Appendix

APPENDIX

A-1

997 F.3d 1142
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Carlton **POTTS**, a.k.a. Pep, Defendant-Appellant.

No. 19-12061
|
(May 19, 2021)

Synopsis

Background: Defendant filed motion for sentence reduction pursuant to First Step Act. The United States District Court for the Southern District of Florida, No. 9:06-cr-80070-DMM-2, Donald M. Middlebrooks, J., denied motion, and defendant appealed.

The Court of Appeals, Hull, Circuit Judge, held that district court did not abuse its discretion in denying defendant's motion to reduce his supervised release terms.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

***1143** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:06-cr-80070-DMM-2

Attorneys and Law Firms

Andrea G. Hoffman, Lisa Tobin Rubio, U.S. Attorney Service-Southern District of Florida, U.S. Attorney Service-SFL, H. Ron Davidson, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.

Brenda Greenberg Bryn, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL, Tracy Michele Dreispul, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before LAGOA, HULL and MARCUS, Circuit Judges.

Opinion

HULL, Circuit Judge:

Carlton Potts appeals the district court's denial of his motion for a sentence reduction pursuant to § 404(b) of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194. After a careful review of the record and with the benefit of oral argument, we affirm.

I. BACKGROUND

A. Initial Sentencing

In 2006, Potts entered guilty pleas in two consolidated criminal cases pursuant to a written plea agreement. In Case No. 06-cr-80070, Potts pled guilty to conspiracy to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii) and 846.

In Case No. 06-cr-80081, Potts pled guilty to drug and firearm offenses: (1) conspiracy to manufacture, possess with intent to distribute, and distribute at least 50 grams of crack cocaine and at least 5 kilograms of powder cocaine, in violation of §§ 841(a)(1), (b)(1)(A)(iii) and 846; and (2) being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g) and 924(e).

At sentencing, the district court calculated Potts' advisory guidelines range of 360 months to life for his two drug convictions. The district court granted Potts a U.S.S.G. § 5K1.1 downward departure for substantial assistance and imposed concurrent 240-month sentences on each drug case, followed by concurrent supervised release terms of 10 years in Case No. 06-cr-80070 and 5 years in Case No. 06-cr-80081. For his § 922(g) firearm conviction in Case No. 06-cr-80081, Potts received a third concurrent 240-month prison sentence and a concurrent 5-year term of supervised release.

B. First Step Act Motion

In March 2019, Potts filed a pro se "Motion for Appointment of Counsel and Motion for Reduction of Sentence" under the First Step Act.[1] Potts' motion argued he was eligible for a sentence reduction ***1144** under the First Step Act and should receive one.

1 Potts' motion for a sentence reduction also cited 18 U.S.C. § 3582(c). However, this Court has now

held that a motion brought under the First Step Act need not be paired with a request for relief under § 3582(c)(1)(B) because the First Step Act is self-contained and self-executing. See United States v. Edwards, 997 F.3d 1115, 1117–18 (11th Cir. May 13, 2021).

At the district court's direction, the government and the probation officer filed responses to Potts' First Step Act motion for a sentence reduction. The government opposed Potts' motion, arguing that: (1) Potts was ineligible for a First Step Act reduction because he was not convicted of a "covered offense"; and (2) in any event, even if he was eligible, such relief was not warranted based on the 18 U.S.C. § 3553(a) factors and the facts and circumstances of Potts' case. The government addressed certain § 3553(a) factors and why a reduction was not warranted. In particular, the government emphasized Potts' extensive criminal history and the seriousness of his offenses.

The probation officer, however, filed a memorandum that determined that Potts was eligible for relief under the First Step Act. As a result, the memorandum calculated a new advisory guidelines range of 292 to 356 months after Amendment 782 to the Sentencing Guidelines. The probation officer also advised the district court what Potts' new mandatory minimum and maximum penalties would be with retroactive application of the Fair Sentencing Act. In particular, the probation officer's memorandum advised that Potts' minimum supervised release term on his drug conviction in Case No. 06-cr-80070 was reduced from 10 years to 8 years under the Fair Sentencing Act. As to Case No. 06-cr-80081, the probation officer's memorandum stated that his minimum supervised release term on his drug conviction was 5 years and the minimum supervised release term on his firearm conviction remained at 5 years.

In a May 7, 2019 order, the district court denied Potts' First Step Act motion, "[a]fter consideration of the government and probation's responses." The court concluded that: (1) Potts was ineligible because he was not sentenced for a "covered offense" within the meaning of the First Step Act; and alternatively (2) "even if legally eligible for a sentence reduction pursuant to the First Step Act, the factors set forth in 18 U.S.C. § 3553(a) indicate that a sentence reduction is unwarranted under the facts and circumstances of this case." Potts filed this appeal, and this Court appointed him counsel.

C. Compassionate Release to Time Served

On September 14, 2020, while Potts' appeal was pending, the district court granted Potts' motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). After analyzing the § 3553(a) factors, the district court concluded that there were compelling reasons to grant relief. Potts' serious medical conditions rendered him uniquely vulnerable to COVID-19 and that outweighed his extensive criminal history. The district court reduced Potts' prison term to time served on his two drug convictions and his firearm conviction and ordered him released immediately.

As a special condition of compassionate release, the district court imposed an additional 37-month supervised release term—the unserved portion of his original prison sentence—to be served on "home confinement" before serving his original, concurrent supervised release terms of 10 years and 5 years.

II. DISCUSSION

After supplemental briefing, the parties agree that Potts' compassionate release renders his appeal moot as to his prison terms but not as to his undischarged supervised release terms. The parties also agree that, in light of this Court's decision in United States v. Jones, 962 F.3d 1290 (11th Cir. 2020), Potts' crack cocaine offenses ***1145** qualify as "covered offenses" under the First Step Act, making him eligible for a reduction of his supervised release terms on his two drug convictions. However, the First Step Act did not change his 5-year concurrent supervised release term on his firearm conviction. So, no matter the drug convictions, Potts still has a 5-year supervised release term on his firearm conviction.

Thus, the issue on appeal is whether the district court abused its discretion in declining to reduce Potts' (1) 10-year supervised release term on his drug conviction in Case No. 06-cr-80070, and (2) his 5-year supervised release term on his drug conviction in Case No. 06-cr-80081.[2] As to Case No. 06-cr-80081, as noted above, Potts has a 5-year supervised release term for his firearm conviction in the same case. Thus, the more important supervised release term for Potts is his existing 10-year supervised release term on his separate drug conviction in Case No. 06-cr-80070.

2 We review for abuse of discretion a district court's denial of an eligible movant's First Step Act motion and "must affirm unless the district court made a

clear error of judgment or applied the wrong legal standard." United States v. Denson, 963 F.3d 1080, 1086 n.4 (11th Cir. 2020).

Although the district court was authorized to reduce Potts' prison terms and his supervised release terms, it was not required to do so. See United States v. Denson, 963 F.3d 1080, 1084 (11th Cir. 2020); Jones, 962 F.3d at 1304. Indeed, the district court has "wide latitude to determine whether and how to exercise [its] discretion in [the First Step Act] context." Id. In its alternative ruling, the district court concluded that a reduction under the First Step Act was unwarranted in light of "the factors set forth in 18 U.S.C. § 3553(a)" and "under the facts and circumstances of this case." It is undisputed that Potts had an extensive criminal history and qualified as both a career offender and an armed career criminal under the Sentencing Guidelines. Under the circumstances, we cannot say the district court's refusal to reduce Potts' supervised release terms was an abuse of its discretion.

Potts argues we must remand because we cannot discern from the district court's alternative ruling which § 3553(a) factors it considered, making it incapable of meaningful appellate review. At the outset, this Court recently held that "the First Step Act does not mandate consideration of the statutory sentencing factors set forth in § 3553(a)" United States v. Stevens, — F.3d ——, ——, No. 19-12858, slip op. at 15, 2021 WL 1997011 (11th Cir. May 19, 2021) (explaining that to hold otherwise "would impermissibly hamper and cabin [the] wide discretion that Congress expressly afforded district courts"). Thus, a district court may, but is not required to, consider the § 3553(a) factors in deciding whether to exercise its discretion and reduce a sentence under the First Step Act. See id.; Jones, 962 F.3d at 1304.

That said, the district court's decision whether to reduce a defendant's sentence under the First Step Act "must adequately explain its sentencing decision to allow for meaningful appellate review." Stevens, — F.3d at ——, No. 19-12858, slip op. at 16. As with an initial sentencing, the district court should set forth enough to demonstrate it "considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." Id. at ——, No. 19-12858, slip op. at 16 (alteration in original) (citing Rita v. United States, 551 U.S. 338, 356, 127 S. Ct. 2456, 2468, 168 L.Ed.2d 203 (2007), and ***1146** Gall v. United States, 552 U.S. 38, 50, 128 S. Ct. 586, 597, 169 L.Ed.2d 445 (2007)); see also United States v. Russell, 994 F.3d 1230, 1239 (11th Cir. 2021). How much explanation is required "depends ... upon the circumstances of the particular case." Chavez-Meza v. United States, 585 U.S. ——, 138 S. Ct. 1959, 1965, 201 L.Ed.2d 359 (2018); see also Stevens, — F.3d at ——, No. 19-12858, slip op. at 16 (acknowledging that the explanation "need not necessarily be lengthy" so long as it makes clear the district court's reasoned basis for its decision). "In some cases, it may be sufficient for purposes of appellate review that the judge simply relied upon the record, while making clear that he or she has considered the parties' arguments and taken account of the § 3553(a) factors, among others." Chavez-Meza, 585 U.S. at ——, 138 S. Ct. at 1965; see also United States v. Eggersdorf, 126 F.3d 1318, 1322-23 (11th Cir. 1997) (finding district court's explanation for denying a § 3582(c)(2) reduction sufficient where it stated it had reviewed the government's brief in opposition that set out and addressed the pertinent § 3553(a) factors).

Here, the district court stated it had reviewed the government's response, which set out and addressed the § 3553(a) factors, and the probation officer's memorandum. And, as noted above, as to Potts' drug conviction in Case No. 06-cr-80070, the probation officer's memorandum not only indicated Potts was eligible for a sentence reduction but also set forth the fact that his minimum supervised release term was reduced from 10 years to 8 years. As to Case No. 06-cr-80081, Potts had a 5-year supervised release term on his firearm conviction, no matter the supervised release term on his drug conviction in that case.[3] The district court stated that, after reviewing the government's response and the probation officer's memorandum, it had determined the § 3553(a) factors indicated that a reduction was not warranted under the facts and circumstances of Potts' case. The district court's explanation, while brief, was sufficient, and a remand for a more complete explanation is unnecessary. And, the district court's decision not to reduce Potts' supervised release terms under the First Step Act was not an abuse of discretion.

3 While Potts' counsel does not raise this issue, the probation officer's memorandum said the new supervised release term on the drug conviction in Case No. 06-cr-80081 was 5 years when it was 4 years. That seems to be a typo. But, we conclude any error in the probation officer's memorandum was harmless, as Potts had 5 years of supervised release on his firearm conviction anyway.

Finally, we note this case is materially different from our recent decision in Russell for several reasons. First, the defendant in Russell merely wrote a letter asking the district court to appoint counsel to assist him in filing a First Step

Act motion. Russell, 994 F.3d at 1234. The district court sua sponte converted his request into a motion for a sentence reduction although the defendant did not request a sentence reduction in his letter. Id. at 1240 & n.9. In contrast, Potts filed a combined motion for appointment of counsel and for a sentence reduction in which he argued that he was both eligible for and deserved a sentence reduction under the First Step Act.

Second, in Russell the district court ordered the probation officer to file a response, but that response was never made part of the record. Id. at 1235 n.3. Here, unlike in Russell, the district court's order expressly referenced the probation officer's memorandum, which advised that Potts was eligible for a sentence reduction. Further, the government's response alternatively assumed Potts was eligible and addressed whether the district court should exercise its discretion and reduce ***1147** Potts' sentences. In doing so, the government reviewed the facts and circumstances of Potts' case, addressed the § 3553(a) factors, and stressed his extensive criminal history and the seriousness of his offenses.

Third, and perhaps most importantly, the record in Potts' case is not ambiguous as to the district court's alternative ruling denying Potts a sentence reduction as a matter of discretion. In its alternative ruling, the district court stated that "even if [Potts was] legally eligible,"—meaning the court accepted for purposes of its alternative ruling that it had the authority to grant Potts' motion—it would not reduce Potts' sentence as a matter of discretion in light of the § 3553(a) factors and the facts and circumstances of Potts' case. The district court did not include any "ambiguous" language like that found in the district court's reconsideration order in Russell. See id. at 1239. Rather, here we are fully able to discern the district court's two alternative bases for denying Potts' motion for a sentence reduction.

In short, we find the district court's brief explanation for that alternative ruling adequate for meaningful appellate review, and a remand is not required here. [4]

4 For completeness and clarity, we point out that the district court in Stevens said only "[e]ven if the First Step Act applied, the Court would still impose a sentence of five (5) years of supervised release." Stevens, —— F.3d at ——, 19-12858, slip op. at 6 (quotation marks omitted, alteration in original). Here though, the district court said more, as outlined above, and we are able to conduct meaningful appellate review under the facts and circumstance of this case.

The government argues that a remand is not required because we can look to the district court's compassionate release order to conclude that it would be futile to remand, as the district court reaffirmed the same terms of supervised release in that order. In effect, the government says remand is unnecessary because any alleged error was harmless. We need not address this argument given our holding above. Further, we note that Potts is not only now released but also has a mandatory 5-year concurrent term of supervised release on his firearm conviction that is not impacted by the First Step Act.

AFFIRMED.

All Citations

997 F.3d 1142, 28 Fla. L. Weekly Fed. C 2927

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A-2

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

UNITED STATES OF AMERICA,

Plaintiff,

-vs- Case No. 9:06-cr-80070-DMM

CARLTON POTTS,

Defendant.

MOTION FOR APPOINTMENT OF COUNSEL
AND MOTION FOR REDUCTION OF SENTENCE
PURSUANT TO 18 U.S.C. § 3582(c)(2)

COMES NOW, the defendant, Carlton Potts, as pro se, hereby moves the court for appointment of counsel, and for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2), and the First Step Act of 2018. The purpose of the motion is to detemrine whether the defendant is eligible for relief under the First Step Act. He believes that relief based on the fact that the First Step Act make the reforms enacted by the Fair Sentencing Act of 2010 retroactive. Under the Act, "[a] court that imposed a sentence for a covered offense may, on motion of...the court, impose a reduced sentence as if sections 2 and 3 of the First Step Act were in effect at the time the covered offense was committed." First Step Act § 404(b). Had the First Step Act been in effect at the time he committed his offense the drug quantity necessary under the Fair Sentencing Act was increased to trigger the mandatory minimum making him eligible for a reduced sentence.

WHEREFORE, for the above and foregoing reasons the court should grant the requested relief for reasons consistent with the above.

Respectfully submitted this 6 day of March, 2019.

Carlton Potts

Carlton Potts, Pro Se
FMC Rochester
PMB 4000
Rochester, Minnesota, 55903

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

-vs- Case No. 9:06-cr-80070-DMM

CARLTON POTTS,

Defendant.

MOTION FOR APPOINTMENT OF COUNSEL

AND MOTION FOR REDUCTION OF SENTENCE

PURSUANT TO 18 U.S.C. § 3582(c)(2)

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Respectfully submitted thi

Carlton Potts

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33401-511352

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-80070-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

v.

CARLTON POTTS,

Defendant.
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT CARLTON POTTS' MOTION FOR REDUCTION OF SENTENCE PURSUANT TO THE FIRST STEP ACT

Defendant Carlton Potts ("Potts") has filed a motion seeking to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2)[1] and Section 404 of the First Step Act of 2018 (D.E. 1266).[2] Potts argues that he is eligible for a sentence reduction because the First Step Act's retroactive application of the Fair Sentencing Act of 2010 would increase the drug quantity necessary to trigger the mandatory minimum in his case, thereby making him eligible for a reduced sentence (D.E. 1266 at 1).

Potts, however, is legally ineligible for the sentence reduction that he has requested. Section 404 of the First Step Act, which permits a sentence reduction if a retroactive application of the Fair Sentencing Act lowers the statutory penalties for a criminal violation, is inapplicable to Potts' case because Potts' offense involved more than 1.5 kilograms of crack cocaine, and Potts thus remains subject to the same statutory penalties under the Fair Sentencing Act.

[1] Although Potts has invoked 18 U.S.C. § 3582(c)(2) in his motion, that provision is inapplicable to a request for a First Step Act sentence reduction. Presumably, Potts' sentence reduction request is instead made pursuant to § 3582(c)(1)(B), which provides that a court "may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute."

[2] Unless otherwise specified, the citations to docket entries in this response shall be to the docket in Case No. 06-80070-Cr-Middlebrooks.

Moreover, even if Potts were legally eligible for a sentence reduction pursuant to the First Step Act, a reduction of Potts' sentence is unwarranted based on the facts of this case. Accordingly, Potts' motion should be denied.

I. Procedural and Factual Background

Defendant Carlton Potts was charged in two separate criminal cases (Case No. 06-80070-Cr-Middlebrooks and Case No. 06-80081-Cr-Hurley) that were consolidated before Judge Middlebrooks, with respect to Potts, for Potts' change of plea and sentencing (*see* D.E. 994, 1153; D.E. 360, Case No. 06-80081-Cr-Hurley (transferring defendant Carlton Potts to the calendar of Judge Middlebrooks)).

A. *The Offenses of Conviction*

On November 8, 2006, Potts entered guilty pleas pursuant to a plea agreement with the government to Count 1 of the third superseding indictment in Case No. 06-80070-Cr-Middlebrooks and Counts 1 and 25 of the third superseding indictment in Case No. 06-80081-Cr-Hurley (D.E. 718 & 994). Count 1 in Case No. 06-80070-Cr-Middlebrooks charged Potts with conspiracy to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846; Count 1 in Case No. 06-80081-Cr-Hurley charged Potts with conspiracy to manufacture, possess with intent to distribute, and distribute at least 50 grams of crack cocaine and at least 5 kilograms of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846; and Count 25 in Case No. 06-80081-Cr-Hurley charged Potts with being a felon in possession of a firearm (a .40 caliber Glock semi-automatic pistol and eight rounds of .40 caliber ammunition), in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (D.E. 596; D.E. 256, Case No. 06-80081-Cr-Hurley).

B. *Potts' Sentence*

1. *Potts' Pre-Sentence Investigation Report ("PSI")*

Potts' base offense level was set at 38 pursuant to USSG §§ 2D1.1(a)(3) and 2D1.1(c)(1) (2006) because Potts' offenses involved 1.5 kilograms or more of crack cocaine (PSI ¶¶ 77-78).[3] Because Potts possessed a dangerous weapon, his offense level was increased by two in accordance with USSG § 2D1.1(b)(1) (PSI ¶ 79). Pursuant to USSG § 3B1.1(a), Potts' offense level was also increased by four because he was an organizer/leader of criminal activity that involved five or more participants or was otherwise extensive (PSI ¶ 81). These guideline calculations yielded an adjusted offense level subtotal of 44 (PSI ¶ 83). Potts was also classified both as a career offender pursuant to USSG § 4B1.1(a) because he had at least two prior felony convictions for controlled substance offenses (PSI ¶ 84) and as an armed career criminal pursuant to USSG § 4B1.4(a) because he was subject to an enhanced sentence under 18 U.S.C. § 924(e) (PSI ¶ 85). However, because Potts' adjusted offense level was already greater than the offense levels indicated in USSG § 4B1.1(b) for career offenders and in USSG § 4B1.4(b) for

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[3] In actuality, *each* of Potts' two separate drug distribution conspiracy offenses involved more than 1.5 kilograms of crack cocaine (PSI ¶ 37 ("more than 1.5 kilograms of cocaine base" in Case No. 06-80070-Cr-Middlebrooks); PSI ¶ 58 ("more than 1.5 kilograms of cocaine base" in Case No. 06-80081-Cr-Hurley)). In addition, although the PSI did not calculate the additional amount of powder cocaine involved in Potts' offenses—such a calculation being unnecessary at the time because a quantity of "1.5 KG or more of Cocaine Base," by itself, already placed Potts at the highest offense level found in USSG § 2D1.1(c)'s drug quantity table—Potts' own sworn testimony at the trial of his co-defendants established that his offenses also involved more than 200 kilograms of cocaine (*see* D.E. 890 at 952 (admitting that he sold "[p]robably anywhere from four to five" kilograms of powder cocaine per week to various customers); D.E. 891 at 984-85 (discussing sales of powder cocaine over course of a year to co-defendant Hunt and others); *see also, e.g.*, PSI ¶¶ 36, 58-60, 65-66, 68-70, 72 (addressing Potts' involvement in drug conspiracies spanning from June 2005 to May 2006 that involved purchases of approximately 5 kilograms of powder cocaine per week and sales of powder cocaine that included weekly sales of 1½ to 2 kilograms of powder cocaine to co-defendant Hunt and additional powder cocaine sales to various others). That amount of cocaine (*i.e.*, "150 KG or more of Cocaine") also independently qualified Potts for a base offense level of 38. USSG § 2D1.1(c)(1) (2006).

armed career criminals,[4] Potts' offense level remained at 44 (PSI ¶¶ 84-85). Potts' offense level was then reduced by three pursuant to USSG § 3E1.1 as a result of Potts' timely acceptance of responsibility (PSI ¶¶ 85-86). Accordingly, Potts' total offense level was 41 (PSI ¶ 87; D.E. 1153 at 3).

Potts was then placed in criminal history category VI because he was a career offender, for which USSG § 4B1.1(b) automatically placed him in criminal history category VI, and because he was an armed career criminal, for which USSG § 4B1.4(b) also placed him in criminal history category VI (PSI ¶ 119). With a criminal history category of VI and an offense level of 41, Potts faced a sentencing guideline range of 360 months to life imprisonment (PSI ¶ 174).[5] USSG Ch. 5, Pt. A (sentencing table). Potts also faced a mandatory 20-year minimum term of imprisonment on Count 1 in Case No. 06-80070-Cr-Middlebrooks pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851; a mandatory 10-year minimum term of imprisonment on Count 1 in Case No. 06-80080-Cr-Hurley pursuant to 21 U.S.C. § 841(b)(1)(A); and a mandatory 15-year minimum term of imprisonment on Count 25 in Case No. 06-80080-Cr-Hurley pursuant to 18 U.S.C. § 924(e)(1) (PSI ¶ 173).

2. *The Government's § 5K1.1 Motions*

Prior to Potts' sentencing hearing, the government filed a motion pursuant to USSG § 5K1.1 in each of Potts' two criminal cases (D.E. 821; D.E. 404, Case No. 06-80081-Cr-Hurley). Each of those motions stated: "Based on [Potts'] substantial assistance, the government

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[4] Based on Potts' career offender status and an offense statutory maximum of life (*see* PSI ¶ 173), USSG § 4B1.1(b)(1) would otherwise have assigned Potts a base offense level of 37. *See also* USSG § 4B1.4(c)(1).

[5] Potts would have faced the very same sentencing guideline range of 360-to-life based on his criminal history category of VI and an offense level of 41 even if the § 2D1.1-based computations had not taken crack cocaine into consideration and had only been based on the powder cocaine involved in Potts' offenses. *See* USSG Ch. 5, Pt. A (sentencing table); *supra* note 3.

files this motion to allow the Court to depart from the guideline range." The government never filed any motion pursuant to 18 U.S.C. § 3553(e) authorizing the imposition of a sentence below the applicable mandatory minimum statutory sentence.

3. *Potts' Sentencing*

At sentencing, the court heard argument on the government's motion pursuant to USSG § 5K1.1 and thereafter granted Potts a § 5K1.1 departure from the applicable 360-to-life advisory guideline range (D.E. 1153 at 4-14). The court then sentenced Potts to 240 months of imprisonment on all counts, to be served concurrently; 10 years of supervised release on Count 1 in Case No. 06-80070-Cr-Middlebrooks and 5 years of supervised release on Counts 1 and 25 in Case No. 06-80081-Cr-Hurley, to be served concurrently; and a special assessment of $300 (*id.* at 14-15; D.E. 833; D.E. 406, Case No. 06-80081-Cr-Hurley).

C. *Potts' Previous § 3582(c)(2) Motions to Reduce His Sentence*

On March 19, 2012, Potts filed a motion pursuant to 18 U.S.C. § 3582(c)(2) in which he sought to reduce his sentence based on the retroactive application of Sentencing Guidelines Amendment 750 (D.E. 1152; D.E. 703, Case No. 06-80081-Cr-Hurley). On May 11, 2012, the court denied that § 3582(c)(2) motion (D.E. 1154; D.E. 716, Case No. 06-80081-Cr-Hurley). Potts did not appeal that order.

On March 23, 2015, Potts filed a second § 3582(c)(2) motion in which he sought to reduce his sentence based on the retroactive application of Sentencing Guidelines Amendments 750 and 780 (D.E. 1207). On May 11, 2015, the court denied that § 3582(c)(2) motion (D.E. 1214). Potts appealed (D.E. 1216), and, on March 8, 2016, the Eleventh Circuit affirmed the denial of § 3582(c)(2) relief (D.E. 1230).

II. Potts' Present Request for a Sentence Reduction Pursuant to the First Step Act

Section 404 of the First Step Act of 2018 makes retroactive those provisions of the Fair Sentencing Act of 2010 that raised the threshold drug quantities used to trigger increased statutory penalties for certain offenses involving cocaine base (crack cocaine). More specifically, Section 404 provides that a district court "that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222. For purposes of Section 404, a "covered offense" is "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . ., that was committed before August 3, 2010." *Id.* § 404(b). Sections 2 and 3 of the Fair Sentencing Act, in turn, only modified statutory penalties for crack cocaine offenses.[6] Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2-3, 124 Stat. 2372. Section 404 of the First Step Act additionally provides that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section. First Step Act, § 404(c), 132 Stat. at 5222.

A. *Potts' Ineligibility for a Sentence Reduction Pursuant to the First Step Act*

As a threshold matter, Potts' offenses do not constitute "covered offenses" within the meaning of Section 404 the First Step Act. Had sections 2 and 3 of the Fair Sentencing Act been in effect at the time of Potts' sentencing, they would have had no impact on his sentence.

Two of Potts' offenses (his Count 1 and Count 25 offenses in Case No. 06-80081-Cr-

[6] Section 2 of the Fair Sentencing Act increased the threshold amount of cocaine base in 21 U.S.C. §§ 841(b)(1)(A)(iii) and 960(b)(1)(C) from 50 grams to 280 grams and increased the threshold amount of cocaine base in 21 U.S.C. §§ 841(b)(1)(B)(iii) and 960(b)(2)(C) from 5 grams to 28 grams. Section 3 of the Fair Sentencing Act did away with the mandatory minimum sentence for possession of cocaine base in 21 U.S.C. § 844(a).

Hurley) are indisputably not "covered offenses" because the statutory penalties for crack cocaine did not determine the statutory penalties for those offenses. Potts' Count 25 offense involved his being a felon in possession of a firearm (a .40 caliber Glock semi-automatic pistol and eight rounds of .40 caliber ammunition), and the statutory penalties for that violation of 18 U.S.C. § 922(g) were determined by 18 U.S.C. § 924(e) and were in no way modified or impacted by section 2 or 3 of the Fair Sentencing Act of 2010. Potts' Count 1 conspiracy offense in Case No. 06-80081-Cr-Hurley is similarly not a "covered offense" within the meaning of the First Step Act. Although that drug trafficking offense did involve crack cocaine, Potts' violation of 21 U.S.C. §§ 841(a)(1) and 846 also involved more than 5 kilograms of cocaine, and, as a result, the statutory penalties for that offense—which were duplicatively set by 21 U.S.C. § 841(b)(1)(A)(ii) (for cocaine) and by 21 U.S.C. § 841(b)(1)(A)(iii) (for cocaine base)—were not modified by section 2 or 3 of the Fair Sentencing Act of 2010.[7]

Potts' third offense (his Count 1 offense in Case No. 06-80070-Cr-Middlebrooks) is also not a "covered offense" within the meaning of the First Step Act. Had sections 2 and 3 of the Fair Sentencing Act been in effect at the time of Potts' sentencing, they would have had no impact on Potts' sentence because, as established at sentencing, his violation of 21 U.S.C. §§ 841(a)(1) and 846 in Count 1 of Case No. 06-80070-Cr-Middlebrooks involved "more than 1.5 kilograms of cocaine base" (PSI ¶¶ 36, 78). Potts has never contested that fact (*see* PSI, Addendum; D.E. 1153 at 2-3, 15). On the contrary, Potts testified under oath at the trial of his

[7] Although the Fair Sentencing Act modified the penalties for some violations that previously fell under 21 U.S.C. § 841(b)(1)(A)(iii) (cocaine base) by raising the applicable drug quantity threshold, it did not modify the penalties for violations falling under 21 U.S.C. § 841(b)(1)(A)(ii) (cocaine). Thus, notwithstanding any arguable impact that the Fair Sentencing Act may have with respect to violations falling under 21 U.S.C. § 841(b)(1)(A)(iii), the statutory penalties that § 841(b)(1)(A)(ii) set for Potts for Count 1 of Case No. 06-80081-Cr-Hurley remain unchanged.

co-defendants that his drug trafficking violation in Case No. 06-80070-Cr-Middlebrooks involved far more crack cocaine than 1.5 kilograms. Indeed, according to Potts, in addition to initially selling crack cocaine to co-defendant/co-conspirator Winfred Lorenzo Hunt in 9-ounce (*i.e.*, about a quarter kilogram) and 18-ounce (*i.e.*, about a half kilogram) quantities, he also supplied Hunt on a frequent basis with powder cocaine, which Hunt mostly cooked into crack cocaine, at a rate of approximately 1 to 2 kilograms of cocaine per week during 2005 and from January through May of 2006 (DE:890 at 938-41, 945, 959, 963; D.E. 891 at 984; *see* PSI ¶ 36; *see also* PSI ¶¶ 12, 35). Because Potts' violation of 21 U.S.C. §§ 841(a)(1) and 846 involved more than 1.5 kilograms of crack cocaine, the penalties applicable to his drug trafficking violation were not modified by section 2 or 3 of the Fair Sentencing Act. While the Fair Sentencing Act raised the threshold quantity of crack cocaine needed to trigger the penalties set by 21 U.S.C. § 841(b)(1)(A)(iii) to "280 grams or more," the "more than 1.5 kilograms" quantity of crack cocaine involved in Potts' drug trafficking violation far exceeded that 280-gram threshold quantity. *See United States v. Glover*, __ F. Supp. 3d __, 2109 WL 1562833, *10, *13 (S.D. Fla. Apr. 11, 2019) (determining effect of retroactive application of Fair Sentencing Act for First Step Act purposes using drug quantity established at sentencing); *but see* Order at 6-8, D.E. 94, *United States v. Allen*, Case No. 95-6008-Cr-Ungaro (S.D. Fla. Apr. 15, 2019).[8]

[8] The government recognizes that the determination of drug quantity in this case was established by the unobjected-to facts of Potts' PSI and by Potts' own sworn testimony. However, that fact does not violate either *Apprendi v. New Jersey,* 530 U.S. 466 (2000), which barred increase of a statutory-maximum sentence based on facts found by a judge alone, or *Alleyne v. United States*, 570 U.S. 99 (2013), stating the same prohibition regarding imposition of an increased statutory mandatory-minimum penalty. The *Apprendi/Alleyne* doctrine does not apply in the present context. Potts' original sentence was lawful when imposed, and neither *Apprendi* nor *Alleyne* applies retroactively to afford relief on collateral review. *See Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285-86 (11th Cir. 2014). Indeed, with respect to the mandatory-minimum provisions altered by the Fair Sentencing Act, the sentencing in every case in which the earlier penalties were imposed occurred before August 3, 2010, close to three years before

Because Potts' sentence was thus not "imposed . . . for a covered offense" within the meaning of Section 404 of the First Step Act, he is ineligible for any relief pursuant to that section of the Act.

B. *A Sentence Reduction Is Not Warranted in Potts' Case*

Even if Potts were legally eligible for a sentence reduction under the First Step Act, a sentence reduction is unwarranted under the facts and circumstances of this case. An examination of the factors set forth in 18 U.S.C. § 3553(a) demonstrates that Potts' sentence should not be reduced beyond the 240-month sentence that this Court previously imposed, pursuant to USSG § 5K1.1, when it reduced Potts' sentence to 240 months from a sentencing guideline range of 360 months to life. Indeed, an analysis of those factors demonstrates that the 240-month sentence imposed by this Court when it sentenced Potts remains necessary to reflect the seriousness of Potts' offenses, to promote respect for the law, to provide just punishment for Potts' offenses, to protect the public from further crimes by Potts, and to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

Here, the record establishes that Potts had an extensive criminal history involving 30

Alleyne was decided. In those cases, courts regularly made the determination of the quantity that produced a mandatory-minimum sentence—a practice authorized at the time by *Harris v. United States*, 536 U.S. 545 (2002). The First Step Act only directs courts to examine a sentence as if sections 2 and 3 of the Fair Sentencing Act were in effect at the time, not to change the manner of determining quantity. Relying at this time, for purposes of analyzing a potential sentence *reduction*, on the "more than 1.5 kilograms" determination previously made at Potts' sentencing does not offend *Apprendi* or *Alleyne,* as it does not involve any *increase* in a sentence based on judge-found facts. To the contrary, the First Step Act only authorizes a court to "reduce" a sentence, and further makes clear that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." First Step Act, § 404(c), 132 Stat. at 1522; *see also Dillon v. United States,* 560 U.S. 817 (2010) (holding that a court need not apply *Booker v. United States,* 543 U.S. 220 (2005), which rendered the Guidelines advisory, to remedy a violation of *Apprendi* where the court is considering only whether to reduce a sentence based on a retroactive guideline amendment).

adult convictions (PSI ¶¶ 88-119) and more than 20 arrests (PSI ¶¶ 120-44). He qualified as both a career offender and an armed career criminal under the Sentencing Guidelines (PSI ¶¶ 84-85). He served as an organizer/leader in his drug trafficking activities (PSI ¶ 81). Moreover, given the extensive scope of Potts' drug trafficking activities and his related firearm possession, even if Potts were resentenced today under the present version of USSG § 2D1.1 with the reduced penalties now found in its amended Drug Quantity Table, Potts would still be facing an unchanged sentencing guideline range of 360 months to life imprisonment.

The seriousness of Potts' crimes are demonstrated by the manner in which the Sentencing Guidelines continue to treat Potts' offenses. At the time of Potts' sentencing, his base offense level for his drug offense was 38, and his total offense level was 41 under the governing version of the Sentencing Guidelines (PSI ¶¶ 78, 87). Because Potts falls within criminal history category VI (PSI ¶ 119), that resulted in a sentencing guideline range of 360 months to life imprisonment. *See* USSG Ch. 5, Pt. A (sentencing table). Under the present provisions of § 2D1.1, Potts' base offense level would be 36 (if calculated based on the more than 150 kilograms of powder cocaine involved in Potts' offenses, *see supra* at 3 note 3), and his total offense level after adjustments (*see* PSI ¶¶ 79, 81, 85-86) would be 39. *See* USSG § 2D1.1(c)(2). Alternatively, even if Potts' sentencing guideline range were determined solely on the basis of the more than 3.0 kilograms of cocaine base (*i.e.*, the more than 1.5 kilograms for each of his offenses) that were specifically attributed to him at sentencing for purposes of addressing the former drug quantity threshold set by USSG § 2D1.1(c)(1) (2006) (*see* PSI ¶¶ 36, 58)—a threshold computation that does not include either the much larger quantity of cocaine base that was both attributable and attributed to Potts for his offenses or the large amount of powder cocaine involved in Potts' offenses—Potts would have a base offense level of 34 under

the present provisions of § 2D1.1, and his total offense level after adjustments (*see* PSI ¶¶ 79, 81, 85-86) would be 37. *See* USSG § 2D1.1(c)(3). With a criminal history category of VI and an offense level of either 37 or 39, Potts would still face the identical sentencing guideline range of 360 months to life imprisonment that he faced when he was sentenced in 2007. *See* USSG Ch. 5, Pt. A (sentencing table).

This Court recognized the seriousness of Potts' crimes and the importance and justness of a 20-year sentence for those crimes, notwithstanding Potts' cooperation with the government, when it sentenced Potts. Addressing Potts at his sentencing, the Court stated:

> Mr. Potts, I recognize this is still a long sentence. It is ten years off what you would otherwise have faced. And when you recognize that two of the men ended up with life, I think it's a fair sentence.
>
> The thing I need to look at it [sic] is both the prior history but then also the sentences with respect to the other defendants and try to be fair to everybody in the case. And so I -- this gives you a chance to serve your sentence and return to your family.

(D.E. 1153 at 14).

The need this Court recognized at Potts' sentencing to avoid unwarranted sentencing disparities for serious offenses remains critically important. *See* 18 U.S.C. § 3553(a)(6). A reduction in Potts sentence would give Potts a windfall relative to defendants who were later charged and sentenced for drug trafficking offenses comparable to—and even less serious than—his. Indeed, a sentence reduction would create a disparity between Potts and other defendants who were prosecuted and sentenced after August 3, 2010, when the government obtained convictions specifically based upon charges and findings that an offense involved 28 grams or more of cocaine base. Such an outcome would offend "the need to avoid unwarranted sentencing disparities among" similarly situated offenders under 18 U.S.C. § 3553(a)(6), and the need for a sentence to "reflect the seriousness of the offense," "promote respect for the law," and

"provide just punishment for the offense" under § 3553(a)(2)(A). *See Dorsey v. United States*, 567 U.S. 260, 276-79 (2012) (expressing the importance of consistency in sentencing similarly situated offenders when determining the retroactive application of a statutory amendment).

"Nothing in [Section 404 of the First Step Act] shall be construed to require a court to reduce any sentence pursuant to this section." First Step Act, § 404(c), 132 Stat. at 5222. Here, notwithstanding the enactment of the First Step Act, an analysis of the facts and circumstances of this case and the sentencing factors set forth in 18 U.S.C. § 3553(a) demonstrates that, even if Potts were legally eligible for a sentence reduction, this Court should not reduce his sentence. A sentence reduction is simply unwarranted in this case.

III. Conclusion

Because Potts was not sentenced for a "covered offense" within the meaning of the First Step Act, he is ineligible for a sentence reduction pursuant to Section 404 of the Act. But even if Potts were legally eligible for a sentence reduction pursuant to the First Step Act, an analysis of the factors set forth in 18 U.S.C. § 3553(a) demonstrates that a sentence reduction is unwarranted under the facts and circumstances present in this case. Accordingly, Potts' motion seeking a sentence reduction pursuant to Section 404 of the First Step Act should be denied.

Respectfully submitted,

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UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *United States' Response in Opposition to Defendant Carlton Potts' Motion for Reduction of Sentence Pursuant to the First Step Act* was filed via CM/ECF and served via U.S. Mail upon:

Carlton Van Potts, Reg. # 75608-004
FMC Rochester
Federal Medical Center
PMB 4000
Rochester, MN 55903-4000

on this 17th day of April, 2019.

/s Eduardo I. Sánchez
Eduardo I. Sánchez
Assistant United States Attorney

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-80070-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARLTON POTTS,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO REDUCE SENTENCE

THIS CAUSE comes before the Court pursuant to Defendant's Motion to Appoint Counsel and Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2) and the First Step Act of 2018 (D.E.1266). After consideration of the government and probation's responses, the defendant was not sentenced for a "covered offense" within the meaning of the First Step Act. He is therefore ineligible for a sentence reduction pursuant to Section 404 of the Act. Moreover, even if legally eligible for a sentence reduction pursuant to the First Step Act, the factors set forth in 18 U.S.C. § 3553(a) indicate that a sentence reduction is unwarranted under the facts and circumstances of this case. Therefore, it is

ORDERED and ADJUDGED that Defendant's Motion Seeking a Sentence Reduction Pursuant to Section 404 of the First Step Act and to Appoint Counsel (**D.E. 1266**) is hereby **DENIED**.

DONE AND ORDERED at West Palm Beach, Florida this 7 day of May, 2019.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record
Carlton Potts, Defendant

A-5

Carlton Van Potts
#75608-004
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v CARLTON VAN POTTS, Defendant.	Case No. 06-cr-80070 and Case No. 06-cr-80081 REPLY TO AUSA'S RESPONSE TO § 3582/FIRST STEP MOTION Before Hon. Donald M. Middlebrooks

COMES NOW, Defendant Carlton Van Potts, appearing pro se, hereinafter referred to as "Defendant," who respectfully brings his Reply before this Honorable Court.

This Honorable Court imposed a 240-month sentence based upon the AUSA's and PSR's recommendation. Since the Court could have had imposed a greater sentence, he is very appreciative to all. However, in the years since, while he has been in prison, have been extremely difficult due to his disability. Much of what Mr. Sanchez says in his Response is true. However the question is not whether the Court ***must*** grant the motion; rather is whether the Court ***should*** grant some relief.

At the time of sentencing the changes brought about by *Booker* and *Blakely* and similar cases were still in their infancy. And since the time Defendant was before this Honorable Court many other decisions have changed the way the courts handle cases, the amount of leeway, etc., in sentencing. Hence, the real question is not whether relief is required; rather, it is whether the Court has the latitude to reduce the sentence under current law and practice. It is just as Mr. Sanchez stated: "Nothing in Section 404 of the First Step Act shall be construed to require a court to reduce any sentence pursuant to this section." (Response at 12, brackets omitted.) However, Defendant disagrees with Mr. Sanchez'

assertion that "even if Potts were legally eligible for a sentence reduction pursuant to Section 404 of the First Step Act, an analysis of the factors set forth in 18 U.S.C. § 3553(a) demonstrates that a sentence reduction is unwarranted." (Response at 12.)

Among the many changes in facts and circumstances which the Court may and ought to consider, are spelled out in the horrific overcrowding problems that have plagued the BOP. Cooks, medical personnel, counselors, etc., are having to be drafted into guard duty because there are not enough officers to care for the job of maintaining discipline and order. Inmate and employee safety is compromised as well as the ability of the BOP to provide adequate medical care.

WHEREFORE, Defendant respectfully prays the Court will grant his motion and resentence him after considering the intent of all three Branches of Government which prompted the passage of this "First Step" in making sentences more practical, viewing the factors set forth in § 3553, and for such other and further relief as the Court deems just and equitable.

By executing this Motion this 10 day of May 2019, Defendant declares under penalty of perjury that the statements herein are true pursuant to 28 U.S.C. § 1746.

Carlton Van Potts, Defendant

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of this Reply was served upon AUSA Eduardo I. Sanchez, 99 N.E. 4th Street, Miami, FL 33132, the date set forth above, via First Class mail, with postage prepaid.

Carlton Van Potts, Pro Se

COMMITTED NAME: Carlton Potts
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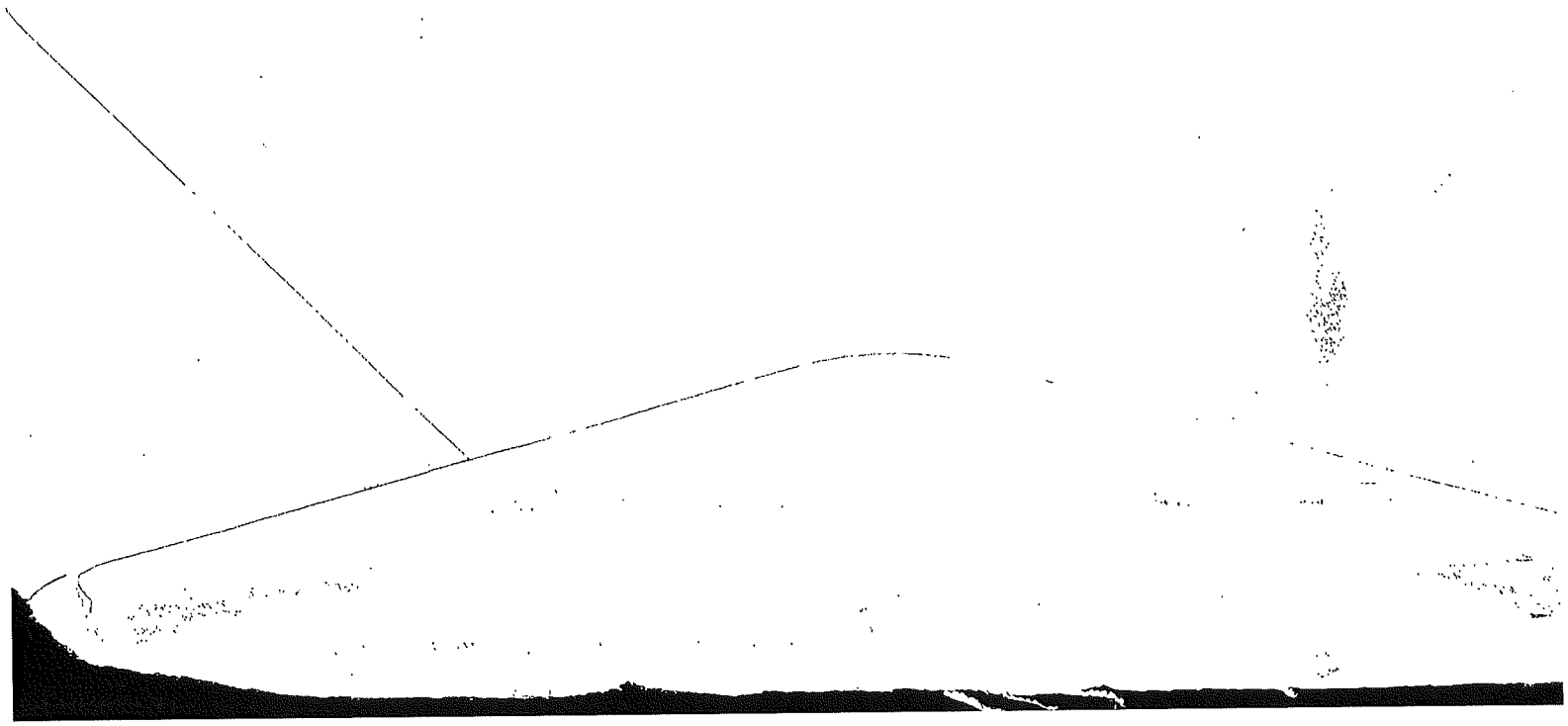

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-80070-CR-MIDDLEBROOKS
(CASE NO. 06-80081-CR-MIDDLEBROOKS)

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLTON POTTS,

Defendant.
_____/

AMENDED ORDER GRANTING MOTION FOR COMPASSIONATE RELEASE

THIS CAUSE is before the Court upon the Motion for Compassionate Release filed on August 24, 2020 by Defendant Carlton Potts ("Defendant"). (DE 1333). The Government responded in opposition on September 2, 2020. (DE 1338). Defendant replied on September 7, 2020. (DE 1340). For the following reasons, Defendant's Motion is granted.

I. BACKGROUND

Defendant is currently incarcerated at the Federal Medical Center in Rochester, Minnesota, where he is serving a 240-month sentence. Defendant seeks compassionate release to lessen his chances of contracting the COVID-19 virus, which he alleges has serious, potentially lethal, consequences for individuals with his medical history.

A. Defendant's Offenses and Sentencing

Defendant was charged with firearm and narcotics related offenses in two separate criminal cases: the instant case, Case No. 06-80070-Cr-Middlebrooks, and Case No. 06-80081-Cr-Hurley ("the Hurley case"). These two cases were consolidated before me for change of plea and sentencing. (*See* DE 360 in the Hurley case).

On November 8, 2006, Defendant pled guilty to Count 1 of the third superseding indictment in my case, which charged him with conspiracy to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846, and he pled guilty to Counts 1 and 25 of the third superseding indictment in the Hurley case, which charged him with conspiracy to manufacture, possess with intent to distribute, and distribute at least 50 grams of crack cocaine and at least 5 kilograms of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846 (Count 1), and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count 25). (DE 718).

At sentencing, Defendant was classified both as a Career Offender pursuant to USSG § 4B1.1(a) (PSI ¶ 84), and as an Armed Career Criminal pursuant to USSG § 4B1.4(a) (PSI ¶ 85). His guidelines range was 360 months to life imprisonment (PSI ¶ 174), and he also faced mandatory minimum terms of imprisonment for the offenses of conviction. The government filed a motion pursuant to USSG § 5K1.1 prior to sentencing based upon Defendant's substantial assistance, which authorized me to sentence Defendant below the guidelines range (but not below the applicable mandatory minimum sentences). I granted the motion and sentenced Defendant to 240 months imprisonment on all counts, to be served concurrently, followed by 10 years of supervised release on Count 1 in my case, and 5 years of supervised release on Counts 1 and 25 in the Hurley case, to be served concurrently.[1]

[1] On May 11, 2012, I denied Defendant's first § 3582(c)(2) motion on the grounds that Defendant's dual Career Offender and Armed Career Criminal status precluded modifying the guideline range even if his base offense level were lowered. (DE 1154; DE 716, Case No. 06-80081-Cr-Hurley). On May 11, 2015, I denied Defendant's second § 3582(c)(2) motion because Defendant was subject to a mandatory minimum sentence, which I was not authorized to reduce. (DE 1214 at 1). Thereafter, on May 7, 2019, I denied Defendant's Motion to Reduce Sentence under the First Step Act, 18 U.S.C. § 3582(c)(2), because Defendant had not been sentenced for a "covered offense" within the meaning of the statute. (DE 1274).

Defendant has now served over 14 years of his 240-month sentence, which equates to 71.4% of his full term and 82% of his statutory term. (DE 1338 at 2). His projected release date is October 16, 2023. *Id.*

B. Defendant's Medical Background

Defendant is seriously ill. His sealed medical records were filed in the court record in connection with this Motion. (DE 1339). Defendant's medical history is summarized in Defendant's reply in support of his Motion for Compassionate Release (DE 1340 at 4-5). According to the briefing, Defendant's medical issues, many of which are chronic, include the following: Defendant is a paraplegic and bound to a wheelchair. His paraplegia is a consequence of a spinal cord injury he sustained in 1989. He also suffers from hypertension (high blood pressure), hyperlipidemia (high cholesterol), and obesity. Defendant is immunocompromised due to HIV, his paraplegia (which is linked to decreased immune function), and because of the surgical removal of his spleen, the organ responsible for fighting infection. He has had repeated upper respiratory infections, including two incidents of full bronchopneumonia in 2013 and 2016. Defendant has had neurogenic bladder (absence of bladder control due to nerve damage) since 2011, as well as neurogenic bowel (absence of bowel control due to nerve damage) since 2017. Defendant requires use of a suprapubic catheter which drains urine from the bladder through an incision in his stomach. Additionally, Defendant suffers from chronic infections both of his urinary tract (since 2010) and skin infections (since 2018). He has recurring chronic ulcers, likely due to his paraplegia and being wheelchair bound. Other medical problems include chronic rhinitis and vitamin D deficiency.

C. Defendant's Compassionate Release Motion

Defendant argues that his numerous medical conditions render him uniquely vulnerable while incarcerated due to the known and by now well-documented risks inherent in transmission

of COVID-19 in the prison setting. On this basis, Defendant moves for compassionate release under 18 U.S.C. 3582(c)(1)(A). The Government acknowledges many of Defendant's health issues, but argues that his Motion should be denied because no "extraordinary and compelling reasons" support a sentence reduction, and because Defendant's extensive criminal history renders him a danger to the community and ineligible for release. (DE 1338 at 11-12).

II. LEGAL STANDARD

The compassionate release provision of 18 U.S.C. § 3582(c), as amended by the First Step Act of 2018, provides, in pertinent part, that "the court . . . upon motion of the defendant after the defendant has fully exhausted all administrative [remedies] . . . may reduce the [defendant's] term of imprisonment" under the following circumstances: *first*, after "consider[ing] the factors set forth in [18 U.S.C.] section 3553(a) to the extent that they are applicable[;]" *second,* if the court "finds that . . . extraordinary and compelling reasons warrant such a reduction;" and *third,* if the court further finds that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]" 18 U.S.C. § 3582(c)(1)(A); First Step Act of 2018, Pub. L. 115-391, § 603(b), 132 Stat. 5194, 5239.

The Sentencing Commission has issued a policy statement addressing reductions of sentence under § 3582(c)(2)(A), which is found at USSG § 1B1.13. Under that guideline provision, in addition to the above findings and considerations, the court must "determine[] that . . . [t]he 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)" before granting compassionate release. The commentary to USSG § 1B1.13, which will be discussed in further detail below, provides additional guidance regarding factors that support compassionate release.

III. DISCUSSION

A. Exhaustion of Administrative Remedies

District courts may consider granting compassionate release "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 defendant's facility, whichever is earlier[.]" *See* 18 U.S.C. § 3582(c)(1)(A). Based upon his concerns related to COVID-19, Defendant directed a request for compassionate release to the Warden of FMC Rochester on April 30, 2020. (DE 1340 at 1). On June 22, 2020, the Warden issued a Memorandum denying Defendant's request. (DE 1338 Ex. A). Defendant filed an administrative grievance relating to this finding, which was denied and which Defendant appealed. That appeal is unresolved. The government states in its Response that "given [Defendant's] history, he does not appear to have been considered for home confinement." (DE 1338 at 10). Based upon the foregoing, the Parties agree that Defendant has satisfied the requirement of exhaustion of administrative remedies. (DE 1338 at 11).

B. Extraordinary and Compelling Reasons Justifying Release

Application Note 1 of section 1B1.13 of the Sentencing Guidelines describes "extraordinary and compelling reasons" for release as including certain medical conditions, advanced age, certain family circumstances, or some "other" reason "[a]s determined by the Director of the Bureau of Prisons" that may act "in combination" with the medical condition of a defendant. *See* U.S.S.G. § 1B1.13, Note 1. The Note specifies that "a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover"

constitutes an "extraordinary and compelling reason" justifying compassionate release. *See* U.S.S.G. § 1B1.13, Note 1(A)(ii)(I).

In this case, I find that extraordinary and compelling reasons exist in light of Defendant's medical conditions when considered in combination with the unprecedented nature of the COVID-19 pandemic and its spread within correctional facilities. FMC Rochester, where Defendant is housed, has seen a recent spike in COVID-19 cases. According to news reports, the virus was introduced into the prison in late August when six COVID-positive inmates were transferred to FMC Rochester. Since then, other inmates and staff have contracted the virus. At last count there were a total of 17 cases, with 15 inmates and 2 staff members having tested positive.[2] And because the facility has not tested the entire inmate population, it is unknown how widespread the infection rate actually is within that facility.

Due to the conditions under which inmates live, they are at extreme risk of infection once COVID-19 breaches prison walls. Social distancing is difficult, and sometimes impossible. Asymptomatic transmission presents additional complications in controlling the spread.[3] Given the realities of prison life, it is not necessarily clear than any individual is safer from the virus while incarcerated. "Courts around the country have recognized that the risk of COVID-19 to people held in jails and prisons 'is significantly higher than in the community, both in terms of risk

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[2] https://www.bop.gov/coronavirus/

[3] In recent testimony before the Senate Judiciary Committee, Bureau of Prisons Medical Director Dr. Jeffrey Allen commented that "[a]symptomatic transmission has caused particular challenges[.] It illustrates the infectivity of the disease and difficulty controlling it in correctional environments." Dave Minsky, *Nearly All Inmates at Lompoc FCI Tested Positive for Coronavirus, Most Asymptomatic*, LOMPOC REC. (June 5, 2020), https://lompocrecord.com/news/local/crime-and-courts/nearly-all-inmates-at-lompoc-fci-tested-positive-for-coronavirus-most-asymptomatic/article_f3fb06d7-f231-52b3-8f89-f21f11b73974.html.

of transmission, exposure, and harm to individuals who become infected.'"[4] Because COVID-19 has entered Defendant's facility at FMC Rochester, its rapid spread is likely unavoidable, despite any precautions the facility may take.

Defendant is particularly vulnerable. As previously noted, he is in dire physical health. He suffers from numerous conditions identified by the Center for Disease Control and Prevention ("CDC") as elevating an individual's risk of becoming seriously ill or dying from COVID-19. Specifically, he is immunocompromised, he has hypertension, and he is obese. Moreover, with respect to COVID-19 risk factors, it is significant that Defendant has had repeated respiratory infections, including two bouts of bronchopneumonia in recent years.

The CDC lists eight conditions which place "[p]eople of any age . . . at increased risk of severe illness from COVID-19."[5] These conditions include people who are in an immunocompromised state. Defendant is immunocompromised because of HIV, a spinal cord injury, and his lack of a spleen. And as Defendant points out in his Reply, his immunocompromised condition is evidenced by the frequency with which he gets infections. (DE 1340 at 6-7). Defendant's documented medical history reflects susceptibility to skin infections and urinary tract infections.

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[4] *See United States v. Williams*, 2020 WL 1751545, at *2 (N.D. Fla. Apr. 1, 2020) (quoting *Basank v. Decker*, --- F. Supp. 3d ---, 2020 WL 1481503, at *3 (S.D.N.Y. March 26, 2020), and citing *United States v. Harris*, --- F. Supp. 3d ---, 2020 WL 1503444, at ¶ 7 (D.D.C. Mar. 27, 2020)); *United States v. Campagna*, 2020 WL 1489829, at *2 (S.D.N.Y. Mar. 27, 2020); *Castillo v. Barr*, 2020 WL 1502864, at *2 (C.D. Cal. Mar. 27, 2020); *United States v. Kennedy*, 2020 WL 1493481, at *2-3 (E.D. Mich. Mar. 27, 2020); *United States v. Garlock*, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020)).

[5] *Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited Sept. 11, 2020).

Defendant also suffers from hypertension, or high blood pressure. He has had this condition since 2017. The CDC has consistently classified hypertension as among the diseases that may increase the risk for worse outcomes from COVID-19, even increasing the risk of hospitalization for COVID-19 threefold.[6] People with hypertension who contract the virus may suffer such adverse outcomes as lung injury or mortality.[7]

Defendant's obesity is also a significant risk factor. At the time of sentencing, the PSI indicated that he was 6-feet tall and weighed 300 pounds. (PSI ¶ 259). His current weight is not known to defense counsel and is not otherwise reflected in the briefing, however Defendant's medical records were filed under seal. (DE 1339). Recent data has connected obesity (defined as a body mass index of more than 30) to severe outcomes from COVID-19. As of June 2020, the CDC has determined that regardless of age, all individuals with a BMI of 30 or above are at heightened risk.[8] Defendant's reply brief cites to a recently published study by researchers at UNC

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[6] *See Coronavirus Disease 2019 (COVID-19), COVID-19 Associated Hospitalization Related to Underlying Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-underlying-medical-conditions.html (last visited Sept. 11, 2020); *Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions, Serious Heart Conditions and Other Cardiovascular and Cerebrovascular Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#serious-heart-conditions (last visited Sept. 11, 2020).

[7] *See* Ernesto L. Schiffrin et al., *Hypertension and COVID-19*, 33 AM. J. HYPERTENSION 373, 373 (2020).

[8] *See Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions, Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#obesity (last visited Sept. 11, 2020).

which "determined that obese people had a 46% greater risk of catching COVID-19 than non-obese people; a 133% greater risk of hospitalization; a 74% greater risk of ending up in an ICU; and a 48% greater risk of death." (DE 1340 at 13 (citation omitted)).

I also note that Defendant's medical history of respiratory issues is highly concerning. The COVID-19 virus is a respiratory illness. Defendant has recovered from two bouts of bronchopneumonia in recent years. He has had other upper respiratory infections which resulted in shortness of breath. (DE 1340 at 4). Moreover, his spinal cord injury may make his respiratory muscles weaker. (DE 1333 at 5, DE 1340 at 7). Defendant states in his Motion that "[p]eople with spinal cord injuries commonly have insufficiency of respiratory muscles, reduction in vital capacity, ineffective cough, reduction in lung and chest wall compliance and excess oxygen cost of breathing." (DE 1333 at 5). These conditions could quite possibly lead to respiratory failure even in the absence of COVID-19. Defendant also states in his Reply that people with spinal cord injuries experience paralysis of abdominal muscles and often "have an impaired ability to take a deep breath and generate a strong cough," and "a weak cough may make it difficult to clear airway secretions, increasing the risk for respiratory complications if one becomes infected with COVID-19."[9] It would appear that all these factors may make it more difficult for Defendant to recover from the virus if he contracts it.

I find that Defendant's many chronic medical conditions diminish his ability to provide self-care within the environment of a correctional facility during the COVID-19 pandemic. This presents an extraordinary and compelling reason to justify compassionate release under the statute and Sentencing Guidelines policy statement. Combining Defendant's multiple CDC-confirmed

[9] *COVID-19 and Spinal Cord Injury: Minimizing Risks for Complications*, KESSLER FOUND., https://kesslerfoundation.org/info/covid-19-and-spinal-cord-injury-minimizing-risks-complications (last visited Sept. 11, 2020).

COVID-19 risk factors with the considerable risk of infection within FMC Rochester and Defendant's diminished ability to provide self-care, I find that Defendant has demonstrated circumstances sufficient to justify granting compassionate release.

C. Dangerousness

Before granting a reduction in sentence under section 3582(c)(1)(A), the Sentencing Commission directs the court to consider whether a defendant poses "a danger to the safety of any other person or to the community." U.S.S.G. § 1B1.13(2). The Government correctly points out that Defendant has a long and serious criminal record, including 30 adult convictions and over 20 arrests. (DE 1338 at 17). His criminal history qualified him as both a Career Offender and an Armed Career Criminal under the Sentencing Guidelines. A record like this is a massive obstacle in Defendant's path to compassionate release. I recognize this, but I am compelled to approach the question of Defendant's future dangerousness more holistically, and I am not inclined to view his prior criminal record as *per se* disqualifying for several reasons.

First, Defendant does not appear to have had any significant disciplinary record during the course of his incarceration over the past 14 years. In evaluating whether Defendant poses a danger, I certainly do not discount his criminal past, but I do attribute great weight to Defendant's recent good conduct, as I view that as a more reliable indicator of his likelihood to recidivate. *See Pepper v. US*, 562 U.S. 476 (2011) (Defendant's post-sentence rehabilitation provides the "most up-do-date picture" of the defendant and is the best evidence available of the likelihood the defendant will or will not engage in future criminal conduct).

Aside from Defendant's recent conduct, I find Defendant's age and physical health to be persuasive factors in my analysis regarding whether Defendant will pose a danger to the community if released. Defendant is currently 55 years old, and recidivism rates typically decline

with age.[10] Moreover, his health is severely failing and this can't help but make Defendant's commission of future crimes more difficult. He is often sick, suffering from chronic infections of the skin and urinary tract. Defendant's physical mobility is also severely compromised given his paraplegia and confinement to a wheelchair. This will further inhibit his ability to engage in criminal activity, and this is compounded by his inability to control his bladder or bowels, resulting in his need for catheterization through a stomach incision.

In short, Defendant's relatively positive prison disciplinary record, his declining health, and his weakened physical state all weigh in favor of a finding that he is not likely to reoffend and pose a danger to the community if released. Moreover, to the extent that some risk exists that Defendant may return to criminal activity, such risk can be abated through home confinement and close supervision by the Probation Office.

D. Section 3553 Factors

When a defendant has shown that there are extraordinary and compelling reasons for release, and that he is not likely to pose a danger to the community, the Court may reduce his sentence to time served if doing so is consistent with the applicable factors in 18 U.S.C. § 3553(a). *See* § 3582(c)(1)(A) I find that these weigh in favor of Defendant's release.

I have considered the nature of the offense and the history and characteristics of this defendant. Defendant's crimes of conviction were serious, but he accepted responsibility, pled guilty and cooperated with the government. His criminal history is remarkable in its breadth, however as previously discussed, his more recent conduct suggests some degree of meaningful rehabilitation. With respect to the need for the sentence to be sufficiently punitive, I note that

[10] *See* U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders*, at 23 (Dec. 2017).

Defendant has already served a significant amount of time in custody, around 14 years, and in my view this goes a long way towards just punishment for his crimes. Although I have determined that Defendant should be permitted to serve the remainder of his sentence outside prison walls for the sake of his own protection, he will continue to serve a lengthy term of home confinement, which is also a form of punishment. In this sense, Defendant will continue to repay the debt he owes to society. On balance, I find that granting Defendant's motion and reducing his incarceration term to time served will result in an overall sentence that is sufficient but not greater than necessary to achieve the goals of sentencing as set forth in § 3553.

E. Release Plan

Defendant states in his motion that he has access to family and community support. (DE 1333 at 5). His motion includes a proposed release plan. (DE 1333 at 5-6). Defendant would reside with his wife and isolate himself in his home. *Id.* Defendant's wife is a certified nursing assistant and has worked in home health care. (DE 1340 at 27). She is capable of providing assistance to Defendant at home, including transporting him to necessary medical appointments. *Id.*

IV. CONCLUSION

This is not an easy call. If I deny Defendant's motion, he will remain incarcerated. His conditions of confinement render him highly vulnerable. If he contracts the virus, his diminished medical condition will make it difficult for him to fight it; and given his numerous risk factors, the outcome for him could be catastrophic. I have the ability to take action which might ensure this never happens. I have devoted considerable thought to whether Defendant's extensive criminal history should outweigh the many other compelling reasons to grant relief. Ultimately however, I conclude that compassion ought to prevail.

Based upon the foregoing, and after careful consideration of the Parties' written submissions, the record, and applicable law, I find that it is appropriate to grant Defendant's request for compassionate release. Accordingly, it is hereby **ORDERED and ADJUDGED** as follows:

1. Defendant Carlton Potts' Motion for Compassionate Release (DE 1333) is **GRANTED**.
2. Defendant's sentence is reduced to **TIME SERVED.** This reduction in sentence applies to the judgments entered in both the instant case (Case no. 06-80070-CR-MIDDLEBROOKS) and the Hurley case (Case no. 06-80081-CR-MIDDLEBROOKS) as the sentences in these cases were ordered to run concurrently. (*See* DE 833 in Case no. 06-80070-CR and DE 406 in Case no. 06-80081-CR). Accordingly, Defendant shall no longer be committed to the custody of the Bureau of Prisons, and he **SHALL BE RELEASED FROM CUSTODY, EFFECTIVE IMMEDIATELY.**
3. To the extent that Defendant's release plan has not yet been approved by the United States Probation Office, Defendant's counsel shall work with Probation to create an approved plan of release as quickly as possible. **It is the court's expectation that finalization of this release plan will not pose an obstacle to Defendant's immediate release from BOP custody.**
4. Defendant's counsel shall file status reports each week from the date of this order giving a brief summary of all progress made towards creating a compliant plan of release.
5. As a special condition of Defendant's compassionate release, pursuant to and as authorized by 18 U.S.C. § 3582(c)(1)(A), Defendant's sentence shall include an

additional term of supervised released for the unserved portion of his original term of imprisonment, which is thirty-seven (37) months. As a condition of this special term of supervised release, Defendant shall be placed on home confinement. The U.S. Probation Office shall supervise Defendant's home confinement. The terms of Defendant's home confinement are as follows:

Home Detention with Electronic Monitoring - The defendant shall participate in the Home Detention Electronic Monitoring Program for a period of **THIRTY-SEVEN (37) MONTHS.** During this time, the defendant shall remain at his place of residence except for employment, religious observances, medical appointments and other activities approved in advance and provide the U.S. Probation Officer with requested documentation. The defendant shall maintain a telephone at his place of residence without 'call forwarding', 'call waiting', a modem, 'caller ID', or 'call back/call block' services for the above period. The defendant shall wear an electronic monitoring device and follow the electronic monitoring procedures as instructed by the U.S. Probation Officer. The defendant shall pay for the electronic monitoring equipment at the prevailing rate or in accordance with ability to pay.

6. Upon completion of the 37-month special period of supervised release under home confinement, Defendant shall begin his ten-year term of supervised release, and his concurrent five-year term of supervised release, as set forth in his original Judgments. (DE 833 and DE 406 in Case no. 06-80081-CR).
7. All previous conditions imposed in the original judgment and commitment orders remain in full force and effect. (DE 833 and DE 406 in Case no. 06-80081-CR).
8. Upon release from incarceration, effective immediately, Defendant shall self-quarantine for 14 days.

9. Defendant must contact the United States Probation Office within 72 hours of his release.

SIGNED in Chambers at West Palm Beach, Florida, this 13th day of September, 2020.

Donald M. Middlebrooks
United States District Judge