

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD FRANK PLUNK,

Defendant.

Case No. 3:94-cr-00036-TMB

ORDER ON DEFENDANT’S MOTION
FOR REDUCTION OF SENTENCE AND
COMPASSIONATE RELEASE
[DKT. 711]

I. INTRODUCTION

The matter comes before the Court on Defendant Gerald Frank Plunk’s Motion for Reduction of Sentence to Time Served and Compassionate Release from Prison Under 18 U.S.C. § 3582(c)(1)(A)(i)(ii) (the “Motion”).¹ The Government filed an Unopposed Motion for Stay in response and requested a telephonic status conference.² The Motion for Stay was granted and a telephonic status conference set for April 9, 2020.³ Before the status conference, the Government filed a Response to Motion for Sentence Reduction-Conditional Non-Opposition (“Response”).⁴ Now, having held the status conference and lifted the stay, the Motion is ripe for resolution. For the reasons discussed below, the Motion is **GRANTED**.

¹ Dkt. 711 (Motion).

² Dkt. 724 (Motion).

³ Dkt. 726 (Text Order).

⁴ Dkt. 727 (Response).

II. BACKGROUND

Defendant has been in federal custody since his voluntary surrender on March 25, 1994.⁵ He was tried and found guilty of one count of Conspiracy to Distribute Cocaine in violation of 21 U.S.C. § 841(a)(1) and 846, four counts of Use of a Communications Facility in violation of 21 U.S.C. § 843(b), and one count of Possession of Cocaine with Intent to Distribute in violation of 21 U.S.C. § 841(a)(1).⁶ On November 18, 1996, Judge John W. Sedwick sentenced Defendant to two concurrent life terms under the then-mandatory sentencing guidelines.⁷

On September 4, 2019, Defendant filed “Defendant’s Pro Se Motion for Reduction of Sentence and Release from Prison Under 18 U.S.C. § 3582(c)(1)(A)(i)” (“Pro Se Motion”).⁸ Defendant signed the Pro Se Motion under “Pro Se Representation” and reaffirmed his alleged pro se status in the attached Certification of Service.⁹ On September 6, 2019, defense counsel filed “Counsel’s Notice of Joinder to Motion to Reduce Sentence (Dkt 703),” in which Attorney Weidner notifies the Court that he represents Defendant and joins in Defendant’s Motion for Release.¹⁰ The Court explained that Defendant cannot file on his own behalf while he is represented by counsel and denied the Pro Se Motion without prejudice.¹¹ Defendant, through counsel, did not refile any motion seeking to reduce his sentence until the present Motion.

⁵ *Id.* at 9.

⁶ *Id.* at 9–10.

⁷ *Id.* at 10.

⁸ Dkt. 703 (Motion).

⁹ *Id.* at 9, 11.

¹⁰ Dkt. 704 (Notice of Joinder).

¹¹ Dkt. 709 (Order).

On April 1 2020, Defendant filed the Motion requesting the Court reduce his sentence to time served and granting compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and (ii).¹² Defendant argues for release based on both “extraordinary and compelling reasons” and “his age, medical condition and length of incarceration . . . as well as the dangers he now faces as an inmate . . . due to the ongoing national COVID-19 Pandemic and [his] status as a ‘potential high risk victim’ given his advanced age and medical condition.”

The Government initially responded by filing a Motion for Stay.¹³ The Motion for Stay explains that the parties are “discussing the merits of the substantive motions and have been attempting to arrive at a mutually satisfactory resolution.”¹⁴ The Government further represents that “[t]his matter is currently before the Deputy Attorney General for consideration” and that “[w]ithin the Department of Justice, the United States Attorney, District of Alaska, does not have final authority, without designation or authorization to settle the pending matter.”¹⁵ The Government then filed the Response, which states that the Government has considered the merits of the Motion and concludes that it does not oppose Defendant’s release on certain conditions.¹⁶

On April 9, 2020, at the joint request of the Parties, the Court held a telephonic status conference. During the conference, the Parties explained that they had reached an amicable resolution and jointly recommended release. Furthermore, the Court made oral rulings from the bench denying Defendant’s Request for Assignment to Judge John W. Sedwick and/or Voluntary

¹² Dkt. 711 at 1.

¹³ Dkt. 724.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ Dkt. 727 at 3–4.

Recusal of Judge Timothy M. Burgess and lifting the stay that was previously granted on the Government's Unopposed Motion for Stay.¹⁷

III. LEGAL STANDARD

The First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to move the district court for compassionate release after exhausting the Bureau of Prisons' administrative process.¹⁸ Then, after considering the applicable factors set forth in § 3553(a), the court may grant the motion if it finds that:

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

IV. ANALYSIS

Even though Defendant moves for release under both prongs of 18 U.S.C. § 3582(c)(1)(A), the Court finds that the extraordinary and compelling reasons of the first prong suffice to grant Defendant's Motion and so limits the following analysis solely to that basis.¹⁹

¹⁷ See Dkts. 715 (Request); 724; 726.

¹⁸ See Pub. L. 115-391, 132 Stat. 5194, 5239 (2018);

¹⁹ Defendant has not actually served "at least 30 years in prison" to qualify for release under the second prong, § 3582(c)(1)(A)(ii). Nonetheless, Defendant does meet the age and custodial length considered to be extraordinary and compelling reasons for release under § 3582(c)(1)(A)(i) and U.S. Sentencing Guidelines Manual § 1B1.13.

A. Exhaustion of the Bureau of Prisons' Administrative Process

Section 3582(c)(1)(A) confers jurisdiction over compassionate release motions to the district court after the defendant exhausts the BOP's administrative process. "Exhaustion occurs when the BOP denies a defendant's application or lets thirty days pass without responding to it."²⁰ Here, Defendant has previously submitted two written requests for compassionate release to his wardens.²¹ His most recent request was submitted to the warden on January 14, 2019.²² More than 30 days have passed since receipt of that request and so this Court has jurisdiction to hear this Motion.

B. The 18 U.S.C. § 3553(a) Factors

The sentencing factors listed under § 3553(a) help the court impose a sentence that is

"sufficient, but not greater than necessary . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, and other correctional treatment in the most effective manner."

In this case, reducing Defendant's sentence to time-served to effectuate an immediate compassionate release fulfills the § 3553(a) considerations. Defendant has been in prison for over 26 years. The Court recognizes the seriousness of his drug trafficking offenses and his history and characteristics at the time of sentencing. However, the nature and circumstances of the offenses were non-violent and his criminal history was significantly less serious than the criminal history

²⁰ *United States v. Mondaca*, Case No.: 89-CR-0655 DMS, 2020 WL 1029024, at *2 (S.D. Cal. Mar. 3, 2020) (internal quotations omitted).

²¹ *See* Dkts. 711-1 (Request); 711-5 (Request).

²² Dkt. 711-1 at 3.

category may have suggested.²³ Furthermore, Defendant was sentenced by Judge Sedwick at a time when the sentencing guidelines were mandatory. In 2015, when Defendant had served approximately 21 years of his sentence, Judge Sedwick wrote to President Obama to support Defendant's commutation petition.²⁴ Judge Sedwick explained in that letter that he lacked discretion in imposing a life sentence and that he doubted Defendant would receive "more time than he has already served" if sentenced at the time of the letter.²⁵ Nearly five years later, this Court finds that the 26 year sentence Defendant has served to date is sufficient to address the seriousness of the offense, promote respect for the law, deter Defendant and others, provide just punishment, and protect the public. Therefore, reducing Defendant's sentence and granting the Motion is consistent with the factors set forth in § 3553(a).

C. Extraordinary and Compelling Reasons

The applicable policy statement issued by the United States Sentencing Commission, § 1B1.13 of the United States Sentencing Guidelines Manual ("USSG"), explains that extraordinary and compelling reasons exist when the defendant is "(I) suffering from a serious physical or medical condition" or "(III) experiencing deteriorating physical or mental health because of the aging process."²⁶ Extraordinary and compelling reasons also exist when the

²³ According to the Presentence Report (PSR), Defendant received two criminal history points for two prior alcohol-related driving offenses and an additional two points for being on probation for those driving offenses when he committed the federal drug offenses. Hence, the four criminal history points placed Defendant in criminal history category III. However, in the Statement of Reasons when adopting the PSR, Judge Sedwick found that the correct total of criminal history points was only two and defendant's criminal history most closely resembled a criminal history category I. Dkt. 711-6 at 4.

²⁴ Dkt. 711-2 (Letter).

²⁵ *Id.* at 2–3.

²⁶ U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)(ii) (U.S. Sentencing Comm'n 2018).

defendant “(i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the ageing process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.”²⁷ Section 1B1.13 imposes an additional consideration of whether the defendant is a danger to the safety of any other person or to the community.²⁸

In this case, Defendant qualifies for compassionate release due to his medical conditions and age, particularly in light of the ongoing coronavirus (COVID-19) pandemic, and time spent in custody, as well as his remarkable history of rehabilitation while in custody and several prior recommendations by his wardens, the U.S. Probation office, and Judge Sedwick to reduce or commute his sentence. It is clear on the record that Defendant is not a danger to the community and the Motion should be granted.

1. Medical Condition of the Defendant

USSG § 1B1.13 cmt. n.1(A)(ii) specifically considers the medical condition of the defendant as a circumstance under which extraordinary and compelling reasons exist to warrant the defendant’s compassionate release. Here, Defendant qualifies because he is “experiencing deteriorating physical or mental health because of the aging process.”²⁹ Defendant states that “[t]he cartilage around his knee, hip, and shoulder joints is severely worn-down causing bone on bone contact and severe pain. He has lower back pain due to moderate to severe deterioration of his lumbar spinal discs. He also has arthritis in his wrists and hands, high blood pressure, a swollen prostate, age related eyesight and hearing loss, and suffers from post herpetic neuralgia (a

²⁷ *Id.* at cmt. n.1(B).

²⁸ *Id.* § 1B1.13(2).

²⁹ U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)(ii)(III).

complication of the shingles virus for which there is no cure).”³⁰ In addition, Defendant is over 70 years old and thus within the age group that the Center for Disease Control recognizes as being at higher risk for severe illness, such as COVID-19.³¹ The Court finds that COVID-19 presents a clear and present danger for individuals who are in custody.³² If COVID-19 reaches Defendant’s custodial facility, his ability to follow recommended self-care and public health guidance is substantially diminished by the restrictions inherent to his environment.³³ Notwithstanding, Defendant is not expected to recover from deteriorating health because of the aging process.³⁴ Therefore, Defendant has presented extraordinary and compelling reasons based on medical conditions in support of his Motion.

2. Age of the Defendant

In addition to experiencing serious deterioration in physical or mental health because of the aging process, USSG § 1B1.13 cmt. n.1(B) considers extraordinary and compelling reasons for release exist when defendants are “at least 65 years old” and have “served 10 years or 75 percent of his or her term of imprisonment, whichever is less.” Here, Defendant falls squarely within these qualifications. He is over 70 years old and has served over 26 years in prison. As

³⁰ Dkt. 711 at 17–18.

³¹ Center for Disease Control, Coronavirus Disease 2019 (COVID-19), People Who Are at Higher Risk, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Apr. 7, 2020).

³² See Federal Bureau of Prisons, COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/> (tracking the number of COVID-19 cases in BOP facilities on a daily basis) (last visited Apr. 9, 2020).

³³ See U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)(ii).

³⁴ See *id.*

described above, he meets the requisite medical conditions for release. Therefore, Defendant has again presented extraordinary and compelling reasons to support his Motion.

3. Other Reasons

USSG § 1B1.13 cmt. n.1(D) permits the consideration of other extraordinary and compelling reasons “[a]s determined by the Director of the Bureau of Prisons.” Even without the prerequisite determination by the Director of the Bureau of Prisons, several factors in Defendant’s case warrant discussion here. First, Judge Sedwick, the sentencing judge, has written to support the commutation of Defendant’s sentence.³⁵ Second, two wardens and an assistant director of the Department of Justice Correctional Programs Division have also written to recommend Defendant for sentence reduction.³⁶ Each authority has recognized that Defendant meets the criteria for sentence reduction, is not a risk to the community, or a risk of reoffending.³⁷ Third, Defendant has obtained significant education and vocational certifications while in custody and now even trains other inmates.³⁸ The BOP staff at his current facility praised Defendant, stating “Plunk sets the example in many ways and it is evident in the way he has embraced his current condition and encourages others to maintain a positive outlook on life. . . he has learned from his mistakes and will be a great assets to others in and out of prison.”³⁹ More recently, the staff noted, “Inmate Plunk has been a model inmate while incarcerated at FCI Jesup.”⁴⁰ The recommendation letters,

³⁵ Dkt. 711-2.

³⁶ Dkts. 711-3 (Letter); 711-4 (Letter); 711-7 (Letter).

³⁷ Dkts. 711-2 at 2–3; 711-3 at 2, 4; 711-4 at 2; 711-7 at 2.

³⁸ *See* 711-11 (Certifications); 711-12 (Summary Reentry Plan).

³⁹ Dkt. 711-12 at 5.

⁴⁰ Dkt. 711-13 at 5.

achievement certifications, and staff evaluations clearly support that Defendant has taken his rehabilitation seriously and that presents other reasons worth consideration for release.

4. Danger to Others or the Community

Finally, a court must consider the “nature and seriousness of the danger to any person or the community” that the defendant’s release would pose.⁴¹ The Court finds that many of the foregoing reasons weigh heavily in favor of Defendant. His age, medical conditions, and rehabilitative achievements all demonstrate that Defendant would not be a danger to any person or the community. Furthermore, Defendant has a verified release plan and proposes living with his sister in California. A U.S. Probation Officer has approved that residence and acknowledged, “considering his personal characteristics and criminal history, it does not appear that [Defendant] poses a third party risk to any specific individual/entity as a result of his residence.”⁴² Accordingly, the Court finds that Defendant is not a danger to any person or community upon release.

⁴¹ U.S. Sentencing Guidelines Manual § 1B1.13(2) (citing 18 U.S.C. § 3142(g)).

⁴² Dkt. 711-15 at 2.

V. CONCLUSION

Therefore, the Court finds that the 18 U.S.C. § 3553(a) sentencing factors, extraordinary and compelling reasons under 18 U.S.C § 3582(c)(1)(A) and USSG § 1B1.13, and consideration of the applicable U.S. Sentencing Commission policies warrant Defendant's immediate compassionate release. Furthermore, upon release, Defendant will not post a danger to any person or the community under 18 U.S.C. § 3142(g). Accordingly, the Motion at Docket 711 is **GRANTED**. Defendant shall be released from BOP custody as soon as the release plan is implemented, and travel arrangements made. The corresponding Judgment shall be issued forthwith.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 9th day of April, 2020.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE