

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:10-cr-35-T-27CPT

SANDCHASE CODY

ORDER

Before the Court is Defendant Sandchase Cody's motion for the appointment of counsel. (Doc. 157). For the reasons discussed below, Cody's motion is denied without prejudice.

I.

In February 2010, Cody was charged in a superseding indictment with two counts of possessing with the intent to distribute and distributing cocaine, one count of being a felon in possession of ammunition, and one count of possessing with the intent to distribute cocaine base, cocaine, and marijuana. (Doc. 18). Cody was convicted on all four counts following a trial, and was thereafter sentenced in April 2011 principally to concurrent terms of imprisonment of 294 months. (Docs. 80, 105). The Eleventh Circuit affirmed Cody's conviction on appeal. (Doc. 124).

Cody subsequently filed two motions to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docs. 129, 145). The first of these motions was denied in May 2014 (Doc. 131), while the second was granted in part in May 2019 (Doc. 148).

Exhibit #1

The May 2019 Order lowered Cody's sentence on the felon in possession count to 120 months imprisonment, but did not impact the concurrent 294-month imprisonment terms imposed on the other three counts. *Id.*; (Doc. 147). Cody appealed the May 2019 Order (Doc. 149), and that appeal remains pending.

In April 2020, Cody filed a motion to reduce his sentence (Doc. 154), which the Court denied that same month (Doc. 155). In doing so, the Court found, *inter alia*, that Cody had not shown the type of extraordinary and compelling circumstances required for compassionate release under the First Step Act (FSA). *Id.*

By way of the instant motion, Cody seeks the appointment of counsel to assist him in determining whether he qualifies for relief under the FSA. (Doc. 157).

II.

Effective December 21, 2018, the FSA amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to move for a reduction of his imprisonment term "after [he] has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons [BOP] to bring a motion on [his] behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Once a defendant has satisfied this exhaustion requirement, a court may—after considering the factors set forth in 18 U.S.C. § 3553(a)¹ to the extent they are applicable—reduce a defendant's sentence if it finds that:

¹ Those factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from

- (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 [18 U.S.C. §] 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, as provided under [18 U.S.C. §] 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.²

18 U.S.C. § 3582(c)(1)(A).

The Eleventh Circuit has apparently not yet addressed the issue as to whether a defendant has the right to the appointment of counsel in connection with a compassionate release request under section 3582(c)(1)(A).³ It has, however, squarely decided that there is no such right relative to motions or hearings under section 3582(c)(1)(A)'s neighboring provision, section 3582(c)(2).⁴ *United States v. Webb*, 565

further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

² The Sentencing Commission has not issued a policy statement applicable to motions for compassionate release filed by defendants pursuant to the FSA. Courts, however, have been guided by the Sentencing Commission's policy statement adopted before passage of the FSA in 2018. *See U.S.S.G. § 1B1.13.*

³ An appeal on this issue is currently pending before the Eleventh Circuit. *United States v. Siria Hernandez*, No. 19-13375 (11th Cir.).

⁴ Section 3582(c)(2) provides that, "[i]n the case of a defendant who has been sentenced to a

F.3d 789, 795 (11th Cir. 2009). The rationale for the Eleventh Circuit's finding has been applied equally to section 3582(c)(1)(A) by a number of courts in this and other districts. *See, e.g., United States v. Heromin*, No. 8:11-cr-550-T-33SPF, Doc. 448 (M.D. Fla. June 5, 2019); *United States v. Wilson*, 2019 WL 7372975, at *3 (D.S.D. Dec. 31, 2019); *United States v. Bruner*, 2017 WL 1060434, at *2 (E.D. Ky. Mar. 21, 2017).

Irrespective of whether a defendant seeking compassionate release has a right to the appointment of counsel, the Eleventh Circuit's decision in *Webb* suggests that the decision to appoint an attorney in such cases is left to the district court's discretion. *See Webb*, 565 F.3d at 795.

Upon due consideration of the matter, the Court finds that the appointment of counsel is unwarranted given the limited information contained in Cody's motion. (Doc. 157).⁵ To begin, Cody presents no basis in his motion to conclude that he is entitled to relief under the FSA or that he requires the assistance of counsel in presenting his arguments to the Court.

Furthermore, based on what he states in his motion, it is not clear that Cody has exhausted his administrative remedies as required by section 3582(c)(1)(A).

term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

⁵ This finding pertains solely to Cody's instant motion and does not bear on his more recently filed *Motion for Compassionate Release/Reduction in Sentence Pursuant to 28 U.S.C. § 3582(c)(1)(A)* (Doc. 158). That later motion will be addressed by separate Order.

Although he cites the BOP's Program Statement No. 5050.50, titled "Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)" (Jan. 17, 2019) (available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf), he makes no allegation that he has complied with its requirements. Among other things, this Program Statement explains that a prisoner seeking compassionate release must first file a request with the prison warden asking the BOP to seek compassionate release on the prisoner's behalf. *Id.* at 3 (citing 28 C.F.R. § 571.61). If the prison warden denies that request, the prisoner must then appeal that denial through the BOP's Administrative Remedy Procedure. *Id.* at 15 (citing 28 C.F.R. § 571.63). Without exhaustion of his administrative remedies, Cody would not be entitled to relief under section 3582(c)(1)(A). See *United States v. Bolino*, 2020 WL 32461, at *2 (E.D.N.Y. Jan. 2, 2020) (denying motion for compassionate release without prejudice based on defendant's failure to submit a sufficient record showing that he had exhausted his administrative remedies); *United States v. Hassan*, 2019 WL 6910068, at *1 (D. Minn. Dec. 19, 2019) (providing that defendant requesting compassionate release must exhaust her administrative remedies or show she submitted a request for compassionate release and that 30 days have elapsed without action by the BOP); *United States v. Solis*, 2019 WL 2518452, at *2 (S.D. Ala. June 18, 2019) (finding that a defendant who has not "requested compassionate release from the BOP or otherwise exhausted his administrative remedies" is not entitled to reduction of his imprisonment term).

III.

In light of the above, Cody's motion for the appointment of counsel (Doc. 157) is denied without prejudice.

DONE and ORDERED in Tampa, Florida, this 6th day of August 2020.

Christopher P. Tutte
HONORABLE CHRISTOPHER P. TUTTE
United States Magistrate Judge

Copies to:
Counsel of record
Pro se Defendant

Exhibit #6

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

SANDCHASE CODY

Case No. 8:10-cr-35-T-27CPT

ORDER

BEFORE THE COURT is Defendant Cody's *pro se* "Motion for Compassionate Release/Reduction in Sentence Pursuant to 28 U.S.C. § 3582(c)(1)(A)." (Dkt. 158). A response is unnecessary. The motion is DENIED.

Cody was convicted and sentenced to concurrent terms of 294 months imprisonment for distribution of cocaine (Counts One and Two), felon in possession of a firearm (Count Three), and possession with intent to distribute cocaine base, cocaine, and marijuana (Count Four). (Dkts. 80, 105, 118). His convictions and sentence were affirmed. (Dkt. 124); *United States v. Cody*, 460 F. App'x 825 (11th Cir. 2012). This Court granted in part a subsequent motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, correcting Cody's sentence on Count Three to 120 months imprisonment, concurrent with Counts One, Two, and Four. (Dkt. 148). An amended judgment was entered, which is currently on appeal. (Dkt. 147; Dkt. 149).

This Court denied a subsequent motion for reduction in sentence, finding that Cody had not presented extraordinary and compelling reasons to warrant compassionate release. (Dkt. 155). He now seeks a sentence reduction "[p]ursuant to petitioner's living conditions and the situation at FCI-Edgefield more broadly are such that he is likely unable to protect himself from contracting COVID-

19 per the CDC guidelines.” (Dkt. 158). His contentions, however, are without merit.

The First Step Act amended § 3582(c)(1)(A) to allow a defendant to seek compassionate release with the court after fully exhausting administrative remedies available to him following the failure of the Bureau of Prisons (“BOP”) to bring a motion on his behalf, or 30 days after the warden receives the request to bring such a motion, whichever is earlier. *See First Step Act of 2018*, § 603(b). Cody asserts and provides documentation reflecting that he filed a request with the warden more than 30 days ago and has not received a response. (Dkt. 158; Dkt. 158-1 at 1). Accordingly, his motion for compassionate release can be considered.

While section 3582(c)(1)(A) allows a sentence reduction based on “extraordinary and compelling reasons,” the reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A). What constitutes “extraordinary and compelling circumstances” is not defined, except that “[r]ehabilitation of the defendant alone” is insufficient. *See* 28 U.S.C. § 994(t).

The Sentencing Commission promulgated its policy statement in U.S.S.G. § 1B1.13. The application notes to § 1B1.13 list four circumstances as extraordinary and compelling under § 3582(c)(1)(A): (A) a serious medical condition; (B) advanced age and deteriorating health; (C) family circumstances; and (D) an extraordinary and compelling reason other than, or in combination with, (A)-(C), as determined by the Director of the Bureau of Prisons. § 1B1.13, cmt. n.1. None of Cody’s contentions fall within application notes (A)-(C). Although he suffers from asthma and high blood pressure (Dkt. 158-1 at 1, 13), he does not assert or provide documentation demonstrating that his medical conditions substantially diminish his ability to provide self-care. *See* § 1B1.13, cmt. n.1(A)(ii); *see United States v. Heromin*, No. 8:11-CR-550-T-33SPF, 2019 WL 2411311, at *1-2

(M.D. Fla. June 7, 2019) (noting that defendants cannot “self-diagnose their own medical conditions” and denying compassionate release due to absence of corroboration from medical provider that defendant is unable to provide self-care or suffers a serious medical condition); *see also United States v. Dowlings*, No. CR413-171, 2019 WL 4803280, at *1 (S.D. Ga. Sept. 30, 2019) (denying compassionate release where defendant asserted he was diagnosed with a brain tumor, but does not “indicate that he is unable to care for himself while incarcerated”). And courts in this Circuit have found that “general concerns about possible exposure to COVID-19 do not meet the criteria for an extraordinary and compelling reason under U.S.S.G. § 1B1.13.” *See United States v. Smith*, No. 8:17-cr-412-T-36, 2020 WL 2512883, at *4 (M.D. Fla. May 15, 2020). Last, while Cody’s rehabilitation efforts are admirable, rehabilitation alone is insufficient to warrant release. *See 28 U.S.C. § 994(t).*

In sum, none of Cody’s reasons are encompassed within the “extraordinary and compelling” circumstances in the policy statement of § 1B1.13, even if considered in combination with the criteria in the application notes. These reasons are therefore not consistent with the policy statement in § 1B1.13. Accordingly, because he has not shown extraordinary and compelling reasons or any other basis to grant compassionate release, this Court is without authority to grant relief, and the motion for compassionate release is **DENIED**.

DONE AND ORDERED this 6th day of August, 2020.

/s/ James D. Whittemore

JAMES D. WHITTEMORE
United States District Judge

Copies to: Defendant. Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13536-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANDCHASE CODY,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

ORDER:

Sandchase Cody's motion for appointment of counsel is DENIED. See 18 U.S.C.

§ 3006A(a)(2).

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

Exhibit #10

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13536-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANDCHASE CODY,

Defendant-Appellant.

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

ORDER:

Appellee's motion to supplement the record on appeal is GRANTED.

Appellee's motion for an extension in which to file its response brief, as construed from its request to stay briefing, is GRANTED. The response brief is due within 30 days after the date of this order.

Appellant's motion to supplement the record with the attached Bureau of Prisons Individualized Needs Plan, as construed from his "Motion to Amend 'Progress Report' and 'Medical Records' for Exhibits to Cody's Initial Brief for Compassionate Release," is GRANTED.

Appellant's "Motion to Supplement the Record on Appeal and Motion for Appointment of Independent Investigator Pursuant to his Actual Innocent Claim" is GRANTED to the extent that

Exhibit # 11

he seeks to supplement the record with the emails he sent to prison medical staff in 2021. The motion is otherwise DENIED.

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13536-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANDCHASE CODY,

Defendant-Appellant.

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

ORDER:

Before this Court is Appellant's "Motion for Clarification and Motion to Reply to Government's Responce [sic] Due on July 24, 2021 Pursuant to Whatever Rule May Apply."

To the extent that Appellant seeks clarification of this Court's June 24, 2021 order, the motion is GRANTED. The June 24 order granted Appellant leave to supplement the record with the six emails to prison medical staff that were attached to his "Motion to Supplement the Record on Appeal and Motion for Appointment of Independent Investigator Pursuant to his Actual Innocent Claim" and those emails have been included in the appellate record.

To the extent that Appellant seeks to supplement the record with the two emails to prison medical staff in May 2021, which are attached to his "Motion for Clarification and Motion to Reply

Exhibit # 13

to Government's Response [sic] Due on July 24, 2021 Pursuant to Whatever Rule May Apply," the motion is GRANTED.

To the extent that Appellant seeks leave to file a reply brief, the motion is DENIED AS UNNECESSARY. Appellant may file a reply brief within 21 days after the date of this order.

Also before this Court is Appellant's June 29, 2021 motion to supplement the record with the same six emails to prison medical staff that were attached to his "Motion to Supplement the Record on Appeal and Motion for Appointment of Independent Investigator Pursuant to his Actual Innocent Claim." The June 29 motion to supplement the record is DENIED AS MOOT because the requested relief has already been granted.

/s/ Andrew Brasher
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13536

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANDCHASE CODY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:10-cr-00035-JDW-CPT-1

Exhibit # 15

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and BRANCH, Circuit Judges.

PER CURIAM:

Sandchase Cody, a federal prisoner, appeals *pro se* the *sua sponte* denial of his third motion for compassionate release and the denial of his motion to reconsider. 18 U.S.C. § 3582(c)(1)(A). The district court ruled that Cody failed to identify extraordinary and compelling reasons for early release, U.S.S.G. § 1B1.13, and, in the alternative, that the statutory sentencing factors weighed against granting his motion, 18 U.S.C. § 3553(a). The district court also denied Cody's motion to reconsider because it only reiterated his earlier arguments. We affirm.

We review the denial of motions for compassionate release and for reconsideration for abuse of discretion. *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021) (release); *United States v. Simms*, 385 F.3d 1347, 1356 (11th Cir. 2004) (reconsideration). “A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.” *Harris*, 989 F.3d at 911 (quoting *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019)).

A district “court may not modify a term of imprisonment once it has been imposed” except under certain circumstances. 18 U.S.C. § 3582(c); see *United States v. Jones*, 962 F.3d 1290, 1297

Exhibit # 16

20-13536

Opinion of the Court

3

(11th Cir. 2020). Section 3582(c), as amended by the First Step Act, gives the district court discretion to “reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable” if a reduction is warranted for “extraordinary and compelling reasons” and “is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A). So the district court may deny a motion to reduce because no “extraordinary and compelling reasons” exist or because relief is inappropriate based on the statutory sentencing factors.

We need not address Cody’s argument that the statutory sentencing factors weighed in favor of early release because we can affirm on the alternative ground that he failed to establish an extraordinary and compelling reason to justify his early release. Cody argued that his medical conditions of asthma, hypertension, glaucoma, and high cholesterol increased the risk that COVID-19 would make him seriously ill. The district court found that none of Cody’s medical conditions, for which he “provide[d] [no] documentation” to prove they “substantially diminish[ed] his ability to provide self-care” in prison, qualified as extraordinary and compelling enough to warrant early release. *See Harris*, 989 F.3d at 912; U.S.S.G. § 1B1.13 cmt. n.1. The district court also found that Cody’s concerns about possible exposure to COVID-19 and his rehabilitation in prison did not warrant compassionate release. *See id.* § 1B1.13 cmt. n.3. And the district court correctly reasoned that a reduction of Cody’s sentence had to comport with the definition

Exhibit #17

of “extraordinary and compelling reasons” in section 1B1.13. *See United States v. Bryant*, 996 F.3d 1243, 1252–62 (11th Cir.), *petition for cert. filed*, No. 20-1732 (U.S. June 10, 2021).

Cody also argues, for the first time, that his situation is “extraordinary” because he would not be classified as a career offender were he sentenced under the present version of the Sentencing Guidelines. Under plain error review, *United States v. Monroe*, 353 F.3d 1346, 1349 (11th Cir. 2003), Cody’s argument fails because the alleged illegality of his sentence is not a basis for compassionate release. *See* § 1B1.13 cmt. n.1.

The district court also did not abuse its discretion when it denied Cody’s motion for reconsideration. “A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” *See Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010) (internal quotation marks omitted). As the district court stated, Cody “presented [no] new evidence” and could not use his motion to reconsider to “reiterate arguments that he previously made.”

We **AFFIRM** the denial of Cody’s motion for compassionate release.

Exhibit # 18

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13536

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANDCHASE CODY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:10-cr-00035-JDW-CPT-1

JUDGMENT

Exhibit # 19

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: November 16, 2021

For the Court: DAVID J. SMITH, Clerk of Court

Exhibit # 20

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13536-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

SANDCHASE CODY,

Defendant - Appellant.

On Appeal from the United States
District Court for the Middle District of Florida

ORDER:

Appellant's "Motion for Clarification Pursuant to this Court's Order Granting Mr. Cody's Motion for Appointment of Independent Investigator Pursuing His Actual Innocence Claim" is GRANTED to the extent that the Court CLARIFIES that it did not grant Appellant's request to appoint an investigator in either its June 24, 2021 order or its August 3, 2021 order. Instead, the Court explicitly denied that relief in its June 24, 2021 order. *See, e.g., Order, June 24, 2021 ("The motion is otherwise DENIED.")*. To be clear, the Court has not granted Appellant's request to appoint an investigator.

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

ENTERED FOR THE COURT – BY DIRECTION

Exhibit # 21

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