UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Ernesto Quintieri,

Defendant,

Carlo Donato,

Defendant - Appellant.

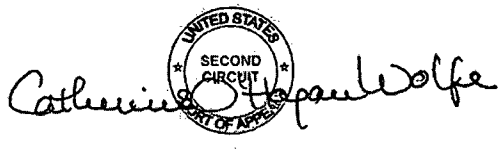
ORDER

Docket No: 21-984

Appellant, Carlo Donato, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



E.D.N.Y. – C. Islip
95-cr-223
Hurley, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of October, two thousand twenty-one.

Present:

Dennis Jacobs,
Susan L. Carney,
Richard J. Sullivan,
Circuit Judges.

A

United States of America,

Appellee,

v. 21-984

Ernesto Quintieri,

Defendant,

Carlo Donato,

Defendant-Appellant.

Appellant, pro se, moves for leave to proceed in forma pauperis ("IFP") and for compassionate release, which we construe as seeking summary reversal of the district court order denying compassionate release. Upon due consideration, it is hereby ORDERED that the IFP motion is denied as unnecessary, *see* Fed. R. App. P. 24(a)(3), and the motion for compassionate release is DENIED. It is further ORDERED that the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see* 28 U.S.C. § 1915(e); *Cortorreal v. United States*, 486 F.3d 742, 743 (2d Cir. 2007) (per curiam).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

-against-

CARLO DONATO,
Defendant.
----------X

MEMORANDUM & ORDER
95-CR-223 (DRH)(AYS)

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APPEARANCES:

For the Government:
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United States District Court
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HURLEY, Senior District Judge:

Presently before the Court is defendant's motion for compassionate release, pursuant to 18 U.S.C.§ 3582(c)(1)(A)(i) and the First Step Act. For the reasons set forth below, the motion is denied.

BACKGROUND

After a trial before the Honorable Jacob Mishler, defendant was convicted of one count of conspiracy to commit carjacking in violation of 18 U.SC. § 371, six

counts of carjacking in violation of 18 U.S.C. § 2119, one count of possession of a firearm to commit a crime of violence in violation of 18 U.S.C. § 924(c) and five counts of use of a firearm during the commission of a crime of violence in violation of 18 U.S.C. §924(c).[1]

I. The Trial

The evidence at trial included testimony from the seven victims of the carjackings, three eyewitnesses, several law enforcement officials and automobile executives, and over 65 exhibits including defendant's fingerprints lifted from one of the carjacked vehicles. The evidence at trial is recounted below and is taken from the original appellate brief filed by the government as reproduced in the government's opposition papers herein.

A. The Silverman Carjacking

On March 27, 1993, Phyllis Silverman entered her 1990 black BMW 750il which was parked near the Great Neck railroad station. (T 151-52). As she put on her seat belt, a man subsequently identified as defendant entered her car through the passenger door. The man pointed a black handgun at her face from a distance she described as "close." (T158-59). The man said either "Get out" or "Be quiet." (T 153-54). Silverman started shouting and left her car, yelling. She saw defendant leave her car by the passenger door, go behind her car, enter it on the driver's

[1] Defendant was acquitted of two counts related to the Kahn carjacking for which he presented an alibi defense.

side and drive off. (T 154). Irene Messina witnessed this carjacking as she sat in her vehicle nearby, looking for a parking space and hoping that Silverman was leaving a space. (T 308).

Defendant's associate, Ernesto Quintieri,[2] witnessed him commit this carjacking from a distance. Afterward, he drove to a prearranged spot on 18th Avenue in Brooklyn. (T 628-31). Quintieri parked his car and waited for defendant. Twenty minutes later, a smiling defendant arrived in the black BMW. Quintieri entered the BMW and defendant drove to an area near a cemetery in Glendale, Queens. Once there, defendant parked the BMW and proceeded to remove license plates from a vehicle parked nearby. He then drove to Howard Beach, Queens where he stopped and switched the stolen license plates for the BMW's plates. He also threw out papers that were in the BMW. (T 637-38). Defendant then dropped Quintieri at home. Thereafter, Quintieri saw defendant driving the BMW in the Ozone Park, Queens area several times during 1993 and early 1994. (T 639-40).

B. The Wilkins Carjacking

On February 2, 1994 between 3:00 and 4:00 p.m., as Iris Wilkins started to leave her car, a 1993 Mercedes Benz convertible, her driver's side door was opened by a man subsequently identified as defendant who said, "Get out, get out!" While Wilkins attempted to gather her belongings, defendant, who was holding a silver-barreled revolver in his hand and pointing it at her, continued to order her out of

[2] Quintieri was a named co-defendant who testified at Donato's trial.

the car. (D 1011). As she got out of the car, Wilkins turned to defendant and asked for her purse. Defendant reached over to the passenger side, retrieved her purse, threw it out the car window and then drove away. (D 11).

C. The Kushner Carjacking

On March 2, 1994 as Kushner entered her parked, white 1987 Mercedes Benz, a man subsequently identified as defendant knocked on her window. He said something to her, but through her closed window she could not make it out. Defendant spoke again but Kushner still could not understand him. (T 331, 357). Kushner then proceeded to a nearby deli. Once parked, she opened the door to get out. She was confronted by defendant, who pointed a silver handgun in her face and shouted either "Get out of the car" or "Give me the keys" and pulled Kushner's keys out of her hand. (T 333, 357-59).

D. The Koch Carjacking

Erwin Koch was employed as a driver by Alan Cohen, the owner of Sterling Optical. On April 25, 1994, Koch, a retired police officer, who carried a .38 caliber revolver, drove the Cohens to their home in Old Westbury after a shopping trip. (T 371-72, 401-02). After the Cohens left the vehicle, Koch emptied the car's trunk of packages and drove the vehicle, a 1994 silver Mercedes Benz S500, to the rear of the house. As Koch was placing an umbrella into the trunk, he turned around and in a well-lit area was confronted by a man subsequently identified as defendant, approximately four feet away, with a black or silver automatic handgun in his hand.

(T 373-74, 399, 403). Defendant said, "Give me the keys." Upon hearing the demand for the keys, Koch threw them to the ground and started walking away. As he did so, Koch heard the Mercedes Benz start up and saw that it was headed in his direction in a speedy manner. (T 374-75, 40305). Unable to move quickly due to a knee injury, Koch drew his revolver and fired at the approaching vehicle hitting one of its side windows. The car veered out of the Cohen driveway onto a neighbor's lawn and then left the scene trailed by another vehicle. (T 375-76, 405).

E. The Glass Carjacking

Glass testified that on May 31, 1994, as he sat in his gray 1993 BMW 740il, the passenger side front door opened and a man subsequently identified as defendant with a gun in his hand entered. Defendant told Glass to get out of the car. (T 218-19, 271-73). Defendant pointed a silver-barreled gun with a silver or white stock that looked "like a .45" but was "a smaller version" in Glass' face at a distance of six to ten inches. As defendant held the gun on him, he again told Glass to get out of the car. Glass began to argue with him. Defendant repeated his command and thrust the gun closer to Glass. Glass stumbled out of the driver's side and defendant drove off. (T 219-21, 273-74). In a conversation with his coconspirator Quintieri, defendant boasted about committing this carjacking. (T 661-62).

F. The Epstein Carjacking

On June 30, 1994, as Donna Epstein entered her parked green 1993 BMW 740il and started the engine, her passenger door was opened by a man subsequently

identified as defendant, who pointed a silver handgun at her and told her to get out of the car. (T 424-27, 445-49). Epstein estimated that the gun was two feet from her face. As defendant held the gun on her, he repeated his command to get out of the car. Epstein froze. Defendant repeated his order. Epstein backed out of her car, leaving behind her handbag, which contained newly purchased, unsigned travelers checks. (T 427, 449). Once out of her car, defendant drove off. (T 428, 450-51).

II. Sentence, Initial Appeal, and Prior Collateral Attacks

Having been found guilty of one count of conspiracy to commit carjacking in violation of 18 U.S.C. § 371, six counts of carjacking in violation of 18 U.S.C. § 2119, one count of possession of firearm to commit a crime of violence in violation of 18 U.S.C. § 924(c) and five counts of use of a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c), defendant was sentenced on August 2, 1996 to 119 years' incarceration, a fine in the amount of $175,000 and restitution in the amount of $295,807.25, plus three years supervised release by the Honorable Jacob Mishler. The Second Circuit affirmed the judgment. *See United States v. Donato*, 112 F.3d 506 (2d Cir. 1997).

Defendant filed a petition pursuant to 28 U.S.C. § 2255 on March 28, 1998, claiming, among other things, ineffectiveness of counsel. The petition was denied and that denial was affirmed by the Second Circuit except for a potential improper double counting regarding sentencing on the conspiracy count. *See Donato v. United States*, 208 F.3d 202 (2d Cir. 2000)(unpub.). On remand, defendant was resentenced

by Judge Mishler to 115 years' incarceration, a fine in the amount of $175,000, restitution in the amount of $295,807.25- and three years supervised release. Defendant again appealed arguing (1) he was entitled to a hearing to determine his competency to be resentenced; (2) a new presentence report should have been prepared prior to resentencing; (3) the district court failed to consider all required factors in its order of restitution and a fine; (4) the amount of the fine was in error; (5) the district court failed to consider his downward departure motion; and (5) the resentence violated *Apprendi v.New Jersey*, 530 U.S. 466 (2000). *See Quintieri*, 306 F.3d at 1222 (2002). The Circuit rejected all of these arguments save for the claim that the district court improperly imposed a fine above the amount prescribed by the United States Sentencing Guidelines without explaining its reasons for departure. *Id.* The imposition of the fine was vacated and the matter remanded for the limited purpose of imposing a fine within the appropriate Guideline range, or imposing a fine above the Guideline range with appropriate explanation. *Id.* at 1235. On remand, this Court denied defendant's application to reopen his entire sentence and resentenced him to no fine. Defendant again appealed and the Second Circuit summarily affirmed.

In 2006, defendant filed a petition pursuant to 28 U.S.C. § 2241 in the Eastern District of New York asserting that he did not understand the proceedings prior to the July 6, 2005 resentencing because he had been denied the services of an Italian interpreter, he was over medicated at resentencing and that he was misidentified at trial as a carjacker. See *Donato v. United States,* 06-CV-5287(JS).

The matter was assigned to Judge Seybert, who denied the petition, characterized it as a second and successive § 2255 motion and transferred the petition to the Second Circuit for consideration as an application for a second and successive. The Second Circuit denied the application. *See id.* at DE 18;

In 2012, defendant filed another 28 U.S.C. § 2241 petition in United States District Court for the Middle District of Pennsylvania, asserting that he was actually innocent, and that his trial counsel was ineffective for (1) failing to obtain an interpreter for his criminal proceedings; (2) waiving his right to testify; and (3) failing to contact the Italian consulate as required by the Vienna Convention on Consular Relations ("VCCR"). He further claimed that a motion under § 2255 was inadequate because the prior proceedings he had for § 2255 relief were "inadequate and ineffective to address the fundamental defects of trial." After defendant clarified that he wished to proceed under § 2241 and not § 2255, the district court, adopted the report and recommendation of the magistrate judge and held that defendant had failed to show that he could not adequately obtain the relief he sought under §2255. On appeal, the Third Circuit summarily affirmed the dismissal. *See Donato v. Warden of U.S. Penitentiary*, 519 F. App'x 113 (3d Cir. 2013).

In 2013, defendant moved directly in the Second Circuit for an Order authorizing the EDNY to consider a successive 28 U.S.C. § 2255 petition. See *Donato v. United States*, 06-CV-5287(JS) at DE 23. The Second Circuit remanded the matter to Judge Seybert to decide in the first instance. *Id.* Judge Seybert

granted an application by defendant to amend his petition to include his claim of actual innocence. *Id.* at DE 24. In an Order dated May 7, 2014, Judge Seybert denied the § 2255 petition on the merits. The Second Circuit denied a certificate of appealability and dismissed the appeal. *Id.* at DE 29.

On December 11, 2014, defendant filed another habeas petition pursuant to § 2241 again alleging actual innocence, which Judge Seybert on August 5, 2015 ordered to be transferred to the Second Circuit as a successive petition. *Donato v. United States*, 14-CV-7393(JS) at DE 10. On November 13, 2015, the Court of Appeals denied the motion as unnecessary. *See id.*

On June 20, 2016, defendant filed another habeas petition pursuant to § 2255 based upon *Johnson v. United States*, 576 U.S. 591 (2015). *See United States v. Donato*, 95-CR-223(DRH) at DE 137. The petition was held in abeyance pending a decision from the Circuit as to a successive petition. By mandate issued December 7, 2020, the Court of Appeals denied the petition holding that the carjackings here were crimes of violence and as such, defendant's 924(c) convictions were proper. *See id.* at DE 156. Defendant is currently incarcerated at United States Penitentiary ("USP") Allenwood ("Allenwood"), a high security federal correctional institution.

III. Defendant's Current Application

In support of his motion for compassionate release defendant argues that the elimination of the practice of stacking 924(c) counts and his prison record support a finding of "extraordinary and compelling circumstances" under 18 U.S.C. § 3682(c)(1)(A). Specifically, he relies upon the section 403 of the First Step Act,

whereby Congress amended § 924(c) to provide that the 25-year consecutive term for a successive 924(c) offense does not apply unless a defendant had a previous, final conviction for a 924(c) charge at the time of the offense. According to defendant, the foregoing statutory change, together with his record in prison, constitutes "extraordinary and compelling circumstances" under 18 U.S.C. § 3582(c)(1)(A), warranting a reduction in his sentence to time served.

IV. The Government's Position

According to the government, "extraordinary and compelling circumstances" are defined by the Sentencing Commission and the governing policy statement does not permit relief based on disagreement with the length of a mandatory sentence. Further, even if the Court has the authority to take into account factor not contained in the sentencing commission's policy statement, the government urges that the request be denied as he is a danger to the community and his crimes were such that the sentence imposed was appropriate. According to the government, even under current law defendant would face a seven-year sentence on each 924(c) charge for brandishing a firearm in each robbery to run consecutively and thus if sentence today would 42 years consecutive to his 10-year sentence for conspiracy for a total sentence of 52 years. (Gov't's Opp. at 11.)

DISCUSSION

I. Legal Standard

As amended by the First Step Act, 18 U.S.C. § 3582(c)(1)(A), the basis for the current application, provides:

> The court may not modify a term of imprisonment once it has been imposed except that - -
> (1) in any case - -
>
> > (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in 3553(a) to the extent that they are applicable, if it finds that - -
> >
> > (i) extraordinary and compelling reasons warrant such a reduction; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community under section 3142(g);
> >
> > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;

18 U.S.C. § 3582 ((c)(1)(A). In other words, to prevail on a motion for compassionate release, a defendant must demonstrate extraordinary and compelling circumstances. In addition, a court must consider the § 3553(a) factors.[3]

II. The Court is Not Limited in its Discretion by the Policy Statement

The government's position that this Court is limited by the sentencing commissions policy statement in determining "extraordinary and compelling

[3] The government does not challenge defendant's assertion that he has properly exhausted and therefore the Court will not address that issue.

circumstances, is admittedly, contrary to the Second Circuit's decision in *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020).

In *Brooker*, the Second Circuit clarified that Section 1B1.13 applies "only to those motions that the BOP has made" on behalf of inmates and is "not 'applicable' to compassionate release motions brought by defendants[.]" *Id.* at 235-36 (citing U.S.S.G. § 1B1.13). As a result, "[n]either the Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court's discretion" in deciding a defendant's compassionate release motion. *Id.* at 236. Courts may "look[ ] to § 1B1.13 for guidance in the exercise of [their] discretion, but [are] free to consider 'the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release.' " *United States v. Rodriguez*, 2020 WL 7640539, at *3 (S.D.N.Y. Dec. 23, 2020) (quoting *Brooker*, 976 F.3d at 237)).

Consistent with the decision in *Brooker*, the Court rejects the government's position that it is limited by the sentencing commissions policy statement in determining "extraordinary and compelling circumstances." Thus, the Court proceed to determine whether extraordinary and compelling circumstances.

III. Extraordinary and Compelling Circumstances

One court has recently noted:

> Courts weighing the amendments to the stacking provisions on motions for sentence reductions do not view the change in law per se as an extraordinary and compelling reason. Rather, they analyze the sentence imposed relative to the sentence that would now be received for the same offense. *See, e.g., United States v. Williams*, 2020 WL 6940790, at *3 (N.D. Ill. Nov. 25, 2020) (stating that an eighteen-year

> disparity supported a finding of extraordinary and compelling reasons); *United States v. Redd,* 444 F. Supp. 3d 717, 722–23 (E.D. Va. 2020) (stating that the court "has initially and centrally considered the sentence [defendant] received relative to the sentence he would now receive for the same offense, whether and to what extent there is a disparity between the two sentences, and why that disparity exists"); *United States v. Urkevich,* 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019) ("A reduction in [defendant's] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.").

United States v. Castillo, 2021 WL 268638, at *3 (S.D.N.Y. Jan. 27, 2021). Setting aside, for the moment, whether defendant's 115 year stacked sentence is fair under Congress's recent amendment to § 924(c), his request for immediate release ignores the fact even without that stacking by the Court's calculation his sentence would be 50 years,[4] far longer than the amount of time he has thus far served.[5]

The Court understands that it is not bound by the sentence defendant would face if sentenced today; it is, however, a factor that the Court may take into account. *See United States v. Rose*, 837 F. Appx. 72, 73-74) (2d Cir. 2021) (stating that on a motion for compassionate release "the district court must consider the § 3553(a) factors; it may look to, but is not bound by, the mandatory minimums that the defendant would face if being sentenced for the first time under revised guidelines or statutes [and] . . . consider [defendant's] record while in prison.) At this point in

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[4] Plaintiff's assertion that application of the First Step Act would result in a sentence of 360 months is in error. Applying the First Step Act, the sentence would be calculated as follows: 5 years Count 3, 7 years for each of Counts 7, 9, 11, 13, 15, all consecutive to each other and to the 10 years for Counts 1, 2, 6, 8, 10, 12, and 14, for a total of 50 years.

[5] At this time, defendant has served approximately twenty-five years.

time defendant has served only approximately half of the sentence he would face today.

It is also noteworthy, in this Court's view, that Congress specifically chose not to make its amendment to § 924(c) retroactive. See Pub. L. No. 115-391, § 401(c), 132 Stat. 5194, 5221 (2018). "Though the disparity in [the defendant's] sentence measured against offenders sentenced after passage of the First Step Act may seem unfair, that disparity was clearly contemplated by Congress when it decided not to make the Act's sentencing reforms retroactive." *Musa v. United States*, -- F. Supp. 3d--, 2020 WL 6873506, at *8 (S.D.N.Y. Nov. 23, 2020) (denying release); *see also Castillo*, 2021 WL 268638, at *3 (same). While the absence of retroactivity does not preclude a reduction in sentence, it is a factor to be considered.

Accordingly, the Court cannot conclude that, standing alone, Congress's recent amendment to § 924(c) constitutes an extraordinary and compelling reason for a reduction in defendant's sentence to time served.

The Court reaches the same conclusion even considering defendant's prison record. Defendant's submission includes numerous certificates of completions for the programs he has attended while incarcerated, an excellent disciplinary record, and a very complementary review regarding his work from 2005 to the present in Food Service from the Food Service Manager. While his record is commendable, rehabilitation alone cannot constitute an extraordinary and compelling reason justifying a sentence reduction. *Brooker*, 976 F.3d at 237-38; 28 U.S.C. § 994(t).

While it may be considered in combination with other factors, *see United States v. Millan*, 2020 WL 1674058, at *7 (S.D.N.Y. Apr. 6, 2020), the combination presented in this case viz., the length of defendant's sentence in light of the changes to the stacking provision of 924(c) and his rehabilitation, does not warrant a sentence of time served.

In sum, the Court concludes that "extraordinary and compelling circumstances" do not exist as to support the relief sought.[6]

IV. The 3553(a) Factors Do Not Warrant the Relief Requested

Assuming arguendo, defendant has demonstrated "extraordinary and compelling circumstances," consideration of the sentencing factors set forth in 18 U.S.C. § 3553(a), outweighs the reasons for a modification.

As recounted above, defendant engaged in repeated acts of violence against innocent citizens, supporting the conclusions that defendant should serve a substantial sentence and that he poses a risk of danger to the safety of others or the community. Moreover, consideration of general deterrence supports denial of the application. Defendants continued confinement serves as a deterrent to others who would engage in similar violent acts against innocent citizens. The 3553(a) factors weigh against the sought reduction.

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[6] The Court notes that defendant mentions the current COVID-19 pandemic only in passing and does not assert that he suffers from any condition that subjects him to increased vulnerability to the virus. Accordingly, the Court need not address the pandemic as a factor in determining whether extraordinary and compelling circumstances exist.

CONCLUSION

Defendant's application for compassionate release is denied.

SO ORDERED.

Dated: Central Islip, New York
March 26, 2021

s/ Denis R. Hurley
Denis R. Hurley
United States District Judge

Additional material from this filing is available in the Clerk's Office.