

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:07CR75TSL-LRA
LEONARD GRIFFIN

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Leonard Griffin for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). The government has responded in opposition to the motion. The court, for reasons which follow, concludes that the motion should be denied.

In July 2007, Griffin was indicted for being a felon in possession of a firearm. He pled guilty in September 2007 and in January 2008, the court sentenced him to 180 months' imprisonment, to be followed by a 3-year term of supervised release. He is currently incarcerated at FCI Talladega, in Talladega, Alabama. He is scheduled to be released on January 17, 2023 and is eligible for home detention on July 17, 2022.

On April 10, 2020, Griffin submitted for consideration by the warden at FCI Talladega a request for compassionate release, stating:

My mother ... is elderly with a respiratory disease of COPD. ... With this coronavirus existing, I'm therefore requesting a compassionate release to go home and look

after and also help provide for my "mother". ... [D]ue to my mother, being elderly, and also subject to C.O.P.D. - with the use of consistent oxygen, with the coronavirus having greater impact on people with her condition, I therefore request for a compassionate release.

On May 18, the warden denied this request.

On July 17, defendant, acting *pro se*, filed with this court his present motion for compassionate release, asserting that he has medical conditions, namely, "high blood pressure and hyperthyroid problems," that make him more susceptible to contracting COVID-19 or more likely to suffer complications if he were to contract the virus. He argues that because of his vulnerability, and his inability in the prison setting to take needed precautions to protect himself from contracting COVID-19, the court should grant a reduction in sentence so that he may be released from prison. The government opposes Griffin's motion, contending he fails to meet the statutory criteria for compassionate release.

The compassionate release statute, § 3582(c)(1)(A), as amended by the First Step Act of 2018, states that once imposed, the court may not modify a term of imprisonment, except that the court, on motion of Bureau of Prisons (BOP) or on motion of the defendant following exhaustion of administrative remedies, may reduce or modify a term of imprisonment after considering the

factors of 18 U.S.C. § 3553(a), if it finds that "extraordinary and compelling reasons warrant such a reduction" and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" § 3582(c)(1)(A)(i). See United States v. Chambliss, 948 F.3d 691, 692–93 (5th Cir. 2020).

Prior to the First Step Act of 2018, a district court could grant relief under § 3582(c)(1)(A) only on a motion by the BOP. And prior to December 2018, the Sentencing Commission, pursuant to authority granted in 28 U.S.C. § 994(t), issued a policy statement identifying as "extraordinary and compelling reasons" that may justify compassionate release a defendant's medical condition, his advanced age, family circumstances, and "other reasons" "as determined by the Director of the [BOP]" to warrant a sentence reduction in the defendant's case.¹ U.S.S.G. § 1B1.13 n.1. The policy statement further provides that

¹ With respect to a defendant's medical condition, the policy statement recites that a defendant's medical condition can be an "extraordinary and compelling reason" for relief where the defendant has a terminal illness or is suffering from a serious medical condition, a serious functional or cognitive impairment, or deteriorating physical or mental health because of the aging process, which 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." U.S.S.G. § 1B1.13 n.1(A). Griffin does not contend that he meets any of these criteria.

compassionate release is available only if 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)." Since this policy statement has not been revised since § 3582(c)(1)(A) was amended to allow defendants to seek compassionate release and a portion of the policy statement is now inconsistent with the statute, as amended, many district courts "have concluded that ... the Sentencing Commission does not have a policy position applicable to motions for compassionate release filed by defendants pursuant to the First Step Act" and that the courts therefore "have discretion to determine what constitutes an 'extraordinary and compelling reason[]' on a case by case basis, and reliance on the policy statement may be helpful, but not dispositive."

United States v. Perdigao, No. CR 07-103, 2020 WL 1672322, at *2 (E.D. La. Apr. 2, 2020) (citing United States v. Beck, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019) (concluding that "[w]hile the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction under § 3582(c)(1)(A)(i)."). See United States v. McLin, No. 1:17-CR-110-LG-RHW, 2020 WL 3803919, at *2 (S.D. Miss. July 7, 2020) ("Regardless of whether the policy statement remains binding, it continues to provide helpful guidance for

determining whether a defendant is entitled to compassionate release."). Others have found the policy statement must be strictly followed. See, e.g., United States v. Winner, No. CR 117-034, 2020 WL 2124594, at *2 (S.D. Ga. Apr. 24, 2020) (concluding that, even after 2018 amendment, Congress intended the Commission, and not the judiciary, to determine what constitutes extraordinary circumstances). For purposes of resolving the present motion, however, the court need not decide this issue because Griffin has not demonstrated the existence of what the court would, under any standard, consider to be extraordinary and compelling reasons for the relief he seeks.

As a preliminary matter, the court acknowledges that the government's response to Griffin's motion references Griffin's April 10, 2020 request to the warden for compassionate release and recites that in light of that request, "Griffin has complied with the requirements of the First Step Act by exhausting his administrative remedies". However, Griffin's April 10 request to the warden for compassionate release was based exclusively on his professed desire to "go home and look after and also help provide for [his] 'mother'". He did not purport to seek relief based on his own alleged heightened risk of contracting COVID-19 and suffering severe illness (and possibly death) if he were to contract COVID-19. Under these circumstances, the court

questions whether Griffin has, in fact, exhausted his administrative remedies. See United States v. Silcox, No. 317CR134TAVHBG1, 2020 WL 4341758, at *2 (E.D. Tenn. July 28, 2020) (quoting United States v. Alam, 960 F.3d 831, 835 (6th Cir. 2020) (reasoning that “[i]t would disrupt the ‘orderly system for reviewing compassionate-release applications’ and ‘incentivize[] line jumping’ to permit defendants to present grounds for compassionate release to the Court that the BOP had not already received the opportunity to consider”, and thus finding that defendant did not exhaust where she presented to the court different grounds for compassionate release than those advanced to the warden); see also United States v. Girod, No. 5:15-087, 2020 WL 1931242, at *3 (E.D. Ky. Apr. 21, 2020) (denying defendant's § 3582(c)(1)(A) motion where the grounds for relief sought in the motion (i.e., the possibility that defendant might contract COVID-19 if not released) were not included as grounds for relief sought in prior administrative proceedings); United States v. Salvagno, No. 5:02-cr-51, 2020 WL 3410601 (N.D.N.Y. Apr. 23, 2020) (stating that compassionate release request based on personal health concerns “require[d] a second round of exhaustion” where defendant first presented that ground for relief in a motion before the court). Regardless of whether he has exhausted, however, Griffin's motion is due to be

denied, either for lack of jurisdiction or for lack of merit.

As Judge Ozerden recently observed, district courts in this circuit are split on whether the exhaustion requirement at issue is jurisdictional. United States v. Garrett, No. 1:19CR48-HSO-JCG, 2020 WL 4340982, at *3 (S.D. Miss. July 28, 2020) (citing cases). If exhaustion is jurisdictional, and if Griffin has not exhausted because he did not pursue an administrative request for compassionate release based on concerns relating to the risk that COVID-19 poses to him personally due to his own health issues, then notwithstanding the government's concession regarding exhaustion, the court would lack jurisdiction to consider his motion for compassionate relief and deny his motion for that reason. On the other hand, if Griffin could fairly be found to have exhausted his administrative remedy despite having failed to first address to the warden the alleged concerns raised in his present motion, or if exhaustion is not jurisdictional and any potential failure to exhaust has been waived by the government's having conceded exhaustion, then the motion nevertheless fails on the merits as Griffin has not shown an extraordinary and compelling circumstance warranting compassionate release.

Griffin contends that he is at greater risk from COVID-19 because he has "high blood pressure and hyperthyroid problems."

While the Centers for Disease Control and Prevention (CDC) has recognized that people with certain underlying medical conditions are at increased risk for severe illness from COVID-19, it has not recognized hypertension alone as causing an increased risk for severe illness from COVID-19. Clinical Questions about COVID 19: Questions and Answers, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Patients-with-Hypertension> (last accessed August 4, 2020). Rather, the CDC advises that individuals with hypertension "might be at increased risk for severe illness from COVID 19." Groups at Higher Risk for Severe Illness, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (retrieved August 4, 2020) (emphasis added). See United States v. Ferrell, No. 116CR00259TWPMJD1, 2020 WL 3871210, at *5 (S.D. Ind. July 8, 2020) (stating that although CDC has stated that hypertension has been associated with increased illness severity and adverse outcomes, "association is not necessarily causation, and the CDC has not yet identified hypertension (no matter how mild, and no matter how well-controlled) in its general list of conditions that put people at risk for severe COVID-19 symptoms"). Moreover, the CDC has not identified hyperthyroid problems as

even potentially causing an increased risk for severe COVID-19 illness. The court is thus not persuaded that these health issues Griffin has identified amount to extraordinary circumstances warranting a reduction in his sentence.

Though not mentioned in his motion, Griffin's rebuttal brief, filed by his appointed counsel, notes that the CDC has reported that current data reflects a disproportionate number of cases and deaths from COVID-19 in racial minority groups.² Counsel thus contends that Griffin, who is African American, is at increased risk from COVID-19 because of his race. The CDC has recognized that "[l]ong-standing systemic health and social inequities have put many people from racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19." Health Equity Considerations and Racial and Ethnic Minority Groups, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html (last accessed August 4, 2020. However, as one court has aptly observed, this recognition does not necessarily

² Upon filing his motion, the Federal Public Defender was appointed to represent Griffin and filed a rebuttal submission on his behalf.

translate into a conclusion that an inmate is more at risk for a negative outcome merely because he is African American. United States v. Burnside, No. 18-CR-2068-CJW-MAR, 2020 WL 3443944, at *8 (N.D. Iowa June 18, 2020). On this issue, the Burnside court stated:

Although data shows the black community has been disproportionately affected in the United States, this is likely attributable to broader societal circumstances and inequalities and consequential health issues. The Court is not aware of any authority that an inmate is more at risk of serious illness merely because they are African American.

Id.

Moreover, while not mentioned in his motion, Griffin argues in his rebuttal brief that his elderly mother's health condition, i.e., COPD requiring her to wear an oxygen mask, warrants releasing him from prison or ordering home confinement. In this regard, he points to several cases in which courts have found that the need to care for a parent when there is no one else to fill that role constitutes an "extraordinary and compelling" reason to grant compassionate release. See United States v. Bucci, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (When a defendant is the "only available caregiver" for an incapacitated parent (perhaps a more unique occurrence given that inmates may have siblings or other family members able to care for their parents), then, it is likewise an "extraordinary and compelling"

reason warranting compassionate release.); United States v. Riley, No. 2:12-cr-62, 2020 U.S. Dist. LEXIS 82909 (D. Vt. May 12, 2020) (compassionate release granted based on age, asthma, and defendant's father's failing health and him being the only person available to provide his father's daily care.); United States v. Hernandez, Case No. 16-20091 (S.D. Fl. April 3, 2020) (extraordinary and compelling reasons warranting a compassionate release reduction where defendant was the only possible caregiver for his 84-year-old mother who suffers from degenerative ocular disease and cancer (in remission) that renders her functionally blind and who has mobility issues); United States v. Lisi, 2020 U.S. Dist. LEXIS 31127 (S.D.N.Y. Feb. 24, 2020) (court found that if the defendant's claims are factually accurate, and he is the only person capable of caring for his mother, then that would constitute an extraordinary and compelling reason for compassionate release). While the citation to these cases is perhaps intended to imply that Griffin is the only possible caregiver for his mother, Griffin has not actually made such a claim and has certainly offered no proof of any sort to support such a claim. In support of the argument that the need to care for his mother is a basis for relief, the rebuttal does no more than cite Griffin's April 10 administrative claim for relief, in which he merely stated that

he sought compassionate release so that he could "go home and look after and also help provide for" his mother. He did not claim that there was no one else available to care for his mother. Griffin has been incarcerated for approximately 13 years. He does not explain what care she has needed or who has provided such care during all or any of this time or suggested what, if anything, has changed about his mother's circumstances that has given rise to any need for him to now provide her care. In short, he has not claimed or shown that he is the only possible person who could provide needed care for his mother.

Based on the forgoing, to the extent that exhaustion is jurisdictional and to the extent defendant has not exhausted the basis for relief set out in his motion, the court will deny the motion without prejudice for failure to exhaust. Alternatively, the court will deny the motion on the merits.

Based on the foregoing, it is ordered that defendant's motion for compassionate release is denied without prejudice for failure to exhaust. Alternatively, the motion is denied with prejudice on the merits.

SO ORDERED this 4th day of August, 2020.

____/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX 2

FILED

Sep 16 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI **ARTHUR JOHNSTON, CLERK**
NORTHERN DIVISION

By:  Deputy Clerk

UNITED STATES OF AMERICA

VS.

LEONARD GRIFFIN

CRIMINAL NO. 3:07CR75TSL-LRA

ORDER

This cause is before the court on the second motion of defendant Leonard Griffin for compassionate release pursuant to 18 U.S.C. § 3582(c) (1) (A). The government has responded in opposition to the motion. The court, for reasons which follow, concludes that the motion should be denied.

On August 4, 2020, the court denied Griffin's first motion for compassionate release. By the memorandum opinion and order, the court concluded that Griffin had not demonstrated that he had exhausted his administrative remedies¹; alternatively, it

1 While in response to the first motion, the government purported to concede that Griffin had exhausted his administrative remedies, because there was, at the time, a question as to whether exhaustion under 18 U.S.C. § 3582(c) (1) (A) was jurisdictional and thus, not subject to waiver by the government, the court addressed the question of whether Griffin had exhausted his administrative remedies with regard to his medical conditions. Ultimately, the court concluded he had not and denied the motion without prejudice "to the extent that exhaustion is jurisdictional and to the extent defendant has not exhausted the basis for relief set out in his motion." On September 3, 2020, the Fifth Circuit held that the exhaustion requirement is not jurisdictional, but rather is a mandatory claims processing rule. See United States v. Franco,

ruled that he had failed to establish extraordinary circumstances warranting release. Defendant's second motion is in all pertinent respects identical to his first and is therefore denied for the reasons set forth in the court's August 4, 2020 alternative ruling on the merits. See United States v. Gonzalez, No. 19-50305, 2020 WL 5352078, at *1 (5th Cir. Sept. 4, 2020) (recognizing that U.S.S.G. § 1B1.13 was not "the dispositive boundary of what may be judicially determined to be extraordinary and compelling reasons for a sentence reduction for medical reasons" and reviewing district court's denial of motion for compassionate release for abuse of discretion) (citing United States v. Hernandez, 645 F.3d 709, 712 (5th Cir. 2011) ("[T]he decision whether to ultimately grant a modification is left to the sound discretion of the trial court.")). The court additionally finds that, even if defendant had demonstrated extraordinary circumstances, relief would be denied because Griffin's lengthy inmate disciplinary record, which includes a conviction for assault upon a federal correctional officer, negates a finding that he would not be a danger to the community if released.

Based on the foregoing, it is ordered that defendant's

2020WL5249369, at *2 (5th Cir. Sept. 3, 2020).

second motion for compassionate release is denied.

SO ORDERED this 16th day of September, 2020.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX 3A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals

Fifth Circuit

FILED

February 10, 2021

No. 20-60876
Summary Calendar

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LEONARD GRIFFIN,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:07-CR-75-1

Before JONES, BARKSDALE, and STEWART, *Circuit Judges.*

PER CURIAM:*

Leonard Griffin, federal prisoner # 09300-043, is serving a 180-month sentence for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He challenges the district court's denial of his 18 U.S.C. § 3582(c)(1)(A) motion for compassionate release due to the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-60876

COVID-19 pandemic. Griffin contends that his health conditions (hypertension and hyperthyroidism), his age (49), and his being black create a risk of severe illness due to COVID-19, constituting extraordinary and compelling reasons for compassionate release. He also asserts his mother's advanced age and health conditions warrant compassionate release to allow him to care for her. Further, Griffin contends the 18 U.S.C. § 3553(a) sentencing factors support his request.

A district court may reduce a defendant's sentence if, after considering any relevant § 3553(a) factors, it finds: "extraordinary and compelling reasons warrant such a reduction"; and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission". 18 U.S.C. § 3582(c)(1)(A)(i). This court reviews the district court's denial of a § 3582(c)(1)(A) motion for abuse of discretion, giving deference to the district court's application of the § 3553(a) sentencing factors. *United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020) (noting the district court "is in a superior position to find facts and judge their import under § 3553(a) in the individual case").

The court determined that, even if there were extraordinary and compelling reasons warranting Griffin's release (there were not), he would be a danger to society and should not be released. The court relied on Griffin's prison disciplinary record, which includes a conviction for assaulting an officer. Griffin has not established that the court based its decision on an error of law or a clearly erroneous assessment of the evidence when it determined that the § 3553(a) factors weighed against a compassionate-release reduction. See § 3553(a)(1) (history and characteristics of defendant) and (a)(2)(C) (need to protect the public); *see Chambliss*, 948 F.3d at 694.

AFFIRMED.

APPENDIX 3B



United States Court of Appeals for the Fifth Circuit

Certified as a true copy and issued
as the mandate on Mar 04, 2021

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 10, 2021

No. 20-60876
Summary Calendar

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LEONARD GRIFFIN,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:07-CR-75-1

Before JONES, BARKSDALE, and STEWART, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.