APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6733

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DWAYNE FERGUSON,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:04-cr-00013-REP-1)

Argued: October 26, 2022 Decided: November 29, 2022

Before WILKINSON, THACKER and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion, in which Judge Wilkinson and Judge

Richardson joined.

ARGUED: Ann M. Reardon, ANN REARDON LAW PLC, Richmond, Virginia, for Appellant. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. ON BRIEF: Raj Parekh, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

THACKER, Circuit Judge:

While serving his federal sentence, Dwayne Ferguson ("Appellant") asked the warden of the facility where he was incarcerated to file a motion for compassionate release on his behalf. After the warden denied his request, Appellant moved for compassionate release in federal district court. In addition to the arguments for compassionate release that Appellant presented to the warden, which were related to his medical condition, Appellant's motion for compassionate release in the district court included arguments that his convictions and sentence were unlawful.

The district court denied Appellant's motion. First, the district court determined that Appellant had not exhausted his administrative remedies as to the arguments about his convictions and sentence because he had not raised them in his request to the warden. The district court also concluded that those arguments could not sustain a compassionate release motion

because to consider them would usurp the existing procedures for a defendant to challenge his conviction and/or sentence.

Although we agree with Appellant that he was not required to include the arguments about his convictions and sentence in his request for compassionate release to the warden, we agree with the district court that Appellant cannot challenge the validity of his convictions and sentence through a compassionate release motion. Accordingly, we affirm the district court's denial of Appellant's compassionate release motion.

I.

In September 2004, a jury found Appellant guilty of five federal offenses stemming from his involvement in a drug trafficking operation, and he was sentenced to a total of 765 months of imprisonment in February 2005. This total included a mandatory minimum sentence of 30 years for possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Appellant's convictions and sentence were upheld on direct appeal. *United States v. Ferguson*, 172 F. App'x 539 (4th Cir.) (per curiam), *cert. denied*, 549 U.S. 926 (2006).

For more than a decade, Appellant lodged challenges to his convictions and sentence via various means, including two 28 U.S.C. § 2255 motions. Although his requests for relief were largely unsuccessful, in October 2016 the district court

granted Appellant's motion for a sentence reduction filed pursuant to 18 U.S.C. § 3582(c)(2) and reduced Appellant's sentence to 622 months of imprisonment due to a retroactive change to the applicable United States Sentencing Guidelines ("USSG").

On May 15, 2020, Appellant submitted a request for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) to the warden of the facility at which he was then incarcerated. Appellant asked to be released because he was "at a heightened risk for death due to the global pandemic known as the coronavirus (COVID-19)" due to his asthma and high blood pressure. J.A. 138.[1] The warden denied Appellant's request in a letter dated May 26, 2020.

Shortly afterward, on June 8, 2020, Appellant filed a pro se § 3582(c)(1)(A) motion in the district court. In addition to asserting that his asthma and high blood pressure enhanced his risk of death from contracting COVID-19, Appellant argued that he should not have been sentenced to the mandatory minimum 30 years of imprisonment for his conviction on Count Seven of the indictment, which charged him with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c), because the indictment did not allege that he possessed a silencer. At Appellant's request, the district court appointed counsel to assist him in prosecuting his compassionate release motion, and on January 21, 2021, Appellant, through counsel, filed

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

another § 3582(c)(1)(A) motion. In this second motion, Appellant made the same arguments as he made in his pro se motion and the following additional arguments:

- The district court failed to instruct the jury that Appellant's possession of the silencer was an element of the offense on Count Seven.
- The United States (the "Government") failed to inform Appellant of the applicable penalty on Count Seven at his arraignment.
- Appellant's Guidelines range was calculated incorrectly.
- Appellant's trial counsel was ineffective by (1) failing to subpoena a witness; (2) incorrectly advising Appellant of the applicable Guidelines range; (3) failing to object to the calculation of the Guidelines range as to Count Seven; and (4) incorrectly informing Appellant that he faced the same penalty by going to trial as pleading guilty.

The district court denied Appellant's compassionate release motion on April 29, 2021. Appellant timely appealed.

II.

Before turning to the arguments Appellant makes in this appeal, we pause to address our jurisdiction to review the district court's denial of

Appellant's compassionate release motion. *See Hyman v. City of Gastonia*, 466 F.3d 284, 286 (4th Cir. 2006) ("We have an obligation to inquire into jurisdictional issues *sua sponte*."). Although we have never previously explained the basis of our jurisdiction to review rulings on such motions, we have exercised appellate jurisdiction over motions brought under a similar provision, 18 U.S.C. § 3582(c)(2), pursuant to *both* 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. *See United States v. Legree*, 205 F.3d 724, 727 (4th Cir. 2000) (§ 3742(a)); *United States v. Munn*, 595 F.3d 183, 186 (4th Cir. 2010) (§ 1291). We now follow the lead of several of our sister circuits and hold that 28 U.S.C. § 1291 confers our appellate jurisdiction to review the district court's denial of a compassionate release motion filed pursuant to 18 U.S.C. § 3582(c)(1)(A). *See, e.g., United States v. King*, 24 F.4th 1226, 1228 (9th Cir. 2022); *United States v. McCall*, 20 F.4th 1108, 1111 (6th Cir. 2021), *reh'g granted*, 29 F.4th 816 (6th Cir. 2022) (mem); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Hald*, 8 F.4th 932, 937 (10th Cir. 2021); *United States v. Vangh*, No. 20-1901, 2021 WL 2934764, at *1 (8th Cir. July 13, 2021) (per curiam); *United States v. Long*, 997 F.3d 342, 350–52 (D.C. Cir. 2021). *But see United States v. Bridgewater*, 995 F.3d 591, 594 (7th Cir. 2021) (asserting jurisdiction pursuant to both § 1291 and § 3742(a)(1)).

We believe that § 1291, which gives us broad authority to hear "appeals from all final decisions of the district courts of the United States," is a better fit for compassionate release motions than § 3742(a), which permits a criminal defendant to appeal "an

otherwise final sentence" in one of four statutorily enumerated circumstances. While some of these circumstances could potentially overlap with the arguments a defendant makes in his compassionate release motion, § 3742(a) could also deprive us of jurisdiction to consider other arguments, such as those relating to a defendant's advanced age or deteriorating medical condition, which have historically been the hallmark of compassionate release motions. "[W]e interpret our jurisdiction under § 3742(a) narrowly." *United States v. Hill*, 70 F.3d 321, 324 (4th Cir. 1995). It would thus be difficult for any defendant to wedge arguments about his advanced age or deteriorating medical condition into one of the statutorily enumerated circumstances pursuant to which we may review his sentence. For instance, that a defendant is nearing 80 while incarcerated does not mean that his sentence "was imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(a)(2), or "is greater than the sentence specified in the applicable guideline range," *id.* § 3742(a)(3).

Moreover, 18 U.S.C. § 3582(c) provides a mechanism for a district court to "modify" an existing sentence, rather than impose a new sentence. *See Dillon v. United States*, 560 U.S. 817, 825 (2010) ("By its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the modification of a term of imprisonment by giving courts the power to reduce an otherwise final sentence . . . ." (alteration and internal quotation marks omitted)). But as the D.C. Circuit has observed, § 3742(a) "contemplates only procedures imposing

sentences initially or through resentencing [It] says nothing about the 'sentence modification' procedures set out in [§] 3582(c)(2) or in any other type of post-imposition adjustment in sentences." *Long*, 997 F.3d at 351. There is not a new sentence when the district court denies a defendant's motion for compassionate release, since the defendant's sentence remains the one that the district court initially imposed. Therefore, if § 3742(a) were the source of our appellate jurisdiction, then we would be limited to considering appeals of compassionate release motions only if those motions were granted. But we review both grants and denials of compassionate release pursuant to an abuse of discretion standard. *United States v. Kibble*, 992 F.3d 326, 329 (4th Cir. 2021) (per curiam). Only § 1291 affords us the power to do that.

As such, we possess jurisdiction to consider the district court's denial of Appellant's compassionate release motion pursuant to § 1291.

III.

A.

Moving on to the arguments Appellant makes in this appeal, Appellant first argues that the district court erred when it held that he failed to administratively exhaust the non- medical arguments in his compassionate release motion because he did not raise them in his request for compassionate release to the warden of his facility. We review this issue de novo. *See United States v. Muhammad*, 16 F.4th 126, 127 (4th Cir. 2021) (addressing

administrative exhaustion requirement in compassionate release context as statutory interpretation issue and reviewing de novo); *see also Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017) ("We review de novo a district court's dismissal for failure to exhaust available administrative remedies.").

"A sentencing court may not, as a general matter, 'modify a term of imprisonment once it has been imposed.'" *United States v. Hargrove*, 30 F.4th 189, 194 (4th Cir. 2022) (quoting 18 U.S.C. § 3582(c)). Compassionate release is an exception to this rule that permits the sentencing court to reduce a defendant's sentence "if it finds that . . . extraordinary and compelling reasons warrant such a reduction" and the reduction aligns with "the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable" as well as "applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

A criminal defendant may move for compassionate release in federal district court "on [his] own behalf, so long as [he] first appl[ies] to" the federal Bureau of Prisons (the "BOP") for such relief. *United States v. McCoy*, 981 F.3d 271, 276 (4th Cir. 2020). The district court in this case determined, "if the defendant does file for compassionate release, he must do so in accord with applicable rules." *United States v. Ferguson*, No. 3:04-cr-13, 2021 WL 1701918, at *4 (E.D. Va. Apr. 29, 2021). However, according to the district court, "where a defendant files claims with the Warden of a prison, he is obligated to pursue the administrative process and that includes the filing of

all his claims at the same time." *Id.*

The district court's pronouncement was incorrect because § 3582(c)(1)(A) "outlines two routes" for requesting compassionate release in the district court, "one of which does not require exhaustion of administrative remedies." *Muhammad*, 16 F.4th at 131. Specifically, the defendant may move for compassionate release "after [he] has fully exhausted all administrative rights to appeal a failure of the [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) (emphases supplied). Stated differently, "the threshold requirement" to file a compassionate release motion is "satisfied if a defendant requests the [BOP] to bring a motion on [his] behalf and either fully exhausts all administrative rights to appeal the [BOP]'s decision or waits 30 days from the date of [his] initial request." *Muhammad*, 16 F.4th at 131 (emphases in original).[2] In short, the defendant is not required to exhaust his administrative remedies with the BOP at all beyond making the initial request for compassionate release.

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[2] Appellant did not wait 30 days from the date of his submission to the warden (May 15, 2020) before filing his motion for compassionate release in the district court on June 8, 2020. But the Government has not pressed this argument, and we decline to independently address it. *See Muhammad*, 16 F.4th at 130 ("We conclude . . . that [§ 3582(c)(1)(A)'s] requirement that a defendant satisfy the threshold requirement before filing a motion in the district court is a non-jurisdictional claim-processing rule. Because the requirement is not jurisdictional, it may be waived or forfeited.").

Therefore, we see no reason to limit his motion for compassionate release in the district court to only those grounds for compassionate release he identified in his request to the BOP.

For that reason, the Government's attempt to compare § 3582(c)(1)(A) to the administrative exhaustion requirement in the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), is unavailing. That statute prohibits a prisoner from filing suit about prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). In other words, the PLRA mandates administrative exhaustion in all cases, at least where administrative remedies are "available." *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (holding that § 1997e(a) requires "proper exhaustion"). The PLRA was also intended "to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* (alteration and internal quotation marks omitted). But allowing a defendant to file his own § 3582(c)(1)(A) motion was intended to do the opposite: "Congress amended § 3582(c)(1)(A) to remove the [BOP] from its former role as a gatekeeper over compassionate release petitions" because the BOP was making so little use of its authority to request compassionate release on an inmate's behalf. *McCoy*, 981 F.3d at 276 (internal quotation marks omitted). Therefore, the policy considerations that underlie administrative exhaustion in the PLRA context are simply not present in the compassionate release context.

Moreover, issue exhaustion typically derives from the language of the governing statute or regulation. *See Sims v. Apfel*, 530 U.S. 103, 107–08 (2000). But neither § 3582(c)(1)(A) nor the BOP's compassionate release procedures expressly require issue exhaustion. As we have already said, the statute allows a criminal defendant to bring a compassionate release motion in district court even without exhausting his administrative remedies with the BOP. *See Muhammad*, 16 F.4th at 131. And the BOP regulation setting forth the procedures for making a compassionate release request, 28 C.F.R. § 571.61(a)(1), simply obligates the inmate to include "[t]he extraordinary or compelling circumstances that the inmate believes warrant consideration" in his request to the warden of his facility – it does not purport to apply to the inmate's request to the district court or limit the district court's consideration to only those reasons identified to the BOP.

And, in the absence of a statutory or regulatory issue exhaustion requirement, the Supreme Court has cautioned against judicially imposing such a requirement in a non- adversarial administrative proceeding. *Sims*, 530 U.S. at 109–10 ("[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. . . . Where . . . an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker."). The compassionate release process at the BOP level is non-adversarial, and the BOP is not adjudicating the merits of the

inmate's request for compassionate release but rather determining whether to use government resources to ask for compassionate release on the inmate's behalf. Accordingly, Sims counsels against imposing an issue exhaustion requirement in the compassionate release context.

We hold that § 3582(c)(1)(A) does not require issue exhaustion. The district court erred when it concluded that it could not consider Appellant's non-medical arguments because he did not raise them in the request for compassionate release that he made to the BOP.

B.

The district court also rejected Appellant's non-medical arguments for compassionate release on another, distinct basis: it determined that those arguments were in substance a collateral attack on Appellant's convictions and sentence and noted that the proper vehicle for such a challenge is a 28 U.S.C. § 2255 motion to vacate, set aside, or correct a federal sentence. The district court concluded that arguments challenging the validity of a conviction or sentence could not, as a matter of law, constitute "extraordinary and compelling reasons warranting compassionate release." *United States v. Ferguson*, No. 3:04-cr-13, 2021 WL 1701918, at *4 (E.D. Va. Apr. 29, 2021). We generally review the district court's denial of a compassionate release motion for abuse of discretion. *United States v. Kibble*, 992 F.3d 326, 329 (4th Cir. 2021) (per curiam). But we review the district court's interpretation of the scope of § 3582(c)(1)(A) de novo.

See United States v. McCoy, 981 F.3d 271, 280 (4th Cir. 2020) (reviewing de novo statutory interpretation issue about meaning of "extraordinary and compelling reasons" in § 3582(c)(1)(A)).

When the BOP moves for compassionate release on a criminal defendant's behalf, the federal Sentencing Guidelines – specifically, the application notes to USSG § 1B1.13 – limit the district court to considering only the defendant's medical condition, age, and family circumstances and "other reasons" identified by the BOP when determining whether there are "extraordinary and compelling reasons" meriting compassionate release. However, those application notes do not apply to a motion filed by a defendant on his own behalf. *McCoy*, 981 F.3d at 284. Accordingly, when adjudicating such a motion, the district court is "empowered to consider any extraordinary and compelling reason for release that a defendant might raise." *Id.* (alteration and internal quotation marks omitted) (emphasis deleted). Appellant argues that those reasons include arguments that a defendant's sentence should be reduced because his conviction is unlawful.

But Appellant's attempt to collaterally attack his convictions and sentence via a compassionate release motion ignores the established procedures for doing so. Namely, 28 U.S.C. § 2255 is "[t]he exclusive remedy" for challenging a federal conviction or sentence after the conclusion of the period for direct appeal, "unless [§ 2255] is inadequate or ineffective," in which case the defendant may file a 28 U.S.C. § 2241 petition for habeas corpus pursuant to the

savings clause at § 2255(e). *United States v. Simpson*, 27 F. App'x 221, 224 (4th Cir. 2001) (Traxler, J., concurring); *Farkas v. Warden, FCI Butner II*, 972 F.3d 548, 550 (4th Cir. 2020) ("Congress requires every federal prisoner who collaterally attacks his conviction to employ the motion mechanism provided in 28 U.S.C. § 2255. There is one exception: If § 2255 appears 'inadequate or ineffective,' then § 2255(e) provides that a federal prisoner may apply for a writ of habeas corpus under § 2241.").

Because § 2255 is the exclusive method of collaterally attacking a federal conviction or sentence, a criminal defendant is foreclosed from the use of another mechanism, such as compassionate release, to sidestep § 2255's requirements. "A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005); *see United States v. Winestock*, 340 F.3d 200, 207 (4th Cir. 2003) ("[A] motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application . . . ."). "In order for these limitations to be effective, courts must not allow prisoners to circumvent them by attaching labels other than 'successive application' to their pleadings." *Winestock*, 340 F.3d at 203 (citing *Calderon v. Thompson*, 523 U.S. 538, 553 (1998)). In other words, no matter how an inmate characterizes his request for relief, the substance of that request controls. If in substance he attacks his conviction and/or sentence, his filing is subject to the rules set forth in § 2255.

"Insisting that defendants use the correct process to challenge their convictions and sentences," as the district court did here, "is not empty formalism." *United States v. Sanchez*, 891 F.3d 535, 539 (4th Cir. 2018).

Appellant compares the arguments in his compassionate release motion to those made by the defendants in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), and *United States v. Zullo*, 976 F.3d 228 (2d Cir. 2020), which we cited favorably in *McCoy*, but those comparisons are inapt. The defendants in *McCoy* argued that a change in the sentencing law that occurred after their sentencings (but did not apply retroactively) merited a reduction in their sentences to conform to that change. 981 F.3d at 275. And the defendant in *Zullo* argued that he qualified for a sentence reduction pursuant to § 3582(c)(1)(A) due to "his (apparently extensive) rehabilitation," his "age at the time of the crime[,] and the sentencing court's statements about the injustice of his lengthy sentence." 976 F.3d at 238. By contrast, the arguments Appellant makes in his § 3582(c)(1)(A) motion constitute quintessential collateral attacks on his convictions and sentence that must be brought via § 2255. Appellant's arguments are clearly different in kind from the arguments made by the defendants in *McCoy* and *Zullo* because they would require the district court, in determining whether "extraordinary and compelling reasons" for compassionate release exist, to evaluate whether Appellant's convictions – and particularly his conviction on Count Seven – were valid. "Those convicted in federal court are required to bring collateral attacks challenging the validity of

their judgment and sentence by filing a motion to vacate [their] sentence pursuant to 28 U.S.C.[] § 2255." *In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997) (en banc).

Appellant suggests that pursuing his arguments in a § 2255 petition would be futile because, as the Government points out, such a petition would be both successive and untimely. But these restrictions are precisely why Appellant cannot use § 3582(c)(1)(A) to avoid the exclusive remedy that § 2255 provides. To be sure, we have explained, "the very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions when there is not a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." *McCoy*, 981 F.3d at 287 (emphasis in original). But in this case, there is such a statute: § 2255. "[T]he remedy afforded by § 2255 is not rendered inadequate or effective" – meaning that a defendant cannot use § 2255(e)'s savings clause to file a § 2241 motion – "merely because an individual has been unable to obtain relief under [§ 2255] or because [he] is procedurally barred from filing a § 2255 motion." *Vial*, 115 F.3d at 1194 n.5 (internal citations omitted). That same principle applies in the compassionate release context. The fact that Appellant may be procedurally barred from raising his arguments in a § 2255 petition does not qualify as an "extraordinary and compelling reason[]" for compassionate release.

Our reasoning is consistent with that of the vast majority of our sister circuits to have considered the

question. The majority of our sister circuits have, as we do today, held that the procedures set forth in § 2255 are the appropriate vehicle for a defendant's challenge to his federal conviction and/or sentence. *See, e.g., United States v. Jenkins*, 50 F.4th 1185, 1202 (D.C. Cir. 2022); *United States v. Amato*, 48 F.4th 61, 65 (2d Cir. 2022) (per curiam); *United States v. Hunter*, 12 F.4th 555, 567 (6th Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021); *United States v. Fine*, 982 F.3d 1117, 1118 (8th Cir. 2020); *see also United States v. Mata-Soto*, 861 F. App'x 251, 255 (10th Cir. 2021); *United States v. Miller*, 855 F. App'x 949, 950 (5th Cir. 2021) (per curiam); *United States v. Handerhan*, 789 F. App'x 924, 926 (3d Cir. 2019) (per curiam).

In fact, only the First Circuit disagrees. In *United States v. Trenkler*, the First Circuit explained that since the application notes to USSG § 1B1.13 do not constrain the district court when it addresses a compassionate release motion filed by a defendant, the district court may consider any factors that, within its discretion, it deems appropriate. 47 F.4th 42, 48 (1st Cir. 2022). Of course, as Appellant points out, we made this same holding in *McCoy*. See 981 F.3d at 284. But the First Circuit takes the principle farther, positing that the district court need not construe compassionate release motions that seek to collaterally attack a sentence as habeas petitions because "correct application of the 'extraordinary and compelling' standard for compassionate release naturally precludes classic post-conviction arguments, without more, from carrying such motions to success." *Trenkler*, 47 F.4th at 48. Even assuming that district

courts will correctly apply that standard in every case, we are not persuaded by the First Circuit's failure to grapple with the reality that addressing a defendant's argument about the validity of his conviction or sentence in connection with a compassionate release motion – and then granting the motion on that basis – would have the practical effect of correcting a purportedly illegal sentence, a remedy that is exclusively within the province of § 2255.

Therefore, we hold that a compassionate release motion cannot be used to challenge the validity of a defendant's conviction or sentence. The district court in this case correctly identified Appellant's non-medical arguments in his compassionate release motion as such challenges and properly denied relief.
IV.

The district court's denial of Appellant's compassionate release motion is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,

v. Criminal No. 3:04cr13-01

DWAYNE FERGUSON

MEMORANDUM OPINION

This matter is before the Court on the defendant's MOTION FOR COMPASSIONATE RELEASE PURSUANT TO SECTION 603(b) OF THE FIRST STEP ACT (ECF No. 235). Having considered the motion, the United States' Response in Opposition to Defendant's Motion for Compassionate Release (ECF No. 246), the defendant's REPLY TO UNITED STATES [sic] RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR COMPASSIONATE RELEASE PURSUANT TO § 603(b) OF THE FIRST STEP ACT (ECF No. 250), the Joint Status Report (ECF No. 253), and the record herein, the defendant's MOTION FOR COMPASSIONATE RELEASE PURSUANT TO SECTION 603(b) OF THE FIRST STEP ACT (ECF No. 235) will be denied.

BACKGROUND

In 2004, the defendant was indicted on eight

counts arising out of a drug trafficking operation. The jury found him guilty of five counts specifically:

- Count One (conspiracy to distribute one kilogram or more of heroin, 50 grams or more of cocaine base, and five kilograms or more of cocaine hydrochloride, in violation of 21 U.S.C. § 846};
- Count Three (possession with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. § 841);
- Count Four (possession with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841);
- Count Six (maintaining a place for distribut6ion of controlled substances, in violation of 21 U.S.C. § 856);
- Count Seven (possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924 (C))

The jury found that the defendant was responsible for conspiring to distribute 30 kilograms or more of heroin, 1.5 kilograms or more of cocaine base, and 150 kilograms of cocaine hydrochloride, and determined that he was a manager or supervisor of the conspiracy alleged in Count One. The jury also found that he possessed with the intent to distribute three to ten kilograms of heroin and 50 to 150 grams of cocaine base, and that he possessed certain firearms in furtherance of a drug trafficking crime. The defendant was sentenced to 765 months imprisonment in total and his conviction and sentence was affirmed on

appeal.[1] In 2016, the defendant filed a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) because of changes to the drug quantity tables in the Sentencing Guidelines. The United States did not oppose that request for reduction and the Court granted the defendant's motion reducing his sentence of confinement to 622 months.

On May 15, 2020 the defendant filed a motion for compassionate release with the Warden at FCI Beckley where he is confined. He has asserted that he was entitled to release because he has asthma and has high blood pressure and is therefore placed at an increased risk of serious illness from COVID-19. The Warden denied that request. On January 22, 2021, the defendant filed the pending motion asserting that he is entitled to relief because he "is 43 years old and suffers now, or has suffered in the past, from asthma, obesity, high blood pressure, and renal insufficiency." That, he says, renders him particularly susceptible to COVID-19.

The record established that the defendant's place of incarceration, FCI Beckley, is a medium security facility. The defendant's projected release date is April 26, 2048. FCI Beckley has a total of 1,499 inmates and as of March 2, 2021, two inmates and five staff members at FCI Beckley showed positive for COVID-19. The record also shows that 219 inmates

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[1] Since then, the defendant has filed several motions seeking various relief, either by motions for new trial, motions to vacate, or motions under 28 U.S.C. § 2255, and a motion for reduction of sentence.

and 76 staff members had previously tested positive for COVID-19 and have recovered. No inmate or staff member has died from COVID-19.

FCI Beckley has implemented a number of safety measures and, according to the Joint Status Report (ECF No. 253), FCI Beckley has vaccinated (with both doses) 160 staff members and 114 inmates and is continuing to receive vaccines and administer them to inmates based on priority and need in accord with the CDC Guidelines.

According to the BOP records, Ferguson is, as he alleges, 43 years and is a medical Care Level 1 inmate. That is the lowest care level meaning that Ferguson is healthy and if there are any chronic conditions, they are simple ones. Although Ferguson was low on the priority list for receiving vaccines, he nonetheless received the first dose of a vaccine on March 3, 3021 and is scheduled to receive his second dose shortly.

DISCUSSION

The applicable statute, 18 U.S.C. § 3582(c)(1)(A), provides, in pertinent part, that, upon appropriate motion, the Court "may reduce the term of imprisonment if it finds that 'extraordinary and compelling reasons' warrant such a reduction." It is settled that the burden is on the defendant to prove that extraordinary and compelling reasons exist for compassionate release under§ 3582(c)(1)(A)(i). United States v. White, 378 F. Supp.3 784, 785 (W.D. Mo. 2019).

The "mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering the Bureau of Prison's statutory role, and extensive professional efforts to curtail the virus' spread. United States v. Raia, 954 F.3d 594, 597 (3rd Cir. 2020). In assessing whether the record shows the existence of extraordinary and compelling reasons for compassionate release, courts consider, inter alia, the guidance of the CDC, and non-binding policy statements of the United States Sentencing Guidelines. See United States v. Beck, 425 F. Supp. 3d 573, 581-82 (M.D.N.C. 2019). These policy statements are not binding but are informative and may be considered. United States v. McCoy, 981 F.3d 271, 276 (4th Cir. 2020). The cases teach that, to constitute extraordinary and compelling reasons for compassionate release, medical conditions must be serious. Also, it is generally true that "chronic conditions that can be managed in prison are not a sufficient basis for compassionate release." United States v. Ayon-Nunez, No. l:16-cr-130, 2020 WL 704785, at *2-3 (E.D. Cal. Feb. 12, 2020).

To establish existence of "extraordinary and compelling" reasons for compassionate release because of COVID-19, the defendant must show both a particularized susceptibility to the disease and a particularized risk of contracting the disease at [his] prison facility." United States v. White, ___F. Supp.3d ___, 2020 WL 1906845, at *1 (E.D. Va. April 23, 2020) (quoting United States v. Feiling, 453 F. Supp.3d 832,

840 (E.D. Va. 2020)).

1. Particularized Susceptibility

The defendant has established that he has asthma, hypertension and that he is obese with a risk of diabetes. He argues that, taken together, these conditions satisfy the particularized susceptibility factor. However, the fact that a defendant has established a higher susceptibility to COVID-19 does not resolve the particularized susceptibility requirement. The medical records in this case show that Ferguson is relatively healthy.

Also, it appears that the conditions on which Ferguson bases his motion are "chronic conditions that can be managed in prison [and thus] are not a sufficient basis for compassionate release." United States v. Ayon-Nunez, No. l:16-cr-130, 2020 WL 704785, at *2-3 (E.D. Cal. Feb. 12, 2020). In addition, Ferguson has not established that his medical needs cannot be met while incarcerated and, indeed, the medical records filed herein outline that he receives regular medical care, adjustment of his medications, and testing related to the chronic health issues. Moreover, Ferguson has received his first dose of vaccine and soon will receive the second one. Thus, whatever risk he may face is significantly diminished.

In sum, Ferguson has not met the particularized susceptibility risk facet of the applicable test.

2. Particularized Facility Risk

Nor has Ferguson met the particularized facility risk component of the test. His motion cites press releases respecting the instances of COVID-19 among inmates and staff at BOP facilities nationwide, but provides no real evidentiary support of a particularized risk of contracting the disease at FCI Beckley, the defendant's facility of incarceration. Further, the record reflects that, at the time of the filing of the Government's papers, FCI Beckley had two active case of COVID-19 among inmates, five active cases of COVID-19 among staff, and 219 inmates and 76 staff members who had previously recovered from COVID-19. No staff members or inmates at FCI Beckley have died from COVID-19.

In addition, all inmates who have tested positive are being appropriately treated and isolated in accord with the appropriate CDC guidelines that have been adopted by the Bureau of Prisons. And, the record shows that staff and inmates are receiving vaccinations.

On this record, the particularized facility risk has not been shown.

3. Assessment Under 18 U.S.C. § 3553(a)

But, even if Ferguson had met the particularized risk assessment and the particularized facility assessment (which he has not), it would be appropriate to deny compassionate release in perspective of the sentencing factors prescribed by 18

U.S.C. § 3553(a). Compassionate release, of course, is appropriate only where the defendant is not a danger to the safety of any other person or of the community. The defendant argues, in conclusory fashion, that he is not a danger to the community. That, he says, is largely because he has not been convicted of a crime of violence or "carried or used guns."

It is correct that Ferguson has not been convicted of a crime of violence but it is incorrect that he has not carried or used guns. Indeed, he was convicted of possessing a Ruger .45 caliber handgun, an SKS .223 assault rifle, an MP-10 .45 caliber firearm, and a silencer in furtherance of his drug trafficking.

Moreover, the defendant was the leader of an extensive drug conspiracy and distributed a vast amount of drugs. Drugs present tremendous danger to society, often resulting in the debilitation of those who use them and sometimes even in death. Reports are legion of the violence associated with drug trafficking. In other words, the defendant was convicted of conduct that itself presents a danger to society. And it cannot be denied that the presence of extensive weaponry in the defendant's possession is evidence of his willingness to do violence in defense of his illegal trade.

The original sentence, as reduced, protects society, promotes respect for the law and serves as a deterrent to the defendant. It remains the same today when one takes into account the entire record. And that record, of course, includes the defendant's record

of self-betterment while in prison. The Court has considered that record and finds that the defendant has put his time in prison to good use and notes that there is no record of infractions of the Bureau of Prisons' rules while incarcerated. And the Court commends the defendant for all of those activities. Nonetheless, the seriousness of the offense and the danger that it represents, the vast quantities of the drugs distributed, the leadership role in the conspiracy, and the possession of firearms in furtherance of the conspiracy militate against a finding that compassionate release is appropriate here. United States v. Reyes, No. 3:03crl95, 2021 WL 411437, at *2 (E.D. Va. Feb. 5, 2021); see also Albury v. United States, No. 2:19-cr-68, 2020 WL 6779643, at *5 (E.D. Va. Oct. 23, 2020).

In a remarkable effort to expand the compassionate release statute, Ferguson makes several other arguments. First, he argues that the Court should apply United States v. O'Brien, 560 U.S. 218 (2010) and Alleyne v. United States, 570 U.S. 99 (2013) to vacate his conviction on Count Seven or to reduce his sentence on that count to five years because the Indictment failed to specify the use of a silencer as an element of the offense. He also contends that his Fifth and Sixth Amendment rights were violated because (1) the Government failed to specify the silencer in the Indictment and thereby did not give him adequate notice of the potential punishment; (2) the Court failed to instruct the jury that it had to find the existence of a silencer beyond a reasonable doubt; and (3) the Government failed to advise him at the arraignment of the enhanced penalty on Count Seven

and that the Court sentenced him under an incorrect guideline on Count Seven.

The United States contends that none of these claims were raised with the Warden and therefore the defendant has not exhausted his remaining claims within the Bureau of Prisons. It seems relatively clear from the statute that, where a defendant files claims with the Warden of a prison, he is obligated to pursue the administrative process and that includes the filing of all his claims at the same time. He did not do that and thus he is, according to the Government, barred from doing do so here because he has not exhausted his remaining claims with the Bureau of Prisons.

The statutory exhaustion requirement is a mandatory, non- jurisdictional claims-processing rule. United States v. Williams, 829 F. App'x 138, 140 7th Cir. 2020; United States v. Franco, 973 F.3d 465, 468 (5th Cir. 2020). The Courts have held and the United States has previously agreed that a defendant need not file for a compassionate release with the Bureau of Prisons before filing in court. That, however, does not change the fact that, if the defendant does file for compassionate release, he must do so in accord with applicable rules. He has not done that and so the defendant has failed to exhaust these new theories.

The failure to exhaust can be excused particularly where, as here, the arguments are legal and not factual. That precept, however, does not assist Ferguson here. The statute, 18 U.S.C. § 3582(c)(1)(A) does not authorize relief for alleged errors at trial and sentencing in the way that Ferguson presses them

here. In essence, what Ferguson does here is attempt to file a second 28 U.S.C. § 2255 motion and he has not satisfied the requirements for doing that. The compassionate release statute allows the court to consider extraordinary and compelling reasons warranting compassionate release, but it does not replace the established mechanism for challenging the validity of a sentence. Nor does it allow the defendant to make arguments that were, or could have been, raised in direct appeal or collateral review. See United States v. Mattice, No. 20-3668, 2020 WL 7587155, at *2 (6th Cir. Oct. 7, 2020); United States v. Sargent, No. 20-5508, 2020 WL 6589004, at *2 (6th Cir. Sept. 30, 2020).

It is settled that, if all judicial appeals have been properly exhausted through the criminal appeals process, the proper method for challenging a conviction or sentence is by filing a habeas corpus petition. Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010); United States v. Hartwell, 448 F.3d 707, 714-15 (4th Cir. 2006) ("Any challenges to a criminal judgment after the appellate process is complete therefore may generally be brought only pursuant to a specific authorization for collateral review, such as 28 U.S.C. § 2255"). That principle is not altered merely because a defendant has put all of those challenges in a pleading labeled as one for compassionate release for the label does not control. United States v. Fine, 982 F.3d 1117, 1119 (8th Cir. 2020); Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004) ("Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita qu.erela, certiorari, capias, habeas corpus, ejectment, quare

impedit . . . or an application for a Get-Out-of-Jail-Card; the name makes no difference. It is substance that controls.")

The defendant cannot proceed with a collateral attack on his sentence and thereby escape the time limitations and applicable rules for collateral attack on sentences. The defendant has already filed an unsuccessful motion under 28 U.S.C. § 2255 and has not sought the Fourth Circuit's authorization to file a second or successive motion and therefore the Court certainly has no jurisdiction over the claims that he now asserts in that capacity.

CONCLUSION

For the foregoing reasons, the defendant's MOTION FOR COMPASSIONATE RELEASE PURSUANT TO SECTION 603(b) OF THE FIRST STEP ACT (ECF No. 235) will be denied.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: April 29, 2021

FILED: December 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6733
(3:04-cr-00013-REP-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DWAYNE FERGUSON

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

28 U.S.C. § 994(t): Duties of the Commission

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 2255: Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the

sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> (1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole,

would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.