

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2867

UNITED STATES OF AMERICA

v.

MARCAL FRACTION, also known as Monk,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:14-cr-00305-003)
District Judge: Hon. Malachy E. Mannion

Submitted Under Third Circuit LAR 34.1(a)
September 8, 2022

Before: JORDAN, HARDIMAN, and SMITH, *Circuit Judges.*

(Filed: September 12, 2022)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

HARDIMAN, *Circuit Judge*.

Marcal Fraction appeals the District Court’s order denying his compassionate release motion. Fraction has not shown “extraordinary and compelling reasons” for compassionate release, so we will affirm.

I

In 2017, Fraction pleaded guilty to conspiracy to distribute and possess with intent to distribute cocaine. Because he was a career offender, Fraction’s advisory Sentencing Guidelines range was 151 to 188 months’ imprisonment. The District Court varied downward, imposing a sentence of 120 months. Fraction moved the District Court for compassionate release based on his increased risk of complications from COVID-19, but the District Court denied that motion, and we summarily affirmed. *See United States v. Fraction*, 855 F. App’x 72, 72 (3d Cir. 2021) (per curiam).

Fraction filed a second motion for compassionate release, arguing that if he were sentenced today, he would no longer be considered a career offender and would receive a shorter sentence. The District Court denied that motion too. The sole issue before us is whether Fraction’s second motion demonstrated “extraordinary and compelling reasons” to warrant compassionate release. *See* 18 U.S.C. § 3582(c)(1)(A)(i).¹

¹ We decline Fraction’s invitation to reconsider all the issues he raised in his first motion for compassionate release because, by his own admission, he “did not re-raise all of these arguments in his most recent motion.” Fraction Br. 10 n.1.

II²

In *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc), we overruled prior precedent and held that inchoate offenses—including conspiracy, *id.* at 469 n.10—“are not included in the definition of ‘controlled substance offenses’ given in section 4B1.2(b) of the sentencing guidelines,” *id.* at 472. As the Government concedes, if Fraction were sentenced today, he would not be considered a career offender under *Nasir* and would receive a shorter sentence. But he was sentenced before *Nasir*, and he does not argue that his sentence was unlawful at the time it was imposed.

In *United States v. Andrews*, 12 F.4th 255, 260–61 (3d Cir. 2021), we held that “[t]he duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance.” We also held that “nonretroactive changes” in statutory sentencing law “cannot be a basis for compassionate release.” *Id.* at 261. So *Andrews* precludes Fraction’s argument that his lawfully imposed sentence should have been modified based on *Nasir*’s nonretroactive change in the law. *See id.*; *see also Harper v. Va. Dep’t of Tax’n*, 509 U.S. 86, 97 (1993) (holding that a new interpretation of federal law applies to “cases still open on direct review”). We will affirm the District Court’s order denying Fraction’s motion for compassionate release.

² The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. We review the District Court’s order denying compassionate release for abuse of discretion. *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MARCAL FRACTION

:

v.

: CRIMINAL NO. 3:14-CR-305

UNITED STATES OF AMERICA

:

(JUDGE MANNION)

:

ORDER¹

On August 26, 2021, defendant Fraction filed a second motion for compassionate release under §3582(c)(1)(A)(i), (Doc. 693), with attached Exhibits. On February 4, 2021, this court denied Fraction's first motion for compassionate release on its merits. (Doc. 681). The court found that Fraction's medical conditions and the risks he faces due to the COVID-19 pandemic, did not constitute "extraordinary and compelling reasons", and that consideration of the relevant factors in §3553(a) weighed against his release to home confinement with his wife in Plains, PA. Fraction's appeal of this Order is still pending with the Third Circuit. (Doc. 687).

¹Since the background of this case is stated in the court's numerous prior decisions, (see e.g., Docs. 669 & 681), it is not repeated herein. Additionally, on April 26, 2021, the Third Circuit denied Fraction's request for a certificate of appealability with respect to this court's December 15, 2020 Order, (Doc. 670), denying his motion to vacate under 28 U.S.C. §2255. (Doc. 692).

Fraction is currently serving his 120-month sentence at FCI Allenwood, Low Security Camp, and his projected release date is August 3, 2024.

In his second motion, Fraction contends that he is now entitled to compassionate release since he is no longer a career offender based on an intervening Third Circuit decision and that this constitutes extraordinary and compelling reason for his release.

As this court explained in its December 15, 2020 Memorandum denying Fraction's §2255 motion, (Doc. 669 at 23-26), he qualified as a career offender pursuant to §4B1.1 based on the following three predicate felony convictions for controlled substance offenses: his 2003 conviction for criminal sale of a controlled substance (PSR ¶34); his 2006 conviction for criminal sale of a controlled substance (PSR ¶36); and his 2010 conviction for manufacture, deliver, and possession of a controlled substance (PSR ¶38). (See Doc. 496 at 9-10). As noted, the Third Circuit denied Fraction's request for a certificate of appealability under 28 U.S.C. §2253(c)(2) regarding this court's denial of his §2255 motion. (Doc. 692). The claim in Fraction's second motion for compassionate release is a claim that must be brought in a §2255 motion and, as such his instant motion is really an attempt to circumvent the denial of his request for a certificate of appealability.

Thus, Fraction's second motion for compassionate release, **(Doc. 693)**, is **DENIED**.

Moreover, even if his second motion for compassionate release is construed as a motion for reconsideration, it will be denied. The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco v. Zlotnicki, 779 F.2d 906, 909

(3d Cir. 1985). “Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” Howard Hess Dental Labs. Inc. v. Dentsply Intern., Inc., 602 F.3d 237, 251 (3d Cir. 2010) (quoting Max’s Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)); Chesapeake Appalachia, LLC v. Scott Petroleum, LLC, 73 F. Supp. 3d 488, 491 (M.D. Pa. 2014) (Generally, reconsideration motions should be granted sparingly.). “The standard for granting a motion for reconsideration is a stringent one ... [A] mere disagreement with the court does not translate into a clear error of law.” Chesapeake Appalachia, LLC, 73 F. Supp. 3d at 491 (quoting Mpala v. Smith, 2007 WL 136750, at *2 (M.D. Pa. Jan. 16, 2007), aff’d, 241 Fed.Appx. 3 (3d Cir. 2007)) (alteration in original).

The burden for reconsideration is on the moving party and Fraction does not demonstrate that any of the three grounds exist in his case which are required for the court to grant reconsideration. Further, since the court gave a detailed explanation in its Order for denying Fraction’s first motion for compassionate release, it will not repeat this discussion. Also, simply because Fraction is unhappy with the result of the court’s February 4, 2021 Order “is an insufficient basis to grant [him] relief.” Kropa v. Cabot Oil & Gas Corp., 716 F.Supp.2d 375, 378 (M.D. Pa. 2010) (citation omitted).

The court also notes that as of September 10, 2021, there are currently no positive COVID-19 cases among the inmates and no positive cases among the staff at FCI Allenwood Low, and 235 inmates and 21 staff have recovered from the virus. There have been no deaths at the prison among staff and inmates. Also, to date, the BOP has administered 218,091 doses of COVID-19 vaccines among inmates and staff around the country.

Thus, to the extent Fraction requests the court to reconsider its February 4, 2021 Order, his motion, (**Doc. 693**), is also **DENIED**.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

DATE: September 23, 2021

14-305-28 mf

ALD-183

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1270

UNITED STATES OF AMERICA

v.

MARCAL FRACTION, a/k/a MONK,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. Action No. 3:14-cr-00305-003)
District Judge: Honorable Malachy E. Mannion

Submitted on Appellee's Motion for Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

May 20, 2021
Before: MCKEE, GREENAWAY, Jr., and BIBAS, Circuit Judges
(Opinion filed: August 5, 2021)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Marcal Fraction, a prisoner confined at FCI-Allenwood, appeals pro se from an order of the United States District Court for the Middle District of Pennsylvania denying his motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). The Government has filed a motion for summary affirmance. For the following reasons, we grant the Government's motion and will summarily affirm the District Court's judgment.

In February 2017, Fraction pleaded guilty to conspiring to distribute cocaine. See 21 U.S.C. § 846. As a career offender previously convicted of several prior drug trafficking offenses, Fraction faced an advisory sentencing guideline range of 151 to 188 months of imprisonment. The District Court varied downward, sentencing him to 120 months of imprisonment.

In December 2020, Fraction filed a pro se motion for compassionate release (ECF 672), which he later supplemented with two addendums (ECF 675 and 679) and a letter from his wife (ECF 678). He argued that the District Court should order his immediate release because of the threat posed by COVID-19. He claimed that numerous inmates at FCI-Allenwood had tested positive for the virus, that those inmates were "not getting the proper medical attention needed," and that, following a 20-day quarantine in the special housing unit, he was going to be returned to the unit that housed the inmates who had contracted the virus. Furthermore, Fraction alleged that he is at risk of serious illness if he contracted COVID-19 because he is obese. Fraction also claimed that he is not a danger to the community because he "changed in the way that I view life."

The District Court denied the compassionate release motion, holding, among other things, the relevant factors under 18 U.S.C. § 3553(a) weighed against any reduction in his sentence. (ECF 681.) Fraction appealed. (687.) In this Court, Fraction has a motion for appointment of counsel (Doc. 7) and his opening brief (Doc. 10). The Government has moved for summary affirmance (Doc. 8).

We have jurisdiction under 28 U.S.C. § 1291. We review for abuse of discretion the denial of an eligible defendant's motion for a sentence modification under § 3582(c). See United States v. Pawlowski, 967 F.3d 327, 330 (3d Cir. 2020). Thus, we “will not disturb the District Court’s decision unless there is a definite and firm conviction that it committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.” Id. (alteration, quotation marks, and citation omitted). We may affirm on any basis supported by the record. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

The compassionate release provision states that a district court “may reduce the term of imprisonment” and “impose a term of probation or supervised release” if it finds that “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A)(i). Before granting compassionate release, a district court must consider “the factors set forth in § 3553(a) to the extent that they are applicable.” § 3582(c)(1)(A). Those factors include, among other things, “the nature and circumstances of the offense and the history and characteristics of the defendant,” § 3553(a)(1), and the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to

provide just punishment for the offense”; “to afford adequate deterrence to criminal conduct”; and “to protect the public from further crimes of the defendant,” § 3553(a)(2)(A)-(C).

The District Court did not abuse its discretion in denying Fraction’s compassionate release motion because the applicable § 3553(a) factors do not support relief. Fraction’s offense was serious. He distributed between 100 and 200 grams of cocaine over a period of almost two years. In addition, he qualified as a career offender based on his extensive criminal history. Moreover, Fraction’s sentence already included a significant downward variance from the guidelines range. See United States v. Ruffin, 978 F.3d 1000, 1008 (6th Cir. 2020) (noting that sentence reduction was not warranted where, among other factors, “the court had already varied downward by five years from Ruffin’s guidelines range when imposing [a] lengthy sentence”). Finally, as the District Court noted, because Fraction had served approximately only 40% of his sentence, the “need to serve additional prison time to deter him from continuing a life of crime based upon his history of disrespect for the law” weighed against relief. (ECF 681, at 4); Pawlowski, 967 F.3d at 331 (stating that “the time remaining in [the] sentence may—along with the circumstances underlying the motion for compassionate release and the need to avoid unwarranted disparities among similarly situated inmates—inform whether immediate release would be consistent with” the § 3553(a) factors). These circumstances fail to lead us to “a definite and firm conviction that [the District Court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant

factors.” Id. at 330 (alteration omitted) (quoting Oddi v. Ford Motor Co., 234 F.3d 136, 146 (3d Cir. 2000)).

For the foregoing reasons, we grant the Government’s motion and will summarily affirm the District Court’s judgment.¹

¹ Fraction’s motion for appointment of counsel is denied.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

Case No. 3:14-cr-305

MARCAL FRACTION
Defendant

ORDER ON MOTION FOR
SENTENCE REDUCTION UNDER
18 U.S.C. § 3582(c)(1)(A)
(COMPASSIONATE RELEASE)

Upon motion of the defendant for a reduction in sentence under 18 U.S.C. §3582(c)(1)(A), (Doc. 672), and after considering the applicable factors provided in 18 U.S.C. §3553(a) and the applicable policy statements issued by the Sentencing Commission, **IT IS ORDERED** that the motion is:

- GRANTED
- The defendant's previously imposed sentence of imprisonment of _____ is reduced to _____. If this sentence is less than the amount of time the defendant already served, the sentence is reduced to a time served; or
- Time served.

If the defendant's sentence is reduced to time served:

- This order is stayed for up to fourteen days, for the verification of the defendant's residence and/or establishment of a release plan, to make appropriate travel arrangements, and to ensure the defendant's safe release. The defendant shall be released as soon as a residence is verified, a release plan is established, appropriate travel arrangements are made, and it is safe for the defendant to travel. There shall

be no delay in ensuring travel arrangements are made. If more than fourteen days are needed to make appropriate travel arrangements and ensure the defendant's safe release, the parties shall immediately notify the court and show cause why the stay should be extended, or

- There being a verified residence and an appropriate release plan in place, this order is stayed for up to fourteen days to make appropriate travel arrangements and to ensure the defendant's safe release. The defendant shall be released as soon as appropriate travel arrangements are made and it is safe for the defendant to travel. There shall be no delay in ensuring travel arrangements are made. If more than fourteen days are needed to make appropriate travel arrangements and ensure the defendant's safe release, then the parties shall immediately notify the court and show cause why the stay should be extended.
- The defendant must provide the complete address where the defendant will reside upon release to the probation office in the district where they will be released because it was not included in the motion for sentence reduction.
- Under 18 U.S.C. §3582(c)(1)(A), the defendant is ordered to serve a "special term" of probation or supervised release of ___ months (not to exceed the unserved portion of the original term of imprisonment).
- The defendant's previously imposed conditions of supervised release apply to the "special term" of supervision; or
- The conditions of the "special term" of supervision are as follows:
- The defendant's previously imposed conditions of supervised release are unchanged.

The defendant's previously imposed conditions of supervised release are modified as follows:

DEFERRED pending supplemental briefing and/or a hearing. The court DIRECTS the United States Attorney to file a response on or before _____, along with all Bureau of Prisons records (medical, institutional, administrative) relevant to this motion.

DENIED after complete review of the motion on the merits.

FACTORS CONSIDERED (Optional)

The background of this case is stated in the court's numerous prior decisions and will not be repeated. The court has considered the filings of the parties, including the defendant's supplements and his wife's letter. First, the defendant has not shown extraordinary and compelling reasons for compassionate release since he is only 40 years old and he does not have any diagnosed medical condition that render him susceptible to suffer serious complications if he does contract the Covid-19 virus. His alleged obesity is not a sufficient threat considering his overall healthy medical condition, as reflected in his medical records (including no immune compromising conditions), and the fact that he has no physical restrictions due to any medical condition. Faction's generalized health concerns related to being incarcerated during the pandemic and the alleged unsafe conditions at the federal prison (LFCI-Allenwood) are insufficient to meet his burden. (See Docs. 644, defendant's BOP medical records). Further, there are currently only two inmate positive cases at the prison and no staff positive cases,

and 287 inmates have recovered from the virus. Also, Fraction's recent Covid-19 test was negative. (Doc. 679).

Additionally, in considering the applicable factors set forth in 18 U.S.C. §3553(a), as the government summarizes, (Doc. 677 at 10), in its opposition brief:

"Fraction's offense of conviction involved his participation in a drug trafficking conspiracy that lasted close to two years, from approximately January 2013 until November 2014, during which time Fraction acknowledged personally distributing between 100 and 200 grams of cocaine. (Doc. 496). As a result of three prior drug trafficking convictions, Fraction was sentenced as a career offender. Although he faced a guideline range of 151 to 188 months, the Court in its discretion sentenced him to a 120-month period of imprisonment. [A]t present, Fraction has served only about 46 months of that sentence."

The court finds that defendant Fraction still poses a significant danger to the safety of the community based on the serious nature of his current drug trafficking conspiracy conviction (which he acknowledges) as well as his prior drug convictions detailed in the court's prior decisions in this case which supported his sentence as a career offender. The court notes that in the numerous filings of Fraction after his sentence, as well as during his testimony at his hearing on his 2255 motion, he has shown no signs of remorse. The court recognizes that Fraction completed the RDAP program. However, the court also considers the relative short period of time he has presently served on his sentence and the need for the defendant to serve additional prison time to deter him from continuing a life of crime based upon his history of disrespect for the law. As indicated, Fraction already received a sentence significantly below the advisory guideline range.

- DENIED WITHOUT PREJUDICE because the defendant has not exhausted all administrative remedies as required in 18 U.S.C. §3582(c)(1)(A), nor have 30 days lapsed since receipt of the defendant's request by the warden of the defendant's facility.

s/ Malachy E. Mannion

Malachy E. Mannion,
U.S. DISTRICT JUDGE

Dated: February 4, 2021
14-305-26