

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10740-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AARON MICHAEL MURRAY,
a.k.a. Tyler Peterson,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Aaron Murray, a federal prisoner serving a 200-month sentence for the transportation of child pornography, seeks leave to proceed on appeal *in forma pauperis* ("IFP") and permission to file an initial brief in excess of the applicable page and word limits in his appeal from the district court's denial of his *pro se* motions for: (1) compassionate release, brought under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, First Step Act, § 603(b), 132 Stat. 5194, 5239 (2018); (2) reconsideration of the order of denial; and (3) appointment of counsel.

Because Murray seeks leave to proceed IFP on appeal, his appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B)(i); *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983). An action is frivolous if it is without arguable merit either in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002), *overruled on other grounds by Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021) (*en banc*).

We review a district court's denial of a prisoner's § 3582(c)(1)(A) motion for an abuse of discretion. *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021). Section 3582(c)(1)(A) of Title 18 of the U.S. Code permits a district court to modify a prison sentence if, after considering the 18 U.S.C. § 3553(a) sentencing factors, it finds that "extraordinary and compelling reasons warrant such a reduction" and that "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

We review the denial of a motion for reconsideration for an abuse of discretion. *Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010). Further, such a motion "cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Id.* (quotation marks and citation omitted).

While we have not addressed whether there is a right to appointment of counsel in § 3582(c)(1) proceedings, we have held that there is no right to appointed counsel in § 3582(c)(2) proceedings. *United States v. Webb*, 565 F.3d 789, 795 (11th Cir. 2009). However, equitable concerns, such as the complexity of the issues involved, may make the appointment of counsel appropriate to ensure a just outcome. *Id.* at 795 & n.4. In this context, we review the denial of a motion for appointment of counsel for an abuse of discretion. *Id.* at 795.

Here, there are no nonfrivolous issues on appeal. *See Napier*, 314 F.3d at 531. The district court exercised its discretion to deny Murray's motion based on its review of the § 3553(a) factors,

regardless of whether Murray had established extraordinary and compelling reasons for his release. It determined that—considering that Murray had served less than half of his below-guideline sentence—granting the motion would not have reflected the seriousness of his crime, promoted respect for the law, provided a just punishment, afforded adequate deterrence, or provided the public with protection from future crimes. *See 18 U.S.C. § 3553(a)*. Such a finding was not clearly erroneous, and the district court did not follow any improper procedure or apply an incorrect legal standard in making this determination. *See Harris*, 989 F.3d at 911. Further, the district court did not abuse its discretion in denying Murray’s motion for reconsideration, as Murray merely took issue with the district court’s ruling and attempted to relitigate the merits of his § 3582(c)(1)(A) motion. *See Richardson*, 598 F.3d at 740. Moreover, the district court did not abuse its discretion in denying Murray’s request for appointment of counsel, as the proceedings were neither factually nor legally complex and his filings at the district court showed that he was capable of adequately presenting his case. *See Webb*, 565 F.3d at 795 & n.4. Accordingly, Murray’s motion for leave to proceed IFP on appeal is DENIED.

Lastly, because Murray has not offered any justification for the length of his initial brief beyond the fact that he is *pro se*, his motion for leave to file an initial brief in excess of the applicable word and page limits is DENIED. *See Fed. R. App. P. 32(a)(7)* (providing that an initial brief generally may not exceed 30 pages or 13,000 words); 11th Cir. R. 32-4 (stating that we disfavor motions for leave to file briefs that do not comply with the length requirements, and will only grant them “for extraordinary and compelling reasons.”).

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

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FOR THE ELEVENTH CIRCUIT

No. 21-10740-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AARON MICHAEL MURRAY,
a.k.a. Tyler Peterson,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Aaron Murray has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's order dated August 12, 2021, denying his motions for leave to proceed on appeal *in forma pauperis*, and for leave to file an initial brief in excess of the applicable page and word limits, in his appeal from the district court's denial of his motions for: (1) compassionate release, pursuant to 18 U.S.C. § 3582(c)(1)(A); (2) reconsideration; and (3) appointment of counsel. Because Murray has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

UNITED STATES OF AMERICA

VS.

CASE NO: 5:13-cr-49-Oc-22PRL

AARON MICHAEL MURRAY

ORDER

This cause comes before the Court on Defendant Aaron Michael Murray's (Defendant's or Murray's) *pro se* Motion for Compassionate Release (Doc. 157, filed December 7, 2020). The Government filed a Response in Opposition to Defendant's Motion (Doc. 159, filed December 31, 2021). Thereafter, Murray filed a Reply (Doc. 161) and a motion seeking leave to exceed the Reply's page limit (Doc. 160). After consideration of the Motion, the Government's Response, and the Reply, Defendant's Motion for Compassionate Release is denied.

I. BACKGROUND AND PROCEDURAL HISTORY

Murray is currently incarcerated at the Federal Correctional Complex in Coleman, Florida as the result of a June 2, 2015 conviction for one count of transportation of child pornography. Murray's conviction arose from conduct in which he used the internet to share and exchange child pornography with children under the alias of "Tyler Peterson."

Murray was charged by superseding indictment with five counts of advertising for child pornography; four counts of transporting child pornography; and two counts of possession of child pornography (Doc. 31). Pursuant to a plea agreement, Murray pleaded guilty to one possession count, and the remaining counts on the superseding indictment were dismissed (Doc. 86; Doc. 87). Based upon a total offense level of 38 and a criminal history category of one, Murray's sentencing guidelines range was 235 to 240 months in prison (Doc. 91 at 12). The Court sentenced Murray to

200 months in prison and to 20 years of supervised release (Doc. 141 at 21). The Court considered Murray's age and the long period of supervised release as reasons for the substantial downward departure from the guideline sentence (*Id.* at 25). Murray's release date (with good-conduct credit) is August 13, 2029 (Doc. 159 at 3).

II. ARGUMENTS

Murray now moves this Court pursuant to 18 U.S.C. § 3582(c)(1)(A) for compassionate release. He seeks release from custody or placement into home confinement because he suffers from serious medical conditions that place him at increased risk of severe COVID-19 related illness (Doc. 157 at 1, 7). Specifically, Murray suffers from hypertension, obesity, and bicuspid aortic valve disease (BAVD), which affects his heart and circulatory system (*Id.* at 7–8). Murray notes that the Centers for Disease Control cautions that people with these conditions have a greater-than-average risk of severe illness if they contract COVID-19 (*Id.* at 7, citing www.cdc.gov). Murray states that he has not had his blood pressure or heart checked or been issued medication for over seven months and that “FCI Coleman has proven time and time again that it is incapable of protecting its inmate population from the spread of COVID-19[.]” (*Id.* at 11). Murray argues that his combination of illnesses and FCI-Coleman’s failure to adequately protect prisoners from the spread of COVID-19 create extraordinary and compelling circumstances sufficient to justify early release (*Id.* at 5). Murray attaches numerous pre-pandemic medical records to his motion. He urges that the amount of time served and his exemplary prison record, combined with his term of supervised release, show and ensure that he will not be a danger to society if released (*Id.* at 12). He further urges that consideration of the 18 U.S.C. § 3553(a) factors support his request for a reduced prison sentence (*Id.* at 18). He also notes that “the Bureau of Justice Statistics, and the Sentencing Commission have all acknowledged these low recidivism rates and the fact that child

pornography offenders are not often found to have engaged in sexual abuse of children.” (*Id.* at 16) (emphasis in original).

The Government asks the Court to deny Murray’s Motion (Doc. 159). While conceding that Murray’s heart condition may qualify as an “extraordinary and compelling” reason for compassionate release, the Government urges that he has not shown “that this condition, or any other condition, is terminal, unmanaged, or that he cannot provide self-care in prison.” (*Id.* at 159). The Government further argues that Murray is a danger to the community and that the 18 U.S.C. § 3553(a) factors weigh strongly against early release (*Id.* at 16–20).

On January 15, 2021, Murray filed a 44-page Reply in which he largely repeated his prior arguments and opined that the sentencing guidelines and protocols under which he was originally sentenced were too harsh (Doc. 161). Murray did not have permission to file a reply. *See Local Rule 3.01(c)* (“No party shall file any reply or further memorandum directed to the motion or response . . . unless the Court grants leave.”). Nevertheless, for the sake of efficiency, the Court reviewed and considered the information in Murray’s Reply.

III. LAW AND ANALYSIS

The compassionate release statute, as amended by the First Step Act of 2018, provides the factors that must be considered before a court may grant compassionate release:

[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 . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A). In other words, before a Court may modify a defendant’s sentence, it must: (1) determine that the defendant has fully exhausted all administrative rights; (2) find that extraordinary and compelling reasons warrant the reduction; (3) consider the § 3553(a) factors;

and (4) find that a reduction is consistent with applicable policy statements issued by the Sentencing Commission. *Id.* The Government does not dispute that Murray has exhausted his administrative rights. Therefore, this Court turns to the remaining factors.

A. Extraordinary and Compelling Reasons

To discern whether a defendant has provided extraordinary and compelling reasons for a sentence reduction, the Court looks at the policy statements set forth by the Sentencing Commission. *See* 28 U.S.C. § 994(t) (providing that the policy statements “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”). The applicable policy statement for § 3582(c)(1)(A) is found in USSG § 1B1.13.¹ Application Note One to § 1B1.13, lists four extraordinary and compelling reasons that may be considered for sentence reduction: (A) Defendant’s Medical Condition; (B) Defendant’s Age; (C) Family Circumstances; and (D) Other Reasons. *Id.* at § 1B1.13(A)-(D). Generally, the defendant has the burden to show circumstances for compassionate release. *United States v. Heromin*, 2019 WL 2411311, at *2 (M.D. Fla. June 7, 2019) (citing *United States v. Hamilton*, 715 F.3d 328, 327 (11th Cir. 2013)).

¹ The First Step Act of 2018 allows inmates to file motions for compassionate release directly with the sentencing court (assuming exhaustion) without waiting for a motion to be filed by the Director of the BOP as was previously required. Because the policy statement in § 1B1.13 has not been amended since the First Step Act was passed, there is a question as to whether this policy statement actually applies to § 3582(c)(1)(A) motions filed directly by prisoners. The Eleventh Circuit has yet to issue a published opinion determining whether pre-First Step Act Sentencing Commission policy statements apply to motions for compassionate release filed by prisoners (rather than the Director of the BOP). Nevertheless, when this statutory provision was amended to authorize motions by defendants, no change was made to the actual requirements for granting a sentence reduction. Therefore, § 1B1.13’s descriptions of “extraordinary and compelling reasons” for compassionate release remain relevant, even if the limitation on the identity of the moving party does not.

Presumably, Murray seeks relief under subsection A. This subsection provides that extraordinary and compelling reasons exist when a defendant suffers from a 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 comment. n.1(A)(ii). The Government concedes that Murray’s BAVD “qualifies as a risk factor that presents an ‘extraordinary and compelling reason’ allowing compassionate release under section 3582(c)(1)(A) and sentencing policy statements during the COVID-19 pandemic,” but argues that Murray’s condition is no worse than it was prior to incarceration (Doc. 159 at 12). The Government also argues that Murray’s obesity and managed hypertension do not constitute extraordinary and compelling justification for compassionate release (*Id.* at 13–14).

Publications by the Centers for Disease Control and Prevention recognize heart disease, obesity, and hypertension as among the conditions that increase (or may increase) the risk of severe illness from COVID-19. *See* www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions (last accessed January 14, 2021). Nevertheless, some district courts have determined that preexisting medical conditions that place a defendant at increased risk for serious illness from COVID-19 may be insufficient to establish extraordinary and compelling reasons justifying a reduction in sentence. *See United States v. Oliejniczak*, No. 1:15-CR-142-EAW, 2020 WL 2846591, at *4 (W.D.N.Y. June 2, 2020); *United States v. Denault*, No. 11 Crim. 121-7 (GBD), 2020 WL 2836780, at *2 (S.D.N.Y. June 1, 2020); *United States v. Colonna*, No. 18-cr-60012-BLOOM, 2020 WL 2839172, at *4 (S.D. Fla. June 1, 2020). The Bureau of Prisons website shows that there are currently only five inmates and 37 staff members with confirmed cases of COVID-19 at FCI Coleman Medium. *See* www.bop.gov/coronavirus (last accessed January 21, 2021). Therefore, the threat posed by

COVID-19 at FCI Coleman Medium, even in conjunction with Murray's unique medical vulnerability, may not constitute extraordinary and compelling circumstances when compared with the overall threat COVID-19 poses to non-incarcerated Florida residents.

B. Danger to the Community and 3553(a) Sentencing Factors

Even if Murray's health concerns, coupled with the presence of COVID-19 at FCI Coleman Medium, rise to the level of "extraordinary and compelling," it would not mandate release. Rather, the Court must consider the 18 U.S.C. § 3553(a) sentencing factors and the policy statement's guidance on whether the defendant remains a danger to the safety of any other person or to the community. *See USSG. § 1B1.13(2).*²

1. Murray remains a danger to the community

In determining whether a defendant presents a danger to the community, courts turn to the factors set forth in 18 U.S.C. § 3142(g), which include: the nature and circumstances of the crimes charged, including whether the offense involved a minor victim; the defendant's history and characteristics; and the defendant's criminal history. *See United States v. Pitcock*, No. 15-cr-60222, 2020 WL 3129135, at *4 (S.D. Fla. Jun. 12, 2020) ("[T]he Court must evaluate whether Defendant is a danger to the safety of others or the community under 18 U.S.C. § 3142(g).").

In the instant Motion and Reply, Murray does not dispute his guilt and "freely admits that he was stupid and immature when he used a fictitious name and picture to hide his identity while online[.]" (Doc. 161 at 13). Nevertheless, he claims that he is not a danger to society and that he is no longer sexually attracted to children (*Id.* at 15). Notably however, Murray's history with this Court demonstrates a remarkable disregard for truth. In his motion to withdraw his guilty plea

² Because the § 3553(a) sentencing factors and Defendant's danger to the community preclude early release, the Court will not consider whether Murray's family's financial and health concerns constitute extraordinary and compelling reasons for compassionate release (Doc. 161).

(Doc. 92), Murray asserted that he lied about his guilt and his defense attorney's performance during his plea colloquy, but argued that he was coerced to do so because of his fear of a lengthy prison sentence if convicted at trial (*Id.* at 2). In resolving that motion, the Court noted that “[t]here is simply no way to reconcile Defendant's inconsistent (sworn) representations; either Defendant lied in his affidavit and verified motions, or he perjured himself in front of the magistrate judge.” (Doc. 101 at 9). Despite his current admission of guilt, Murray swore in a 28 U.S.C. § 2255 motion (Doc. 154) that he was completely innocent of the crimes with which he was charged; that trial counsel coerced him to plead guilty; that Murray's next-door neighbor may have been the person who solicited and received the child pornography; and that the police actually framed him for the crimes (*Id.*). In his pro se brief on direct appeal, Murray strenuously denied that he was Tyler Peterson; urged that he could not have accessed the internet at the times alleged by the Government; claimed that the lead investigator on his case manipulated evidence, withheld favorable witness statements, and testified falsely in court; and suggested that Tyler Peterson may actually have been a friend of his younger brother who lived nearby. *United States v. Murray*, No. 15-13448, 617 F. App'x 747 (11th Cir. Nov. 30, 2016) (Appellant's Response, filed June 6, 2016, pp. 20-51).

Given Murray's history of using lies and subterfuge to attract children to engage with him on the internet and his clear disregard for the truth during his legal proceedings, this Court is not convinced that he would no longer be a threat to others if released. Murray entered a guilty plea to a single count in an eleven-count indictment (Doc. 31). He used a false name and persona to entice juveniles to trade pornography with him. After considering several special offense characteristics, Murray's total offense level was calculated as 38 (Doc. 102 at 7-8). These special offense characteristics included: the possession of material containing the depiction of minors less than 12

years old; the intent to persuade, induce, entice or coerce minors to engage in illegal activity; the portrayal of masochism and violence; and the amount of illicit material possessed (*Id.*). In response to Murray's objections to the PSR, the United States Attorney noted that several minor children near Murray's home were contacted by Murray (who was using the Tyler Peterson pseudonym), and at least three of them were asked to send him photographs of themselves (Doc. 109 at 52–53).

Moreover, if released, Murray will return to the same home and living situation where he committed his original crimes. Other district courts have analyzed similar motions in the midst of the COVID-19 pandemic and concluded that a defendant with the same conviction as Murray's should not be released to home confinement, where there is a risk he will reoffend. *See, e.g., United States v. Hylander*, No. 18-cr-60017, 2020 WL 1915950, at *3 (S.D. Fla. Apr. 20, 2020) (denying motion for compassionate release of defendant convicted of possession of child pornography because "defendant proposes to be released to the home with his wife and brother-in-law, which is precisely the location in which the offense for which he was convicted was committed, and presents a concern that Defendant will reoffend."); *United States v. Feiling*, No. 3:19CR112 (DJN), 2020 WL 1821457, at *8 (E.D. Va. Apr. 10, 2020) (denying motion for compassionate release of defendant convicted of possession of child pornography in part because defendant committed his instant offense while at home, "meaning a term of home confinement would be less likely to protect the public"); *United States v. Miezin*, No. 1:13CR15, 2020 WL 1985042, at *5 (N.D. Ohio Apr. 27, 2020) (denying motion for compassionate release of defendant convicted of receipt and distribution of child pornography, in part because "[i]n today's society with smartphones, tablets, laptops, smart TVs, and countless other devices, it would not be possible to place [defendant] in home confinement and eliminate his ability to engage in his prior criminal conduct.").

2. The § 3553(a) factors militate against release

Finally, the Court must consider the § 3553(a) factors, which include the nature and circumstances of the offense and the history of the defendant. The Court may also consider the need for the sentence imposed to reflect the seriousness of the offense, afford adequate deterrence, protect the public, and provide the defendant with needed education, training, and treatment. 18 U.S.C. § 3553(a). Murray argues that his original sentence was simply too long in the first place when compared to those of others who committed similar actions (Doc. 157 at 15–16). However, Murray’s sentence reflected the Court’s view of the § 3553(a) factors at the time of sentencing, and that view has not changed. Murray benefited from a below-guideline sentence that was imposed after consideration of his age and the long supervised release plan. Further, Murray has served only 38 percent, of his 200-month sentence. *See United States v. Pawlowski*, 967 F.3d 327, 331 (3d Cir. 2020) (holding that “the time remaining in [the] sentence may . . . inform whether immediate release would be consistent with the § 3553(a) factors”).

Murray claims that he has been a model prisoner and has taken strides to rehabilitate himself and to assist in the rehabilitation of fellow inmates (Doc. 157 at 18). He asserts that he has helped inmates and staff members create new educational programs, served as a tutor, and been a companion for elderly inmates (*Id.*). He has received a paralegal certification and has assisted *pro se* inmates as a clerk in the legal law library (*Id.*). While the Court applauds Murray’s progress towards rehabilitation, such efforts, coupled with Murray’s lack of criminal history, do not outweigh the other § 3553(a) factors. *See United States v. Mortenson*, No. 2:11-cr-00095-JAD-CWH, 2020 WL 2549970, at *2 (May 19, 2020) (denying the defendant’s compassionate release motion where the defendant was a model inmate and had no criminal history, reasoning that the “seriousness of his conviction [receipt of child pornography]” and the “predatory nature” of the

defendant's conduct could not be overlooked.); *United States v. Ackerman*, Case No. 11-740-KSM-1, 2020 WL 5017618, at *9 (E.D. Penn. Aug. 25, 2020) (finding that steps towards rehabilitation taken by defendant convicted of receipt, possession, and conspiracy to receive, distribute and possess child pornography did not outweigh § 3553(a) factors).

Finally, the type of offense committed also weighs against release. *See United States v. Schemmel*, No. 3:18-cr-207, 2020 WL 6273769, at *2 (M.D. Fla. Oct. 26, 2020) (denying compassionate release where the defendant convicted of possessing child pornography received a substantial downward departure and had served only one year of a 110 month sentence); *United States v. Pitcock*, No. 15-cr-60222, 2020 WL 3129135, at *4 (S.D. Fla. Jun. 12, 2020) (denying release for defendant who admitted downloading, viewing and transporting large amounts of child pornography because of continuing concerns of recidivism, notwithstanding Pitcock's studies supporting his claim of falling withing a low recidivism category).

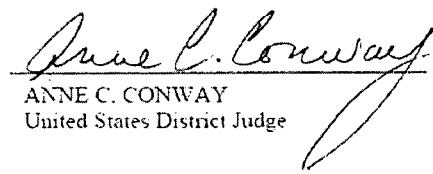
IV. Conclusion

Even considering Murray's medical issues, granting compassionate release at this time would not reflect the seriousness of his crimes, promote respect for the law, provide just punishment, afford adequate deterrence, or protect the public from future crimes. The Court remains convinced, for the reasons laid out at sentencing, that Murray's sentence of 200 months is sufficient, but not greater than necessary, to comply with the goals of 18 U.S.C. § 3553.

Based on the foregoing, it is ordered as follows:

1. Murray's Motion to Exceed Page Limit (Doc. 160) is **GRANTED** to the extend that the Court reviewed and considered the Reply before preparing this Order.
2. Murray's Motion for Compassionate Release (Doc. 157) is **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida on January 22, 2021.


Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Magistrate Judge
United States Marshals Service
United States Probation Office
United States Pretrial Services