Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3847

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC A. ZEVELY,

Defendant-Appellant.

Before: GUY, KETHLEDGE, and BUSH,, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon consideration of the government's motion to dismiss.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the motion to dismiss is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 22-3847

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 22, 2023
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERIC A. ZEVELY, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: GUY, KETHLEDGE, and BUSH, Circuit Judges.

This matter is before the court upon the government's motion to dismiss the appeal.

Eric A. Zevely filed a motion for compassionate release, which the district court denied on July 26, 2022. Zevely filed a motion for reconsideration, which the district court denied on August 30, 2022. On October 3, 2022, Zevely filed his notice of appeal challenging the July 26, 2022, and August 30, 2022, orders.

In a criminal case, the defendant must file a notice of appeal no later than 14 days after the challenged order is entered. Fed. R. App. P. 4(b)(1)(A). Accordingly, the government moved to dismiss the appeal as untimely. By an earlier order, we dismissed the appeal as it related to the July 26, 2022, finding the notice of appeal to be untimely. We deferred ruling on the government's motion to dismiss as it related to the August 30, 2022, order and remanded for the district court to

the district court denied on August 30, 2022. On October 3, 2022, Zevely filed his notice of appeal challenging the July 26, 2022, and the August 30, 2022, orders.

The government argues that Zevely's notice of appeal is untimely as it relates to the July 26, 2022, order denying the motion for compassionate release and as it relates to the August 30, 2022, order denying reconsideration. But the government acknowledges that, as it relates to the denial of the reconsideration motion *only*, the notice was filed within the additional 30-day period in which the time to appeal may be extended under Rule 4(b)(4). Accordingly, the government asserts that the appeal should be remanded for the district court to determine whether Zevely can show excusable neglect or good cause warranting an extension of the time to appeal from the denial of the motion for reconsideration.

In a criminal case, the defendant must file a notice of appeal no later than 14 days after the challenged order is entered. Fed. R. App. P. 4(b)(1)(A). Following the district court's denial of Zevely's motion for compassionate release on July 26, 2002, he filed a motion for reconsideration. Such a motion will toll the period to appeal only if it is filed within "the original period for review," or 14 days. *United States v. Correa-Gomez*, 328 F.3d 297, 299 (6th Cir. 2003) (quoting *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 268 (1978)). Pursuant to the certificate of service, Zevely filed his motion for reconsideration on August 19, 2022, *see* Fed. R. App. P. 4(c)(1), which was more than 14 days after July 26, 2022. As a result, it did not toll the time to appeal. The time for filing a notice of appeal from the district court's July 26, 2022, order thus expired on August 9, 2022. The time to appeal the August 30, 2022, order denying reconsideration expired on September 13, 2022. Zevely's notice of appeal was filed on October 3, 2022, which was 55 days late as to the first order and 20 days late as to the second.

Rule 4(b)(4) states that a district court, "[u]pon a finding of excusable neglect or good cause . . . may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days." A notice of appeal filed by a criminal defendant after the 14-day deadline set forth in Rule 4(b), but before the expiration of the 30-day period for seeking an extension pursuant to that rule, is to be treated as a request for an

extension of time to file an appeal. *See United States v. Payton*, 979 F.3d 388, 390 (6th Cir. 2020). Here, although Zevely's notice of appeal was not filed within the additional 30-day period as it relates to the July 26, 2022 order, it was filed within that time period as it relates to the August 30, 2022 order denying reconsideration.

Accordingly, we **GRANT** in part the government's motion and **DISMISS** the appeal as it relates to the July 26, 2022, order denying the motion for compassionate release. We **REMAND** the case to the district court for the limited purpose of allowing the court to determine whether Zevely can show excusable neglect or good cause warranting an extension of the appeal period under Rule 4(b)(4) as it relates to the August 30, 2022, order denying reconsideration. After this limited remand, the record as supplemented will be returned to this court for further consideration. We defer ruling on the remainder of the government's motion to dismiss pending the limited remand.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-3847

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.) ORDER
)
ERIC A. ZEVELY,)
)
Defendant-Appellant.)
)

Before: BOGGS, GRIFFIN, and MATHIS, Circuit Judges.

Eric A. Zevely appeals the district court's order denying his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The government moves to dismiss the appeal as untimely under Federal Rule of Appellate Procedure 4(b)(1)(A). Alternatively, the government moves to remand the case for the limited purpose of allowing the district court to determine whether Zevely has shown excusable neglect or good cause that warrants an extension of his time to appeal under Federal Rule of Appellate Procedure 4(b)(4).

The deadline in Rule 4(b)(1)(A) for a defendant to file a notice of appeal is not jurisdictional. *See United States v. Brown*, 817 F.3d 486, 489 (6th Cir. 2016); *United States v. Gaytan-Garza*, 652 F.3d 680, 681 (6th Cir. 2011) (per curiam). But it is a mandatory claims-processing rule; if the government raises the issue of timeliness, we must enforce the deadline. *See Brown*, 817 F.3d at 489; *Gaytan-Garza*, 652 F.3d at 681. The government has properly raised the timeliness issue by filing a motion to dismiss.

Zevely pleaded guilty to production of child pornography in 2018 and was sentenced to 250 months of imprisonment. In June 2022, Zevely filed a motion for compassionate release, which the district court denied on July 26, 2022. Zevely filed a motion for reconsideration, which

determine whether Zevely's untimely filing was due to excusable neglect or good cause. On remand, the district court determined that Zevely had not demonstrated that circumstances beyond his control affected his ability to file a timely notice of appeal. The district court therefore denied his request for an extension of time.

Because Zevely's notice of appeal is untimely and he has not been granted an extension, the government's motion to dismiss the appeal for failure to comply with the time limitations of Rule 4(b) is **GRANTED**. This appeal is **DISMISSED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:18-cr-173
JUDGE EDMUND A. SARGUS, JR.

v.

ERIC A. ZEVELY,

Defendant.

OPINION AND ORDER

This matter is before the Court pursuant to the Sixth Circuit's February 28, 2023, order directing this Court to "determine whether Zevely can show excusable neglect or good cause warranting an extension of the appeal period under Rule 4(b)(4) as it relates to the August 30, 2022, order denying reconsideration." (ECF No. 63.) Pursuant to this limited purpose, the Court directed Zevely to provide a showing of excusable neglect or good cause warranting an extension of time to appeal from the Court's denial of his motion for reconsideration. On April 4, 2023, Zevely responded to the Court's order to show cause. (ECF No. 66.) For the reasons stated below, the Court finds that Zevely has failed to establish excusable neglect or good cause warranting an extension of the appeal period under Rule 4(b)(4) as it relates to the August 30, 2022, Order denying reconsideration.

I. RELEVANT BACKGROUND

On December 20, 2018, Zevely pled guilty to Count One of the Indictment, Production of Child Pornography in violation of 18 U.S.C. § 2251. (Change of Plea Minute Entry, ECF No. 28; Plea Agreement, ECF No. 26.) On May 22, 2019, the Court sentenced Zevely to a 250-month period of incarceration followed by a 15-year term of supervised release. (Sentencing Minute Entry, ECF No. 41.)

On June 13, 2022, Zevely filed a motion to reduce his sentence, which the Court denied. (July 26, 2022 Order, ECF No. 53.) On August 26, 2022, Zevely filed a motion for reconsideration of compassionate release, which the Court also denied. (August 30, 2022 Order, ECF No. 55.)

On October 3, 2022, Zevely filed his notice of appeal challenging the July 26, 2022, and August 30, 2022, Orders. (*See* Sixth Circuit Order, ECF No. 63.) The government moved to dismiss Zevely's appeal as untimely or, in the alternative, the government requested an order remanding the case to this Court for the limited purpose of determining whether Zevely has shown excusable neglect or good cause warranting an extension of his time to appeal under Federal Rule of Appellate Procedure 4(b)(4). (*Id.*)

The Sixth Circuit granted the government's motion with respect to Zevely's appeal of the July 26, 2022 Order denying the motion for compassionate release. As to Zevely's appeal of the August 30, 2022 Order, the panel concluded that Zevely's notice of appeal should "be treated as a request for an extension of time to file an appeal," and remanded the case to this Court to determine whether Zevely can show excusable neglect or good cause for an extension of the appeal period. (*Id.* at 2-3 (citing *United States v. Payton*, 979 F.3d 388, 390 (6th Cir. 2020)).)

On March 2, 2023, the Court directed Zevely to provide a showing of excusable neglect or good cause warranting an extension of time to appeal from the Court's denial of his motion for reconsideration. (ECF No. 64.) Zevely has done so (ECF No. 66), and, the government's time to file a reply having passed, this matter is now ripe for review.

II. LEGAL STANDARD

In a criminal case, as is the case here, a defendant must file his or her notice of appeal in the district court "within 14 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal." Fed. R. App. P. 4(b)(1).

Rule 4(b)(4), however, states that a district court, "[u]pon a finding of excusable neglect or good cause . . . may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days." Where a criminal defendant files his or her notice of appeal after the 14-day deadline but before the expiration of the 30-day period for seeking an extension, a district court treats the notice as a request for an extension of time to file an appeal. *United States v. Rollins*, 2022 U.S. App. LEXIS 34263, *2 (6th Cir. Dec. 12, 2022) (citing *Payton*, 979 F.3d at 390).

Here, Zevely asserts that he has good cause for the late filing of his notice for appeal. (Showing of Good Cause, ECF No. 66.) The Sixth Circuit has held that "good cause" exists "where forces beyond the control of the appellant prevented [him] from filing a timely notice of appeal." *Nicholson v. City of Warren*, 467 F.3d 525, 526 (6th Cir. 2006); *see also* Fed. R. App. P. 4, advisory committee note to 2002 amendments ("The good cause standard applies in situations in which there is no fault—excusable or otherwise.") The party seeking an extension of time bears the burden of showing good cause. *United States v. Smith*, No. 1:14-CR-232, 2016 U.S. Dist. LEXIS 87283, *6 (N.D. Ohio July 6, 2016) (citing *United States v. Williams*, 166 F.3d 1216 (6th Cir. 1988)). If the moving party fails to carry this burden, the court cannot grant the extension. *Id.*; *see also United States v. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996) ("District court are not permitted to carte blanche grant motions for extensions of time under Fed. R. App. 4.")

III. DISCUSSION

In the case at hand, Zevely failed to file his notice of appeal within the 14-day window proscribed by Rule 4(b)(1). Instead, he filed his notice of appeal on October 3, 2023—20 days after the 14-day deadline. Given that Zevely filed the notice after the expiration of the original 14-

day appeal period, but within the additional 30-day window set by Rule 4(b)(4), this Court will treat Zevely's notice as a request for an extension to file an appeal.

Here, Zevely has failed to carry his burden to demonstrate good cause justifying his untimely appeal. Zevely asserts that:

> [W]hen the notice of appeal was sent to this Court for filing, it was sent when Defendant, finally, persuaded a correctional officer staff member to make copies of said notice during the time the institution was on lockdown status, from September 15, until October 4, 2022, when we were back to normal operations, due to a staff member being physically assaulted on the afternoon of September, 15, 2022, resulting in no access to the law library, inmate copier, which had been inoperable since a week before the lockdown above stated, due to a jam of the copy card reader, thus having to rely on copies of the notice of appeal being provided by a considerate member of the staff during the last days of September, 2022.

(Showing of Good Cause, ECF No. 66.) In essence, Zevely articulates two grounds for the Court to find good cause for his late filing: (1) the institutional lockdown from September 15 to October 4, 2022; and (2) an inoperable inmate copier. Neither of these grounds, viewed independently or in combination, support a finding of good cause.

The Court begins its analysis with Zevely's first basis for good cause—the lockdown of FCI Hazelton. As Zevely accurately points out in his brief, courts often find good cause for an extension when an institutional lockdown stood in the way of a prisoner filing a timely notice of appeal. (*Id.* (citing *Burford v. Brun*, No. 3:20-cv-00549, 2022 U.S. Dist. LEXIS 202220, *5-6 (M.D. Tenn. Nov. 7, 2022) (collecting cases)).) But Zevely's case is materially different from the cases upon which Zevely relies because FCI Hazelton placed its inmates on lockdown *after* the 14-day deadline to appeal had already expired. This lockdown began on September 15, 2022—two days *after* the expiration of Zevely's deadline to appeal. Because the lockdown occurred after the 14-day window to appeal had closed, the lockdown does not constitute a "force[] beyond the

control of the appellant prevent[ing him] from filing a timely notice of appeal," and therefore it does not support a finding of good cause. *See Nicholson*, 467 F.3d at 526.

The Court now turns to Zevely's second basis for establishing good cause—FCI Hazelton's inoperable inmate copier. Unlike the institutional lockdown, which occurred after the appeal deadline had expired, the inmate copier was inoperable during Zevely's appeal period. Even so, an inoperable inmate copier falls short of providing Zevely with good cause for his untimely notice. Zevely did not need a copier to timely file his notice of appeal; indeed, Zevely could have simply written a letter to the Court indicating his intent to appeal. *See United States v. Dotz*, 455 F.3d 644, 647 (6th Cir. 2006) ("This court has made clear that a document that clearly indicates an intent to appeal may suffice as notice.") (citation omitted); *United States v. Douglas*, 746 Fed. Appx. 465, 467 (6th Cir. 2018) (relying on *Dotz* in declining to find good cause where defendant could send notice of appeal via written letter but failed to do so). Based upon the record before the Court, Zevely has not provided any evidence indicating that the inoperable inmate copier prevented him from being able to write a letter providing notice of his appeal within Rule 4(b)(1)(A)'s 14-day deadline. Accordingly, Zevely has failed to establish good cause for his untimely notice.[1]

Nor does the record provide a basis for finding excusable neglect, an argument that Zevely does not appear to pursue. "Excusable neglect has been held to be a strict standard which is met only in extraordinary cases . . . . Ignorance of the rules or mistakes in construing the rules do not

[1] The Court recognizes the importance of having copies of one's own filings. As did the District Court for the District of Colorado when it offered the following particularly relevant guidance:

> [A]s between having a copy and meeting the filing deadline, prisoners should always choose to meet the filing deadline. If an unusual situation like a broken copy machine indeed prevents the prisoner from making a copy before mailing, the Court itself can mail such a copy back to the prisoner once the document has been filed.

Poole v. United States, 212 F. Supp. 3d 985, 989 (D. Colo. July 14, 2016).

usually constitute excusable neglect." *Nicholson*, 467 F.3d at 526–27 (6th Cir. 2006) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993)).

IV. CONCLUSION

For the foregoing reasons, the Court hereby finds that Zevely has failed to show good cause or excusable neglect warranting an extension of the time to appeal from the denial of the August 30, 2022, order denying reconsideration.

IT IS SO ORDERED.

5/11/2023
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC A. ZEVELY,

Defendant.

Case No. 2:18-cr-173
JUDGE EDMUND A. SARGUS, JR.

ORDER

This matter is before the Court on Defendant Eric A. Zevely's Motion for Reconsideration of Compassionate Release and to Alter or Amend Judgment Under Federal Rule of Civil Procedure 59(e). (ECF No. 54). Defendant previously filed a motion to reduce his sentence on June 13, 2022. (ECF No. 46). This Court denied his motion on three separate grounds: (1) Defendant failed to exhaust his administrative remedies prior to bringing his motion, as required under 18 U.S.C. § 3582(c)(1)(A); (2) Defendant failed to allege an extraordinary and compelling reason for his relief; and (3) the Court's consideration of the factors listed in 18 U.S.C. § 3553(a) weighed against Defendant's early release. (ECF No. 53). Much like Defendant's prior motion, Defendant's pending motion largely repeats the same arguments that this Court previously rejected. Because there is no new material information presented that the Court did not consider in its July 26, 2022 Order denying Defendant's motion to reduce his sentence, Defendant's pending Motion for Reconsideration of Compassionate Release and to Alter or Amend Judgment Under Federal Rule of Civil Procedure 59(e) is **DENIED**.

IT IS SO ORDERED.

8/30/2022
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC A. ZEVELY,

Defendant.

Case No. 2:18-cr-173
JUDGE EDMUND A. SARGUS, JR.

OPINION AND ORDER

This matter is before the Court on Defendant Eric Zevely's Motion to Reduce Sentence (ECF No. 46) and Motion to Order the Government to Provide Defendant with a Copy of its Response (ECF No. 52). For the following reasons, Defendant's motion to reduce his sentence is **DENIED** and his motion to receive a copy of the Government's response is **GRANTED in part**.

I. BACKGROUND

On December 20, 2018, Defendant pled guilty to Count One of the Indictment, Production of Child Pornography in violation of 18 U.S.C. § 2251. (Change of Plea Minute Entry, ECF No. 28; Plea Agreement, ECF No. 26.) On May 22, 2019, the Court sentenced Defendant to a 250-month period of incarceration followed by a fifteen-year term of supervised release. (Sentencing Minute Entry, ECF No. 41.)

On June 13, 2022, Defendant filed a motion to reduce his sentence (ECF No. 46) and a supporting memorandum (ECF No. 49). The Government filed a response in opposition to the motion. (ECF No. 48.) Defendant also filed a motion to order the Government to provide his with a copy of its response brief. (ECF No. 52.) Defendant's motions are ripe for review.

II. STANDARD

Since Congress passed the Sentencing Reform Act of 1984, federal law has authorized courts to reduce the sentences of federal prisoners with extraordinary health concerns and other hardships, but only under very limited circumstances. *See United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020); *see also* Pub. L. No. 98–473, ch. II(D) § 3582(c)(1)(A), 98 Stat. 1837 (1984). Prior to the passage of the First Step Act of 2018, a district court could grant compassionate release sentence reductions only upon motion by the Director of the Bureau of Prisons ("BOP"). *See id.*

On December 21, 2018, Section 603(b) of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, modified 18 U.S.C. § 3582(c)(1)(A) to allow a sentencing court to reduce an imposed sentence. The statute provides:

> The court may not modify a term of imprisonment once it has been imposed except that—in any case—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 or the lapse of 30 days from the receipt of such a request by the warden of the defendants' facility, 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)(i).

As the Court of Appeals explained in *Ruffin*, the statute contains "three substantive requirements for granting relief." *Ruffin*, 978 F.3d at 1006. First, the court must initially find that "extraordinary and compelling reasons warrant such a reduction." *Id.* (citing § 3582(c)(1)(A)). Second, before granting a reduced sentence, the Court must find "that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* at 1007. But district

courts may skip this second step and have "full discretion to define 'extraordinary and compelling' without consulting the policy statement U.S.S.G. § 1B1.13" when an incarcerated person files the motion for compassionate release, because § 1B1.13 is not an "applicable" policy statement when an incarcerated person files the motion. *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020). Third and finally, even if the Court finds that extraordinary and compelling reasons exist, the Court may not grant a release before considering the sentencing factors set forth in § 3553(a). *Ruffin*, 978 F.3d at 1008. This last step gives the Court "substantial discretion" in deciding whether to reduce or modify a sentence. *Id.*

III. ANALYSIS

Defendant is not entitled to early release because he did not exhaust his administrative remedies by applying for early release from the warden of his institution, he does not assert an extraordinary and compelling reason for release, and the § 3553(a) factors weigh against release.

A. Defendant did not exhaust his administrative remedies

Defendant has not submitted proof that he exhausted the statute's administrative requirements. Under § 3582(c)(1)(A), the Court "may not modify a term of imprisonment" based on a defendant's compassionate release motion until "after the defendant has fully exhausted all administrative rights to appeal a failure of the Federal Bureau of Prisons ("BOP") 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). That restriction—which can be satisfied either by full administrative exhaustion or instead by waiting 30 days from the warden's receipt of the request—is mandatory. *United States v. Alam*, 960 F.3d 831, 833 (6th

Cir. 2020). "A defendant bears the burden to show administrative exhaustion." *United States v. Green*, No. 3:20-cr-15, 2022 WL 93376, at *2 (S.D. Ohio Jan. 10, 2022).

In his motion for early release, Defendant does not claim that he submitted a request to the warden and he does not provide evidence of such a request. Because Defendant does not meet his burden to show administrative exhaustion, Defendant's motion for a sentence reduction is denied.

B. Defendant did not allege an extraordinary and compelling reason for release

Even if Defendant had properly exhausted his administrative remedies, he is not entitled to compassionate release because he does not allege "extraordinary and compelling reasons" for release. *See* 18 U.S.C. § 3582(c)(1)(A). Defendant argues that "unconstitutional deprivation of liberty" is an extraordinary and compelling reason for release. (ECF No. 46 at 15.) He states that the Constitution places limits on the federal government's power and the power is subject to judicial review. (*See id.* at 18.) Because child pornography is not explicitly in the Constitution, Defendant argues that the federal government does not have authority to create or enforce laws prohibiting child pornography. He asks this Court to interpret the federal government's authority. (*See id.* at 21.)

The Court agrees with the Government that Defendant's constitutional argument has no merit. It is well-established that "Congress has a legitimate basis for attempting to regulate the interstate market in child pornography" through the Commerce Clause. *See, e.g.*, *United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010) (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)). Therefore, Defendant is not entitled to release because he does not state an extraordinary and compelling reason for release.

C. The § 3553(a) factors weigh against Defendant's release

This Court must consider factors listed in § 3553(a) as part of its analysis. The factors include "the nature and circumstances of the offense and the history and characteristics of the defendant," the need to "protect the public from further crimes of the defendant." "The sentence must reflect the seriousness of the offense" and it must "afford adequate deterrence of criminal conduct." 18 U.S.C. § 3582(c)(1)(A).

The nature and circumstances of the Defendant's offense do not support his early release. Defendant sexually assaulted a 10-year-old child and documented himself abusing the child. He distributed photographs of the abuse. He also attempted to find additional victims online when he conversed with undercover officers. This conduct weighs against early release. Furthermore, the Court is not convinced Defendant is fully rehabilitated and believes there is an ongoing need to protect the public. Finally, Defendant has served less than four years of his nearly twenty-one-year sentence. An early release at this time would not reflect the seriousness of his crimes or deter other criminal conduct. Thus, the § 3553(a) factors weigh strongly against early release.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Reduce Sentence (ECF No. 46) is **DENIED**. Defendant's Motion to Order the Government to Provide the Response (ECF No. 52) is **GRANTED in part**. The Government does not need to send its response. Instead, the Court **DIRECTS** the Clerk's Office to send Defendant a copy of the Government's response in opposition (ECF No. 48).

IT IS SO ORDERED.

7/26/2022
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE