

ATTACHMENT(S)

- 1). Order denying Compassionate Release Motion.
- 2). Order denying Motion for Reconsideration.
- 3). Order denying Appeal (Summary Affirmed).
- 4). Order denying Rehearing En Banc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NOBLE L. BENNETT,

Defendant.

Case No. 4:91 CR 1 CDP-7

MEMORANDUM AND ORDER

Defendant Noble L. Bennett is a 69-year-old African American man serving a life sentence imposed in 1993 after he was convicted of conducting an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Through appointed counsel, he seeks release under the First Step Act claiming that his serious health conditions – which include cancer, chronic kidney disease, hypertension, and diabetes – render him especially vulnerable to COVID-19. The government opposes the motion, arguing that Bennett’s health conditions do not qualify as extraordinary and compelling reasons warranting a reduction of sentence and, further, that he continues to be a danger to the community. Although Bennett’s medical conditions are undoubtedly serious, the factors set out in 18 U.S.C. § 3553(a) do not support a reduction in sentence, and Bennett presents a danger to the community if released. I will therefore deny the motion for compassionate release.

Background

In 1991, defendant Bennett and several others were charged in a multi-count indictment that alleged various offenses involving the Jerry Lewis Organization (JLO), “a powerful criminal racketeering enterprise that for over ten years controlled a large percentage of the market for T’s and Blues (a heroin substitute), heroin, and cocaine in north St. Louis.” *United States v. Darden*, 70 F.3d 1507, 1516 (8th Cir. 1995). After a nine-month trial involving eight defendants, Bennett was convicted in June 1993 of one count of conducting an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). He was acquitted of conspiring to do the same in violation of § 1962(d). Based on his being held accountable for 213 kilograms of cocaine and two murders, Bennett was sentenced on September 24, 1993, to life imprisonment. In *Darden*, the Eighth Circuit Court of Appeals affirmed his conviction. He did not challenge his sentence on appeal. *Id.* at 1517. Bennett has filed several motions in this case to reduce his sentence, all of which have been denied. (*See* ECF 263, 289, 373.) His motion filed under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence was also denied. *See Bennett v. United States*, Case No. 4:97CV757 ERW (E.D. Mo.) (Memo. & Order, Jan. 8, 1999) (ECF 11).

Bennett is presently incarcerated at FMC Butner in North Carolina. He is 70 years old. Bennett has many serious health conditions, some of which are

recognized by the Centers for Disease Control and Prevention (CDC) as making him more likely to become severely ill if he should contract COVID-19. He has grade M0, IIb, Gleason 7 prostate cancer for which he recently completed a two-month course of radiation treatment and is currently undergoing injection therapy with leuprolide acetate.¹ He has stage 3 kidney disease with limited kidney function. He has degenerative disc disease with associated peripheral neuropathy and moderate to severe back pain for which he is managed by the Bureau of Prison's pain management clinic. He has been temporarily assigned a wheelchair to use when traveling long distances. He also has hepatitis C, well-controlled hypertension, gastroesophageal reflux disease, hyperlipidemia, diabetes, and glaucoma. When he was offered the COVID vaccine in February 2021, he declined out of concern of potential side effects with his cancer treatment. After consultation with his doctors, he received both doses of the Pfizer vaccine in April 2021.²

Discussion

Bennett moves for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), which permits the court to reduce a term of imprisonment if, after considering the

¹ Leuprolide injection is a hormone therapy used to treat symptoms associated with advanced prostate cancer. *Medline Plus*, <https://medlineplus.gov/druginfo/meds/a685040.html> (last revised July 15, 2020).

² Given Bennett's documented and legitimate concerns regarding potential negative interaction between the vaccine and his cancer treatment, I reject the government's argument that Bennett's initial refusal of the vaccine renders him ineligible for release.

factors set forth in 18 U.S.C. § 3553(a), it finds that “extraordinary and compelling reasons warrant such a reduction.” Bennett contends that such extraordinary and compelling reasons exist here given that his personal characteristics and serious medical conditions make him particularly vulnerable to serious illness if he contracts COVID-19.

I do not disagree that Bennett’s circumstances – and particularly his incarceration,³ health conditions,⁴ and age⁵ – generally make him more likely to become seriously ill if he were to contract COVID-19. However, adults 65 years old and older who are fully vaccinated have a 94% reduction in risk of COVID-19 hospitalizations.⁶ Bennett’s status as being fully vaccinated therefore mitigates his risk from COVID-19 to such an extent that COVID-19, in combination with his underlying conditions, no longer presents an extraordinary and compelling reason to grant compassionate release. Although vaccines are not one hundred percent

³ Centers for Disease Control and Prevention, *People Living in Prisons and Jails*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/living-prisons-jails.html> (last updated Mar. 5, 2021).

⁴ Centers for Disease Control and Prevention, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated May 13, 2021).

⁵ *Id.* See also Centers for Disease Control and Prevention, *Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last updated June 9, 2021).

⁶ Centers for Disease Control and Prevention, *Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last updated June 9, 2021).

effective, the CDC states that “[c]urrently authorized vaccines in the United States are highly effective at protecting vaccinated people against symptomatic and severe COVID-19.”⁷ Vaccines are particularly effective at preventing “severe illness and death.”⁸ Accordingly, as a result of his vaccination, Bennett now has significant protection against serious illness or death should he contract COVID-19.

Regardless, the COVID-19 pandemic does not alone warrant the release of every federal prisoner with health conditions that make them more susceptible to the disease. *See Llera-Plaza v. United States*, No. 2:98-CR-00362-10, 2021 WL 2343000, at *3 (E.D. Pa. June 8, 2021). In determining whether extraordinary and compelling reasons exist for compassionate release, I must also consider the § 3553(a) factors, which includes consideration of the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need for the sentence to reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense. Such consideration in the circumstances of this case weighs strongly against any reduction in sentence.

Bennett’s criminal activity was very serious. He joined the JLO enterprise

⁷ Centers for Disease Control and Prevention, *Covid-19, Guidance for Fully Vaccinated People*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (updated May 28, 2021).

⁸ Centers for Disease Control and Prevention, *Covid-19, When You've Been Fully Vaccinated*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html> (updated May 16, 2021).

after his own drug-trafficking enterprise failed.⁹ *See Darden*, 70 F.3d at 1518, 1520.

The Eighth Circuit described in detail the violent and murderous nature of the JLO enterprise and characterized Bennett's participation as "intimate." *Id.* at 1525. In addition to his extensive involvement in narcotics distribution, Bennett planned the murder of a deputy sheriff, *id.* at 1522, and was implicated in the murder of a rival drug dealer. *See Bennett*, Case No. 4:97CV757 ERW, ECF 11 at pp. 11-17. He also admitted to plans to intimidate government witnesses by murdering their relatives. *Darden*, 70 F.3d at 1541. To reduce his sentence to time served would not reflect the extremely serious and violent nature of his history, characteristics, and offense. Nor would it promote respect for the law or afford adequate deterrence. Moreover, he was disciplined in prison less than four years ago for possessing a dangerous weapon, and the BOP considers him to currently be at medium risk of recidivism. Given Bennett's past and recent history, I am not convinced that he would not be a danger to the community if released.

To the extent § 3553(a)(2)(D) directs me to consider the need to provide

⁹ In relation to his own drug-trafficking enterprise, the "Bennett enterprise," Bennett pleaded guilty in 1996 to one count of conspiracy to violate RICO in violation of 18 U.S.C. § 1962(d). *See United States v. Bennett*, 4:90CR206 SNL (E.D. Mo.). In a Memorandum and Order denying Bennett's motion under 28 U.S.C. § 2255, which sought to vacate his conviction and sentence in the instant JLO enterprise case, Judge E. Richard Webber thoroughly summarized the history underlying the Bennett enterprise case, including that it involved allegations that Bennett personally caused the death of Keith Hayes by means of shooting; killed Henry Gooden during the commission of felony robbery; conspired to commit murder in the first degree of Antar Tiari and cause the death of Antar Tiari; conspired and committed murder in the first degree of Gerald "Billy" Patton; and conspired and attempted to murder Arlester and O'Keith Parnell. *See Bennett*, Case No. 4:97CV757 ERW, ECF 11 at pp. 2-3.

medical care, the records submitted to the Court show that the BOP is managing Bennett's medical needs and is providing the care and treatment required for all of Bennett's health conditions. There is no evidence that the BOP could not adequately care for him in the unlikely event that he contracts COVID-19 given all the safeguards and protocols in place at the institution.

Finally, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005), Bennett argues that he would be subject to only a 20-year maximum sentence rather than life if he was sentenced today for the same offense of conviction, and that such disparity warrants a reduced sentence.¹⁰ I am permitted to consider unwarranted sentencing disparities in determining whether extraordinary and compelling reasons support compassionate release. *See* 18 U.S.C. § 3553(a)(6); *United States v. Hope*, No. 90-CR-06108-KMW-2, 2020 WL 2477523, at *2-4 (S.D. Fla. Apr. 10, 2020) (collecting cases). I disagree, however, that an asserted sentence disparity under the guise of *Apprendi* and/or *Booker* warrants a sentence reduction in this case.

Apprendi held that it was a violation of a defendant's Sixth Amendment right to jury trial for a judge to make factual findings that had the effect of increasing a sentence beyond the statutory maximum for the crime of conviction. Bennett argues

¹⁰ Bennett cites no authority for his assertion that he would be subject to only a 20-year maximum sentence. I presume he relies on 18 U.S.C. § 1963(a) for this assertion.

that the murders used to enhance his sentence as relevant conduct were attributed to him by the district court and not the jury and thus were not proven beyond a reasonable doubt. Without consideration of these murders, Bennett contends he would only be subject to 20 years in prison. *Apprendi* does not apply retroactively, however. *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001). And *Apprendi* did not change the sentence for any crime, only the process by which sentences are imposed. See *United States v. Logan*, Case No. 97-CR-0099(3) (PJS/RLE), 2021 WL 1221481, at *10 (D. Minn. Apr. 1, 2021). And when Bennett was sentenced, his total offense level and criminal history category calculated on the drug offense alone – without consideration of the two murders – subjected him to a guidelines range of life imprisonment. (See Case No. 4:91CR01 CDP (E.D. Mo.), Memo. & Order, May 6, 2011, ECF 289.) Accordingly, *Apprendi* does not provide a basis to find extraordinary and compelling reasons to grant relief here. Regardless, the nature of the offense and the violent history and characteristics of the defendant, as described above, substantially outweigh the mere possibility of a shorter sentence if Bennett was sentenced today.

Bennett's *Booker* argument likewise fails. The sentencing guidelines were mandatory when Bennett was sentenced in 1993, but now, after *Booker*, they are applied in an advisory manner. Accordingly, Bennett would not be subject to a guidelines-mandated term of life imprisonment if he were sentenced today. While a

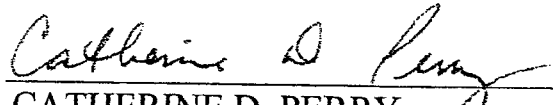
succeeding change in a previously-mandated sentencing regime may be a factor in considering whether a defendant's circumstances are sufficiently extraordinary and compelling to grant compassionate release, *see United States v. McDonald*, No. 94-CR-20256-1, 2020 WL 3166741, at *5 (W.D. Tenn. June 8, 2020), Bennett presents no argument suggesting that it was the then-mandatory nature of the guidelines that drove the sentencing judge to sentence him to life in prison. As set out above and summarized by the Eighth Circuit, Bennett was part of a vast and violent drug conspiracy enterprise that spanned several years and involved numerous murders of law enforcement officials, government witnesses, and drug rivals. Bennett himself was involved in two of the murders and was intimately involved in the drug-trafficking enterprise. Given this and other substantial evidence, there is no indication that the sentencing judge would have imposed something other than a life sentence but for the mandatory nature of the guidelines. Moreover, I am not in a position to review the decision of the sentencing judge or grant the extraordinary remedy of compassionate release based on nothing more than speculation about whether the judge would have departed from the guidelines if he were permitted at that time to do so. *See id.* at *6. "Section 3582(c)(1) was not enacted to provide courts with a mechanism to second-guess sentencing decisions made long ago." *Logan*, 2021 WL 1221481, at *5.

If I were to grant compassionate release, it would be on Bennett's serious

health conditions alone. But his fully vaccinated status coupled with the level of health care the BOP provides him mitigates the danger Bennett faces in the COVID-19 pandemic. Moreover, Bennett has not shown that he would not be a danger to the community if released early or that the factors listed in 18 U.S.C. § 3553(a) favor immediate release.

Accordingly,

IT IS HEREBY ORDERED that defendant Noble L. Bennett's emergency motion for sentence reduction and for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) [435] is **DENIED**. Defendant's request for hearing is likewise **DENIED**. *See United States v. Vangh*, 990 F.3d 1138 (8th Cir. 2021).



CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 15th day of September, 2021.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NOBLE L. BENNETT,

Defendant.

Case No. 4:91 CR 1 CDP-7

MEMORANDUM AND ORDER

On September 15, 2021, I denied defendant Noble L. Bennett's motions for compassionate release under the First Step Act. (ECF 487.) In denying the motions, I considered and addressed Bennett's serious health conditions in relation to the COVID-19 pandemic and the effect of his fully vaccinated status on his vulnerability to complications if he were to contract the virus; the sentencing factors under 18 U.S.C. § 3553(a), finding that they did not warrant early release in the circumstances; and Bennett's continued dangerousness to the community. I also addressed and rejected Bennett's contention that application of *Apprendi v. New Jersey*¹ and *United States v. Booker*² warranted a reduced sentence in his case. The Eighth Circuit Court of Appeals affirmed my decision on October 6 (ECF 495), and

¹ 530 U.S. 466 (2000).

² 543 U.S. 220 (2005).

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

No: 22-1078

United States of America

Plaintiff - Appellee

v.

Noble Laverne Bennett

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:91-cr-00001-CDP-7)

JUDGMENT

Before COLLOTON, GRUENDER, and STRAS, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the decision of the district court is summarily affirmed. See 47A(a).

January 19, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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

No: 22-1078

United States of America

Appellee

v.

Noble Laverne Bennett

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:91-cr-00001-CDP-7)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 11, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans