BLD-152 April 15, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-1438**

UNITED STATES,

VS.

MICHAEL CURTIS REYNOLDS, Appellant

(M.D. Pa. Crim. No. 3:05-cr-00493-001)

Present: AMBRO, SHWARTZ and PORTER, Circuit Judges

Submitted are:

1) By the Clerk for possible summary action under 3rd Cir. L.A.R. 27.4 and Chapter 10.6 of the Court's Internal Operating Procedures;

2) Appellant's March 17, 2021 response;

3) Appellant's March 31, 2021 response; and

4) Appellant's supplemental brief

in the above-captioned case.

Respectfully,

Clerk

ORDER

The District Court's order entered February 10, 2021, is summarily affirmed because no substantial question is presented on appeal. See L.A.R. 27.4; I.O.P. 10.6. The District Court did not abuse its discretion in denying Appellant's motion for compassionate release for the reasons the Court provided. See 18 U.S.C. § 3582(c)(1)(A); United States v. Pawlowski, 967 F.3d 327, 330 (3d Cir. 2020)

To the extent that Appellant requests leave to file a second or successive motion under 28 U.S.C. § 2255 to challenge his convictions based on Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and United States v. Davis, 139 S. Ct. 2319 (2019), the request is denied because Reynolds has previously raised theses challenges to his convictions, and they have been rejected. See C.A. No. 19-3469 (Mar. 31, 2020); C.A. No. 20-1363 (Apr. 10, 2020); see also § 2244(b)(1); White v. United States, 371 F.3d 900, 901 (7th Cir. 2004) (applying rule in § 2255 context).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 16, 2021
CLW/cc: Mr. Michael Curtis Reynolds
James Buchanan, Esq.

Certified as a true copy and issued in lieu of a formal mandate on June 30, 2021

Teste: Patricia A. Dodszuweit

Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

Case No. 3:05-cr-493

MICHAEL CURTIS REYNOLDS
Defendant

ORDER ON MOTION FOR SENTENCE REDUCTION UNDER 18 U.S.C. §3582(c)(1)(A) (COMPASSIONATE RELEASE)

Upon motion of the defendant for a reduction in sentence under 18 U.S.C. §3582(c)(1)(A), **(Doc. 691)**, as well as his several other motions, **(Docs. 696, 700, 706, 717, 719-721)**, and after considering the applicable factors provided in 18 U.S.C. §3553(a) and the applicable policy statements issued by the Sentencing Commission, **IT IS ORDERED** that all of the motions are:

☐ GRANTED

☐ The defendant's previously imposed sentence of imprisonment of _____ is reduced to _____. If this sentence is less than the amount of time the defendant already served, the sentence is reduced to a time served; or

☐ Time served.

If the defendant's sentence is reduced to time served:

☐ This order is stayed for up to fourteen days, for the verification of the defendant's residence and/or establishment of a release plan, to make appropriate travel arrangements, and to ensure the defendant's safe release. The defendant shall be released as soon as a residence is verified, a release plan is established, appropriate travel arrangements are made, and it is safe for the defendant to travel. There shall

be no delay in ensuring travel arrangements are made. If more than fourteen days are needed to make appropriate travel arrangements and ensure the defendant's safe release, the parties shall immediately notify the court and show cause why the stay should be extended, or

☐ There being a verified residence and an appropriate release plan in place, this order is stayed for up to fourteen days to make appropriate travel arrangements and to ensure the defendant's safe release. The defendant shall be released as soon as appropriate travel arrangements are made and it is safe for the defendant to travel. There shall be no delay in ensuring travel arrangements are made. If more than fourteen days are needed to make appropriate travel arrangements and ensure the defendant's safe release, then the parties shall immediately notify the court and show cause why the stay should be extended.

☐ The defendant must provide the complete address where the defendant will reside upon release to the probation office in the district where they will be released because it was not included in the motion for sentence reduction.

☐ Under 18 U.S.C. §3582(c)(1)(A), the defendant is ordered to serve a "special term" of ☐ probation or ☐ supervised release of ___ months (not to exceed the unserved portion of the original term of imprisonment).

☐ The defendant's previously imposed conditions of supervised release apply to the "special term" of supervision; or

☐ The conditions of the "special term" of supervision are as follows:

☐ The defendant's previously imposed conditions of supervised release are unchanged.

☐ The defendant's previously imposed conditions of supervised release are modified as follows:

☐ DEFERRED pending supplemental briefing and/or a hearing. The court DIRECTS the United States Attorney to file a response on or before _____, along with all Bureau of Prisons records (medical, institutional, administrative) relevant to this motion.

X DENIED after complete review of the motions on the merits.

X FACTORS CONSIDERED (Optional)

The background of this case is stated in the court's prior decisions, as well as in the Third Circuit's opinion affirming defendant Reynold's conviction, and will not be fully repeated. (*See* United States v. Reynolds, 374 F.App'x 356 (3d Cir. 2010); Doc. 662). (*See also* Doc. 709 at 2-8), However, due to the very serious and disturbing nature of Reynold's terroristic crimes, which reveal the grave threat he still poses to the public, the court will highlight relevant portions of his background. Defendant Reynolds is currently serving his aggregate sentence of 360-months' imprisonment at FCI-Greenville, Illinois. (Doc. 297). Reynolds received two sentence level enhancements that were based on his involvement in terrorist activities. (*See* U.S.S.G. §§2M5.3(b), 3A1.4(a)). In particular, Reynolds was convicted of Count One of the superseding indictment, (Doc. 80), which charged him with attempting to provide material support and resources to a foreign terrorist organization, namely Al-Qaeda, in violation of 22 U.S.C. §2339B, and Count Two, which charged him with attempting to provide material support and resources to damage or destroy, or attempt to damage or destroy, any

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL CURTIS REYNOLDS	:	**CASE NO. 3:20-CV-02178**
	:	
v.	:	**(Judge Mannion)**
	:	
UNITED STATES OF AMERICA, et al.	:	**(Electronically Filed)**
Respondents	:	

ORDER

AND NOW, this 20th day of January 2021, upon consideration of the Government's *Nunc Pro Tunc* Motion For Extension Of Time, this motion is hereby GRANTED. The response of the United States is now due on or before January 26, 2021.

BY THE COURT:

s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**No. 3:05-CR-493**
	:	
v.	:	**(Mannion, J.)**
	:	
MICHAEL CURTIS REYNOLDS,	:	
Defendant	:	**Electronically filed**

UNITED STATES' BRIEF IN OPPOSITION TO SECOND MOTION FOR COMPASSIONATE RELEASE

Defendant Michael Curtis Reynolds has filed a *pro se* motion asking the Court to reduce his sentence of imprisonment under 18 U.S.C. § 3582(c)(1)(A) and order his immediate release, relying in part on the threat posed by the COVID-19 pandemic. The Government respectfully opposes the motion. The Court should deny the motion with prejudice because Reynolds has not met his burden of establishing that a sentence reduction is warranted under the statute, and the motion, while bearing a different title, is best construed as a second or successive motion under 28 U.S.C. §2255, filed without prior authorization, and focused on the previously ruled upon legal challenges to the defendant's trial and sentence.

BACKGROUND

On December 5, 2005, Reynolds was arrested in Idaho on a criminal complaint from the Middle District of Pennsylvania charging him with possession of an unregistered destructive device, in violation of 26 U.S.C. §5861(d). On December 20, 2005, a federal grand jury in the Middle District of Pennsylvania returned an indictment charging him with two counts of the same charge.

The grand jury on October 3, 2006, returned a six-count superseding indictment charging Reynolds with attempting to provide material support and resources to a foreign terrorist organization in violation of 18 U.S.C. § 2339B (Count 1); attempting to provide material support and resources to damage or destroy property used in commerce by means of fire or explosive, and to damage or attempt to damage an interstate gas pipeline, in violation of 18 U.S.C. § 2339A (Count 2); solicitation or inducement of another to damage or destroy property used in commerce by means of fire or explosive, and to damage or attempt to damage an interstate gas pipeline in violation of 18 U.S.C. § 373 (Count 3); distribution through the internet of information demonstrating the making or use of an explosive or destructive device

with the intent that the information be used to commit a federal crime of violence in violation of 18 U.S.C. 842(p)(2) (Count 4); and the same two counts of possessing unregistered destructive devices – hand grenades – that had been charged in the original indictment (Counts 5 and 6). (Doc No. 80.)

Defendant pleaded not guilty and trial commenced on July 9, 2007. Following a five-day jury trial, the defendant was found guilty of counts 1-4 and 6 of the superseding indictment. The jury returned a "not guilty" verdict on count 5 of the superseding indictment relating to a charge of possession of a destructive device (hand-grenade).

The basis of these charges is that Reynolds attempted to support terrorism by attempting to enlist units of Al Qaeda to bomb interstate gas pipeline facilities and sought to provide target locations, bomb making advice, and diagrams to assist such activity. Reynolds also sent numerous emails, elicited at trial, which sought to enlist Al Qaeda "crews" to strike gas pipelines in Wyoming, Pennsylvania, and New Jersey. Two hand grenades were also recovered in connection to Reynolds. He was acquitted on Count 5 of the Indictment concerning the hand grenade located in his former residence but was convicted for

possessing the hand grenade recovered from his storage locker in Pennsylvania on or before the date of his arrest, December 5, 2005.

Reynolds filed post-trial motions which were denied by the court.

A presentence report was prepared and determined that pursuant to U.S.S.S. Section 2M5.3, Reynolds' base offense level was 26. That base level was increased by 2 levels because the resources being provided were with the intent that it assists in a violent act. US.S.G. Section 2M5.3(b). In addition, because the offenses were felonies that involved, or intended to promote a federal crime of terrorism, the offense level was increased by 12 levels with a corresponding Category IV criminal history. U.S.S.G. 3A1.4(a). Finally, because the defendant willfully attempted to obstruct justice by committing perjury during the trial, his offense level was increased by an additional two levels pursuant to U.S.S.G. Section 3C1.1.[1] Accordingly, his final offense level of 42 with a Category VI criminal history produced an advisory Guidelines range of 360 to life. (PSR at 46-58; 56.)

[1] At the trial, Reynolds testified that he wrote the emails offered by the government but claimed, essentially, that he was doing so in an attempt to gain evidence so that he could turn the terrorists into authorities. The week after the verdict, Reynolds sent a letter to the Court claiming that he had lied while testifying at trial.

On November 5, 2007, the district court sentenced the defendant to 360 months' imprisonment to be followed by three years of supervised release. Specifically, the Judgement stated:

> *The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 360 month(s). This term consists of terms of one hundred eighty (180) months imprisonment on each of Count 1 and 2, to be served consecutively to each other and terms of ninety (90) months imprisonment on Count 3, two hundred forty (240) months on Count 4, and one hundred twenty (120) months on Count 6, to be served concurrently with each other and with Counts 1 and 2 to the extent necessary to produce a total term of three hundred sixty (360) months.*

(Doc. 297, at 3.)

The defendant was also ordered to serve concurrent terms of three years of supervised release on each count, and to pay a special assessment of $500. No fine was imposed. (Doc 297.)

A timely notice of appeal was filed. On March 18, 2010, the United States Court of Appeals for the Third Circuit affirmed the conviction and sentence in an unreported opinion. *See United States v. Reynolds,* 374 F.App'x 356, 363 (3d Cir. 2010). On October 4, 2010, the United States Supreme Court denied the defendant's petition for a writ of certiorari.

On August 29, 2011, the defendant filed a timely §2255 motion alleging that his trial attorney was ineffective. On August 15, 2012, the Honorable William J. Nealon issued a memorandum and order dismissing Reynolds' §2255 motion and further ordered that there was no basis for the issuance of a certificate of appealability. (Docs 491 and 492.)

On September 4, 2012, Reynolds filed a notice of appeal of the denial of his §2255 motion. (Doc. 484.) On February 13, 2012, the Third Circuit Court of Appeals denied Reynolds' request for a certificate of appealability. (Doc. 493.)

Thereafter, Reynolds filed various other motions with the Court, many of which were construed as successive §2255 motions without authorization by the Court of Appeals. (Docs. 522, 526, 531, 535, 539, 557, 559.) Those motions were denied for failure to have been authorized by the Court of Appeals. (Docs. 537, 543, 562.)

On October 10, 2018, the Court of Appeals issued an order authorizing a second or successive motion under 28 U.S.C. §2255 concluding that Reynolds had made a prima facie showing in his proposed §2255 motion which contained a new rule of constitutional law

in light of the Supreme Court's decisions in Sessions v. Dimaya, 138 S.Ct. 1204 (2018), Welch v. United States, 136 S.Ct. 1257 (2016), and Johnson v. United States, 135 S.Ct. 2551 (2015). (Doc. 565.) In this §2255 motion, Reynolds contended that Count 4 of the Superseding Indictment was invalid, because 18 U.S.C. 842(p)(2) incorporated the definition of "crime of violence" provided by 18 U.S.C. §16(b), which the Supreme Court declared unconstitutionally vague in Dimaya.

On September 26, 2019, the Honorable A. Richard Caputo denied defendant's authorized second or successive §2255 motion finding that the defendant's petition for relief was not actionable because the defendant's custody status would not change even if the proposed relief was granted. (Doc. 662, at 4). Specifically, Judge Caputo found that any challenge to the validity of Count 4 in the Superseding Indictment would not affect the defendant's custody seeing that defendant was also lawfully sentenced at Counts One, Two, Three, and Six, all counts which were not which were not impacted by the Supreme Court's decisions in Dimaya, Welch, and Johnson. (Doc. 662 at 4).

In the same decision, Judge Caputo further denied the approximately 40 additional motions for relief filed by the defendant

between October of 2018 and September of 2019 each, though bearing various titles, requested similar relief regarding the defendant's actual innocence. Judge Caputo construed each of these various motions as second or successive motions under 28 U.S.C. §2255 and dismissed them for being filed without prior authorization. (Doc. 662, at 7).

On July 7, 2020, the defendant submitted a written request for compassionate release to the warden of FCI-Greenville, where the defendant is currently serving his term of imprisonment. *See* Attachment 1. This request was denied by the Warden on July 15, 2020. *See* Attachment 2.

On November 2, 2020, the defendant filed the present one hundred and eighty-nine (189) page motion under 18 U.S.C. § 3582(c)(1)(A) requesting a sentence reduction for extraordinary and compelling reasons and seeking his immediate release from the custody of the Bureau of Prisons (BOP), relying on his medical history of heart murmurs, a family medical history of heart attacks, the claim that a certain Doctor Ahmad, who purportedly is employed at FCI-Greenville, is not a licensed doctor, and various failures by the staff at FCI-Greenville to abide by COVID-19 restrictions. These items, however,

only take up a small percentage of the lengthy motion. While the factors related to the defendant's health are mentioned in both the beginning and conclusion of the motion, and there is a brief six-page interlude in Pages 59-65 of the motion about conditions in FCI-Greenville, the remainder of the 182 pages of the motion re-argue the defendant's legal challenges to his trial and sentence, including the issues decided in defendant's previous §2255 motions described above.

I. BOP's Response to the COVID-19 Pandemic

As this Court is well aware, COVID-19 is an extremely dangerous illness that has caused many deaths in the United States and that has resulted in massive disruption to our society and economy. In response to the pandemic, BOP has taken significant measures to protect the health of the inmates in its charge.

In response to similar motions in other matters, the United States has briefed the Court extensively on the BOP's efforts to combat and contained COVID-19, so will not repeat them all here. However, as an update, the BOP's operations—including the operations at FCI-Greenville, where the defendant is currently incarcerated—are now

governed by Phase Nine of the Action Plan, which went into effect on or about August 5, 2020, and was last updated on November 25, 2020.[2] *See* Attachment 3.

In addition, in an effort to relieve the strain on BOP facilities and assist inmates who are most vulnerable to the disease and pose the least threat to the community, BOP is exercising greater authority to designate inmates for home confinement. On March 26, 2020, the Attorney General directed the Director of the Bureau of Prisons, upon considering the totality of the circumstances concerning each inmate, to prioritize the use of statutory authority to place prisoners in home confinement. That authority includes the ability to place an inmate in home confinement during the last six months or 10% of a sentence, whichever is shorter, *see* 18 U.S.C. § 3624(c)(2), and to move to home confinement those elderly and terminally ill inmates specified in 34 U.S.C. § 60541(g). Congress has also acted to enhance BOP's flexibility to respond to the pandemic. Under the Coronavirus Aid, Relief, and

[2] Further details and updates of BOP's modified operations are available on the BOP website at a regularly updated resource page: www.bop.gov/coronavirus/index.jsp.

Economic Security Act, enacted on March 27, 2020, BOP may "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement" if the Attorney General finds that emergency conditions will materially affect the functioning of BOP. Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (to be codified at 18 U.S.C. § 3621 note).

On April 3, 2020, the Attorney General gave the Director of BOP the authority to exercise this discretion, beginning at the facilities that thus far have seen the greatest incidence of coronavirus transmission. As of this filing, BOP has transferred 17,642 inmates to home confinement. *See* Federal Bureau of Prisons, *COVID-19 Home Confinement Information*, *at* https://www.bop.gov/coronavirus/.

On January 4, 2021, the Director of BOP issued clinical guidance to provide direction on the use of the COVID-19 vaccine for BOP inmates. *See* Federal Bureau of Prisons, *COVID-19 Vaccine Guidance*, at https://www.bop.gov/resources/pdfs/2021_covid19_vaccine.pdf. Within that guidance, the BOP authorized the use of two vaccines, Pfizer and Moderna, to BOP inmates who meet BOP priority levels

based upon their age and medical conditions, including but not limited to cancer, COPD, obesity, and certain heart conditions.

Taken together, all of these measures are designed to mitigate sharply the risks of COVID-19 transmission in a BOP institution. BOP has pledged to continue monitoring the pandemic and to adjust its practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders.

Unfortunately, and inevitably, some inmates have become ill, and more likely will in the weeks and months ahead. But BOP must consider its concern for the health of its inmates and staff alongside other critical considerations. For example, notwithstanding the current pandemic crisis, BOP must carry out its charge to incarcerate sentenced criminals to protect the public. It must consider the effect of a mass release on the safety and health of both the inmate population and the citizenry. It must marshal its resources to care for inmates in the most efficient and beneficial manner possible. It must assess release plans, which are essential to ensure that a defendant has a safe place to live and access to health care in these difficult times. And it must consider

myriad other factors, including the availability of both transportation for inmates (at a time that interstate transportation services often used by released inmates are providing reduced service), and supervision of inmates once released (at a time that the Probation Office has necessarily cut back on home visits and supervision).

II. Reynolds's Request for a Sentence Reduction

Reynolds is currently serving his 360-month period of imprisonment at FCI-Greenville in Greenville, Illinois. That institution has had 667 reported inmate cases of COVID-19 out of approximately 1188 inmates tested, as of this writing. Currently, there are 13 active inmate cases, and 14 active staff cases. There have been no inmate or staff deaths from COVID-19 at the facility. *See* Federal Bureau of Prisons, *COVID-19 Cases*, https://www.bop.gov/coronavirus/. The total inmate population at the institution is 1,194, with 972 inmates at FCI-Greenville and 222 inmates at the adjoining Camp. See Federal Bureau of Prisons, https://www.bop.gov/institutions/gre/.

Reynolds submitted a request to the warden of FCI-Greenville via email for compassionate release dated July 7, 2020. *See* Attachment 1. This request was denied by the warden on July 15, 2020. *See* Attachment 2.

On November 2, 2020, Reynolds sought compassionate release under 18 U.S.C. § 3582(c)(1)(A) on the grounds that he suffers from heart murmurs, that several family members, including his father, grandfather, and two uncles died from heart attacks prior to the age of 65, that COVID-19 is widespread in FCI-Greenville due to various failures to abide by COVID-19 restrictions by staff members, and that a certain Doctor Ahmed who practices at FCI-Greenville is not a licensed physician. (Doc. 691, at 1-2.)

In his motion Reynolds makes no reference to the fact that he previously contracted and recovered from COVID-19 in October of 2020. *See* Attachment 4, at 67 (filed under seal). Reynolds also does not allege in his motion that he currently suffers from any symptoms of COVID-19 or that his undiagnosed history of heart murmurs is not being adequately controlled by BOP medical staff, nor that he suffers

from any symptoms or conditions which render him particularly susceptible to a re-infection of COVID-19.

LEGAL FRAMEWORK

Under 18 U.S.C. § 3582(c)(1)(A), this Court may, in certain circumstances, grant a defendant's motion to reduce his or her term of imprisonment. Before filing that motion, however, the defendant must first request that BOP file such a motion on his or her behalf. § 3582(c)(1)(A). A court may grant the defendant's own motion for a reduction in his sentence only if the motion was filed "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.* Here, 30 days elapsed between Reynolds' request for release to the warden of FCI-Greenville (July 7, 2020), and the docketing of his motion in this Court (November 2, 2020). He thus has passed the statutory limitation on seeking relief in this Court. *See United States v. Harris*, 812 F. App'x 106, 107 (3d Cir. 2020) (per curiam; awaiting designation as precedential) (rejecting argument that inmate was required to fully

exhaust the administrative process when request to warden was denied within 30 days).

If that exhaustion requirement is met, a 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). As the movant, the defendant bears the burden to establish that he or she is eligible for a sentence reduction. *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 Sentencing Commission has issued a policy statement addressing reduction of sentences under § 3582(c)(1)(A). As relevant here, the policy statement provides that a court may reduce the term of imprisonment after considering the § 3553(a) factors if the Court finds that (i) "extraordinary and compelling reasons warrant the reduction"; (ii) "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)"; and (iii) "the reduction is consistent with this policy statement." USSG § 1B1.13.[3]

The policy statement includes an application note that specifies the types of medical conditions that qualify as "extraordinary and compelling reasons." First, that standard is met if the defendant is "suffering from a terminal illness," such as "metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, [or] advanced dementia." USSG § 1B1.13, cmt. n.1(A)(i). Second, the standard is met if 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,

[3] The policy statement refers only to motions filed by the BOP Director. That is because the policy statement was last amended on November 1, 2018, and until the enactment of the First Step Act on December 21, 2018, defendants were not entitled to file motions under § 3582(c). *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239; *cf.* 18 U.S.C. § 3582(c) (2012). In light of the statutory command that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission," § 3582(c)(1)(A)(ii), and the lack of any plausible reason to treat motions filed by defendants differently from motions filed by BOP, the policy statement applies to motions filed by defendants as well.

> 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.

USSG § 1B1.13, cmt. n.1(A)(ii). Third, the standard is met if the defendant is:

> (i) at least 65 years of age,
>
> (ii) is experiencing a serious deterioration in physical or mental health because of the aging process, and
>
> (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

USSG § 1B1.13, cmt. n.1(B) The application note also sets out other conditions and characteristics that qualify as "extraordinary and compelling reasons" related to the defendant's family circumstances. USSG § 1B1.13, cmt. n.1(C). Finally, the note recognizes the possibility that BOP could identify other grounds that amount to "extraordinary and compelling reasons." USSG § 1B1.13, cmt. n.1(D).

ARGUMENT

The Court should deny Reynolds' motion for a reduction in his sentence with prejudice on either of two independently sufficient

grounds. First, Reynolds has not established that "extraordinary and compelling reasons" support a sentence reduction within the meaning of § 3582(c)(1)(A) and the Sentencing Commission's policy statement. Second, Reynolds has not met his burden to show that a reduction is warranted in light of the relevant § 3553(a) factors, and he remains a danger to the community.

A. Reynolds Has Not Identified "Extraordinary and Compelling Reasons" for a Sentence Reduction.

Reynolds' request for a sentence reduction should be denied because he has not demonstrated "extraordinary and compelling reasons" warranting release. As explained above, under the relevant provision of § 3582(c), a court can grant a sentence reduction only if it determines that "extraordinary and compelling reasons" justify the reduction and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i). The Sentencing Commission's policy statement defines "extraordinary and compelling reasons" to include, as relevant here, certain specified categories of medical conditions. USSG § 1B1.13, cmt. n.1(A).

For that reason, to state a cognizable basis for a sentence reduction based on a medical condition, a defendant first must establish that his condition falls within one of the categories listed in the policy statement. Those categories include, as particularly relevant here, (i) any terminal illness, and (ii) any "serious physical or medical condition . . . 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." USSG 1B1.13, cmt. n.1(A). If a defendant's medical condition does not fall within one of the categories specified in the application note (and no other part of the application note applies as the defendant is 62 years old and claims no other circumstances for release due to either the aging process or family circumstances), his or her motion must be denied.

The mere existence of the COVID-19 pandemic, which poses a general threat to every non-immune person in the country, does not fall into either of those categories and therefore could not alone provide a basis for a sentence reduction. The categories encompass specific serious medical conditions afflicting an individual inmate, not generalized threats to the entire population. As the Court of Appeals

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)(vacated and motion granted by *United States v. Raia*, 2020 U.S. App. Lexis 11003, 3d Cir., April 8, 2020); *see also United States v. Eberhart*, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) ("a reduction of sentence due solely to concerns about the spread of COVID-19 is not consistent with the applicable policy statement of the Sentencing Commission as required by § 3582(c)(1)(A)."); *United States v. Korn*, 2020 WL 1808213, at *6 (W.D.N.Y. Apr. 9, 2020) ("in this Court's view, the mere *possibility* of contracting a communicable disease such as COVID-19, without any showing that the Bureau of Prisons will not or cannot guard against or treat such a disease, does not constitute an extraordinary or compelling reason for a sentence reduction under the statutory scheme.").

To classify COVID-19 as an extraordinary and compelling reason would not only be inconsistent with the text of the statute and the policy statement, 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.

i. Reynolds' Medical Conditions and Family Medical History

Reynolds premises his motion on his claimed personal history of heart murmurs and a family history of heart attacks by several close male relatives prior to the age of 65. Reynolds does not allege—and there is no evidence—that his medical issues "substantially diminishes [his] ability . . . to provide self-care within the environment" of his institution. USSG § 1B1.13, cmt. n.1(A)(ii). Although the attached BOP medical records for Reynolds, *see* Attachment 4, confirms that Reynolds report of a family history of heart disease, there is no mention of a heart murmur diagnosis, nor that Reynolds suffered from any symptoms or conditions due to heart murmurs. Reynolds records indicate that he suffers from several joint disorders and bipolar disorder, neither of which is classified as an "at risk" category by the CDC. *See* Attachment

4, at 18; Centers for Disease Control, *Groups at Higher Risk for Severe Illness*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. Even if there had been a diagnosis of heart murmurs, this condition is also not included among the conditions identified by the CDC as increasing a person's risk for developing serious illness from COVID-19. *Id.*; *see also United States v. Green*, 2020 WL 2064066, at *3 (W.D.P.A. July 6, 2020) (denying release for 39-year-old defendant suffering from a heart murmur and high blood pressure that was stabilized and controlled by medication.)

The CDC has listed certain heart conditions and other cardiovascular and cerebrovascular diseases that increase a person's risk of severe illness from COVID-19, namely: heart failure; coronary artery disease; cardiomyopathies; and pulmonary hypertension. *See* Centers for Disease Control, *Groups at Higher Risk for Severe Illness*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. Additionally, the CDC also lists other diseases, hypertension (high blood pressure) and stroke, which might increase your risk of severe illness from COVID-19. These factors, however, only increase risk for severe illness if they are actually

suffered by the individual seeking relief, not if they are suffered by relatives, even close relatives of the petitioner. Of course, a family history of heart attacks, or of any hereditary health condition, may increase a person's chance of one day suffering from that condition, but Reynolds has not established that he has ever suffered a heart attack, heart failure, or any other heart condition listed by the CDC placing him at an increased risk of severe illness from COVID-19.

Moreover, Reynolds' conditions are being well managed by the BOP. Importantly, a review of Reynolds' medical records shows that he receives regular and proper care for his health and psychiatric issues. *See generally* Attachment 4; *see also United States v. Cruz*, 2020 WL 1904476 (M.D. Pa. Apr. 17, 2020) (Mannion, J.) (finding through a review of medical records that the BOP adequately attended to defendant's needs).

Moreover, Reynolds medical records show that he contracted COVID-19 on October 20, 2020 and that on October 29, 2020, Reynolds was diagnosed as "Recovered." *See* Attachment 4, at 29, 57, 67, 79, and

91. [4] During this period, Reynolds was screened for COVID symptoms multiply times and the records indicate that he complained of headaches and body aches but no further COVID symptoms such as cough, pain, fatigue, and any loss of taste or smell, among others. *See* Attachment 4, at 67. Reynolds recovery from COVID indicate that the care provided to him by the BOP while he suffered from the disease was adequate and that no extraordinary and compelling reason for his release exists, a position held by numerous courts throughout the country. *See United States v. Zahn*, 2020 WL 3035794 (N.D. Cal. June 10, 2020); *United States v. Pinkston*, 2020 WL 3492035 (S.D.Ga. June 6, 2020)(relief denied to 70-year old inmate who recovered after hospitalization for COVID-19, and other conditions are controlled); *United States v. Reece*, 2020 WL 3960436, at *6 (D. Kan. July 13, 2020)("In light of Reece's apparent recovery and the fact that he does not dispute that he remains asymptomatic and does not point to any current health problems as a result of having contracted COVID-19, the

[4] According to the CDC, cases of reinfection with COVID-19 have been reported, but remain rare. *See* https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html

Court finds extraordinary and compelling reasons do not exist to warrant a sentence reduction under §3582(c)(1)(A)."); *United States v. McCallum*, 2020 WL 7647198, at *1 (S.D.N.Y. December 23, 2020)("Now that he has weathered the disease, a sentence reduction based on the risk of contracting it no longer makes sense."); *United States v. Wiltshire*, 2020 WL (E.D.Pa. December 9, 2020); *but see United States v. Brown*, 2020 WL 7401617, at *7 (E.D. Wis. December 17, 2020)("I rejected the notion that a prisoner who had recovered from COVID-19 can never demonstrate extraordinary and compelling reasons, instead endorsing an individualized determination, which would include consideration of the prisoner's specific medical problems and their severity, the course of his recovery from the virus, whether he displayed any lingering symptoms or effects, and the conditions at his particular facility.") Reynolds' medical records also indicate that, if Reynolds is re-infected with COVID-19, it is likely that he would receive the same adequate medical care and that his re-infection would again remain relatively asymptomatic.

ii. Alleged Conditions at FCI-Greenville

Beyond allegedly suffering from a heart murmur, and a family medical history of heart failure, Reynolds also claims that the conditions within FCI-Greenville present an extraordinary and compelling reason for his immediate release. In a five page section of his motion entitled, "Covid-19 Misinformation" beginning on Page 59 of his motion, Reynolds lists various failures by the staff at FCI-Greenville to abide by COVID-19 rules and restrictions which have led to an outbreak in the institution. (Doc. 691, at 59-64.)

While the accuracy of these allegations is in doubt, as many are supported by nothing but the bare assertion of the defendant, nevertheless, a serious outbreak of COVID-19 did occur at the institution. As discussed above, there are currently 1,194 inmates incarcerated at FCI-Greenville (including 222 at the Camp). Nearly all of them, 1,188, have been tested for COVID-19 and there have been 667 confirmed cases of COVID-19 in the inmate population at the facility since the beginning of the pandemic, including Reynolds. However, there have been no inmate or staff deaths due to COVID-19 which highlights the adequate level of care provided to inmates if they do

contract the disease. Furthermore, there are currently only 27 active cases at the institution (13 inmate and 14 staff) while there have been 729 cases in which the individual recovered (674 inmate and 55 staff), again, including Reynolds. This decrease in the number of cases within the inmate population shows that the procedures, rules, and restrictions put into place by FCI-Greenville and the Bureau of Prisons has worked in stemming the tide of pandemic within that institution.

Reynolds also claims that a certain "Doctor Ahmed" is not a licensed physician. (Doc 691, at 62-63.) However, the only evidence offered by Reynolds that Doctor Ahmed is not a licensed physician is a website print-out listing the license status of several doctors with the last name of "Ahmed" in Illinois. There is no indication that this print-off shows all the Dr. Ahmeds currently practicing in Illinois, nor that any of the doctors listed is the actual doctor providing care at FCI-Greenville. Furthermore, as Reynolds' medical records show, he has received medical care from a variety of providers including Physician Assistants and Registered Nurses. *See generally* Attachment 4. The only indication that a Doctor Ahmed physically examined Reynolds was during Reynolds' Chronic Care Examination on April 1, 2019, in which

Reynolds was examined by Doctor F. Ahmed, and which Reynolds was assessed as suffering from bipolar disorder, pain in an unspecific joint, and an unspecific Joint disorder. *See* Attachment 4, at 16-18.

The alleged conditions and the outbreak of COVID-19 within FCI-Greenville, while serious, do not create any extraordinary circumstances compelling the immediate release of Reynolds. These conditions apply equally to all the 1,194 inmates currently imprisoned at the institution. Even if every allegation presented by Reynolds is conceded to be true, they do create a compelling reason why Reynolds' sentence alone should be reduced and not the other 1,193 inmates. Reynolds has not alleged that the COVID-19 outbreak has exposed him to any increased risk of severe illness as compared to any other inmate, or that the status of Doctor Ahmed's medical license has led Reynolds to receive inadequate medical care as compared to any similarly situated inmate. Reynolds allegations merely list circumstances applicated to all inmates and hence are not unique to any one person. *See United States v. Wright,* (W.D.L.A. 2020 WL 1976828, April 24, 2020)("The Court cannot release every prisoner at risk of contracting COVID-19 because the Court would then be obligated to release every prisoner.")

Because Reynolds has failed to establish an "extraordinary and compelling reason" for a sentence reduction under § 3582(c), based upon both his personal medical condition, and the conditions present for all the inmates at FCI-Greenville, his motion should be denied.

B. The § 3553(a) Factors Weigh Against Reynolds' Release.

Alternatively, Reynolds' request for a sentence reduction should be denied because he has failed to demonstrate that he merits release under the § 3553(a) factors.

At the present time, it is apparent that, but for the COVID-19 pandemic, Reynolds would present no basis for compassionate release. The alleged medical ailment, the heart murmur, Reynolds has identified is well-controlled and does not present any impediment to his ability to provide self-care in the institution. Reynolds also does not claim that his contraction of and recovery from COVID-19 has impair his condition in any meaningful way. Additionally, Reynolds is only 62 years old and claims no deterioration due to the aging process.

The only question, then, is whether the risk of COVID-19 changes that assessment. It does not. At present, Reynolds medical conditions are appropriately managed at the facility, which is also engaged in strenuous efforts to protect inmates against the further spread of COVID-19, include the process of vaccinating at-risk inmates, and would also act to treat any inmate who does contract COVID-19, as it has already successfully done in respect to Reynolds. The § 3553(a) factors, moreover, weigh against a sentence reduction.

Reynolds is serving a sentence of 360 months (at the bottom of his guidelines of 360 months to life). His conviction stem from Reynolds attempt to support terrorism by attempting to enlist units of Al Qaeda to bomb interstate gas pipeline facilities and providing target locations, bomb making advice, and diagrams to assist such activity. Reynolds also sent numerous emails, elicited at trial, which sought to enlist Al Qaeda "crews" to strike gas pipelines in Wyoming, Pennsylvania, and New Jersey. Reynolds also possessed the hand grenade recovered from his storage locker in Pennsylvania on or before the date of his arrest, December 5, 2005.

Moreover, at sentencing, Reynolds was subject to an obstruction of justice enhancement after Judge Nealon determined that he gave false testimony during the trial.

Reynolds was arrested and has been in federal custody since December 5, 2005. He was sentenced on November 6, 2007. He thus has served approximately 181 months of his 360 months sentence. While 181 months is undoubtedly a significant sentence, it only represents 50.2% of his term of imprisonment. Granting him immediate release at this time would not only result in a sentence that falls well below his guidelines range of 360 months to life Additionally, such a result would effectively remove any sentence for Count 2 of the indictment, attempting to provide material support and resources to damage or destroy property used in commerce by means of fire or explosive, and to damage or attempt to damage an interstate gas pipeline, in violation of 18 U.S.C. 2339A. Such a result would also not adequately account for the serious nature and circumstances of the offenses, the need to promote respect for the law, or the need to afford adequate deterrence.

as no legal argument of a valid 'Terrorist' exists." (Doc 692, at 2.) Reynolds has previously raised the issues presented in the remainder of the 189 pages through various appeals and 28 U.S.C. §2255 motions. Beginning on Page 125 of his motion, Reynolds just incorporates nearly sixty pages of copies of previous §2255 motions which have been denied and which no authorization for a second or successive motion has been granted by the Court of Appeals. (Doc. 692.)

Tellingly, in the two-page section of Reynolds' motion titled, "Conclusions," beginning on Page 183, Reynolds does not mention any medical conditions that would afford an extraordinary or compelling reason for this sentence reduction. Reynolds merely concludes that COVID-19 is "rampant and out of control in FCI Greenville," and that a certain Doctor Ahmad is not a licensed doctor. (Doc. 692, at 183.) The remainder of the two pages of "Conclusions" reargues that the charges for which Reynolds has been convicted are void and unconstitutional. (Doc. 692, at 183-184.) Even if the allegations about the conditions in FCI-Greenville and a certain Doctor Ahmad were true, which Reynolds has failed to show they are, they do not create an extraordinary and compelling reason for the specific release of Reynolds, but for the

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	NO. 3:05-CR-00493
	:	
v.	:	(JUDGE MANNION)
	:	
MICHAEL CURTIS REYNOLDS, Defendant.	:	(Filed Under Seal)

MOTION TO SEAL

AND NOW, the United States of America, by its undersigned counsel, moves pursuant to Local Criminal Rule 49 to file the documents accompanying this motion under seal for the reasons set forth in the accompanying sealed declaration in support of the government's motion to seal.

WHEREFORE, for the foregoing reasons, the United States moves to seal this Motion and the above-referenced pleadings. For the convenience of the Court, a proposed form of Order is attached.

Respectfully submitted,

BRUCE D. BRANDLER
Acting United States Attorney

Date: January 13, 2021

/s/ James M. Buchanan
JAMES M. BUCHANAN
Assistant United States Attorney
james.buchanan@usdoj.gov

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	NO. 3:05-CR-00493
	:	
v.	:	(JUDGE MANNION)
	:	
MICHAEL CURTIS REYNOLDS, Defendant.	:	(Filed Under Seal)

ORDER

IT IS ORDERED that the Clerk of Court provide the United States Attorney's Office with two (2) certified copies of the accompanying documents and thereafter keep these documents from public view until the Clerk has made appropriate docket entries.

IT IS FURTHER ORDERED that these documents only be opened by appropriate Court personnel of the Middle District of Pennsylvania in due course of performing the business of the Clerk's Office, after which the Clerk is ordered to seal this Order and all accompanying documents until:

[X] Notified in writing by the United States Attorney's Office that there is no longer any reason for the documents to remain sealed; or

[ ] Further Order of the Court.

MALACHY E. MANNION
UNITED STATES DISTRICT JUDGE

DATE: January _____, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1438

UNITED STATES OF AMERICA

v.

MICHAEL CURTIS REYNOLDS,
Appellant

(M.D. Pa. Crim. No. 3-05-cr-00493-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: June 22, 2021
CLW/cc: Mr. Michael Curtis Reynolds
James Buchanan, Esq.