APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

July 22, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*
THOMAS L. KIRSCH II, *Circuit Judge*

No. 20-3401	UNITED STATES OF AMERICA, Plaintiff - Appellee v. RONALD TINGLE, also known as CAPTAIN RON, also known as CAP, Defendant - Appellant
Originating Case Information:	
District Court No: 4:15-cr-00023-TWP-VTW-1 Southern District of Indiana, New Albany Division District Judge Tanya Walton Pratt	

The following is before the Court: **JOINT MOTION TO SUMMARILY AFFIRM**, filed on July 20, 2021, by counsel for the parties.

Ronald Tingle appeals the denial of his motion for compassionate release. Tingle's motion rested on the theory that a non-retroactive statutory amendment that would have required a shorter minimum term of imprisonment for his crimes was an "extraordinary and compelling" reason for a sentence reduction. *See* 18 U.S.C. § 3582(c)(1)(A)(i). Tingle renewed his arguments on appeal, but the parties now agree that the outcome of the appeal is controlled by our recent decision in *United States v. Thacker*, No. 20-2943 (7th Cir. July 15, 2021), in which we held that a statutory amendment cannot constitute an extraordinary and compelling reason to reduce a sentence, either alone or in combination with other factors. Accordingly,

IT IS ORDERED that the joint motion is **GRANTED** and the judgment of the district court is summarily **AFFIRMED**.

form name: **c7_Order_3J** (form ID: **177**)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA	Case No. 4:15-cr-23-TWP-VTW-1
v.	ORDER ON MOTION FOR SENTENCE REDUCTION UNDER 18 U.S.C. § 3582(c)(1)(A) (COMPASSIONATE RELEASE)
RONALD TINGLE	

Upon motion of ☒ the defendant ☐ the Director of the Bureau of Prisons for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A), 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 the motion is:

☒ DENIED.

☐ DENIED WITHOUT PREJUDICE.

☐ OTHER:

☒ FACTORS CONSIDERED: See attached opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:15-cr-00023-TWP-VTW-1
	)	
RONALD TINGLE,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION FOR SENTENCE REDUCTION

This matter is before the Court on Ronald Tingle's ("Mr. Tingle") *pro se* Motion seeking a sentence reduction, (Dkt. 248)[1], filed pursuant to § 603 of the First Step Act, which is codified at 18 U.S.C. § 3582(c)(1)(A). For the reasons explained below, Mr. Tingle's motion is **denied.**

I. BACKGROUND

Mr. Tingle was charged by a Second Superseding Indictment with five counts: Count One: possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii); Counts Two and Three: distribution of a mixture or substance containing a detectable amount of methamphetamine, in violation of §§ 841(a)(1) and (b)(1)(C); Count Four: distribution of 5 grams or more of methamphetamine, in violation of §§ 841(a)(1) and (b)(1)(B)(viii); and Count Five: possession of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). (Dkt. 81.) After a jury trial, he was convicted of all 5 counts. (Dkt. 154.)

[1] Citations to this document are to the page numbers electronically "stamped" on the document when it was filed in CM/ECF.

During the course of the case, the Government filed an Information pursuant to 21 U.S.C. § 851(a)(1) alleging that Mr. Tingle had been convicted of a drug felony—trafficking in LSD—in 1982 in Kentucky, for which he was sentenced to a maximum of three years in the state penitentiary. (Dkt. 67.) Mr. Tingle objected and moved to strike application of the § 851 Information. (Dkt. 165.) The Court denied in part, Mr. Tingle's Motion to Strike on the basis that the Information pursuant to 21 U.S.C. § 851 is unconstitutional on its face or in violation of Department of Justice policy, (Dkt. 168), but granted Mr. Tingle a hearing on the remaining arguments. Following a hearing, the Court denied the Motion to Strike, finding that Mr. Tingle's *ex post facto* argument failed. (Dkt. 178.) Because the Government had filed an Information charging that Mr. Tingle was convicted of a previous drug felony, § 841(b)(1)(A)(viii) (as it existed at the time of sentencing), the statute mandated a minimum sentence of 20 years for Count 1. *See* 21 U.S.C. § 841(b)(1)(A)(viii) (eff. Aug. 3, 2020 to Dec. 20, 2018); *see also* Dkt. 162 at 13 (Presentence Investigation Report) (discussing mandatory minimum and maximum sentences). Likewise, § 924(c)(1)(A)(i) mandated a minimum sentence of five years for Count 5, which was required to be consecutive his other sentences. *See* 18 U.S.C. § 924(c)(1)(A)(i) (eff. Oct. 6, 2006 to Dec. 20, 2018). Thus, the statutory mandatory minimum sentence was 25 years.

Mr. Tingle was sentenced on March 16, 2017. (Dkt. 187.) At sentencing, the undersigned stated:

> [T]he Court does not believe that Mr. Tingle is a big fish or major source of supply in the realm of drug dealers.
> ….
>
> For all it's worth, the Court does agree with Defendant's counsel, that this sentence is particularly harsh, and I do believe that it's disparate treatment in this district for someone who has distributed the quantities that Mr. Tingle distributed and possessed. And I personally have never had to sentence on an 851 on a 33-year-

> old drug conviction. Mr. Tingle was not a supervisor or manager of others in a criminal organization. I know the government says today that he was working with some – a Louisville cartel. Although he possessed numerous firearms, there is no evidence that he was involved in the use or threat of violence in connection with this particular offense. He has no history whatsoever of any violent conduct. So, for those reasons, the Court hates to give him this much time. The Court takes into consideration he's 60 years old. I just think this is a harsh sentence when 15 years would be a good harsh sentence. This is an overly harsh sentence, 25 years.

(Dkt. 207 at 30–31.) The undersigned told Mr. Tingle, "Maybe some laws will change. Maybe sometime down the road, you will get some relief, okay?" *Id.* at 34. As it was bound to do, the Court sentenced Mr. Tingle to the mandatory minimum sentence of 25 years (or 300 months) of incarceration, representing 240 months for each of Counts 1, 2, 3 and 5, to be served concurrently; and 60 months for Count 4, to be served consecutive to the sentences for the other counts. (Dkt. 189.) The Court also imposed the statutory minimum of 10 years of supervised release (10 years for Count 1; 6 years for Counts 2 and 3; 8 years for Count 4; and 3 years for Count 5, all concurrent). *Id.* Judgment was entered on March 21, 2017. *Id.*

Mr. Tingle appealed. Among other arguments, he contended that the district court erred when it denied his motion to dismiss the Superseding Indictment because it was sought immediately after he rejected a plea offer—thereby exercising his constitutional right to a jury trial—and that there was no basis for seeking a superseding indictment at that time. (Dkt. 226 at 11–12.) Thus, he pressed a claim of prosecutorial vindictiveness. *Id.* The Seventh Circuit rejected that argument and his other arguments and affirmed Mr. Tingle's conviction. *Id.* Mr. Tingle's petition for rehearing and rehearing *en banc* was also denied. *Id.* at 14.

Mr. Tingle is presently 64 years old. The Bureau of Prisons ("BOP") lists his anticipated release date as February 5, 2037, when he will be 81 years old. Mr. Tingle is currently incarcerated at the Federal Correctional Institution in Ashland, Kentucky ("FCI Ashland"). As of November 2,

2020, the BOP reports that FCI Ashland has one active inmate case of COVID-19 and that seven inmates have recovered from the virus. *See* https://www.bop.gov/coronavirus/ (last visited Nov. 2, 2020).

On April 27, 2020, Mr. Tingle filed a *pro se* motion for sentence reduction. (Dkt. 248.) On May 28, 2020, appointed counsel filed a Memorandum in support. (Dkt. 256.) The Government filed a Response in opposition on June 4, 2020, (Dkt. 257), and Mr. Tingle filed a Reply, (Dkt. 258) on June 11, 2020. Thus, his Motion is ripe for decision.

II. DISCUSSION

Mr. Tingle seeks a sentence reduction based on "extraordinary and compelling reasons" as set forth in 18 U.S.C. § 3582(c)(1)(A)(i). (Dkts. 248, 256.)[2] Specifically, he points out that, due to an intervening change in the law, his sentence would be much shorter if he were sentenced today. (Dkt. 248; Dkt. 256 at 3–4.) He also argues that his health conditions combined with the COVID-19 pandemic support his release. (Dkt. 256 at 6; Dkt. 258 at 8–10.) Finally, he argues that his sentence was overly harsh because the prosecution retaliated against him by filing a § 851 information after he declined a plea offer. (Dkt. 248 at 13–15.)

The Government argues that Mr. Tingle has not shown an extraordinary and compelling reason warranting sentence reduction. (Dkt. 257.) It also argues that he is a danger to the community and that the sentencing factors in 18 U.S.C. § 3553(a) do not favor a sentence reduction. *Id.*

[2] Mr. Tingle's *pro se* Motion suggests that he wants the Court to reduce his total sentence to 15 years—the lowest possible sentence for his crimes under current law. *See* Dkt. 248 at 17 ("This Court should exercise its discretion and resentence Tingle pursuant to what Congress now deems permissible"). His counsel's supporting Memorandum and Reply, however, suggest that Mr. Tingle is seeking immediate release . *See* Dkts. 256, 258. Thus, the Court understands Mr. Tingle to be requesting a sentence reduction of unspecified length—up to, and including, a sentence reduction that would allow for his immediate release.

18 U.S.C. § 3582(c) provides in relevant part:

> [T]he court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant 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,[3] whichever is earlier, may 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 . . . .

18 U.S.C. § 3582(c)(1)(A).

Congress directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). It directed that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.* In response to this directive, the Sentencing Commission promulgated a policy statement regarding compassionate release under § 3582(c), contained in United States Sentencing Guidelines ("U.S.S.G.") § 1B1.13 and the accompanying Application Notes. While that particular policy statement has not yet been updated to reflect that defendants (and not just the BOP) may move for compassionate release,[4] courts have universally turned to U.S.S.G. § 1B1.13 to provide guidance

[3] The parties agree that Mr. Tingle has exhausted his administrative remedies and that the Court can consider the merits of his Motion. (Dkts. 253, 254.)

[4] Until December 21, 2018, only the BOP could bring a motion for sentence reduction under § 3582(c)(1)(A). The First Step Act of 2018, which became effective on December 21, 2018, amended § 3582(c)(1)(A) to allow defendants to bring such motions directly, after exhausting administrative remedies. *See* 132 Stat. 5194, 5239 (2018) (First Step Act § 603(b)).

on the "extraordinary and compelling reasons" that may warrant a sentence reduction. *E.g.*, *United States v. Casey*, 2019 WL 1987311, at *1 (W.D. Va. 2019); *United States v. Gutierrez*, 2019 WL 1472320, at *2 (D.N.M. 2019); *United States v. Overcash*, 2019 WL 1472104, at *2-3 (W.D.N.C. 2019). There is no reason to believe, moreover, that the identity of the movant (either the defendant or the BOP) should have any impact on the factors the courts should consider.

As provided in § 1B1.13, consistent with the statutory directive in § 3582(c)(1)(A), the compassionate release analysis requires several findings. First, the Court must address whether "[e]xtraordinary and compelling reasons warrant the reduction" and whether the reduction is otherwise "consistent with this policy statement." U.S.S.G. § 1B1.13(1)(A), (3). Second, the Court must determine whether Mr. Tingle is "a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13(2). Finally, the Court must consider the § 3553(a) factors, "to the extent they are applicable." U.S.S.G. § 1B1.13.

Subsections (A)-(C) of Application Note 1 to § 1B1.13 identify three specific "reasons" that qualify as "extraordinary and compelling": (A) terminal illness diagnoses or serious conditions from which a defendant is unlikely to recover and which "substantially diminish[]" the defendant's capacity for self-care in prison; (B) aging-related health decline where a defendant is over 65 years old and has served at least ten years or 75% of his sentence, whichever is less; or (C) certain family circumstances (the death or incapacitation of the caregiver of the defendant's minor child or the incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner). U.S.S.G. § 1B1.13, Application Note 1(A)–(C). Subsection (D) adds a catchall provision for "extraordinary and compelling

reason[s] other than, or in combination with, the reasons described in subdivisions (A) through (C)." *Id.*, Application Note 1(D).[5]

Mr. Tingle does not suggest that Subsections (A)-(C) of Application Note 1 to § 1B1.13 apply to him. Thus, the question is whether the catchall provision for extraordinary and compelling reasons applies in this case. The Court concludes that it does not.

A. Prosecutorial Vindictiveness

In his *pro se* Motion, Mr. Tingle argued that the filing of the § 851 Information and his subsequent sentence resulted from prosecutorial vindictiveness—that is, that the prosecutor retaliated against him by seeking a harsh sentence after he refused a plea deal. (Dkt. 248 at 13–15.) Mr. Tingle has already pressed this argument on direct appeal, and the Seventh Circuit rejected it. The Government argued successfully on appeal that it did not blindside Mr. Tingle with the filing of the 851 Information as the 851 was always going to be filed and indeed, was always incorporated in any plea deal the government offered him. The Government further argued that Mr. Tingle's sentence increased significantly between the plea offers and trial was when the

[5] The policy statement provides that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons." U.S.S.G. Manual §1B1.13, Application Note 4. Likewise, the catchall provision provides, "As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." *Id.*, Application Note 1(D). This policy statement has not been amended since the passage of the First Step Act. Insofar as it states that only the Director of the BOP can bring a motion under § 3582(c)(1)(A), it is directly contradicted by the amended statutory text. This discrepancy has led some courts to conclude that the Commission does not have a policy position applicable to motions under § 3582(c)(1)(A)(i) and that they have discretion to determine what constitutes an "extraordinary and compelling reason" on a case-by-case basis, looking to the policy statement as helpful, but not dispositive. *See, e.g.*, *United States v. Perdigao*, 2020 WL 1672322, at *2 (E.D. La. Apr. 2, 2020) (collecting cases); *see also United States v. Haynes*, 2020 WL 1941478, at *14 (E.D.N.Y. Apr. 22, 2020) (collecting cases). Other courts have held that they must follow the policy statement as it stands and, thus, that the Director of the BOP is the ultimate arbiter of what counts as "extraordinary and compelling" under the catchall provision. *See, e.g.*, *United States v. Lynn*, No. 89-0072-WS, 2019 WL 3805349, at *2–4 (S.D. Ala. Aug. 13, 2019). The Court need not resolve that debate, though, because Mr. Tingle's Motion is due to be denied even if the Court assumes that the policy statement is not binding and that it has the discretion to determine what constitutes an "extraordinary and compelling reason" for a sentence reduction.

purity results came back on the methamphetamine – nearly 99% pure – making the mandatory minimum sentence jump from 10 years to 20 years. Mr. Tingle cannot recycle the argument here as an extraordinary and compelling reason warranting a sentence reduction. *See United States v. Williams*, 2019 WL 6529305, at *1 (E.D.N.C. Dec. 4, 2019) ("The arguments defendant makes relate to the validity of her conviction and sentence. Motions for a sentence reduction under § 3582(c)(1)(A) are not substitutes for direct appeal or habeas corpus motions.").

B. Risk from COVID-19

Second, the COVID-19 pandemic does not present an extraordinary and compelling reason warranting a sentence reduction in this case.[6] This Court has repeatedly concluded that the general threat of COVID-19 is not an extraordinary and compelling reason warranting sentence reduction. *See, e.g.*, *United States v. Jackson*, No. 1:18-cr-314-RLY-MJD01, Dkt. 33 (S.D. Ind. Aug. 12, 2020) (concluding that the general threat of contracting COVID-19 is not an extraordinary and compelling reason warranting a sentence reduction). Mr. Tingle (through counsel) claims, without any supporting evidence, that he has a history of diverticulitis, serious dental issues, and is on a special diet. (Dkt. 256 at 6.) But, even assuming Mr. Tingle has these conditions, none of them increase his risk for experiencing severe symptoms if he contracts COVID-19. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-

[6] The Court notes that Mr. Tingle arguably waived this argument. He did not raise it in his *pro se* Motion, *see* Dkt. 248, and his counsel did not explicitly make this argument in his supporting Memorandum, *see* Dkt. 256. Instead, he argued—in conclusory fashion—as follows in discussing the § 3553(a) factors: "Furthermore, Mr. Tingle is 64 years old[,] has a history of diverticulitis, serious dental issues, and is on a special diet, so he remains concerned about whether he is adequately protected from COVID-19 while in prison." *Id.* at 6. Counsel did not fully develop the argument until filing the reply brief, *see* Dkt. 258, which is normally inadequate. *See United States v. Foster*, 652 F.3d 776, 787 n.5 (7th Cir. 2001) ("The reply brief is not the appropriate vehicle for presenting new arguments or legal theories to the court." (internal quotation and quoted authority omitted)). Moreover, counsel has not responded to the Government's argument that Mr. Tingle has not exhausted his administrative remedies as to this theory of relief. *See* Dkt. 257 at 7. Regardless, the Court addresses the argument because the Government responded to it and because it fails even if it has not been waived.

conditions.html (last visited Nov. 2, 2020). And, while the risk of severe COVID-19 symptoms rises with age, *see* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last visited Nov. 2, 2020), age is not an extraordinary and compelling reason warranting a sentence reduction when a defendant does not suffer from other known risk factors, particularly when the defendant is not incarcerated in a "hotspot" for COVID-19 infections. *See United States v. Buck*, 1:17-cr-172-JRS-TAB-01, Dkt. 94 (S.D. Ind. July 7, 2020); *see also United States v. Scott*, No. 3:04-cr-14-RLY-CMM-03, Dkt. 56 (S.D. Ind. July 31, 2020) (declining to find extraordinary and compelling reason warranting sentence reduction for 65-year-old incarcerated in a facility experiencing large COVID-19 outbreak in the absence of other risk factors).

C. Change to § 841

Finally, the Court cannot find that the post-sentencing change to § 841 is an extraordinary and compelling reason for reducing Mr. Tingle's sentence. On December 21, 2018—more than 18 months after Mr. Tingle was sentenced—the First Step Act was enacted. Section 401 of the First Step Act changed the predicate offense required to mandate an enhanced sentence after the filing of an information under § 851. 132 Stat. at 5220–21. Under 21 U.S.C. § 841(b)(1)(A) as amended by § 401 of the First Step Act, an enhanced sentence is now mandated only if the Government files an information showing that the defendant has a prior conviction for a "serious drug felony or serious violent felony." 21 U.S.C. § 841(b)(1)(A) (eff. Dec. 21, 2018). "Serious drug felony" means an offense described in 18 U.S.C. § 924(e)(2) for which (a) the defendant served a term of imprisonment of more than 12 months; and (b) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense. 21 U.S.C. § 802(57) (eff. Dec. 21, 2018).

In addition to changing the predicate offense for an enhanced sentence under § 841, § 401 of the First Step Act also changed the minimum mandatory sentence for cases in which the enhancement applies. Under 21 U.S.C. § 841(b)(1)(A) as amended by § 401 of the First Step Act, a defendant convicted of a drug charge involving 50 grams or more of methamphetamine after committing a serious drug felony is subject to a minimum mandatory sentence of 15 years. 21 U.S.C. § 841(b)(1)(A) (eff. Dec. 21, 2018).

Taken together, these changes to § 841 mean that, if he were sentenced today, Mr. Tingle would not be subject to a 20-year minimum mandatory sentence for Count 1. Because his prior conviction is more than 35 years old and resulted in a maximum 3-year sentence, it is likely too old to count as a prior "serious drug felony" under current law, meaning that he would likely be subject to a minimum mandatory sentence of 10 years for Count 1. *See* 21 U.S.C. § 841(B)(1)(A)(viii). And, even if he did have a prior "serious drug felony," he would be subject to a minimum mandatory sentence of only 15 years for Count 1. *Id.* As a result, once his mandatory consecutive 5-year sentence for Count 5 is added in, the total minimum mandatory sentence he would face today might be as low as 15 years or, at most, 20 years.[7]

However, Mr. Tingle is not being sentenced today. He was sentenced in 2017—more than 18 months before the First Step Act was enacted. Section 401 of the First Step Act provides: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.'" 132 Stat. at 5221 (First Step Act, § 401(c)). In other words, § 401 does

[7] Under the current version of § 841, even if Mr. Tingle had a prior serious drug felony, the mandatory minimum sentence for Count 4 would be 10 years. 21 U.S.C. § 841(b)(1)(B)(viii) (eff. Dec. 21, 2018). And Counts 2 and 3 would not carry a mandatory minimum sentence; instead, they would carry a maximum sentence of 30 years. 21 U.S.C. § 841(c) (eff. Dec. 21, 2018).

not apply retroactively. *See e.g., United States v. Jackson*, 940 F.3d 347, 353–54 (7th Cir. 2019); *United States v. Pierson*, 925 F.3d 913, 927–28 (7th Cir. 2019), *vacated and remanded for further consideration on other grounds, Pierson v. United States*, 140 S. Ct. 1291 (2020).

Mr. Tingle recognizes that § 401 of the First Step Act does not apply retroactively. (*See* Dkt. 256 at 1; Dkt. 248 at 15.) Nonetheless, he argues that the disparity between the sentence he actually received and the sentence he might receive if sentenced today can still be an "extraordinary and compelling reason" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The Court disagrees.

The Court has confronted, and rejected, a similar argument in the context of another provision of the First Step Act: Section 403. Section 403 of the First Step Act changed the so-called "stacking provisions" of § 924. *See* 132 Stat. at 5221–22. As a result, many defendants who received lengthy "stacked" sentences under the old version of § 924 would face much shorter sentences if they were sentenced today. But, as it did with § 401 of the First Step Act, Congress also explicitly declined to make § 403 retroactive. *Id.* Similar to Mr. Tingle, multiple defendants in this district have attempted to avoid the non-retroactivity of § 403 by arguing that the sentencing disparity created by the change to the law constitutes an "extraordinary and compelling reason" warranting a sentence reduction under § 3582(c)(1)(A). The Court has consistently rejected those arguments, reasoning:

> Congress expressly declined to make § 403(a)'s amendment retroactive to defendants . . . who were sentenced before the First Step Act was enacted. First Step Act of 2018, 132 Stat. at 5222. And Congress authorized courts to exercise their discretion to apply other sentencing amendments—but not § 403(a)'s stacking amendment—to otherwise ineligible defendants. *See* First Step Act of 2018, § 404(b), 132 Stat. at 5222 (authorizing courts to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed"). If Congress intended to authorize courts to

> exercise discretion to apply § 403 retroactively to otherwise ineligible defendants, it would have included that amendment in § 404(b). This Court has consistently held that defendants . . . may not use 18 U.S.C. § 3582(c)(1)(A)(i)'s "extraordinary and compelling" provision as an end-around to achieve a result that Congress did not intend. *See United States v. Neubert*, 2020 WL 1285624, at *3 (S.D. Ind. Mar. 17, 2020) (rejecting argument similar to [defendant's]); *see also United States v. Fulcher*, No. 1:98-cr-00119-SEB-TAB, dkt. 18 (S.D. Ind. Aug. 5, 2020) (same); *United States v. Goetz*, No. 1:98-cr-123-SEB-KPF-01, dkt. 25 (S.D. Ind. Sept. 10, 2020) (same); *United States v. Fisher*, 1:15-cr-157-JMS-MJD-01, dkt. 147 (S.D. Ind. Sept. 17, 2020 (same); *but see United States v. Arey*, --- F. Supp. 3d ----, ----, 2020 WL 2464796, at *4-5 (W.D. Va. May 13, 2020) (collecting cases and holding that "continued incarceration under a sentencing scheme that has since been substantially amended is a permissible 'extraordinary and compelling' reason to consider a reduction in [the defendant's] sentence").

United States v. Fox, No. 1:15-cr-25-JMS-MJD-01, Dkt. 204-1 at 5–6 (S.D. Ind. Oct. 26, 2020).

The Court agrees with that reasoning and concludes that it applies equally to the amendment to § 841. While Mr. Tingle would face a lower mandatory minimum sentence if he were sentenced today, Congress explicitly declined to make § 401 of the First Step Act retroactive, and unfortunately, defendants like Mr. Tingle are not able to use the "extraordinary and compelling" provision of § 3582(c)(1)(A) as an end-run to achieve a result that Congress did not intend.

Mr. Tingle emphasizes that courts have broad discretion to decide what constitutes an "extraordinary and compelling reason" for a sentence reduction under § 3582(c)(1)(A)(i) and that nothing in the First Step Act prohibits the Court from finding the change to § 841 to be an extraordinary and compelling reason. (Dkt. 258 at 1; Dkt. 248 at 13.) That may be true. As explained, however, Congress explicitly declined to make the change to § 841 retroactive, thereby leaving in place many sentences imposed under the old version of § 841. As a result, the Court declines to exercise its discretion to find that the difference between the lengthy sentence Mr.

Tingle received and the sentence he might receive if sentenced today is an extraordinary and compelling reason warranting a sentence reduction.

Mr. Tingle also suggests that his sentence was too long when it was originally imposed, relying on the undersigned's statements at the sentencing hearing. (*See, e.g.*, Dkt. 248 at 7–9.) While the undersigned found Mr. Tingle's sentence to be overly harsh, it was the sentence the law required at the time. The Court does not understand § 3582(c)(1)(A) to give it free rein to go back and correct a harsh sentencing scheme where Congress has declined to do so. The Court recognizes that courts in other districts have reached the opposite conclusion, *see, e.g.*, *United States v. McPherson*, 454 F. Supp. 3d 1049, 1053 (W.D.Wash. 2020) (granting compassionate release based on change to stacking provisions of § 924(c), explaining that "Section 3582(c)(1)(A) provides a safety valve against what otherwise would be a harsh, unjust, and unfair result stemming from a non-retroactivity clause"), but the Court respectfully disagrees. While Mr. Tingle's sentence was overly harsh, many defendants faced harsh sentences under § 841 as it existed before § 401 of the First Step Act was passed. Despite this, Congress explicitly declined to make § 401 retroactive. Even though the Court considered Mr. Tingle's original sentence to be overly harsh, (and continues to believe it is harsh), considering the precedent in this Circuit, the fact that Mr. Tingle would face a shorter sentence if sentenced today does not make his case extraordinary.

The Court notes that the change to § 841 is not wholly irrelevant to its consideration of a motion for sentence reduction under § 3582(c)(1)(A)(i). If a defendant shows an extraordinary and compelling reason warranting a sentence reduction, then the Court may properly consider the change in the law when considering the sentencing factors under § 3553(a). *See United States v. Hudson*, 967 F.3d 605, 609, 613 (7th Cir. 2020) (concluding that a court may consider new

statutory minimum or maximum penalties, current guidelines, and post-sentencing conduct when determining whether the § 3553(a) factors warrant a reduced sentence under § 404 of the First Step Act). But Mr. Tingle has not presently shown an extraordinary and compelling reason under § 3582(c)(1)(A)(i). Should Mr. Tingle's circumstances or health condition change, and he is able to show a compelling reason for a reduction under the First Step Act, he is free to file a subsequent motion.

Because Mr. Tingle has not presently shown an extraordinary and compelling reason warranting a sentence reduction, the Court need not consider whether he presents a danger to the community or whether the sentencing factors in § 3553(a) warrant a sentence reduction.

III. CONCLUSION

For the reasons stated above, Mr. Tingle's *pro se* Motion for sentence reduction, (Dkt. [248]), is **DENIED.**

SO ORDERED.

Date: 11/17/2020

Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

DISTRIBUTION:

Ronald Tingle, #12994-028
FEDERAL CORRECTIONAL INSTITUTION
P.O. Box 6001
Ashland, Kentucky 41105

Terry Tolliver
BRATTAIN & MINNIX
terry@bmgindy.com

Bradley A. Blackington
UNITED STATES ATTORNEY'S OFFICE
bradley@blackington@usdoj.gov

MaryAnn Totino Mindrum
UNITED STATES ATTORNEY'S OFFICE
Maryann.mindrum@usdoj.gov

Matthew J. Lasher
UNITED STATES ATTORNEY'S OFFICE
matthew.lasher@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:15-cr-00023-TWP-VTW
	)	
RONALD TINGLE,	)	
	)	
Defendant.	)	

ORDER DENYING MOTIONS TO RECONSIDER

This matter is before the Court on Defendant Ronald Tingle's ("Mr. Tingle") *pro se* Motion to Reconsider Compassionate Release, (Dkt. 261), and Motion for Reconsideration, (Dkt. 270). On November 17, 2020, the Court denied Mr. Tingle's Motion for Sentence Reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), (Dkt. 260). He has now filed two *pro se* motions to reconsider and three supplemental letters in support, (Dkts. 266, 273, 274).[1] Also before the Court is the Government's Motion for Extension of Time to January 17, 2021 to respond to Mr. Tingle's Motions for Reconsideration, (Dkt. 271). For the reasons stated below, the Court concludes that it does not require a response from the Government to resolve the issues raised by Mr. Tingle's Motions, and the Motions must be **denied**.

I. DISCUSSION

"[M]otions to reconsider in criminal prosecutions are proper and will be treated just like motions in civil suits." *United States v. Rollins*, 607 F.3d 500, 502 (7th Cir. 2010). Mr. Tingle's Motions to Reconsider the denial of his Motion for Sentence Reduction were filed within 28

[1] Mr. Tingle's significant other also submitted two letters of support, (Dkts. 269, 275).

days of the date the Court denied his original motion for sentence reduction.[2] They are therefore treated as motions to amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure.[3]

Rule 59(e) allows a court to amend a judgment only if the movant can "demonstrate a manifest error of law or fact or present newly discovered evidence." *Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505–06 (7th Cir. 2016) (internal citations omitted). A "manifest error" means "the district court commits a wholesale disregard, misapplication, or failure to recognize controlling precedent." *Stragapede v. City of Evanston, Illinois*, 865 F.3d 861, 868 (7th Cir. 2017) (internal quotation omitted). "A manifest error is not demonstrated by the disappointment of the losing party." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal quotations omitted). Relief through a Rule 59(e) motion for reconsideration is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

Here, Mr. Tingle has not established any special circumstances that would justify the extraordinary remedy of relief under Rule 59(e). In his original motion, Mr. Tingle sought a sentence reduction based on "extraordinary and compelling reasons" as set forth in 18 U.S.C. § 3582(c)(1)(A)(i). (Dkts. 248, 256.) As relevant to his motions to reconsider, he argued that, due to an intervening change in law, his sentence would be much shorter if he were sentenced today. (Dkt. 248; Dkt. 256 at 3-4.) He also argued that his age and health conditions combined

[2] The Court received Mr. Tingle's second motion to reconsider on December 16, 2020, which was 29 days after denial of his motion for sentence reduction. (Dkt. 270.) Because the second motion to reconsider, mailed from Kentucky, was dated "Dec. 5-8, 2020," *see id.* at 1, the Court concludes that Mr. Tingle mailed it no later than December 15, 2020, or within 28 days. Applying the mailbox rule, the motion is timely.

[3] After Mr. Tingle filed his first motion to reconsider, he filed a Notice of Appeal. (Dkt. 262.) Because Mr. Tingle's Rule 59 motion was pending when he filed the notice of appeal, that notice is not yet effective. Fed. R. App. P. 4(a)(4).

with the COVID-19 pandemic supported his immediate release. (Dkt. 256 at 6; Dkt. 258 at 8-10.) Finally, he argued that his sentence was the result of prosecutorial vindictiveness. (Dkt. 248 at 13-15.) The Court denied his Motion on November 17, 2020, concluding that he had not established an extraordinary and compelling reason warranting a sentence reduction. (Dkt. 260.)

In his first motion to reconsider, Mr. Tingle notes that, since November 17, 2020, after the Court denied his motion for sentence reduction, the facility where he is incarcerated—FCI Ashland—has experienced a significant outbreak of COVID-19. (Dkt. 261 at 1-2.) One inmate at FCI Ashland has died from complications related to the virus and there are not enough COVID-19 tests available. (Dkt. 266.) The Court recognizes that FCI Ashland has experienced an outbreak of COVID-19, *see* https://www.bop.gov/coronavirus/ (last visited Jan. 8, 2021) (reporting 22 active inmate cases of COVID-19 and 6 inmate deaths from COVID-19, plus an additional 336 inmates who have recovered from COVID-19), but this unfortunate fact does not change the Court's conclusion that Mr. Tingle has not shown an extraordinary and compelling reason warranting a sentence reduction. The general threat of COVID-19 is not an extraordinary and compelling reason warranting a sentence reduction, and the courts in this district have consistently denied motions for compassionate release from defendants who—like Mr. Tingle—have not shown that they suffer from medical conditions that place them at an increased risk of suffering severe COVID-19 symptoms. *See* Dkt. 260 at 9-10 (discussing risk of COVID-19 to Mr. Tingle). This is true even when those defendants are incarcerated in "hotspots" for COVID-19. *See United States v. Dyson*, 2020 WL 3440335, at *3 (S.D. Ind. June 22, 2020) (collecting cases). Likewise, the fact that FCI Ashland has experienced a COVID-19 outbreak does not convert Mr. Tingle's age—64 years old—into an extraordinary and compelling reason warranting release. *See United States v. Scott*, No. 3:04-cr-14-RLY-

CMM-03, Dkt. 56 at 8-9 (S.D. Ind. July 31, 2020) (concluding that age alone was not extraordinary and compelling reason warranting sentence reduction, even though defendant was 65 years old and incarcerated in a COVID-19 hotspot).

Mr. Tingle also observes that some appellate courts have recently held that district courts possess broad discretion to determine what constitutes an "extraordinary and compelling reason" warranting a sentence reduction under § 3582(c)(1)(A)(i) and that district courts are not bound by the examples of "extraordinary and compelling reasons" given in United States Sentencing Guideline § 1B1.13. (Dkt. 261 at 2.) He is correct about the law. Indeed, the United States Court of Appeals for the Seventh Circuit recently reached the same conclusion. *See United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020). But this holding makes no difference to the outcome of Mr. Tingle's case. In denying his motion for compassionate release, the Court did not deem itself bound by § 1B.1.13 and assumed that it possessed the discretion to determine what constitutes an "extraordinary and compelling" reason warranting a sentence reduction under § 3582(c)(1)(A)(i). (Dkt. 260 at 8 n.5.) The Court determined that Mr. Tingle's allegation of prosecutorial vindictiveness; his history of diverticulitis and dental issues; and the post-sentencing change to § 841; did not create an extraordinary and compelling reason for reducing Mr. Tingle's sentence. This is because none of these conditions or circumstances increase his risk for experiencing severe symptoms if he contracts COVID-19. The Court declined to exercise its discretion to determine that Mr. Tingle had presented circumstances constituting an extraordinary and compelling reason warranting a sentence reduction. *Id*. at 10-15.

Finally, in his second motion to reconsider and his supplemental letters, Mr. Tingle criticizes the way the Bureau of Prisons ("BOP") has handled the COVID-19 outbreak at FCI

Ashland. (Dkts. 270, 273, 274.) For example, he complains that staff requires inmates to gather in large groups for numerous and "uncalled for" reasons; that inmates have not been provided with protective supplies like N-95 masks and alcohol-based hand sanitizer; that staff and guards did not start consistently wearing masks until mid-November 2020; and that inmates who have tested positive for COVID-19 have been allowed to interact with inmates who have tested negative or who have not been tested. *Id*. The Court agrees that these allegations are troubling. If true, they conceivably support an action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), or a claim for injunctive relief. But, because alternative means exist to address those complaints, they do not represent extraordinary and compelling reasons warranting a sentence reduction.

Mr. Tingle has not established that he is entitled to the extraordinary remedy of relief under Rule 59(e). Specifically, for the reasons explained above, he has not demonstrated that the Court committed a manifest error of law or fact when it denied his motion to reduce sentence under § 3582(c)(1)(A). Neither has he presented newly discovered evidence that warrants a change to the Court's original decision. As stated in the Court's November 17, 2020 Order, if Mr. Tingle's circumstances or health condition change, and he is able to show an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A)(i), he may file a new motion. He has not done so in the motions presently before the Court, and those motions must be denied.

II. CONCLUSION

For the reasons explained above, Mr. Tingle's Motions to Reconsider, Dkt. [261] and [270], are **DENIED**. The Government's Motion for Extension of Time to respond to Mr. Tingle's Motions, Dkt. [271], is **DENIED as moot.**

The **Clerk is directed** to enclose a prisoner civil rights complaint form with Mr. Tingle's copy of this Order.

SO ORDERED.

Date: 1/11/2021

Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

DISTRIBUTION:

Ronald Tingle, #12994-028
Federal Correctional Institution Ashland
P.O. Box 6001
Ashland, Kentucky 41105

Bradley A. Blackington
UNITED STATES ATTORNEY'S OFFICE
bradley.blackington@usdoj.gov

MaryAnn Totino Mindrum
UNITED STATES ATTORNEY'S OFFICE
maryann.mindrum@usdoj.gov

Matthew J. Lasher
UNITED STATES ATTORNEY'S OFFICE
matthew.lasher@usdoj.gov