IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL LYNN BROWN, JR., Defendant.	*	4:05-CR-00227-1 ORDER

Before the Court is Defendant Daniel Lynn Brown, Jr.'s Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). ECF No. 220. The Government filed its resistance, ECF No. 221, to which Defendant replied, ECF No. 224. The Government then amended its resistance. ECF No. 225. The matter is fully submitted.

I. BACKGROUND

In 2006, Defendant pleaded guilty to one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(A), 846; one count of methamphetamine possession with intent to distribute, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1) and (b)(1)(B); and two counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). ECF No. 75. The Court sentenced Defendant to 150 months for the two drug counts and 60 months for the first firearms count to run consecutive to the drug counts. ECF No. 118. It also added an additional 300 months for the second § 924(c) count under the then-usual practice of "stacking." *Id.* Defendant has served 167 months of that sentence, including good-conduct-time credits. *See* ECF No. 220 at 28 (reprinting Defendant's Summary Reentry Plan as of January 20, 2019). During that

stretch he tried numerous vehicles to reduce his sentence. *E.g.*, ECF No. 203, 205, 207, 211, *Brown v. United States*, No. 4:19-cv-00086 (S.D. Iowa Apr. 15, 2019). Each failed.

II. ANALYSIS

A. *Grounds for Compassionate Release*

In 2018, Congress passed the First Step Act (FSA). First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. The statute amends numerous portions of the U.S. Code to promote rehabilitation of prisoners and unwind decades of mass incarceration. Cong. Research Serv., R45558, *The First Step Act of 2018: An Overview* 1 (2019). Defendant's case requires the Court to interpret one of the Act's provisions aimed at "Increasing the Use and Transparency of Compassionate Release." § 603(b), 132 Stat. at 5239. The provision allows defendants, for the first time, to petition district courts directly for compassionate release. *Id.* Under the old regime, defendants could petition only the Director of the Federal Bureau of Prisons (BOP), who could then make a motion, at her discretion, to the district court. *See* U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.4 (U.S. Sentencing Comm'n 2018) [hereinafter U.S.S.G.]. The Director rarely did so. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice).

Compassionate release, codified at 18 U.S.C. § 3582(c), provides a narrow path for defendants in "extraordinary and compelling circumstances" to leave prison early. § 3582(c)(1)(A)(i). Such a sentence reduction must comply with the 18 U.S.C. § 3553(a) factors and "applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A). The Sentencing Commission's policy statement, adopted before the FSA, requires both

"extraordinary and compelling reasons" and that "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)." U.S.S.G. § 1B1.13.

Congress never defined what constitutes "extraordinary and compelling" other than that "[r]ehabilitation of the defendant alone" is insufficient. 28 U.S.C. § 994(t). Instead, the statute directs the Sentencing Commission to promulgate "the criteria to be applied and a list of specific" extraordinary and compelling examples. *Id.* Before the FSA's passage, the Commission concluded "extraordinary and compelling reasons" are limited to four scenarios:

First, the defendant's medical condition is such that he suffers from a "terminal illness" or the condition "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." § 1B1.13 cmt. n.1(A).

Second, "[t]he defendant (i) is at least [sixty-five] years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least [ten] years or [seventy-five] percent of his or her term of imprisonment, whichever is less." § 1B1.13 cmt. n.1(B).

Third, the defendant's family circumstances include either "(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children" or "(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." § 1B1.13 cmt. n.1(C).

And finally, the Sentencing Commission provided a catch-all provision that allows the BOP Director to determine "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)." § 1B1.13 cmt. n.1(D). Extraordinary and compelling reasons "need not have been

unforeseen at the time of sentencing." § 1B1.13 cmt. n.2. And although "rehabilitation . . . is not, *by itself*, an extraordinary and compelling reason," the Commission implies that rehabilitation may be considered with other factors. *See* § 1B1.13 cmt. n.3 (emphasis added).

The Sentencing Commission never harmonized its policy statement with the FSA.[1] Rather, the outdated policy statement still assumes compassionate release "may be granted only upon motion by the Director of the Bureau of Prisons." § 1B1.13 cmt. n.4. This is no longer the law. 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.

A growing number of district courts have concluded this means the Commission lacks an applicable policy statement regarding when a judge can grant compassionate release. *E.g.*, *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *5 (M.D.N.C. June 28, 2019) ("There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act."). In the absence of an applicable policy statement, these courts conclude "the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)–(C) warrant granting relief." *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *5 (S.D. Tex. June 17, 2019); *see also United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11,

[1] 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. *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *1 n.1 (S.D. Tex. June 17, 2019) (quoting *United States v. Handerhan*, No. 1:10-CR-00298, 2019 WL 1437903, at *1 n.4 (M.D. Pa. Apr. 1, 2019)). The Commission still has only two voting members. *About the Commissioners*, U.S. Sentencing Comm'n, https://www.ussc.gov/commissioners (last visited Oct. 3, 2019).

2019) ("I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts."). The result, they reason, is that the district court can consider anything—or at least anything the BOP could have considered—when assessing a defendant's motion.

Other courts have held the FSA merely allows them to grant a motion for compassionate release if the BOP Director could have done the same under the Sentencing Guidelines *and* the BOP Program Statement written for the old law. These courts conclude judges may not stray beyond the specific instances listed in § 1B1.13 cmt. n.1 (A)–(C). *E.g.*, *United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) *appeal docketed*, No. 19-3239 (11th Cir. Aug. 21, 2019). They reason that the Sentencing Commission reserved § 1B1.13 cmt. n.1's residual provision for the BOP Director and only the BOP director. *Id.* "If the policy statement needs tweaking . . . , that tweaking must be accomplished by the Commission, not by the courts." *Id.* The Government in this case takes that position, too.[2] For reasons discussed below, the Court concludes the *Cantu*, *Fox*, and *Beck* courts' reading of § 3582 better comports with the FSA's purpose, congressional intent with amending § 3582(c), and the most natural reading of the statutory scheme.

Courts assume Congress legislates with the full knowledge of how agencies have interpreted earlier versions of a statute. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (noting Congress has "effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products"). Congress also

[2] The Government appears to suggest that the Sentencing Commission's catch-all provision, § 1B1.13 cmt. n.1(D), is limited to circumstances described by the BOP in Program Statement 5050.50. ECF No. 225. However, the Sentencing Commission's policy statement contains no such limitation. Furthermore, BOP Program Statement 5050.50 does not state the Director's ability to find "extraordinary and compelling reasons" is limited to scenarios described in its contents.

can "revoke or amend" the Sentencing Commission's guidelines and policy statements at any time. *United States v. Anderson*, 686 F.3d 585, 590 (8th Cir. 2012) (citing *Mistretta v. United States*, 488 U.S. 361, 393–94 (1989)). The U.S. Supreme Court repeatedly has noted that "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947)). Although titles are not dispositive, sometimes they can be "especially valuable." *Yates v. United States*, 135 S. Ct. 1074, 1090 (2015) (Alito, J., concurring).

Here, Congress knew of the BOP's rare granting of compassionate release petitions.[3] Until 2013, on average, "only [twenty-four] inmates were released each year" through the BOP program. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice). That number increased to eighty-three inmates between August 2013 and September 2014 following complaints to the BOP from the Inspector General's office. *Id.* Since Congress still amended the program following this increase, one can infer Congress thought eighty-three was still insufficient. Because rather than "effectively ratif[ying]" the BOP's position, Congress sought to overturn it by statute. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 144. It did so in three ways: First, § 3582 now mandates the BOP notify terminally ill defendants of their ability to petition the BOP for early release. § 603(b), 132 Stat. at 5239. Second, § 3582 requires the BOP now report to Congress the frequency and reasoning of its compassionate release decisions. *Id.* Third, and critically here, § 3582 now allows defendants to motion district

[3] The First Step Act's compassionate release provisions originally appeared as a stand-alone bill. Granting Release and Compassion Effectively Act of 2018, S. 2471, 115th Cong. (2018). That bill explicitly sought to "improve the compassionate release process of the Bureau of Prisons." *Id.*

courts directly for compassionate release even after the BOP Director denies their petition. *Id.* The Act listed these changes under the title of "Increasing the Use and Transparency of Compassionate Release." *Id.* That title is "especially valuable" here. *Yates*, 135 S. Ct. at 1090. The Court assumes the BOP Director faithfully executes the narrowly drawn policy and program statements related to compassionate release.[4] Therefore, the only way direct motions to district courts would increase the use of compassionate release is to allow district judges to consider the vast variety of circumstances that may constitute "extraordinary and compelling."

There admittedly are compelling policy arguments against this reading. Releasing defendants from incarceration is a delicate business—although not any more so than incarcerating them initially. But the Court's reading does not allow judges to release any prisoner through compassionate release. For one, such a reading would seemingly undermine the intricate sentence-adjustment scheme Congress has created. Second, the Court still must act in harmony with any sentencing policy guidelines that remain applicable and the § 3553(a) factors. § 3582(c)(1)(A). The need to appropriately punish severe conduct and not introduce sentencing disparities between defendants convicted of similar crimes provides firm limits on a judge's ability to release people from custody. *See* 18 U.S.C. § 3553(a)(2)–(6).

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. Unqualified "deference to the BOP no longer makes sense now that the First Step Act has reduced the BOP's role." *Fox*, 2019 WL 3046086, at *3. Thus, the Director's prior

[4] There is not much to debate as to whether a defendant is, for instance, "(i) is at least [sixty-five] years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least [ten] years or [seventy-five] percent of his or her term of imprisonment, whichever is less." § 1B1.13 cmt. n.1.

"interpretation of 'extraordinary and compelling' reasons is informative," but not dispositive. *United States v. Adams*, No. 6:94-CR-302, 2019 WL 3751745, at *3 (M.D.N.C. Aug. 8, 2019).

B. *Extraordinary and Compelling Reasons*

The critical issue for Defendant, however, is whether extraordinary and compelling reasons support his release under § 3582(c)(1)(A)(i). As a threshold matter, the statute requires defendants to exhaust the BOP compassionate release process before moving the district court directly. § 3582(c)(1)(A). Exhaustion occurs when the BOP denies a defendant's application or lets thirty days pass without responding to it. *Id.* The Government concedes the latter occurred with Defendant. ECF No. 225. Regardless, for reasons discussed below, the Court concludes compassionate release is not available, at this time, because of Defendant's age, family circumstances, and the fact much of his sentence would be lawful even if issued today.

First, Defendant does not fit in one of the three categories that form the heartland of compassionate release cases. He is not terminally ill. He is not older than sixty-five. Although his daughter lacks a free parent—Defendant's wife died shortly before his incarceration—she is an adult and Defendant is not her caregiver. *See* § 1B1.13 cmt. n.1(A)–(C).

Second, although much about Defendant's situation is extraordinary and compelling, the Court concludes it cannot exercise its discretion to grant release at this time. To say Defendant has been a model inmate is an understatement. He has not had a single disciplinary incident since entering federal custody in 2007. ECF No. 220 at 30 (reprinting Jan. 20, 2019, BOP Summary Reentry Plan – Progress Report). According to the BOP, "[h]e has exhibited an exemplary rehabilitative record as a testament to his positive character and efforts." *Id.* He has taken 6000 hours of programming, including 4150 hours in a Management Apprenticeship

Program. *Id.* "He should be employable upon release." *Id.* at 31. He teaches and mentors other inmates. *Id.* The BOP thinks he is quite good at it, too:

> Daniel Brown has exhibited exceptional skill in supporting his peers; he is a positive influence and utilizes his skills and education to assist with inmate literacy. He is also very influential in his religious community . . . . Daniel Brown displays excellent character, determination, and readiness to be a productive and responsible citizen in his community.

Id.

The Court does not see BOP Progress Reports like this often. One might even call it extraordinary and compelling. But while Congress largely left "extraordinary and compelling reasons" undefined, it made clear rehabilitation, on its own, does not suffice. § 994(t). The Court considers—and applauds—Defendant's conduct, but it cannot release him on these grounds alone under § 3582(c).

To be sure, Defendant argues that his motion is not based on merely his exemplary behavior. ECF No. 220. He also notes he suffered a botched surgery while incarcerated,[5] that his daughter is nevertheless without a parent, ECF No. 220 at 11, and, principally, that he faces a sentence far longer than he would ever receive under modern law. *Id.* at 6–9.

Indeed, sentences given to many like Defendant "would be laughable if only there weren't real people on the receiving end of them." *United States v. Holloway*, 68 F. Supp. 3d 310, 312 (E.D.N.Y. 2014). Defendant received a 510-month sentence—or 42.5 years—after pleading guilty to selling an admittedly large amount of methamphetamine in western Iowa

[5] Surgery on Defendant's fractured leg led to severe complications. *Brown v. United States*, 737 F. App'x 777, 781 (7th Cir. 2018) (acknowledging Defendant's injury but holding there was no evidence prison medical staff breached a duty of care). He then "fell victim to a gruesome syndrome and endured intolerable pain for years as his seemingly avoidable condition progressed into permanent nerve damage." *Id.* However, Defendant makes no claim in his motion that the condition has led to a terminal illness or bars him from caring for himself in prison. *See* ECF No. 220 at 11.

during the early 2000s. ECF No. 125 ¶¶ 10–62. His gun also went off during his arrest.[6] His co-defendant, who eventually ran his own drug operation, was released in April 2018. *United States v. Bowman*, No. 4:05-cr-00227-2, ECF No. 217 (S.D. Iowa July 24, 2019). Defendant, by contrast, remains in federal prison because he pleaded guilty to two counts of firearm possession in furtherance of a drug trafficking crime, a violation of 18 U.S.C. § 924(c)(1)(A). At the time of sentencing, like now, one § 924(c) count carried a five-year minimum sentence that must be served consecutively. An additional § 924(c) count required the district court to tack on another twenty-five years in prison, even though that gun possession occurred during the same course of conduct as the original count. *Compare* 18 U.S.C. § 924(c)(1)(C), *with Deal v. United States*, 508 U.S. 129, 136–37 (1993), *superseded by statute* First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221–22, *as recognized in United States v. Davis*, 139 S. Ct. 2319 (2019). Even the judge who sentenced Defendant concluded the additional 300 months' imprisonment from the second § 924(c) count was "far greater than was necessary to achieve the ends of justice." ECF No. 220 at 21 (reprinting 2018 letter from Ret. Judge Longstaff to Justice Department).

Congress, to an extent, agreed. The FSA clarified that § 924(c) counts can only be stacked if the second offense occurs *after* a final conviction on the first offense. § 403(a), 132 Stat. at 5221–22. In other words, if sentenced today, a court would add only five years to Defendant's sentence for carrying a gun while selling drugs, not thirty. Congress did not make this change retroactive. § 403(b), 132 Stat. at 5222; *see also Brown v. United States*, No. 4:19-cv-00086 (S.D. Iowa Apr. 15, 2019) (order denying Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255). Regardless, a district court assessing a

[6] No officers were injured, and there appears to be a credible debate as to whether the discharge was intentional. ECF No. 125 ¶ 60.

compassionate release motion may still consider the resulting sentencing disparity when assessing if there are "extraordinary and compelling reasons" supporting release. *United States v. Marks*, No. 6:03-cr-06033 (W.D.N.Y. Mar. 14, 2019).

In this case, compassionate release nevertheless is premature because even if the First Step Act applied retroactively, Defendant would still be in prison. With a lone § 924(c) count, Defendant still faced 210 months in prison. ECF No. 118. Even rounding up to the nearest month and including good conduct credits, Defendant has served 167 months.[7] That is a long stretch by any measure, and perhaps more than appropriate for Defendant's crimes. Regardless, because Defendant would still be in prison under modern law, any sentencing disparity created by § 924(c) stacking does not, at least yet, provide an "extraordinary and compelling reason" for compassionate release. Thus, despite discretion to consider a broad range of factors, the Court declines to grant Defendant's motion at this juncture.

C. *A Request to the U.S. Attorney and Acting Pardon Attorney*

After reviewing Defendant's file, the Court would be remiss not to request U.S. Attorney for the Southern District of Iowa Marc Krickbaum and Acting Pardon Attorney Rosalind Sargent-Burns to do the same. Once they do, the Court requests U.S. Attorney Krickbaum to carefully consider exercising his discretion to agree to an order vacating one of Defendant's § 924(c) convictions. Alternatively, the Court requests Acting Pardon Attorney Sargent-Burns to reconsider Defendant's previous application for a commutation of sentence. *See* ECF No. 220 at 21. Our nation's current discussion of criminal justice reform focuses much on prosecutors' awesome power to punish wrongdoing. *E.g.*, Emily Bazelon, *Charged: The New Movement to*

[7] In his pro se motion, Defendant included a BOP Reentry Plan Progress Report dated January 20, 2019. ECF No. 220 at 28. Including 702 days in good time credits, that report stated he had served 159 months and 4 days. *Id.* Eight months and eighteen days have since passed.

Transform American Prosecution and End Mass Incarceration (2019). Less ink is spent on their equal ability to "*remedy* injustices," too. *Holloway*, 68 F. Supp. 3d at 311. The FSA demonstrates a realization that many of the sentences handed out to men like Defendant were not just "sufficient," but far "greater than necessary." 18 U.S.C. § 3553(a).

As the First Step Act's title indicated, Congress acknowledged it has just begun to rein in its past excesses. In cases where it has not—perhaps out of fear it would take too much effort to make so many people whole—courts and those who appear before them should not hesitate to use their powers to right obvious wrongs. The Court cannot say it more eloquently than Judge Gleeson of the Eastern District of New York after the United States Attorney there agreed to a similar request: "Doing justice . . . takes time and involves work, including careful consideration of the circumstances of particular crimes, defendants, and victims—and often the relevant events occurred in the distant past. It requires a willingness to make hard decisions, including some that will be criticized." *Holloway*, 68 F. Supp. 3d at 316. The Court only hopes this District is up to that challenge, too.

III. CONCLUSION

For the reasons stated herein, Defendant's Pro Se Motion to Reduce Sentence (ECF No. 220) is DENIED.

IT IS SO ORDERED.

Dated this 8th day of October 2019.

Robert W. Pratt

ROBERT W. PRATT, Judge
U.S. DISTRICT COURT