistic and masochistic abuse. The investigation of Defendant also revealed that he had created a photo album on a Russian photo sharing website entitled, "A few of [CV1]," though this album could not be reviewed because it had been blocked by the website. PSR at ¶¶ 8-39.

Defendant is currently serving his sentence at FCI Texarkana and his projected release date is July 25, 2026.¹

Defendant has filed a *pro se* motion seeking release due to the COVID-19 pandemic. He signed his motion on January 24, 2021, and it was filed on February 1, 2021, along with a sealed document containing medical records and additional medical information. Docs. # 52, 53. The Court ordered the Government to respond to these filings. *Text-Only Order*, February 2, 2021. The United States filed a Motion for Extension of Time to File Response on March 2, 2021, which was granted, extending the Government's time to respond until March 22, 2021.

Discussion

This Court should deny the motions with prejudice on either of two independently sufficient grounds. First, Defendant cannot establish that “extraordinary and compelling reasons” support a sentence reduction; and second, Defendant has not met his burden to show that a reduction is warranted in light of the relevant § 3553(a) factors. Based on Defendant's filings, the Government does not argue

¹ Federal Bureau of Prisons, Inmate Locator, https://www.bop.gov/mobile/find_inmate/byname.jsp#inmate_results (last accessed March 22, 2021).

that he has failed to exhaust his administrative remedies because it appears as though Defendant submitted a request to his warden on April 5, 2020, and on June 15, 2020, which his warden denied on July 6, 2020. *See* Doc #53, pp. 6-8.

1. Defendant Cannot Demonstrate Extraordinary and Compelling Reasons for His Release

Once a defendant properly exhausts his administrative remedies, this Court may reduce the defendant's term of imprisonment "after considering the factors set forth in [18 U.S.C. § 3553(a)]" if the Court finds, as relevant here, that (i) "extraordinary and compelling reasons warrant such a reduction" and (ii) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i). Section 1B1.13 of the United States Sentencing Guidelines sets forth the Sentencing Commission's policy statement applicable to compassionate release reductions. *See* U.S.S.G. § 1B1.13. That policy statement, however, was adopted before the First Step Act, and the Sentencing Commission has not updated the policy statement to account for the fact that defendants are now permitted to file their own motions for compassionate release. In light of these circumstances, the Fourth Circuit Court of Appeals has held that § 1B1.13 is no longer

an “applicable” policy statement that constrains the discretion of the district courts in finding that “extraordinary and compelling reasons” exists to warrant a reduction in sentence. *See United States v. McCoy*, - F.3d -, 2020 WL 7050097, at *7 (4th Cir. Dec. 2, 2020) (“By its plain terms, . . . § 1B1.13 does not apply to defendant-filed motions under § 3582(c)(1)(A)”). Thus, the Court is “empowered . . . to consider any extraordinary and compelling reason for release that a defendant might raise.” *Id.* at *9 (quoting *United States v. Zullo*, 976 F.3d 228, 230 (2d Cir. 2020)). The Court still may consider § 1B1.13 factors, however, because that Section “remains helpful guidance even when motions are filed by defendants.” *Id.* at *7, fn.7. As the movant, the Defendant still bears the burden of establishing that he is eligible for a sentence reduction, and that includes establishing that “extraordinary and compelling reasons” justify his request. *United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016); *United States v. Green*, 764 F.3d 1352, 1356 (11th Cir. 2014).

The mere existence of the COVID-19 pandemic, which poses a general threat to every non-immune person in the country, cannot alone provide a basis for a sentence reduction. A defendant must demonstrate specific, serious medical conditions placing him or her at

greater risk, not merely generalized threats to the entire population. As the Third Circuit has held, “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release.” *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). To classify COVID-19 as an extraordinary and compelling reason, without more, would not only be inconsistent with the text of the statute, but would be detrimental to BOP’s organized and comprehensive anti-COVID-19 regimens, could result in the scattershot treatment of inmates, and would undercut the strict criteria BOP employs to determine individual inmates’ eligibility for sentence reductions and home confinement. Section 3582(c)(1)(A) contemplates sentence reductions for specific individuals, not the widespread prophylactic release of inmates and the modification of lawfully imposed sentences to deal with a world-wide viral pandemic.

In his request, Defendant asserts without support that the BOP is ill-equipped to deal with the COVID-19 health crisis and thus also his personal health care needs. This assertion is contradicted by the facts showing extensive and sufficient health care provided by the BOP in Defendant’s health records and his own description of his basis for

relief. Ultimately, Defendant cannot meet his burden of proof because even though he appears to suffer from health conditions identified by the CDC as risk factors, they are well-treated by the BOP and the BOP has already provided at least the first dose of the COVID-19 vaccine to Defendant. Furthermore, though he did not address it in his motion, Defendant appears to have already recovered from an asymptomatic case of COVID-19.

Defendant asserts that he is “particularly vulnerable” to COVID-19 because he suffers from hypertension and because of his age (Defendant is now 65 years old). *See* Doc. # 52, p. 5.

The undersigned obtained additional medical records from the BOP which the Court should take into consideration. *See* Sealed Medical Records. According to the notes from a BOP medical encounter on October 7, 2020, Defendant’s hypertension is treated and “well controlled on current medication.” *Id.* at 5. Notes also state that his hypertension is “at goal” with the recommendation to “continue current treatment.” *Id.* at 7.

Defendant appears to have contracted the COVID-19 virus in November, 2020, with records showing a positive test result from a sample collected on November 19, 2020. *Id.* at 42. The BOP appears to

have isolated Defendant and also closely monitored Defendant's health during this period by regularly taking his temperature, measuring his oxygen levels, and noting his symptoms. Records appear to indicate that Defendant had an asymptomatic case. *Id.* at 22-25. A medical note on December 15, 2020, indicated that Defendant had "recovered" from his COVID-19 case. *Id.* at 32.

Most importantly, Defendant has received at least one dose of the Pfizer COVID-19 vaccine and, according to communications the undersigned has held with the BOP, he has likely already received the second dose as well. Defendant's medical records show he received the first dose of vaccine on February 4, 2021. *Id.* at 36. The BOP has been following the recommended intervals between vaccine doses and the second dose of the Pfizer vaccine is generally given 21 days after the first.²

There is no evidence in his records that any of Defendant's conditions are debilitating or diminish his ability to provide self-care, and they appear to be well-controlled with medication. Defendant therefore has not satisfied his burden of proof. He fails to identify any

² <https://www.fda.gov/news-events/press-announcements/fda-statement-following-authorized-dosing-schedules-covid-19-vaccines>, last accessed March 22, 2021.

specific health conditions that qualify as extraordinary and compelling because all of his medical needs are well treated by the BOP and they are administering the COVID-19 vaccine to him. Contrary to Defendant's argument, and as demonstrated by the medical care received by Defendant, the BOP has taken significant measures to protect the health of its inmates. *See United States v. Johnson*, 2020 WL 7646809, at *2-3 (W.D.N.C. Dec. 23, 2020). The Court should deny his motion with prejudice for failing to demonstrate an extraordinary and compelling reason for release.

2. The Factors Set Forth in 18 U.S.C. § 3553(a) Counsel Against Release

Defendant seeks immediate release, despite having served just over half of his 192-month sentence. In addition to being unable to demonstrate extraordinary and compelling reasons for this request, the Defendant fails to explain why the 18 U.S.C. § 3553(a) factors should be considered differently today.

Defendant's crimes were extremely serious. He is now a sex offender who made contact with a child victim and he used the child to produce sexually explicit imagery for distribution to others and for his own deviant gratification.

Defendant offers neither evidence nor argument regarding the relevant sentencing factors. Section 3553(a) therefore counsels the same sentence today that this Court imposed in 2015. The Court should deny the motion because a substantial reduction in sentence cannot be supported by either the statutory sentencing factors or the Sentencing Commission's policy statements.

Conclusion

For the reasons set forth herein, the Government respectfully requests that the Court deny Defendant's motion for compassionate release.

RESPECTFULLY SUBMITTED, this the 22nd day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of March, 2021, I caused to be served a copy of the foregoing motion on Defendant by mail at the following address:

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/s/ David A. Thorneloe
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