No. _____

IN THE

Supreme Court of the United States

Holli Wrice,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S APPENDIX TO PETITION FOR CERTIORARI

/s/ *Julie K. Morian*
JULIE K. MORIAN
Assistant Federal Public Defender
650 Missouri Ave.
East St. Louis, IL 62201
(618) 482-9050
(618) 482-9057 fax
Julie_Morian@fd.org
Counsel for Petitioner

INDEX TO APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 17, 2021
Decided December 20, 2021

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 21-1947

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Southern District of Illinois.
v.	No. 4:10-cr-40065
HOLLI WRICE, *Defendant-Appellant*.	J. Phil Gilbert, *Judge*.

O R D E R

Holli Wrice appeals the denial of her motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). She sought release on two theories. First, she relied on an amendment in the First Step Act of 2018 limiting the circumstances in which enhanced sentences may be imposed for multiple violations of 18 U.S.C. § 924(c). *See* Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221–22. Although this amendment is not retroactive, she argued that the 18-year difference in the sentence she would have faced under current law presented an "extraordinary and compelling" reason for compassionate release, at least under her specific circumstances. Second, she argued that her medical conditions—asthma and hypertension—increased the risk that she would suffer severe complications if she contracted COVID-19 a second time. The district court denied the motion after concluding that the nonretroactive statutory amendment was not an

extraordinary and compelling reason for release and that Wrice's unexplained refusal to take the COVID-19 vaccine undermined her concerns about the virus.

Our decisions since the district court's ruling foreclose both of Wrice's theories. First, we held that a reason for a sentence reduction under § 3582(c)(1)(A)(i) "cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c)." *United States v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021). In her reply, Wrice insists *Thacker* is wrongly decided, though she identifies no "compelling reasons" for us to overturn circuit precedent. *Campbell v. Kallas*, 936 F.3d 536, 544 (7th Cir. 2019). She otherwise argues that *Thacker* does not control her case, because she did not rely solely on the amendment. But we expressly precluded combining the amendment with other factors, too. *Thacker*, 4 F.4th at 576. Besides the amendment, she points to only the facts surrounding her offense and her efforts at rehabilitation, but she does not attempt to argue that these factors could independently support release. Any such argument would face significant barriers; facts known at the original sentencing cannot justify a later reduction, and there is reason to doubt that compassionate release could ever be justified by rehabilitation alone. *Cf.* 28 U.S.C. § 994(t) (instructing Sentencing Commission that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason").

Second, we have held that a prisoner who rejects an available vaccine for no reason cannot rely on the risks of COVID-19 to seek compassionate release. *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021). Wrice still does not provide any explanation for rejecting the vaccine, so her arguments in this vein must fail. *Id.* The government contends that Wrice's exhaustion of this argument is also "stale" because the circumstances surrounding the virus have changed so significantly since she first exhausted her remedies, but because the claim is foreclosed in any event, we need not resolve this question. Nor need we address Wrice's arguments regarding the factors in 18 U.S.C. § 3553(a), when she has not identified an extraordinary and compelling reason for release. *See United States v. Ugbah*, 4 F.4th 595, 598 (7th Cir. 2021).

Finally, the government argues that the district court's administrative order appointing the Federal Public Defender to represent defendants seeking compassionate release violates the Criminal Justice Act. *See* 18 U.S.C. § 3006A. This court, however, is not the proper forum for the government to air its concerns. *See United States v. Manning*, 5 F.4th 803, 807 (7th Cir. 2021).

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,

v.

HOLLI WRICE,
Defendant.

Case No. 10–CR–40065–JPG

ORDER

Before the Court is Defendant Holli Wrice's Motion for Compassionate Release. (ECF No. 126). Wrice also filed a supplemental brief, (ECF No. 139); and the Government responded, (ECF Nos. 140, 142).

Wrice has been serving a 346-month sentence since 2011. (Judgment at 1–2, ECF No. 64). She is incarcerated at Federal Medical Center ("FMC") Carswell in Texas. *Inmate Locator*, Bureau of Prisons (last visited May 12, 2021).[1]

In July 2020, Wrice moved for a sentence modification under 18 U.S.C. § 3582(c)(1)(A), also called *compassionate release*, for two reasons. (Def.'s Mot. at 1). First, she contends that serious medical conditions—severe asthma and hypertension—make her especially vulnerable to the COVID-19 virus. (*Id.* at 2). In brief, Wrice argues that her increased risk of experiencing serious complications if she contracts COVID-19 is an *extraordinary and compelling reason* warranting her release. (*Id.*).

Alternatively, Wrice argues that a non-retroactive change in law satisfies the criteria. (*Id.*). In 2008, Wrice committed two armed robberies in four months. (*See* Presentence Investigation Report at 4, 8, ECF No. 56). The first occurred at a pawn shop in Missouri; the second, at a bank

[1] *Available at* https://www.bop.gov/inmateloc/.

in Illinois. (*See id.*). The Government then prosecuted her in the Eastern District of Missouri and the Southern District of Illinois, each indictment containing counts under 18 U.S.C. § 924(c) for brandishing a firearm while committing a crime of violence. (*See id.* at 10–11). Wrice pleaded guilty to the charges in both indictments. (*See id.* at 11; Judgment at 1, ECF No. 64). At the time of her sentencing in 2011, "a second or subsequent conviction" under § 924(c) carried a 25-year mandatory minimum. Because Wrice pleaded guilty to violating § 924(c) in the Eastern District of Missouri, this Court considered her guilty plea in the Southern District of Illinois as a second conviction and imposed the 25-year mandatory minimum. (*See* Judgment at 2). But in 2018, Congress amended the language of § 924(c) to require that a prior 924(c) offense be "final" before a defendant *commits* a subsequent § 924(c) offense to trigger the 25-year mandatory minimum. *See* First Step Act § 403(a), PL 115-391, Dec. 21, 2018, 132 Stat. 5194. In other words, Wrice likely would not have received the 25-year mandatory minimum under the current law because the Missouri conviction was not final before she committed the Illinois robbery. That said, however, the amendment does not apply retroactively. *See id.* § 403(b). All the same, Wrice says that the apparent sentencing disparity is sufficiently *extraordinary and compelling* to justify a sentence modification.

District courts generally "may not modify a term of imprisonment once it has been imposed . . . ." 18 U.S.C. § 3582(c). That said, an exception exists for when "extraordinary and compelling reasons warrant such a reduction . . . ." *Id.* § 3582(c)(1)(A)(i). The burden of proof rests on the defendant, and the Court has "broad discretion." *See United States v. Saunders*, 986 F.3d 1076, 1078 (7th Cir. 2021).

To begin, the Court acknowledges the particular danger posed by COVID-19 to prisoners, who live in close quarters and often cannot practice social distancing. "But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release . . . ." *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). The Director of the Bureau of Prisons is in the best position to know which inmates are most vulnerable to infection and whether they still pose a public safety risk. And since March 2020, the Bureau has released over 25,000 inmates that it has identified as "suitable for home confinement," *Coronavirus*, Bureau of Prisons (last visited May 12, 2021),[2] "a 250% increase in home confinement placements since the beginning of the pandemic," Statement of Michael D. Carvajal, Director, Federal Bureau of Prisons Before the Committee on the Judiciary, United States Senate (Apr. 15, 2021).[3] Moreover, as of April 19, 2021, *all federal inmates are eligible for a vaccine*. *Id.* As a result, the Director expects that "by mid-May, . . . all inmates will have been provided the opportunity to be vaccinated." *Id.*

With that in mind, there are not extraordinary and compelling reasons warranting a sentence modification here. First, Wrice was offered the COVID-19 vaccine and rejected it. (*See* Gov't's Suppl., Ex. A, ECF No. 142). Yet she wants a sentence modification partly out of fear that her medical conditions make her more vulnerable to the virus. At any rate, the risk of infection is still greatly reduced thanks to the more than 80,000 inmates who have accepted invitations to receive the vaccine (40,000 of which have already received both doses). *Oversight of the Federal Bureau of Prisons: Hearing Before the Judiciary Comm.*, 117 Cong. (2021) (statement of Michael

[2] *Available at* https://www.bop.gov/coronavirus/.

[3] *Available at* https://www.judiciary.senate.gov/imo/media/doc/BOP%20Director%20-%20%20Written%20Statement%202021-04-15%20SJC%20Hearing%20.pdf.

Carvajal, Dir. of BOP).[4] And according to the Bureau, only four inmates at FMC Carswell currently have the virus. *Coronavirus*, BOP (last visited May 12, 2021).[5] In sum, the risk posed to Wrice by the pandemic is not currently extraordinary and compelling. If the situation changes, then she may move for compassionate release again after exhausting her administrative remedies.

Wrice's change-in-law argument is also unpersuasive. Congress stated explicitly that the amendment to § 924(c) only applies as of December 2018—and Wrice was sentenced in 2011. To be sure, the Court has broad discretion in sentencing matters, including when determining what is *extraordinary and compelling*. *See United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020). But the Court is inclined to show some deference to the legislature, which manifested its intent not to make this amendment apply retroactively. *See Dorsey v. United States*, 567 U.S. 260, 274–75 (2012). Indeed, Wrice is among many inmates across the country affected by this congressional prerogative. Put differently, the sentencing disparity is not extraordinary and compelling, even when considered alongside Wrice's good behavior.

For those reasons, the Court **DENIES** Defendant Holli Wrice's Motion for Compassionate Release.

IT IS SO ORDERED.

Dated: Wednesday, May 12, 2021

S/J. Phil Gilbert
J. PHIL GILBERT
UNITED STATES DISTRICT JUDGE

[4] *Available at* https://www.judiciary.senate.gov/meetings/04/08/2021/oversight-of-the-federal-bureau-of-prisons.

[5] *Available at* https://www.bop.gov/coronavirus/.

834 Fed.Appx. 267 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 7th Cir. Rule 32.1.
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Holli WRICE, Defendant-Appellant.

No. 20-2035
|
Submitted January 22, 2021 *
|
Decided January 25, 2021

Appeal from the United States District Court for the Southern District of Illinois. No. 10-CR-40062-JPG-1, J. Phil Gilbert, *Judge*.

Attorneys and Law Firms

James M. Cutchin, Attorney, Office of the United States Attorney, Civil Division, Fairview Heights, IL, Thomas E. Leggans, Attorney, Office of the United States Attorney, Benton, IL, for Plaintiff-Appellee

Julie K. Morian, Attorney, Office of the Federal Public Defender, East St. Louis, IL, for Defendant-Appellant

Before DIANE P. WOOD, Circuit Judge, DAVID F. HAMILTON, Circuit Judge, MICHAEL Y. SCUDDER, Circuit Judge

ORDER

Holli Wrice appeals from the district court's denial of her motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). That statute authorizes district courts to modify a term of imprisonment when justified by "extraordinary and compelling reasons." The district court held that § 3582(c)'s trailing paragraph, which says a court may not modify a term of imprisonment unless "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" prevented it from granting relief.

After Wrice appealed we held in *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020), that the Sentencing Commission has not yet issued policy statements applicable to a prisoner's motion for compassionate release under the First Step Act. Because there are no applicable policy statements, "the trailing paragraph of § 3582(c)(1)(A) does not curtail a district judge's discretion." *Id.* at 1180.

***268** *Gunn* is controlling in this case. The district court erred when it held that the Guidelines prohibited it from considering whether a favorable but non-retroactive statutory amendment constitutes an extraordinary and compelling reason to reduce Wrice's sentence. The government, in its brief, agrees with Wrice that remand for further proceedings in light of *Gunn* is appropriate. The government offered an independent ground for affirmance in its brief, but remand will allow the district court

to address those arguments in the first instance. Accordingly, the district court's June 9, 2020, order is VACATED and this case is REMANDED to the district court for further consideration in light of *United States v. Gunn*.

All Citations

834 Fed.Appx. 267 (Mem)

Footnotes

* We have agreed to decide the case without oral argument because the dispositive issue has been authoritatively decided. FED. R. APP. P. 34(a)(2)(B).

Appendix 8

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,

v.

HOLLI WRICE,
Defendant.

Case No. 10–CR–40065–JPG–1
FILED UNDER SEAL

MEMORANDUM & ORDER

This is a closed criminal case. Before the Court is Defendant Holli Wrice's Motion for Compassionate Release. The Government responded, and Wrice replied. For the reasons below, the Court **DENIES** Wrice's Motion.

I. PROCEDURAL & FACTUAL HISTORY

In 2008, Wrice committed two armed robberies in a four-month span. The first occurred at a pawn shop in Missouri; the second at a bank in Illinois. The Government then prosecuted her in the Eastern District of Missouri and the Southern District of Illinois, each indictment containing counts under 18 U.S.C. § 924(c) for brandishing a firearm while committing a crime of violence. Wrice pleaded guilty to the charges in both indictments. In doing so, she "knowingly and voluntarily waive[d] her right to contest any aspect of her conviction and sentence that could be contested under Title 18 or Title 28 . . . ." (Plea Agreement 11–12, ECF No. 42).

At the time of Wrice's sentencing in 2011, "a second or subsequent conviction" under § 924(c) carried a 25-year mandatory minimum sentence. Because she pleaded guilty to violating § 924(c) in the Eastern District of Missouri, this Court considered her guilty plea in the Southern District of Illinois as a second conviction and imposed the 25-year mandatory minimum sentence. She is currently incarcerated at Federal Medical Center ("FMC") Carswell in Fort Worth, Texas.

In 2018, Congress amended the language of § 924(c) by enacting the First Step Act. Now, the 25-year mandatory minimum sentence does not apply unless a defendant was convicted under § 924(c) before *committing* the subsequent offense. In other words, Wrice would not have received the 25-year mandatory minimum sentence under the current law because the Missouri conviction was not finalized before she committed the Illinois robbery. That amendment, however, does not apply retroactively.

Wrice wrote the warden of FMC Carswell and requested the Bureau of Prisons (or "BOP") to move for compassionate release on her behalf. The sole issue raised in her letter was the change in law. As a matter of equity, she argued that the sentencing disparity constitutes an "extraordinary and compelling reason" warranting a modification of her term of imprisonment to time served. The Bureau of Prisons disagreed, denying her request and subsequent appeal. In doing so, it explained that it "does not identify non-retroactive amendments to sentence enhancement provisions as extraordinary or compelling circumstances warranting" compassionate release. (Def.'s Motion, Ex. 3, ECF No 114).

Having fully exhausted all administrative remedies, Wrice moved for compassionate release in this Court under 18 U.S.C. § 3582(c)(1)(A), which authorizes district courts to modify a term of imprisonment when justified by "extraordinary and compelling reasons." The Government responded, and Wrice replied.

II. LAW & ANALYSIS

Since her sentencing, Wrice has done all the right things. She turned her life around and gained the respect of her peers. She took control over her future and keeps making strides to better herself. She even exhausted her administrative remedies before moving for compassionate release, a mode of relief not foreclosed by her plea agreement.

But the Court's hands are tied. Federal courts are limited to the powers vested in them by the Constitution and acts of Congress. And although portions of the Sentencing Commission's policy statement are outdated, the rest remains applicable. It is a duty of the Sentencing Commission—not the judiciary—to determine what "extraordinary and compelling reasons" warrant compassionate release. If Congress intended otherwise, then it would have amended 18 U.S.C. § 3582(c)(1)(A) to signal that shift; or amended 28 U.S.C. § 994(t) to strip the Sentencing Commission of its role in defining "extraordinary and compelling reasons"; or directed the federal courts to fill in the gaps until the Sentencing Commission updated its policy statement. But it did none of those things. This Court must therefore defer to the Bureau of Prisons and deny Wrice's Motion for Compassionate Release.

A. Legal Standard

A defendant may seek modification of a term of imprisonment by moving for relief under 18 U.S.C. § 3582(c)(1)(A). Section 3582(c)(1)(A) states as follows:

> (c) **Modification of an imposed term of imprisonment.**—The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the 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, whichever is earlier, 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—
>
> (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 . . . .

Id.

B. Wrice Exhausted All Administrative Remedies

Defendants must exhaust all administrative remedies before moving for compassionate release in federal court. *Id.* This requires them to ask the Bureau of Prisons to move for compassionate release on their behalf. *See id.* If the request and subsequent appeal are denied, then defendants can move for compassionate release on their own. *Id.*

The Government does not dispute that Wrice exhausted all administrate remedies for her change-in-law argument. She wrote the warden of FMC Carswell, noting the sentencing disparity between the old and new versions of 18 U.S.C. § 924(c). She then satisfied the exhaustion requirement when the Bureau of Prisons denied her request and appeal. But in her Motion for Compassionate Release, Wrice also references her exemplary behavior while incarcerated and the threat posed by the COVID-19 pandemic. The Government contends that these are independent bases for relief; and that since neither were mentioned in her request to BOP, Wrice did not exhaust all administrative remedies for those claims. The Court disagrees.

The sentencing disparity is the only basis for relief presented in Wrice's Motion. Indeed, the Sentencing Guidelines specifically foreclose compassionate release based solely on a defendant's rehabilitation. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n.3 (U.S. Sentencing Comm'n 2018). (*See infra* Section II.D (discussing the application of § 1B1.13)). The assertions Wrice makes about her good conduct and the COVID-19 pandemic are only intended to bolster her argument that the factors set forth in 18 U.S.C. § 3553(a) weigh in her favor. The Court therefore finds that Wrice exhausted all administrative remedies and properly moved for compassionate release.

C. Wrice Did Not Waive Her Right to Move for Compassionate Release

"It is well-settled that . . . waivers in plea agreements are generally enforceable." *United States v. Woods*, 581 F.3d 531, 534 (7th Cir. 2009), *overruled on other grounds, United States v. Taylor*, 778 F.3d 667, 669 (7th Cir. 2015). But a waiver in a plea agreement "stands or falls with the guilty plea." *See United States v. Gonzalez*, 765 F.3d 732, 741 (7th Cir. 2014). And unless the plea agreement says otherwise, waiving the right to collateral attack does not foreclose compassionate release under 18 U.S.C. § 3582(c). *See Woods*, 581 F.3d at 535–36.

The Government argues that Wrice is foreclosed from seeking a sentence reduction under 18 U.S.C. § 3582(c)(1)(A) because she waived "her right to contest any aspect of her conviction and sentence that could be contested under Title 18 or Title 28." By analogy, it relies on *United States v. Soto-Ozuna*, an unpublished opinion where the Seventh Circuit found that a defendant was barred from moving for compassionate release because his plea agreement contained an "express waiver of his right to seek to modify his sentence" under 18 U.S.C. § 3582(c)(2) (permitting sentence modification in the event of a retroactive amendment to the Sentencing Guidelines). 681 Fed. App'x 527, 528 (7th Cir. 2017). The Government contends that the plea agreement signed by Wrice is like the one signed by Soto-Ozuna. The Court disagrees.

Unlike Soto-Ozuna, who waived his right to *modify* his sentence, Wrice only waived her right to *contest* her sentence. In *United States v. Monroe*, the Seventh Circuit considered a similar waiver after a defendant "expressly agree[d] not to contest his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, an action brought under 28 U.S.C. § 2255." 580 F.3d 552, 555 (7th Cir. 2009). The court found that this language did not foreclose the defendant from seeking relief under 18 U.S.C. § 3582(c)(2); moving for a sentence modification is not a collateral attack. *See id.* Eight days prior, the Seventh Circuit held the same

in *United States v. Woods*, 581 F.3d at 536–37. Motions for sentence modifications under § 3582(c)(2) are no different. And because her plea agreement did not contemplate sentence modifications, Wrice did not waive her right to move for compassionate release.

D. The Court Cannot Determine What "Other Reasons" Justify Compassionate Release

Although Congress did not articulate what constitutes "extraordinary and compelling reasons" warranting compassionate release, it required that any reduction be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Congress also stated that it is among the Sentencing Commission's many duties to "describe what should be considered extraordinary and compelling reasons for a sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). The Sentencing Commission did so in Sentencing Guideline § 1B1.13, enacted one month before the First Step Act. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 (U.S. SENTENCING COMM'N 2018). Section 1B1.13 states as follows:

> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment . . . if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—
>
> (1) (A) extraordinary and compelling reasons warrant the reduction; or
>
> (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Id.

The application notes to § 1B1.13 then define "extraordinary and compelling reasons" and leave it to the Bureau of Prisons to fill in the gaps. They state as follows:

> 1. *Extraordinary and Compelling Reasons*.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:
>
> (A) *Medical Condition of the Defendant*.—
>
> * * *
>
> (B) *Age of the Defendant*.—
>
> * * *
>
> (C) *Family Circumstances*.—
>
> * * *
>
> (D) *Other Reasons*.—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).
>
> * * *
>
> 4. *Motion by the Director of the Bureau of Prisons*.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of the reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

* * *

> *Background*: The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding the application of the guidelines or other aspects of sentencing in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentencing modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) 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." This policy statement implements 28 U.S.C. § 994(a)(2) and (t).

Id. § 1B1.13 cmt. n.1, 4.

The Sentencing Commission's policy statement contains inaccuracies today. Because the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow defendants to move for compassionate release, it is incorrect to say that a request for sentence modification "may be granted *only* upon motion by the Director of the Bureau of Prisons." U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. n.4 (emphasis added). Based on this inconsistency, Wrice contends that § 1B1.13 of the Sentencing Guidelines and its application notes are no longer "applicable policy statement[s]." What's more, she argues that because Congress expanded the availability of relief under § 3582(c)(1)(A) by authorizing defendants to move for compassionate relief on their own, it also intended to strip the Bureau of Prisons of its role as the sole authority for determining what "other reasons" justify compassionate release.

To be sure, the First Step Act brought much-needed change to the process for compassionate release. Entitled "Increasing the Use and Transparency of Compassionate Release," 164 CONG. REC. H10358 (daily ed. Dec. 20, 2018), the amendment to 18 U.S.C. § 3582(c)(1)(A) addressed the charge that "BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered," U.S. DEP'T

OF JUSTICE, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013). Before, defendants depended on BOP to move for compassionate release on their behalf—if their request was denied, then that was the end of the road. Now, requests for compassionate release no longer rest solely in the hands of BOP: if BOP denies a request or fails to respond within 30 days, a defendant can move for compassionate release on their own. Congress also requires BOP to submit an annual report detailing, among other things, the number of requests that it approved and denied, how long it took to respond to each request, and the number of requests that defendants ultimately brought to federal court. *See* 18 U.S.C. § 3582(d)(3).

Ever since Congress amended § 3582(c)(1)(A)(i) to allow defendants to move for compassionate release without a recommendation from the Bureau of Prisons, courts have disagreed about applying § 1B1.13 of the Sentencing Guidelines. Because § 1B1.13 alludes to an outdated version of the compassionate-release provision, many courts no longer consider it an "applicable policy statement." And without an applicable policy statement, they contend that the *judiciary* can determine what "other reasons" justify compassionate release. For example, Judge Dearie of the Eastern District of New York considered a case very similar to this one in *United States v. Haynes*, ——F. Supp. 3d——, 2020 WL 1941478 (E.D.N.Y. 2020). Like Wrice, Haynes committed a string of armed robberies within a short period and received the then-25-year mandatory minimum sentence under 18 U.S.C. § 924(c). *Id.* at *1–2. But if he were sentenced under the amended § 924(c), then he would not have received the 25-year mandatory minimum. *Id.* So he moved for compassionate release premised on the notion that such a drastic change in law constitutes an extraordinary and compelling reason for relief under 18 U.S.C. § 3582(c)(1)(A)(i). *Id.* Judge Dearie agreed, noting that the court would be on "the right side of history" by authorizing itself "to determine what 'Other Reasons' . . . qualify as 'extraordinary and

compelling' regardless of BOP's view on the matter and without having to await a someday-updating by the Commission of its unquestionably outdated policy statement." *Id.* at *15.

Other courts came to the opposite conclusion, highlighting the boundaries of federal courts' limited power. In *United States v. Winner*, for example, Chief Judge Hall of the Southern District of Georgia noted that "§ 3582(c)(1)(A) as amended by the First Step Act *still* requires courts to abide by 'applicable policy statements issued by the Sentencing Commission.' " ——F. Supp. 3d——, 2020 WL 2124594, at *2 (S.D. Ga. 2020) (emphasis in original). In other words, Congress *could have* removed that language and explicitly authorized the judiciary to decide what "other reasons" warrant compassionate release. *See id.* Instead, they kept that directive in place, along with 28 U.S.C. § 944(t), which specifically delegates that task to the Sentencing Commission. *See id.* Accordingly, Chief Judge Hall criticized those courts whose interpretation of "the salutary purpose expressed in the title of" the amendment "contravenes express Congressional intent that the Sentencing Commission, not the judiciary, must determine what constitutes an appropriate use of the 'compassionate release' provision." *Id.*

Finally, some courts settled on a middle ground. For instance, Judge Hornby in *United States v. Fox* stated that because "[t]he Commission has not revised its policy statement to reflect [the] First Step Act change and is unlikely to do so soon, since it lacks a quorum of members," the Bureau of Prison's "discretion to identify other extraordinary and compelling reasons [is] assigned now to the courts." No. 2:14–CR–03–DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019). That said, he also "conclude[d] that those other extraordinary and compelling reasons should be comparable or analogous to what the Commission has already articulated as criteria for compassionate release." *Id.* In his view, the judiciary can fill in the gaps, but its discretion is not unfettered.

Naturally, Wrice contends that disregarding § 1B1.13 of the Sentencing Guidelines altogether tracks the congressional intent behind the First Step Act. She argues that § 1B1.13's directive that only the Bureau of Prisons can determine what "other reasons" warrant relief thwarts Congress's goal of increasing the use of the compassionate-release provision. And quoting Judge Pratt of the Southern District of Iowa, she asserts that "the only way direct motions to district courts would increase the use of compassionate release is to allow district judges to consider the vast variety of circumstances that may constitute 'extraordinary and compelling.' " *United States v. Brown*, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019). The Court disagrees.

Congress's aim in amending the compassionate-release provision was not to supplant the Bureau of Prisons with the judiciary. Indeed, defendants are still required to exhaust all administrative remedies with BOP before proceeding to federal court, emphasizing BOP's continued role in processing requests for compassionate release. If anything, Congress sought to pressure BOP into taking its duty more seriously, requiring it to submit an annual report that details its activities. Granted, BOP's denial of a request for compassionate release is no longer the be-all and end-all. That fact alone, however, increases the use of the compassionate-release provision—although not as much as Wrice wants. In enacting the First Step Act, Congress showed that it considered the entire compassionate-release framework, including BOP's role. But rather than removing the language in 18 U.S.C. § 3582(c)(1)(A) that directs the Court to apply the Sentencing Commission's policy statement, Congress left it intact. And rather than amending 28 U.S.C. § 944(t) to no longer make it solely the Sentencing Commission's duty to define "extraordinary and compelling reasons," Congress left that intact too. The clearest indication of congressional intent is found in the statutory text; and "[t]he Court is not freed by congressional silence but bound by Commission policy statements that Congress has expressly required the courts to follow."

United States v. Lynn, No. 89–0072–WS, 2019 WL 3805349, at *5 (S.D. Ala. Aug. 13, 2019). The only inference the Court will make is that Congress meant what it said.

What's more, the fact that portions of the Sentencing Commission's policy statement are outdated does not render the rest inapplicable. True enough, § 1B1.13 inaccurately states that only BOP can move for compassionate release on a defendant's behalf. But that defect does not affect the Sentencing Commission's definition of "extraordinary and compelling reasons." Wrice does not point to "any authority for the proposition that the Court may disregard guidance provided by the Sentencing Commission where it appears that such guidance has not kept pace with statutory amendments." *United States v. Shields*, No. 12–CR–00410–BLF–1, 2019 WL 2359231, at *4 (N.D. Cal. June 4, 2019). And "[t]he language in the policy statement which would prevent it from applying, by its terms, to the instant motion is the very language which can no longer be said to be operative. The definition of extraordinary and compelling circumstances, by contrast, stands." *United States v. Garcia*, ——F. Supp. 3d——, 2020 WL 2039227, at *4 (C.D. Ill. 2020). *See generally Alaska Airlines, Inc. v. Brock*, 480 U.S. 578, 684–85 (1987) (favoring severability of invalid provisions). Since the portion of § 1B1.13 that authorizes the Bureau of Prisons to define "other reasons" does not run afoul with the text or purpose of 18 U.S.C. § 3582(c), the Court must apply it.

Finally, proceedings under § 3582(c) are not governed by *United States v. Booker*, 543 U.S. 220, 243–44 (2005), which made the Sentencing Guidelines discretionary in some cases. *See Dillon v. United States*, 560 U.S. 817, 828 (2010). The Sentencing Commission's policy statement therefore remains binding. *See id.* And since the Bureau of Prisons "does not identify non-retroactive amendments to sentence enhancement provisions as extraordinary or compelling circumstances warranting" compassionate release, the Court must deny Wrice's Motion.

III. CONCLUSION

The Court **DENIES** Holli Wrice's Motion for Compassionate Release.

IT IS SO ORDERED.

Dated: Tuesday, June 9, 2020

S/J. Phil Gilbert
J. PHIL GILBERT
UNITED STATES DISTRICT JUDGE