UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

MEMORANDUM OPINION AND ORDER

Crim. No. 11-228 (02) (MJD)

Gerald Joseph Durand,

Defendant.

David J. MacLaughlin, Assistant United States Attorney, Counsel for Plaintiff.

Brian N. Toder, Counsel for Defendant.

This matter is before the Court on Defendant's Motion for Compassionate Release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). (Doc. No. 731)

I. Background

Defendant was found guilty by a jury of multiple counts of Aiding and Abetting Wire and Mail Fraud, and Money Laundering, Conspiracy to Commit Mail and Wire Fraud, Concealing Material Facts from the United States and Filing False Tax Returns. On January 3, 2013, Defendant was sentenced to term of imprisonment of 240 months, followed by three years supervised release. He

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is currently serving his sentence at Rochester FMC, and his release date is June 26, 2029.

II. Motion to Reduce Sentence

Pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may, upon a defendant's motion following exhaustion of administrative remedies or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, "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."

The applicable policy statement with respect to motions to reduce sentence is set forth in U.S.S.G. Section 1B1.13,[1] which provides when deciding a motion

[1] At this time, U.S.S.G. Policy Statement § 1B1.13 only refers to motions for release brought by the BOP under 18 U.S.C. § 3582(c)(1)(A). The Sentencing Commission has not had the opportunity to amend § 1B1.13 to include motions brought by a defendant since the enactment of the First Step Act. Regardless, this Court as well as other courts in this District and elsewhere have construed § 1B1.13 to apply to motions brought by a defendant under § 3582(c)(1)(A). See e.g., United States v. Warren, 456 F. Supp.3d 1083, 1085-1086 (D. Minn. 2020) (finding that part of § 1B1.13 that states "Upon motion of the Director of the Bureau of Prisons" was superseded

for a sentence reduction under § 3582(c), the Court must determine whether extraordinary and compelling reasons exist to warrant such relief, whether the defendant is a danger to the safety of any other person or to the community and whether a sentence reduction is consistent with the policy statement. U.S.S.G. § 1B1.13. This policy statement also defines "extraordinary and compelling reasons" due to medical condition of the defendant as follows:

> (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.

U.S.S.G. § 1B1.13, cmt. 1(A).

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by the First Step Act, and applying factors set forth in § 1B1.13 to motions brought by a defendant under § 3582 (c)(1)(A)).

There is no dispute that Defendant has exhausted his administrative remedies. Accordingly, the Court will proceed to the merits of Defendant's motion.

Defendant has been diagnosed with Grade 5 Prostate Cancer, with a Gleason score of 9, which indicates it is likely the cancer will grow and spread quickly. (Toder Decl., Ex. F at 2-3.) The government concedes that Defendant's medical condition presents extraordinary and compelling reasons for a sentence reduction because of the confluence of his cancer diagnosis and the COVID-19 pandemic. The government nonetheless opposes the motion for a sentence reduction on the basis such a reduction is not supported under 18 U.S.C. § 3553(a) and that he presents a danger to the community.

Based on the record before it, the Court finds that early release from custody is warranted as Defendant does not pose a danger to the community and because a sentence reduction is supported by the factors set forth in 18 U.S.C. § 3553(a).

Defendant has served one half of his sentence; eight years and eight months. A sentence of time served in this case would reflect the

seriousness of the offenses of conviction, afford adequate deterrence to criminal conduct, promote respect for the law and provide a just punishment.

In addition, at 69 years old, Defendant is unlikely to reoffend. See U.S. Sentencing Comm'n, The Effects of Aging on Recidivism Among Federal Offenders at 23 (2017), https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders (setting forth reconviction (6.5%) and reincarceration (4.1%) rates for offenders 65 years or older). Furthermore, Defendant did not incur any disciplinary reports while incarcerated (Toder Decl., Ex. B). This fact, together with his age and ill health, weighs in favor of finding that he does not pose a danger to the community.

Accordingly,

IT IS HEREBY ORDERED:

1. Defendant's Motion for Compassionate Release (Doc No. 731) is **GRANTED;**
2. Defendant's Sentence is reduced to TIME SERVED;

3. All other terms and conditions of this Court's original sentence shall remain in full force and effect; and

4. Defendant's release residence and release plan have been reviewed and approved by the U.S. Probation Office therefore this order is stayed for up to fourteen days to make appropriate travel arrangements and to ensure Defendant's safe release. Defendant shall be released as soon as appropriate travel arrangements are made and it is safe for Defendant to travel. There shall be no delay in ensuring travel arranges are made. If more than fourteen days are needed to make appropriate travel arrangements and ensure Defendant's safe release, then the parties shall immediately notify the Court and show cause why the stay should be extended.

Date: February 12, 2021

/s Michael J. Davis
Michael J. Davis
United States District Court