

No. _____

IN THE
Supreme Court of the United States

VIENGXAY CHANTHARATH,
a/k/a OG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

APPENDIX

JASON J. TUPMAN

Federal Public Defender

MOLLY C. QUINN

Chief Appellate Attorney, *Counsel of Record*

Office of the Federal Public Defender

Districts of South Dakota and North Dakota

101 South Main Street, Suite 400

Sioux Falls, South Dakota 57104

molly_quinn@fd.org

605-330-4489

Attorneys for Petitioner

TABLE OF APPENDICES

	<u>Page(s)</u>
Appendix A – Court of appeals judgment & order of summary affirmance (May 7, 2021).....	1a
Appendix B – District court order denying motion for compassionate release (April 21, 2021).....	2a
Appendix C – Court of appeals order denying petition for rehearing (June 25, 2021)	15a

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1999

United States of America

Plaintiff - Appellee

v.

Viengxay Chantharath, also known as OG

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:10-cr-40004-KES-1)

JUDGMENT

Before ERICKSON, STRAS, and KOBES, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the district court's order denying the motion for compassionate release is summarily affirmed.

May 07, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VIENGXAY CHANTHARATH, Defendant.	4:10-CR-40004-01-KES ORDER DENYING MOTION FOR COMPASSIONATE RELEASE
---	---

Defendant, Viengxay Chantharath, moves for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). Docket 978. Plaintiff, the United States of America, opposes the motion. Docket 1001. For the following reasons, the court denies defendant's motion for compassionate release.

BACKGROUND

On October 31, 2011, a jury found Chantharath guilty of conspiracy to distribute a controlled substance in violation of 21 U.S.C. §§ 846 and 841(a)(1). Docket 614. Prior to trial, the government filed a notice of intent to seek increased punishment based upon Chantharath's two prior convictions of felony drug offenses pursuant to 21 U.S.C. § 851. Docket 590. As it then existed, 21 U.S.C. § 841(b)(1) required a mandatory sentence of life imprisonment for a defendant with two or more prior, final convictions of a felony drug offense. See First Step Act, Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5195 at 5220 (2018).

On January 30, 2012, Chantharath appeared before the court for sentencing. Docket 679. The court reviewed with Chantharath the two prior

felony drug convictions that had been certified by the government. Docket 694 at 5-6. One of the prior convictions was for possession with intent to distribute methamphetamine, filed on May 11, 2000, in the United States District Court for the District of Minnesota, and the other was for possession with intent to deliver methamphetamine, filed on April 4, 2005, in the Iowa District Court for Lyon County. *Id.* Chantharath made affirmations to both prior convictions pursuant to the procedure in 21 U.S.C. § 851(b). *Id.* at 6. The court found the enhanced sentence of life imprisonment applied to Chantharath. *Id.*

The court found the quantity of methamphetamine attributable to Chantharath was 2,268 grams, resulting in a base offense level of 34 under the advisory Sentencing Guidelines. *Id.* at 13. Based on Chantharath's two prior felony drug convictions, he qualified as a career offender under the guidelines, resulting in an offense level of 37 and an advisory guideline range of 360 months to life. *Id.* at 14. The court sentenced Chantharath to the mandatory sentence of life imprisonment without release as required. *Id.* at 18-19; Docket 680 at 2-3. Chantharath appealed and his conviction was upheld by the United States Court of Appeals for the Eighth Circuit. Dockets 681, 818.

Chantharath is currently incarcerated at USP Canaan, a high security penitentiary in Waymart, Pennsylvania. *See* Fed. Bureau of Prisons, <https://www.bop.gov/inmateloc> (last checked Apr. 21, 2021). The total population at USP Canaan is currently 1,235 persons. *See* <https://www.bop.gov/locations/institutions/caa/> (last visited Apr. 21, 2021). As of April 21, 2021, there were no active COVID-19 cases among inmates at

USP Canaan. *See BOP: COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited Apr. 21, 2021). USP Canaan has reported no inmate deaths from COVID-19, and 300 inmates and 70 staff have recovered. *Id.*

Chantharath’s pro se motion seeks compassionate release on the basis of extraordinary and compelling reasons because he has type 2 diabetes, chronic kidney disease—stage 3, chronic hepatitis C, and other conditions that allegedly render him more susceptible to COVID-19. Docket 978 at 1.

Chantharath states he became infected with COVID-19 on November 23, 2020. *Id.* He also argues his conditions of confinement make it difficult to practice social distancing and personal safety measures. *Id.* at 2. Chantharath’s counsel subsequently filed a supplemental brief arguing there are extraordinary and compelling reasons for Chantharath’s release because (1) he would not face a mandatory life sentence if convicted for the same offense today, and (2) his age and health conditions place him at increased risk of a severe case of COVID-19. Docket 994 at 1-3. Chantharath is 60 years old. *Id.* at 3. He has served more than 11 years in custody. Docket 981 at 668.

DISCUSSION

Because sentences are final judgments, a court ordinarily “may not modify a term of imprisonment once it has been imposed[.]” 18 U.S.C. § 3582(c). In 2018, Congress passed the First Step Act (FSA). Pub. L. No. 115-391, 132 Stat. 5194 (2018). In pertinent part, the FSA amends 18 U.S.C. § 3582(c)(1)(A) to permit incarcerated defendants in certain circumstances to file motions with the court seeking compassionate release. Compassionate

release provides a narrow path for defendants with “extraordinary and compelling reasons” to leave prison early. 18 U.S.C. § 3582(c)(1)(A)(i). Such a reduction in sentence must take into consideration the 18 U.S.C. § 3553(a) sentencing factors and be consistent with applicable policy statements issued by the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A).

The Sentencing Commission’s policy statement, which was adopted before the FSA, requires both “extraordinary and compelling reasons” to warrant a sentence reduction and the defendant not pose a danger to the safety of others. USSG § 1B1.13(1)-(2) (U.S. Sentencing Comm. 2018). The burden to establish that a sentence reduction is warranted under 18 U.S.C. § 3582(c) rests with the defendant. *See United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016).

I. Administrative Exhaustion

Previously, only the BOP Director had the authority to bring a compassionate release motion on a defendant’s behalf. With the enactment of the FSA, however, Congress now permits courts to grant compassionate release on motions filed by defendants “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[.]” 18 U.S.C. § 3582(c)(1)(A).

Chantharath, through counsel, submitted an administrative request for compassionate release on February 2, 2021. Docket 991 at 1-2. The request was denied by the warden on February 3, 2021. *Id.* at 3. The court concludes

Chantharath has satisfied the administrative exhaustion requirement and reviews the matter on the merits.

II. Extraordinary and Compelling Reasons

Section 3582(c)(1)(A)(i) provides for compassionate release upon a showing of “extraordinary and compelling reasons,” but Congress did not define what constitutes “extraordinary and compelling.” *See* 28 U.S.C. § 994(t). Instead, the Sentencing Commission was directed to describe what is considered to be “extraordinary and compelling reasons” and fashion “the criteria to be applied and a list of specific examples.” *Id.* The Sentencing Commission did so by limiting “extraordinary and compelling reasons” to four categories. USSG § 1B1.13, cmt. n.1(A)-(C). The four categories pertain to a defendant’s (1) terminal illness, (2) debilitating physical or mental health condition, (3) advanced age and deteriorating health in combination with the amount of time served, and (4) compelling family circumstances. *Id.* A fifth catch-all category also exists for an “extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)” as determined by the Bureau of Prisons. USSG § 1B1.13, cmt. n.1(D).

The Sentencing Commission’s guidance in § 1B1.13 was provided prior to the passage of the FSA amending section 3582(c)(1)(A), and has not been updated because the commission lacks a quorum. *See United States v. Beck*, 425 F. Supp. 3d 573, 579 n.7 (M.D.N.C. 2019). As a result, district courts, including this one, have questioned whether the previous policy statement still applies. *See United States v. Rodd*, 2019 WL 5623973, at *3 (D. Minn. Oct. 31, 2019); *United States v. Brown*, 457 F. Supp. 3d 691, 699 (S.D. Iowa

2020); *United States v. Poole*, 4:15-CR-40099-KES, 2020 WL 4673329, at *2 (D.S.D. Aug. 12, 2020).

The court has detailed the governing law and the analysis it uses when confronted with a compassionate release motion in multiple, previous reported and unreported decisions. *E.g.*, *United States v. Shields*, 3:07-CR-30106-01-KES, 2021 WL 765001, at *2-3 (D.S.D. Feb. 26, 2021); *United States v. Muhs*, 4:19-CR-40023-02-KES, 2021 WL 534517, at *2-3 (D.S.D. Feb. 12, 2021); *United States v. Adame*, 4:18-CR-40117-05-KES, 2020 WL 7212096, at *3 (D.S.D. Dec. 7, 2020); *United States v. Nyuon*, 4:12-CR-40017-01-KES, 2020 WL 7029873, at *3 (D.S.D. Nov. 30, 2020).

It is clear Congress, through the FSA, intended to increase the use of compassionate release by allowing defendants to directly petition the sentencing court after exhausting administrative remedies. *See* Pub. L. No. 115-391, § 603(b), 132 Stat. at 5239. The statute instructs the court may reduce a term of imprisonment for “extraordinary and compelling reasons” if “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]” 18 U.S.C. § 3582(c)(1)(A). The court has assumed the policy statements still apply to compassionate release motions brought under the FSA and utilizes USSG § 1B.13, Application Notes 1(A)-(D) to guide its analysis. *See e.g.*, *Muhs*, 2021 WL 534517, at *3.

Here, Chantharath is seeking to essentially nullify his mandatory sentence of life imprisonment through the vehicle of a compassionate release motion for “extraordinary and compelling reasons” under 18 U.S.C. § 3582(c)(1)(A)(i). Docket 994 at 5-12. Chantharath contends his age, health

conditions and conditions of confinement while incarcerated during the COVID-19 pandemic make him more vulnerable to severe illness if he were to contract the virus. Docket 978 1-2, Docket 994 at 12-17. It is suggested his prior COVID-19 infection does not eliminate the risk due to the potential of reinfection and new variants of the virus causing COVID-19. Docket 994 at 16-17.

The government disputes the risk of serious illness because Chantharath was already diagnosed with COVID-19 and did not have any adverse consequences. Docket 1001 at 3-5, 8. More significantly, the government opposes compassionate release because Chantharath received a mandatory life sentence and the FSA's changes to the penalties for defendants with prior drug convictions were not made retroactive to a defendant who had already been sentenced. *Id.* at 9-12.

A. FSA Section 401 Is Not Retroactive.

The court has already denied a similar motion brought by Chantharath claiming his mandatory life sentence should be reduced because of changes made by the FSA. *See* Dockets 950, 955. In its prior order, the court explained “[s]ection 404 is the only provision of the First Step Act that applies retroactively to defendants who have already been sentenced.” Docket 955 at 1 (alteration omitted). Section 404, which made retroactive changes to crack cocaine offenses, did not apply to Chantharath because he was convicted of a methamphetamine offense. *Id.* at 2.

In his current motion, Chantharath repurposes his prior arguments as “extraordinary and compelling reasons” for compassionate release. The court is

not convinced. The FSA's changes to the enhanced sentences for prior drug offenses are set forth in § 401 of the Act. Chantharath contends if sentenced today, his two prior drug offenses would result in a mandatory sentence of 25 years. Docket 994 at 9. But the reduced penalties were not made retroactive to defendants, like Chantharath, whose sentences were imposed before the enactment of the FSA. See Pub. L. No. 115-391, § 401(c), 132 Stat. at 5221. Section 401(c) provides:

APPLICABILITY TO PENDING CASES.—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.***

Id. (emphasis added). The FSA was enacted on December 21, 2018, which was long after Chantharath's sentence was imposed on January 30, 2012, and affirmed by the Eighth Circuit on January 28, 2013. See *id.*; Dockets 680, 818.

Congress explicitly declined to make § 401 retroactive, while at the same time the changes in § 404 to crack cocaine offenses were specifically made retroactive. See Pub. L. No. 115-391, 133 Stat. at 5221-22. The court concludes it cannot circumvent the clear directive of Congress by granting a sentencing reduction to Chantharath for “extraordinary and compelling reasons” under 18 U.S.C. § 3852(c)(1)(A)(i). See *United States v. Grant*, 813 Fed. Appx. 246, 249 (8th Cir. 2020) (holding district court did not err in denying motion to reduce sentence by failing to consider the FSA's § 401 changes to enhancements for prior drug convictions because those changes were not made retroactive); *United States v. McDonald*, 2020 WL 7169520, at *3 (D. Minn. Dec.

7, 2020) (denying sentence reduction under the FSA based on reduction to mandatory minimum of a person with a prior felony drug offense because § 401 was not retroactive); *United States v. Wills*, 2020 WL 5800922, at *2-3 (E.D. Tenn. Sept. 28, 2020) (denying compassionate release motion on basis of reduced penalties under § 401 of FSA because changes were not retroactive).

Even assuming the court could consider the changes to the enhanced penalties made by § 401 of the FSA as a factor in its analysis, the court concludes Chantharath's circumstances do not rise to the level of "extraordinary and compelling reasons" justifying a sentence reduction. Based on Chantharath's contentions, the court analyzes his motion under the medical conditions category, USSG § 1B1.13 comment note 1(A), and the catch-all provision, USSG § 1B1.13 comment note 1(D).

B. Medical Conditions Category, Note 1(A)

The Centers for Disease Control and Prevention (CDC) recognizes that the risk of severe illness as a result of COVID-19 increases with age, with older adults at higher risk. See Ctrs. for Disease Control & Prevention, *Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (updated Apr. 2, 2021) (last visited Apr. 15, 2021). According to the CDC, eight out of ten COVID-19 deaths are in people 65 years old and older. *Id.* People age 50-64 are 25 times more likely to require hospitalization compared to those age 5-17 years old, but the greatest risk is to those 85 and older. *Id.*

Adults of any age are at increased risk of severe illness from COVID-19 if they have certain conditions. Recently, the CDC updated its understanding of

the health conditions increasing the risk from COVID-19. *See People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (updated Mar. 29, 2021) (last visited Apr. 21, 2021). The CDC now states individuals with the following conditions *can* be more likely to become severely ill from COVID-19: cancer, chronic kidney disease at any stage, chronic lung diseases (including moderate to severe asthma, chronic obstructive pulmonary disease (“COPD”), cystic fibrosis, and pulmonary hypertension), dementia or other neurological conditions, diabetes (type 1 or type 2), heart conditions (such as heart failure, coronary artery disease, cardiomyopathies, or hypertension), HIV infection, immunocompromised state, liver disease, being overweight and obesity, being a current or former smoker, history of stroke or cerebrovascular disease, substance abuse disorders and several others. *Id.*

The court has reviewed the medical records submitted in this case. Chantharath’s medical conditions include type 2 diabetes, latent tuberculosis infection (LTBI), polyp of colon, dermatitis, chronic kidney disease—stage 3, and body mass index of 26.0-26.9 (overweight). Docket 981 at 33. Chantharath takes atorvastatin, losartan potassium, metformin, and aspirin to treat his conditions. *Id.* at 1, 23, 39.

The court does not minimize Chantharath’s medical conditions, but his conditions are similar to others where the court has denied compassionate release motions. *United States v. Gould*, 4:19-CR-40017-01-KES, 2021 WL 872694, at *3 (D.S.D. Mar. 9, 2021) (denying compassionate release to

defendant with hypertension, hypertensive chronic kidney disease, unspecified chest pain with left bundle branch block, stimulant related disorder and others); *United States v. Wright*, 4:16-CR-40083-04 KES, 2021 WL 391605, at *3-4 (D.S.D. Feb. 4, 2021) (denying compassionate release to defendant with BMI of 35.5 or 33.3, bipolar disorder, asthma, latent tuberculosis infection, and chronic and allergic rhinitis); *Adame*, 2020 WL 7212096, at *3-4; (denying compassionate release to defendant with BMI of 33.8, asthma, anxiety, and positive case of COVID-19); *Nyuon*, 2020 WL 7029873, at *3-4 (denying compassionate release to defendant with asthma, chronic kidney disease, high blood pressure, PTSD, and depression); *United States v. Dressen*, 4:17-CR-40047-01-KES, 2020 WL 5642313, at *3-4 (D.S.D. Sept. 22, 2020) (denying compassionate release to defendant with type 2 diabetes and hypertension).

Nor is the court persuaded Chantharath is at risk for severe illness from COVID-19. He had a positive test for COVID-19 in November 2020, which resolved as of December 4, 2020. Docket 981 at 3, 10. During his period of isolation, Chantharath denied symptoms of COVID-19, including cough, sore throat, shortness of breath, and GI symptoms. *Id.* at 4, 7-11, 37. He was released from isolation on December 4, 2020. *Id.* at 3. According to the CDC, “[c]ases of reinfection with COVID-19 have been reported, but remain rare.” <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html> (updated Oct. 27, 2020) (last visited Apr. 21, 2021).

Additionally, the risk of future spread of COVID-19 within prisons is being addressed by the BOP. A COVID-19 vaccination plan has been

implemented and the BOP is administering vaccines to inmates and staff. See *BOP: COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited Apr. 15, 2021). As of April 20, 2021, 137,845 doses have been administered systemwide. *Id.* At USP Canaan, 153 staff and 348 inmates have been fully inoculated as of April 20, 2021. See *Learn More About Vaccinations and View Individual Facility Stats*, <https://www.bop.gov/coronavirus/> (last visited Apr. 21, 2021). According to the BOP, those inmates who wish to receive the vaccine will have an opportunity to do so, but

[w]hen an institution receives an allocation of the vaccine, it is first offered to full-time staff at that location, given that staff - who come and go between the facility and the community - present a higher potential vector for COVID-19 transmission. Vaccinating staff protects fellow staff, inmates at the facility, and the community.

Id.

The court believes Chantharath's medical conditions are appropriately managed at USP Canaan, the facility is engaged in appropriate efforts to protect inmates against the spread of COVID-19, and it would act to treat any inmate who does contract COVID-19. Though reports indicate 300 inmates have contracted COVID-19 at USP Canaan, none have died. On balance, the court is persuaded USP Canaan has acted appropriately to treat inmates who contract COVID-19, including Chantharath.

C. Catch-all Category, Note 1(D)

The catch-all category in Note 1(D) does not result in a different outcome. The catch-all category allows for release if there are extraordinary and compelling reasons other than, or in combination with, those identified in 1(A)

through 1(C). USSG § 1B1.13, cmt. n.1(D). Even after considering the ongoing COVID-19 pandemic combined with Chantharath's age and medical conditions, including his prior case of COVID-19, and the conditions of his confinement, the court concludes extraordinary and compelling reasons do not exist to justify a sentence reduction.

The court next typically considers the sentencing factors of 18 U.S.C. § 3553(a) when considering motions for compassionate release. Here, that analysis is unnecessary because a mandatory life sentence was statutorily required for Chantharath's offense at the time the sentence was imposed. The court is not without compassion for Chantharath in this situation. Many defendants received similarly harsh sentences before the First Step Act was passed. Congress did not make the changes to section § 401 retroactive, and the court does not believe Congress intended courts to circumvent that legislative decision through a compassionate release motion.

CONCLUSION

Chantharath has failed to satisfy the extraordinary and compelling reason standard. Thus, it is

ORDERED that defendant's motion for relief under the First Step Act (Docket 978) is denied.

Dated April 21, 2021.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1999

United States of America

Appellee

v.

Viengxay Chantharath, also known as OG

Appellant

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:10-cr-40004-KES-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 25, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans