

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

v.

**KYLE FALKNER (02),**

**Defendant.**

**Case No. 13-20056-02-DDC**

**MEMORANDUM AND ORDER**<sup>1</sup>

This matter comes before the court on defendant Kyle Falkner’s Motion to Reconsider (Doc. 216) the court’s Order (Doc. 215) dismissing his Motion to Reduce Sentence under 18 U.S.C. § 3582(c)(1)(A) (Doc. 190). For reasons explained below, the court denies Mr. Falkner’s motion.

**I. Background**

On August 7, 2020, Mr. Falkner filed a pro se Motion to Reduce Sentence and Motion to Appoint Counsel. Doc. 190. On September 11, 2020, the Federal Public Defender’s Office entered an appearance on behalf of Mr. Falkner. Doc. 195. The government filed a Response arguing Mr. Falkner had failed to satisfy 18 U.S.C. § 3582(c)(1)(A)’s exhaustion requirement for the court to consider his motion. Doc. 197 at 9–10. The government asserted, “even if the Court credits the defendant’s representations, [Mr. Falkner] provides no details or information about the application to the warden to know whether the grounds for which release is now being sought

---

<sup>1</sup> The court inadvertently omitted a citation to *United States v. Williams*, No. 09-40024-1-JAR, 2020 WL 7081738, at \*2 (D. Kan. Dec. 3, 2020) in discussing the applicable legal standard for a motion to reconsider in criminal cases. The court amends its Order to substitute this citation to *United States v. Williams*, No. 09-40024-1-JAR, 2020 WL 7081738, at \*2 (D. Kan. Dec. 3, 2020) in place of *Weaver v. City of Topeka*, 931 F. Supp. 763, 764 (D. Kan. 1996). See page 2, below.

is what was considered by BOP.” *Id.* at 9. Mr. Falkner replied but failed to describe the contents of the compassionate release request he submitted to his warden. *See* Doc. 211. This left the court unable to determine whether there was a “reasonable degree of overlap” between his initial request and his later motion to the court to satisfy § 3582(c)(1)(A)’s exhaustion requirement. Doc. 215 at 5 (quoting *United States v. Burgoon*, No. 07-20072-05-JWL, 2020 WL 7396914, at \*3 (D. Kan. Dec. 17, 2020)). Thus, the court determined Mr. Falkner had failed to satisfy 18 U.S.C. § 3582(c)(1)(A)’s exhaustion requirement and thus it dismissed his motion for lack of subject matter jurisdiction. *Id.*

## **II. Legal Standard for Motion to Reconsider**

“Although the Federal Rules of Criminal Procedure do not authorize a motion for reconsideration, motions to reconsider in criminal prosecutions are proper.” *United States v. Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011) (internal citations and quotation marks omitted). “A motion to reconsider is committed to the sound discretion of the district court,” *Weaver v. City of Topeka*, 931 F. Supp. 763, 764 (D. Kan. 1996), and recognizes “the wisdom of giving district courts the opportunity promptly to correct their own alleged errors,” *United States v. Dieter*, 429 U.S. 6, 8 (1976). “D. Kan. Rule 7.3(b) governs motions to reconsider non-dispositive orders.” *United States v. Williams*, No. 09-40024-1-JAR, 2020 WL 7081738, at \*2 (D. Kan. Dec. 3, 2020) (applying D. Kan. Rule 7.3(b) to motion to reconsider court’s decision denying compassionate release).

A “party may seek reconsideration on the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice.” *Williams*, 2020 WL 7081738, at \*2 (discussing D. Kan. Rule 7.3(b)). “A motion to reconsider may be granted to correct manifest errors, or in light of newly

discovered evidence . . . [if] the moving party produces new evidence which it could not have obtained through the exercise of due diligence.” *United States v. Beasley*, No. 13-10112-01-JTM, 2021 WL 1377122, at \*1 (D. Kan. Apr. 12, 2021). But, a motion to reconsider does not permit a party “to advance arguments that could have been raised in prior briefing.” *United States v. Ramsey*, No. 09-20046-JAR-09, 2021 WL 1339115, at \*1 (D. Kan. Apr. 9, 2021) (internal quotation marks omitted). “A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed.” *Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1483 (D. Kan. 1994), *aff’d*, 43 F.3d 1484 (10th Cir. 1994).

### **III. Analysis**

Mr. Falkner asks the court to reconsider its Order dismissing his Motion to Reduce Sentence for lack of jurisdiction, asserting the court has jurisdiction to consider his motion. He contends the court dismissed his earlier motion under § 3582(c)(1)(A) “mainly due to the fact that no written record of Mr. Falkner’s request was found.” Doc. 216 at 2. He asserts the court has jurisdiction to consider his Motion to Reduce Sentence, filed August 2020, because he discovered a copy of a written request for compassionate release dated November 10, 2020. Doc. 216-1 at 1.

The court dismissed Mr. Falkner’s Motion to Reduce Sentence (Doc. 190) because “he fail[ed] to assert any information about the contents of his request to the warden” that he asserts he submitted in April 2020. Doc. 215 at 4. The court couldn’t discern—after crediting all of Mr. Falkner’s assertions—whether there was a “reasonable degree of overlap” between his April 2020 request and the motion he filed with the court. *Id.* Mr. Falkner’s Motion to Reconsider attaches his “verifiable request” dated November 10, 2020, which the warden failed to respond to within 30 days. Doc. 216 at 3. He then argues that the court has jurisdiction over his August

2020 motion because of his November 2020 request to his warden. *Id.* But, Mr. Falkner fails to explain (1) why counsel’s due diligence could not have discovered that request before the court’s Order or (2) how this newly discovered evidence affects the court’s analysis concluding it lacked jurisdiction. *See* Doc. 216.

*First*, Mr. Falkner does not explain why he could not have discovered the compassionate release request with due diligence before the court entered its March 19, 2021 Order dismissing his motion. *See* Doc. 215. The court will consider new evidence only if the party could not have discovered it earlier with due diligence. *See Beasley*, 2021 WL 1377122, at \*1. Mr. Falkner asserts that two days before the court entered its order dismissing his motion, “counsel requested the government conduct another search of BOP’s Reduction-in-Sentence (RIS) database for any requests made by Mr. Falkner[,]” and on “March 29, 2021, the government provided an email request to the warden from Mr. Falkner and the warden’s response.” Doc. 216 at 2. Mr. Falkner filed a Reply (Doc. 211) on November 15, 2020—five days after his attached request to the warden. Doc. 216-1 at 1. Nothing in Mr. Falkner’s motion explains why counsel, with due diligence, could not have asked the government for his request sooner, or included this information in his Reply. The court need not consider this newly obtained evidence.

*Second*, and even considering this new evidence, Mr. Falkner fails to explain how the court can consider a compassionate release request submitted to his warden *after* he filed his motion in court seeking relief under § 3582(c)(1)(A) or why it alters the court’s previous analysis. Mr. Falkner asserts “(1) [he] made a verifiable request to the warden for compassionate release, and (2) more than 30 days lapsed before the warden responded[.]” Doc. 216 at 2–3. “Mr. Falkner believes the court has jurisdiction to make a ruling on his motion for reduction in sentence.” *Id.* at 3. He attaches a copy of his request to the warden, dated November 10, 2020

(Doc. 216-1 at 1), about three months *after* he filed his Motion to Reduce Sentence (Doc. 216 at 2).

“In this circuit . . . § 3582(c)(1)(A)’s exhaustion requirement is mandatory, rather than judicially waivable.” *United States v. Johnson*, \_\_\_ F. App’x \_\_\_, 2021 WL 1053706, at \*2 (10th Cir. 2021) (citing *United States v. Gieswein*, 832 F. App’x 576, 577–78 (10th Cir. 2021) (affirming dismissal of compassionate release motion because defendant “did not include COVID-19 as a reason for compassionate release” and thus “failed to meet the statute’s exhaustion requirements and his COVID-19 justification was properly dismissed”). The plain language of § 3582(c)(1)(A) provides that a “court may not modify a term of imprisonment once it has been imposed except . . . 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, whichever is earlier[.]” 18 U.S.C. § 3582(c)(1)(A) (emphasis added); *see also United States v. Carr*, \_\_\_ F. App’x \_\_\_, 2021 WL 1400705, at \*2 (10th Cir. Apr. 14, 2021) (A “prisoner now, *after* exhausting administrative remedies with the BOP, may initiate the sentencing modification process by filing a § 3582(c)(1)(A) motion in the first instance.” (emphasis added)) (citing *United States v. McGee*, 992 F.3d 1035, 2021 WL 1168980, at \*5 (10th Cir. 2021)). For the court to have jurisdiction over a § 3582(c)(1)(A) motion, defendant must have requested compassionate release from the warden *before* filing a motion with the court.

Mr. Falkner fails to explain how he met § 3582(c)(1)(A)’s exhaustion requirement before filing his motion with the court. *See* Doc. 216. He simply attaches a request which he submitted to the warden *after* he filed his Motion to Reduce Sentence (Doc. 190). His assertion that the court now has jurisdiction to consider his Motion to Reduce Sentence (Doc. 190), filed months

*before* his request with the warden, contravenes the statute's plain language. Mr. Falkner doesn't identify any controlling or persuasive authority that provides otherwise. Thus, Mr. Falkner's attached request (Doc. 216-1) does not alter the court's analysis that he failed to satisfy 18 U.S.C. § 3582(c)(1)(A)'s exhaustion requirement.

#### **IV. Conclusion**

Mr. Falkner moves the court to reconsider its dismissal of his motion for compassionate release. He fails to explain why counsel, with due diligence, could not have discovered the request to the warden before filing his Reply (Doc. 211). Mr. Falkner also does not explain how the court erred in its Order (Doc. 216) or why his attached request to the warden, dated November 10, 2020, alters the court's analysis. Thus, the court denies Mr. Falkner's Motion to Reconsider (Doc. 216).

**IT IS SO ORDERED.**

**Dated this 6th day of May, 2021, at Kansas City, Kansas.**

**s/ Daniel D. Crabtree**  
**Daniel D. Crabtree**  
**United States District Judge**