UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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November 09, 2021

Clerk - Northern District of Florida
U.S. District Court
100 N PALAFOX ST
PENSACOLA, FL 32502

Appeal Number: 21-11426-G
Case Style: USA v. Darregus Robinson
District Court Docket No: 3:06-cr-00442-LC-HTC-2

The enclosed copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court. See 11th Cir. R. 41-4.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lee Aaron, G
Phone #: 404-335-6172

Enclosure(s)

DIS-2 Letter and Entry of Dismissal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11426-G

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DARREGUS T. ROBINSON,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Darregus T. Robinson has failed to pay the filing and docketing fees to the district court within the time fixed by the rules, effective November 09, 2021.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Lee Aaron, G, Deputy Clerk

FOR THE COURT - BY DIRECTION

APPENDIX (A)

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11426-G

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DARREGUS T. ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Darregus Robinson is a federal prisoner currently serving a 588-month sentence for carjacking, Hobbs Act robbery, and various firearm offenses. He moves for leave to proceed *in forma pauperis* ("IFP") in his appeal from the denial, in part, of his motion for compassionate release, pursuant to 18 U.S.C. § 3582(c)(1)(A). In this motion, he argued that the disparity between his sentence and the sentence that he would have received under the current sentencing scheme constituted an extraordinary and compelling reason to reduce his sentence.

Because Robinson seeks leave to proceed IFP, the appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B)(i). An action is frivolous if it is without arguable merit in either law or fact. *Napier v. Preslicka,* 314 F.3d 528, 531 (11th Cir. 2002), *overruled on other grounds by Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021) (*en banc*).

Prior to the First Step Act, § 3582(c)(1)(A) allowed the district court to reduce a prisoner's term of imprisonment upon motion of the Director of the Bureau of Prisons, after considering the factors set forth in 18 U.S.C. § 3553(a), if it found that extraordinary and compelling reasons warranted such a reduction. 18 U.S.C. § 3582(c)(1)(A) (effective November 2, 2002, to December 20, 2018). The First Step Act amended § 3582(c)(1)(A) to allow the court to reduce a defendant's term of imprisonment also upon motion of the defendant. *See* First Step Act § 603; 18 U.S.C. § 3582(c)(1)(A). The court must find that extraordinary and compelling reasons warrant such a reduction, consider the § 3553(a) factors, and find that a reduction is consistent with applicable policy statements issued by the Sentencing Commission. *Id.*

The application notes to U.S.S.G. § 1B1.13 list four categories of extraordinary and compelling reasons: (A) the defendant's medical condition, (B) his age, (C) his family circumstances, and (D) "Other Reasons." *Id.*, comment. (n.1(A)-(D)). Under the "Other Reasons" category in Application Note 1(D), a defendant may be eligible for relief if, "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." *Id.*, comment. (n.1(D)). We recently held that, following the enactment of the First Step Act, § 1B1.13 continues to constrain a district court's ability to evaluate whether extraordinary and compelling reasons are present, and that "Application Note 1(D) does not grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence." *United States v. Bryant*, 996 F.3d 1243, 1248 (11th Cir. 2021).

Here, Robinson does not have any non-frivolous issues for appeal. *See Napier*, 314 F.3d at 531. Robinson did not allege that he was entitled to compassionate release based on his medical condition, age, or family circumstances, and we held in *Bryant* that courts do not have discretion

to develop "other reasons" that might justify a reduction in a defendant's sentence under the commentary to U.S.S.G. § 1B1.13. *See* U.S.S.G. § 1B1.13 comment. (n.1(A)-(D)); *Bryant*, 996 F.3d at 1248. Therefore, under our binding precedent, any disparity between Robinson's sentence and the sentence that he would have received under the current sentencing scheme does not constitute an extraordinary or compelling reason for compassionate release.

Thus, Robinson's motion for leave to proceed IFP is DENIED because any appeal would be frivolous. *See Ellis v. United States*, 356 U.S. 674, 674-75 (1958); *Napier*, 314 F.3d at 531.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11426-G

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DARREGUS T. ROBINSON,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Appellant's motion to hold appeal in abeyance is DENIED.

UNITED STATES CIRCUIT JUDGE

21-11426

Darregus T. Robinson
#06568-017
USP McCreary - Inmate Legal Mail
PO BOX 3000
PINE KNOT, KY 42635-3000

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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September 15, 2021

Darregus T. Robinson
USP McCreary - Inmate Legal Mail
PO BOX 3000
PINE KNOT, KY 42635-3000

Appeal Number: 21-11426-G
Case Style: USA v. Darregus Robinson
District Court Docket No: 3:06-cr-00442-LC-HTC-2

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of (14) days from this date, this appeal will be dismissed by the clerk without further notice unless the default(s) noted below have been corrected:

11th Cir. R. 42-1(b) also provides that "If an appellant is represented by appointed counsel, the clerk may refer the matter to the court for possible disciplinary action against counsel in lieu of dismissal."

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless you pay to the DISTRICT COURT clerk the docketing and filing fees, with notice to this office.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lee Aaron, G
Phone #: 404-335-6172

Enclosure(s)

DIS-1 Deficiency

APPENDIX (B)

THE OPINION OF THE UNITED STATES DISTRICT COURT FOR THE ELEVENTH CIRCUIT (PENSACOLA) DIVISION.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,

vs. Case No.: 3:06cr442/LAC

DARREGUS T. ROBINSON,
_____/

ORDER

This matter is before the Court on Defendant Darregus T. Robinson's motion (Doc. 181) for a reduction in sentence under the "Compassionate Release" provision of the First Step Act of 2018 (FSA), codified at 18 U.S.C. § 3582(c)(1)(A). The Government has filed a Response (Doc. 183) to the motion. Defendant had previously filed a motion for compassionate release, which the Government opposed on grounds that Defendant had failed to exhaust his available administrative remedies, and on that basis the Court denied Defendant's earlier motion without prejudice. Since the Government's response to the current motion does not address exhaustion, the Court considers the exhaustion matter to be resolved and will now proceed to the merits.

Pursuant to a plea agreement in November of 2006, Defendant was convicted on three separate counts of carjacking, two counts of robbery, one count of possession of a firearm by a convicted felon, and, as is most relevant to Defendant's argument here,

five counts of using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c). In one of these firearms counts, the firearm was discharged, while in the other four the firearm was brandished.

On February 16, 2007, Defendant was sentenced to concurrent 60 months of imprisonment on the non § 924(c) counts, and on the § 924 counts, he was sentenced to one consecutive 60 month term of imprisonment and four consecutive 150 month terms of imprisonment. In sum, Defendant was sentenced to 720 months imprisonment followed by 3 years of supervised release as to the non § 924(c) counts and 5 years of supervised release as to the § 924(c) counts, with all terms to run concurrently. According to the Bureau of Prisons, Defendant's current projected release date is January 20, 2061.

DISCUSSION

The Court has the discretion under the compassionate release provision to determine whether extraordinary and compelling reasons exist such that relief may be granted an inmate. *See, e.g.*, *United States v. Maumau*, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *2 (D. Utah Feb. 18, 2020); *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019); *United States v.*

Cantu, No. 1:05-CR-458-1, 2019 WL 2498923, at *1 (S.D. Tex. June 17, 2019). Courts evaluate motions for compassionate release with due regard for the factors outlined in U.S.S.G. § 1B1.13, as well as 18 U.S.C. § 3553(a) and 18 U.S.C. § 3142(g), but the decision ultimately rests on the discretion of the court. *See United States v. Winner*, No. 20-11692, 2020 WL 7137068, at *2 (11th Cir. Dec. 7, 2020).

Pursuant to the FSA, this provision was modified in December 2018 to allow that inmates, not just the Director of the Bureau of Prisons ("BOP"), could move the courts for a modification in his or her sentence.[1] Among other factors, a court may now modify a defendant's sentence "if it finds . . . that 'extraordinary and compelling reasons warrant such a reduction' and 'such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'" *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *1 (S.D. Tex. June 17, 2019) (quoting 18 U.S.C. § 3582(c)(1)(A)(i)). While Congress did not define what constitutes "extraordinary and compelling reasons" for a reduction, the Sentencing Commission had been directed to publish policy statements regarding this provision and to "describe what should be

[1] Courts have noted that one apparent reason for this statutory amendment was that the BOP had only rarely filed motions for compassionate release on the behalf of inmates. *See United States v. Marks*, No. 03-CR-6033L, 2020 WL 1908911, at *5–6 (W.D.N.Y. Apr. 20, 2020); *United States v. Rivernider*, 2020 WL 597393, at *3 (D. Conn. Feb. 7, 2020); *United States v. Brown*, 411 F. Supp. 3d 446, 450 (S.D. Iowa 2019).

considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t).[2]

As directed by the statute, and prior to the FSA, the Sentencing Commission set out a Policy Statement which directs courts to first consider the sentencing factors set out in 18 U.S.C. § 3553(a), to the extent they are applicable. *See* U.S. Sentencing Guidelines ("USSG") Manual § 1B1.13. Then, courts are to determine if "[e]xtraordinary and compelling reasons warrant the reduction" and "[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)." *Id.* In evaluating whether extraordinary and compelling reasons exist, the Sentencing Commission established four qualifying categories: where (A) the defendant suffers from a terminal illness or a serious, nor-recoverable medical or mental condition affecting the defendant's ability to provide self-care; (B) the defendant is at least 65 years old, has serious deterioration in physical or mental health, and has served at least 10 years or 75% of his sentence; (C) the caregiver for the defendant's minor child has died or is incapacitated, or the defendant's spouse or partner is incapacitated, with the defendant being the only available caregiver; or (D) "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary

[2] The statute did provide one directive, however, that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t).

and compelling reason other than, or in combination with the reasons described in subdivisions (A) through (C)." *Id.* cmt. n.1.

Thus, under the catch-all provision of subsection (D), the scope of what constitutes "extraordinary and compelling" reasons has been left undefined and delegated to the discretion of the BOP director. These provisions have not been updated since the FSA was enacted, and one factor seems to be that the Sentencing Commission must have four voting commissioners to constitute a quorum, and it currently has only two. *See United States v. Haynes*, 2020 WL 1941478, at *12 n.20 (E.D.N.Y. Apr. 22, 2020).

In the wake of this problem, courts have grappled with the question of whether they can consider criteria other than those identified by the Sentencing Commission. Some courts have held that Congress intended that the Sentencing Commission's pronouncements be the sole arbiter of what constitutes grounds for compassionate release, and therefore courts are permitted only to consider those factors expressly set out by the Sentencing Commission. *See Riley v. United States*, No. C19-1522 JLR, 2020 WL 1819838, at *8 (W.D. Wash. Apr. 10, 2020); *United States v. Willingham*, No. CR 113-010, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019); *United States v. Lynn*,

2019 WL 3805349, at *4 (S.D. Ala. Aug. 12, 2019). The Government takes this view in the instant case.

However, this court sides with those courts that have found that they should not be so constrained. The purpose of the FSA is to increase the use of compassionate release, and it would run contrary to that purpose to limit courts only to those criteria set out by the Sentencing Commission – especially given that those criteria have not been revisited in light of the FSA. As one court has stated:

> Nor it is [sic] obvious that courts remain bound by what the Sentencing Commission has so far announced, which is in considerable tension with the First Step Act. If read literally, the existing policy statement would only permit courts to determine whether an inmate fell into one of the three narrow categories of extraordinary and compelling circumstances identified by the Sentencing Commission. The fourth, "catch-all" provision only permits the Director of the Bureau of Prisons to determine whether other extraordinary and compelling reasons exist. The policy statement would therefore severely limit the authority conferred on the courts by the First Step Act.

United States v. Maka, No. CR 03-00084 SOM, 2020 WL 2544408, at *3 (D. Haw. May 19, 2020). Thus, it has now become inappropriate for the BOP to retain significant discretionary control over the decision-making process when the FSA has effectively eliminated the BOP's control over whether compassionate release motions are filed. It is therefore apparent that the Court should take a more expansive approach towards what factors it should consider in making its decision. *See United States v. Maumau*,

No. 08-cr-758, 2020 WL 806121, at *4 (D.Utah. Feb. 18, 2020); *see also United States v. Marks*, No. 03-CR-6033L, 2020 WL 1908911, at *7 (W.D.N.Y. Apr. 20, 2020) (citing *Dinning v. United States*, No. 2:12-cr-84, 2020 WL 1889361, at *2 n.1 (E.D.Va. Apr. 16, 2020) ("this Court has the discretion to provide relief to petitioners who do not fall directly within the Sentencing Commission's current policy statement"); *United States v. Schmitt*, No. CR12-4076, 2020 WL 96904, at *3 (N.D. Iowa Jan. 8, 2020) ("although the Guideline provides helpful guidance on what constitutes extraordinary and compelling reasons, it is not conclusive given the recent statutory changes"); *United States v. Gonzales*, No. 05-CR-561, 2019 WL 5102742, at *3 (W.D. Tex. Oct. 10, 2019) (stating that just as with "all sentencing decisions, a judge should consider the Guidelines" but is not bound by them, the court would consider U.S.S.G. § 1B1.13, but would not consider itself bound by that guideline); *United States v. Brown*, 411 F. Supp. 3d 446, 452 (S.D. Iowa 2019) (Sentencing Commission's prior interpretation of "extraordinary and compelling reasons" is informative, but not dispositive); *United States v. Beck*, No. 13-CR-186, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019) ("While the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction under § 3582(c)(1)(A)(I)")).

This view comports with the apparent intent of the statute that the BOP should no longer serve as an absolute gatekeeper for compassionate release motions, as now courts can grant these motions even after the BOP did not find them appropriate or meritorious.[3] Thus, numerous courts have held that they have discretion under the "catch all" provision to determine what might constitute extraordinary and compelling reasons to modify a sentence, and this Court agrees with that holding.

The central point of Defendant's argument is that, were he to be sentenced today, the firearm statutes under which he was convicted would provide for much shorter mandatory minimum sentence terms. The revisions to the criminal statute under which Defendant was sentenced, 18 U.S.C. § 924(c), were not made retroactive. Nonetheless, courts have looked to the compassionate release statute as a means to grant relief from disproportionately large sentences that have been subsequently modified. This Court, having already found that it has the discretion to determine the scope of what constitutes an extraordinary and compelling reason under that statute, agrees.

[3] As suggested in at least one of the aforementioned cases, *Maumau*, courts have always had the discretion to determine the outcomes of compassionate release motions, but the BOP's gatekeeping function essentially meant that the courts would only receive motions when the BOP was in favor of compassionate release and therefore elected to file them. *See* 2020 WL 806121, at *4.

As other courts have held, the fact that an amendment to a criminal sentencing statute was not made to apply retroactively does not mean that the court is unable to consider the effects of the amendment under a compassionate release motion. That a revised criminal statute is not retroactive simply means that all defendants sentenced under that amendment are not automatically entitled to relief. Certainly, Congress could decide against blanket relief for all defendants while at the same time deferring to the authority and discretion of the courts to individually determine whether a defendant should be granted relief under an amended sentencing statute. *See Maumau*, 2020 WL 806121 at *7; *Brown*, 411 F. Supp. 3d at 453; *United States v. Urkevich*, No. 03-37, 2019 WL 6037391 at *3–4 (D. Neb. Nov. 14, 2019). Thus, the fact that a defendant was sentenced under a now-amended but non-retroactive sentencing statute, while a factor to be considered by the court, is not an obstacle to relief.

At the time Defendant was sentenced, 18 U.S.C. § 924(c)(1)(A)(iii)(2005) provided for a minimum of 10 years imprisonment for the offense of discharging a firearm in furtherance of a crime of violence, and that minimum remains in the current statute. Likewise, § 924(c)(1)(A)(ii)(2005) provided, and still provides, for a minimum of 7 years imprisonment for brandishing a firearm in furtherance of a crime of violence.[4]

[4] In Defendant's own assessment of his sentencing metrics, he seems to overlook the fact that one count involved the discharging of a firearm, while the remaining four counts involved the

Importantly, during sentencing the four brandishing counts against Defendant were enhanced under § 924(c)(1)(C)(i)(2005), which provided that a statutory minimum of 25 years would apply "[i]n the case of a second or subsequent conviction" under § 924(c). Thus, all four brandishing counts became subject to the 25 year minimum under this subsection. However, the FSA altered the current statute such that this subsection now only applies "[i]n the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final." This change effectively prevents the 25 year enhanced minimum from being grouped together, or "stacked," into a single indictment, as they are in this case.

While under today's sentencing scheme Defendant would benefit from not having the 25 year minimum under § 924(c)(1)(C)(i) applied to any count against him, the Court notes that he was actually sentenced below these statutory minimums as a result of the Government's filing of a sealed motion on his behalf. The Court sentenced Defendant to 150 months, or exactly half of the 25 year minimum, as to each of the four counts of brandishing a firearm. Still, had the present sentencing scheme been in effect at the time of sentencing, Defendant's minimum sentence on each of these four counts

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brandishing of a firearm, both of which provide for enhanced penalties identified herein. Thus, Defendant is incorrect in his assertion that each of these five counts would now carry only a five year mandatory minimum.

would have been 84 months, which is 216 months less than the previous statutory minimum he was subject to, and 66 months less than the sentence he actually received on each count. Obviously, this constitutes a substantial adjustment downward, which provides an extraordinary and compelling reason to warrant a reduction.

That said, the Court is also mindful that Defendant's original sentencing was significantly beneath the statutory minimum for these counts. Additionally, it cannot be overlooked that in the instant criminal case Defendant committed several acts of carjacking and robbery, all involving firearms, and that his criminal history reveals other crimes involving firearms or violence.

Accordingly, it is **ORDERED:**

1. Defendant's motion (Doc. 181) for reduction in sentence under the "Compassionate Release" provision of the First Step Act of 2018 (FSA) is **GRANTED** only to the extent that his terms of imprisonment under Counts Four, Six, Eight and Ten are each reduced to 117 months, with each Count to run consecutively to one another and to all other Counts, thus reducing Defendant's total term of imprisonment from 720 months to 588 months.

2. Defendant's Motion for Status Update and for Appointment of Counsel (Doc. 191) is **DENIED**.

ORDERED on this 8th day of April, 2021.

s/*L.A. Collier*

Lacey A. Collier
Senior United States District Judge