

United States Court of Appeals
For the Eighth Circuit

No. 19-2685

United States of America

Plaintiff - Appellee

v.

Antwoyn Terrell Spencer

Defendant - Appellant

No. 19-2691

United States of America

Plaintiff - Appellee

v.

Derrick Jerome Spencer

Defendant - Appellant

Appeal from United States District Court
for the District of Minnesota

Submitted: February 17, 2021
Case Re-Submitted: March 5, 2021
Filed: May 27, 2021

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

Brothers Antwoyn T. and Derrick J. Spencer moved pro se to reduce their sentences under the First Step Act of 2018. *See Pub. L. No. 115-391*, § 404, 132 Stat. 5194, 5222. The district court denied the motions, finding both of them ineligible. *United States v. Spencer*, 2019 WL 3369794, at *2 (D. Minn. July 26, 2019); *United States v. Spencer*, 2019 WL 3369792, at *2 (D. Minn. July 26, 2019). Having jurisdiction under 28 U.S.C. § 1291, this court reverses and remands.

I.

In September 2007, the Spencers were convicted of a conspiracy to distribute both crack and powder cocaine. *See 21 U.S.C. § 846*. The jury found each brother guilty of conspiring to distribute at least 5 kilograms of powder and at least 50 grams of crack. Their convictions then triggered penalties under § 841(b)(1)(A)(ii) (for powder cocaine) and (b)(1)(A)(iii) (for crack cocaine, or “cocaine base”). *See 21 U.S.C. § 841 (b)(1)(A)(iii)* (repealed Aug. 3, 2010). Though their conspiracy involved two controlled substances triggering different penalties, “participation in a single drug-trafficking conspiracy constitutes a single offense.” *See United States v. Taylor*, 982 F.3d 1295, 1300 (11th Cir. 2020), *citing Braverman v. United States*, 317 U.S. 49, 54 (1942). Antwoyn received 324 months. *United States v. Spencer*, 592 F.3d 866, 872, 882 (8th Cir. 2010) (affirming sentence). Derrick received 292 months, but his sentence was later reduced to 262 months. *Id.*; *Spencer*, 2019 WL 3369792, at *1 (noting that because Derrick had a prior drug conviction, he had a 20-year mandatory minimum sentence on the conspiracy charge).

They moved to reduce their sentences under § 404 of the First Step Act. The district court ruled them ineligible and denied relief. They appeal.

II.

This court considers the motions for First Step Act relief in two steps. *See United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019). “First, the court must decide whether the defendant is eligible for relief under § 404. Second, if the defendant is eligible, the court must decide, in its discretion, whether to grant a reduction.” *Id.* This court “review[s] de novo the applicability of the First Step Act to a defendant’s case, including whether a defendant is eligible for a sentence reduction.” *Id.* at 771.

The Fair Sentencing Act of 2010 reduced (future) sentencing disparities between crack-cocaine and powder-cocaine offenses. *Id.*, citing *Dorsey v. United States*, 567 U.S. 260, 269 (2012); **Fair Sentencing Act of 2010**, Pub. L. No. 111-220, 124 Stat. 2372. In 2018, the First Step Act made specific parts of the Fair Sentencing Act retroactive to offenses committed before August 3, 2010. *McDonald*, 944 F.3d at 771. Section 404(b) permits a district court to reduce the sentence for a “covered offense.” “[T]he term ‘covered offense’ means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act.” § 404(a).

The parties dispute the Spencers’ eligibility. The issue is whether a “covered offense” includes their multidrug conspiracy with the objects to distribute both crack and powder cocaine. *See Taylor*, 982 F.3d at 1300. The answer depends on whether the “statutory penalties” for that single “violation” include (1) the statutory penalties for both objects of the conspiracy or (2) the statutory penalties for only the object of the conspiracy that actually determines the minimum and maximum penalties for the violation. The government advocates the second approach, reasoning that the

Spencers are not eligible because the powder cocaine would trigger the same minimum and maximum penalties, regardless of the Fair Sentencing Act.

Section 404(a) of the First Step Act says that covered offenses are those whose penalties “were *modified* by section 2 or 3 of the Fair Sentencing Act.” (Emphasis added.) Before the Fair Sentencing Act, the Spencers’ crack-cocaine quantity—over 50 grams—triggered a 10-year minimum sentence. *See McDonald*, 944 F.3d at 771; *Taylor*, 982 F.3d at 1301. It now triggers a 5-year minimum sentence. *See* § 841(b)(1)(B)(iii); *McDonald*, 944 F.3d at 771. So the “statutory penalties for” one object of the Spencers’ multidrug conspiracy offense “were modified by” § 2 of the Fair Sentencing Act. *See Taylor*, 982 F.3d at 1301.

This is true even if the Spencers “ultimately would be subject to the same statutory sentencing range as a consequence of” the powder cocaine. *See id.* “[T]he ‘statutory penalties for’ a drug-trafficking offense include *all* the penalties triggered by every drug-quantity element of the offense, not just the highest tier of penalties triggered by any one drug-quantity element.” *Id.* at 1300.¹

¹This court requested briefing whether a live controversy exists in Antwoyn’s case. Because Antwoyn was convicted of more than one count in a multicount indictment, his case involves a sentencing package. *See United States v. Evans*, 314 F.3d 329, 332, 334 (8th Cir. 2002) (“Under the [Sentencing] Guidelines, a multi-count sentence is a package.” (internal quotation marks omitted)) (“Once the total punishment is determined, Part 5G directs the court to sentence multiple counts of conviction as an interdependent package, and to use consecutive as well as concurrent sentencing to construct a combined sentence equal to the total punishment.”). As discussed, a modification of the crack-cocaine object could permit a sentence reduction on the powder-cocaine object. *See First Step Act*, § 404(b) (permitting a court to “impose a reduced sentence” but not limiting this relief to defendants who were sentenced only for a covered offense). There is, thus, a live controversy in Antwoyn’s case. *See generally Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (ongoing incarceration confers Article III standing). *Cf. United States v. Mannie*, 971 F.3d 1145, 1153-54 (10th Cir. 2020) (no standing where defendant’s concurrent sentences were nonreducible, unlike Antwoyn’s sentence that was packaged).

The First Step Act does not require the Spencers to show that the Fair Sentencing Act reduced their penalties. *See id.* at 1301. *See also United States v. Winters*, 986 F.3d 942, 948 (5th Cir. 2021) (“In the case of a multi-object offense, the argument that eligibility requires that there be a change in the statutory range resulting from considering all objects of the conspiracy is adding language to what Congress stated in simple terms.”).

First, Congress used the term “modified”—not “reduced,” “lowered,” or “decreased.” § 404(a). This implements the Fair Sentencing Act, which did not reduce, lower, or decrease penalties for crack-cocaine offenses. *See McDonald*, 944 F.3d at 771. It increased the minimum crack-cocaine quantity for the penalty ranges. *Id.* (“Section 2 of the Fair Sentencing Act increased the quantity of cocaine base required to trigger mandatory minimum sentences. It raised the threshold for the 5-year minimum from 5 grams to 28 grams, and raised the threshold for the 10-year minimum from 50 grams to 280 grams.”), *citing Dorsey*, 567 U.S. at 269. “Modified” in § 404(a) requires only a change in the penalties for the crack-cocaine quantity.

Second, a related subsection, § 404(c), states limitations on the First Step Act’s application. Congress did not limit it to single-drug conspiracies involving crack cocaine, or to defendants whose penalties would decrease after the Fair Sentencing Act.

“[T]he First Step Act casts a wide net at the eligibility stage.” *Taylor*, 982 F.3d at 1300. The Spencers are eligible for resentencing under the First Step Act. *See Winters*, 986 F.3d at 949 (“Whether the interplay of statutory minima of the modified and other, unmodified statutes relevant to the conviction actually changes the sentencing range is relevant, but only at the later merits stage.”); *United States v. Gravatt*, 953 F.3d 258, 264 n.5 (4th Cir. 2020) (“[S]tatutory mandatory minimum terms remain in effect for certain drug offenses. Even if a defendant’s sentence involves a covered offense, the district court’s review of a defendant’s First Step Act

motion cannot avoid those statutory requirements.”). *See generally Taylor*, 982 F.3d at 1301; *Winters*, 986 F.3d at 950 (dual-object conspiracy to distribute both crack and powder cocaine is a covered offense)²; *Gravatt*, 953 F.3d at 264 (same); *United States v. Mitchell*, 832 Fed. Appx. 387, 390-91 (6th Cir. 2020) (Stranch, J., concurring) (signaling support for *Gravatt*’s approach); *United States v. Hudson*, 967 F.3d 605, 611 (7th Cir. 2020) (holding defendant convicted of crack offense and firearm offense eligible for First Step Act relief). *But see United States v. Lott*, 830 Fed. Appx. 365, 366 (2d Cir. 2020) (triple-object conspiracy not covered).

* * * * *

The judgments are reversed, and the cases remanded for further proceedings consistent with this opinion.

²To the extent *Winters* and *Gravatt* discuss a dual-object conspiracy as two separate offenses, this court disagrees. *See Winters*, 986 F.3d at 949 (“The ‘statutory penalties’ have to be considered modified when any statutory penalty for one of the offenses included in a count of conviction has been changed.”); *Gravatt*, 953 F.3d at 264 (“If Congress intended for the Act not to apply if a covered offense was combined with an offense that is not covered, it could have included that language.”). A dual-object conspiracy is a single offense. *Taylor*, 982 F.3d at 1300, *citing Braverman*, 317 U.S. at 54.

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

No: 19-2685

United States of America

Plaintiff - Appellee

v.

Antwoyn Terrell Spencer

Defendant - Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:07-cr-00174-JRT-1)

JUDGMENT

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

May 27, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Criminal No. 07-174(1) (JRT/JJG)

Plaintiff,

v.

**MEMORANDUM OPINION AND ORDER
DENYING MOTION FOR
COMPASSIONATE RELEASE**

ANTWOYN TERRELL SPENCER,

Defendant.

Jeffrey S. Paulsen, Andrew S. Dunne, James S. Alexander, and Michael L. Cheever, **UNITED STATES ATTORNEY'S OFFICE**, 300 South Fourth Street, Suite 600, Minneapolis, MN 55415, for plaintiff.

Antwoyn Terrell Spencer, BOP Reg. No. 14781-041, FCI Sandstone, P.O. Box 1000, Sandstone, MN 55072, *pro se*.

Defendant Antwoyn Terrell Spencer is currently serving a 324-month sentence for conspiracy to distribute cocaine and crack cocaine, attempted possession with intent to distribute cocaine, and money laundering. Spencer asks the Court to reduce his sentence and grant him compassionate release because of the ongoing COVID-19 pandemic. Because he did not first request the Bureau of Prisons ("BOP") to file a motion on his behalf, as required by 18 U.S.C. § 3582(c)(1)(A), the Court will deny Spencer's Motion for Compassionate Release without prejudice.

BACKGROUND

Spencer is currently incarcerated at the Federal Correctional Institution in Sandstone, Minnesota. *Inmate Locator*, Fed. Bureau of Prisons, <https://www.bop.gov/inmateloc> (last visited Sept. 25, 2020). In September 2007, Spencer was found guilty of conspiracy to distribute five kilograms or more of cocaine and fifty grams or more of crack cocaine, attempted possession with intent to distribute approximately eight kilograms of cocaine, and money laundering. (Jury Verdict at 1–3, Sept. 18, 2007, Docket No. 144.) On January 15, 2009, Spencer was sentenced to a 324-month term of imprisonment. (Sentencing J. at 2, Jan. 15, 2009, Docket No. 294.) Spencer's current projected release date is September 17, 2030. *Inmate Locator*.

On May 20, 2020, Spencer filed a Motion for Compassionate Release pursuant to 18 U.S.C. § 3582(c)(1)(A), arguing that he should be released because he is susceptible to suffering adverse consequences from COVID-19. (Mot. for Compassionate Release at 1, May 20, 2020, Docket No. 470.) Spencer claims to suffer from chronic allergies and that he has to breath in increased amounts of dust and mold while confined to his cell during the pandemic. (*Id.* at 1–2.) The United States opposes the Motion. (Mem. Opp., June 16, 2020, Docket No. 475.)

DISCUSSION

The First Step Act, passed in December 2018, amended the procedure for compassionate release. See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194,

5239 (2018). It allows defendants, in addition to the BOP, to move for compassionate release. *Id.* (codified at 18 U.S.C. § 3582(c)(1)(A)). However, a defendant may only bring such a motion “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). In short, the First Step Act allows a court to modify a term of imprisonment based on a defendant’s motion only when the defendant has first requested the BOP to bring a motion on the defendant’s behalf and such a request has either been rebuffed or lapses. *Id.*


Because Spencer has not demonstrated that he requested the BOP to bring a motion on his behalf before filing this Motion, the Court cannot consider the merits of his arguments at this time.¹ Accordingly, the Court will deny Spencer’s Motion for Compassionate Release without prejudice.

¹ Although the Court will not reach the merits of Spencer’s Motion, the Court will note that he likely faces a difficult path to demonstrate that a sentence reduction is warranted because of extraordinary and compelling reasons. Allergies are not among the conditions known to increase the risk of suffering severe illness from COVID-19. *See People with Certain Medical Conditions, Coronavirus Disease 2019 (COVID-19)*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Sept. 11, 2020); ~~see also U.S.S.G. § 1B1.13 cmt. n.1(A) (listing serious conditions that substantially diminish a defendant’s ability to provide self-care).~~

ORDER

Based on the foregoing and on all the files, records, and proceedings herein, Defendant's Motion for Compassionate Release [Docket No. 470] is **DENIED without prejudice.**

DATED: October 16, 2020
at Minneapolis, Minnesota.



JOHN R. TUNHEIM
Chief Judge
United States District Court

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

UNITED STATES OF AMERICA,

Criminal No. 07-174(1) (JRT/JJG)

Plaintiff,

v.

**MEMORANDUM OPINION AND ORDER
DENYING MOTION FOR
COMPASSIONATE RELEASE**

ANTWOYN TERRELL SPENCER,

Defendant.

Jeffrey S. Paulsen, **UNITED STATES ATTORNEY'S OFFICE**, 300 South Fourth Street, Suite 600, Minneapolis, MN 55415, for plaintiff.

Antwoyn Terrell Spencer, Reg. No. 14781-041, FPC Duluth, P.O. Box 1000, Duluth, MN 55814, pro se.

Defendant Antwoyn Terrell Spencer is serving a 324-month sentence after being found guilty of conspiracy to distribute cocaine and crack cocaine, attempted possession with intent to distribute cocaine, and money laundering. Spencer asks the Court to grant him compassionate release due to the COVID-19 pandemic. Because Spencer fails to demonstrate that extraordinary and compelling reasons warrant reduction of his sentence, and because such a reduction would not be consistent with the § 3553(a) sentencing factors and applicable policy statements, the Court will deny Spencer's Motion for Compassionate Release.

BACKGROUND

On September 18, 2007, Spencer was found guilty of conspiracy to distribute five kilograms or more of cocaine and fifty grams or more of crack cocaine, attempted possession with intent to distribute five kilograms or more of cocaine, and money laundering. (Jury Verdict at 1–3, Sept. 18, 2007, Docket No. 144.) On January 15, 2009, Spencer was sentenced to a 324-month term of imprisonment. (Sentencing J. at 2, Jan. 15, 2009, Docket No. 294.)

Spencer is currently incarcerated at the Federal Prison Camp in Duluth, Minnesota (“FPC Duluth”). *Inmate Locator*, Fed. Bureau of Prisons, <https://www.bop.gov/inmateloc> (last visited Mar. 3, 2021). His projected release date is September 17, 2030. *Id.*

Currently, FPC Duluth has no active COVID-19 cases among staff or inmates. *COVID-19 Coronavirus*, Fed. Bureau of Prisons, <https://www.bop.gov/coronavirus/> (last visited Mar. 3, 2021). There have been no COVID-19-related deaths at FPC Duluth during the pandemic. *Id.*

On May 20, 2020, Spencer filed a Motion for Compassionate Release, (1st Mot. Compassionate Release, May 20, 2020, Docket No. 470), which the Court denied without prejudice because Spencer had not yet requested the Bureau of Prisons (“BOP”) to file a motion on his behalf, as required by 18 U.S.C. § 3582(c)(1)(A), (Mem. Op. & Order, Oct. 16, 2020, Docket No. 479). Spencer asserts that he has now submitted such a request to

the BOP and thus asks the Court to consider again whether compassionate release is warranted.¹ (2nd Mot. Compassionate Release, Oct. 22, 2020, Docket No. 481.)²

DISCUSSION

The First Step Act, passed in December 2018, amended the procedure for compassionate release. See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5239 (codified at 18 U.S.C. § 3582(c)(1)(A)). The law now allows defendants, in addition to the BOP, to move for compassionate release after a defendant has fully exhausted all administrative rights to appeal a failure of the BOP to bring a motion on the defendant's

¹ The Court notes that, in addition to asking for compassionate release, Spencer's Motion also presents constitutional claims and claims sounding in tort. The Court will not consider these claims here, as they must be made in a properly filed *Bivens* complaint, see, e.g., *Farmer v. Brennan*, 511 U.S. 825, 830 (1994) (complaint alleging an Eighth Amendment violation), or a complaint brought pursuant to the Federal Tort Claims Act, see, e.g., *United States v. Muniz*, 374 U.S. 150, 164–65 (1963) (complaint alleging a breach of BOP's duty of care, as established under 18 U.S.C. § 4042).

Further, Spencer seems to request habeas relief in addition to compassionate release. However, neither will the Court consider whether habeas relief is warranted, as such relief must likewise be requested via a properly filed petition. See *generally Pro Se Guidebook for Writs of Habeas Corpus Under 28 U.S.C. § 2241*, U.S. Dist. Court for the Dist. of Minn. (October 2020), <https://www.mnd.uscourts.gov/sites/mnd/files/2241-PrisonerGuidebook.pdf>.

Spencer is free to assert these claims and request habeas relief, but he must properly file them via, respectively, a complaint or a petition, not a motion for compassionate release.

² The Court notes that, while the United States has not filed a brief opposing Spencer's second Motion, it did address the merits of Spencer's compassionate release claims for relief when opposing Spencer's first Motion, (Mem. Opp. at 4–6, June 16, 2020, Docket No. 475), claims which remain unchanged here.

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).

Spencer asserts that he requested the warden to bring a motion on his behalf, the warden either denied and/or failed to respond to the request, and that more than 30 days have passed.³ Once the relevant 30 days have lapsed, the Court may modify a defendant's sentence after considering the "factors set forth in section 3553(a)," 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." *Id.*

The Sentencing Commission notes that extraordinary and compelling reasons may exist when a defendant is suffering from a terminal illness or a serious physical or medical condition that substantially diminishes the defendant's ability to provide self-care, *see* U.S.S.G. § 1B1.13 cmt. n.1, but Spencer has no such illness or condition.⁴ Additionally, while "there can be no doubt that incarcerated individuals are at a higher risk for

³ Although Spencer has provided no evidence to demonstrate that he made such a request, the Court presumes that this is true given the potential penalties Spencer would face if this assertion, attested to under penalty of perjury, were untrue. *See* 18 U.S.C. § 1621(2); 28 U.S.C. § 1746.

⁴ Spencer previously asserted that he suffers from allergies. However, allergies are not a terminal illness or a serious condition substantially diminishing one's ability to provide self-care. Nor are they among the conditions known to increase the risk of suffering severe illness from COVID-19. *See People with Certain Medical Conditions*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Feb. 22, 2021).

contracting COVID-19 . . . because of the realities of life in congregate-living facilities such as prisons,” *United States v. Trice*, No. 12-96, 2020 U.S. Dist. LEXIS 141608, at *4 (D. Minn. Aug. 7, 2020), at this time FPC Duluth has no reported active COVID-19 cases and has had no associated deaths. As such, the Court finds that there are no extraordinary or compelling reasons warranting a reduction of Spencer’s sentence.

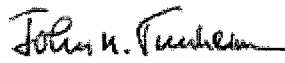
Furthermore, the Court finds that a reduction of Spencer’s sentence would not comport with the factors set forth in § 3553(a) and the applicable policy statements, which ask the Court to consider, as relevant here, the nature of the offense, whether release would pose a danger to the safety of any person or the community, the length of the sentence and the amount of time served, and whether release would minimize the severity of the offense. *See* 18 U.S.C. § 3553(a); U.S.S.G. § 1B1.13. First, as Spencer still has roughly 180 months left to serve, reducing his term of imprisonment or granting him home confinement in lieu of imprisonment would create sentence disparities and minimize the seriousness of the crimes. Additionally, given the scope of his drug distribution operation and the harmful impacts that this operation had on communities, so modifying Spencer’s sentence would also pose a danger to others and the community.

In sum, extraordinary and compelling reasons do not warrant a reduction of Spencer’s sentence. Nor would such a reduction be consistent with the relevant sentencing factors and policy statements. Thus, the Court will deny Spencer’s Motion.

ORDER

Based on the foregoing and on all the files, records, and proceedings herein,
Defendant's Motion for Compassionate Release [Docket No. 481] is **DENIED**.

DATED: March 5, 2021
at Minneapolis, Minnesota.



JOHN R. TUNHEIM
Chief Judge
United States District Court