A P P E N D I X

APPENDIX

A-1

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10587

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEETAVIOUS M. GAINES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:96-cr-06159-KMM-1

Before WILSON, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Leetavious M. Gaines, a counseled federal prisoner, appeals the denial of his 18 U.S.C. § 3582(c)(1)(A) motion for compassionate release pursuant to § 603 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018) ("First Step Act"). The government has moved for summary affirmance, and Gaines has responded by conceding that the merits of his appeal are squarely foreclosed by binding precedent. We agree and affirm.[1]

A jury found Gaines guilty of one count of conspiracy to commit Hobbs Act robbery, six counts of Hobbs Act robbery, six counts of use of a firearm during a crime of violence, and one count of possession of a firearm after having been convicted of a felony. The district court sentenced him to a total sentence of 1330 months' imprisonment. We affirmed his convictions and sentence. *See United States v. Liddell*, 192 F.3d 130 (11th Cir. 1999).

In 2020, Gaines filed the present, counseled motion for compassionate release. He did so before we decided *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 583 (2021). Gaines argued that the United States Sentencing Guidelines § 1B1.13 policy statement, which lists extraordinary circumstances

[1] We DENY the government's alternative request to stay the briefing schedule as moot.

warranting compassionate release, did not apply to prisoner motions, so the district court could consider his "stacked" sentences as an extraordinary and compelling reason warranting release. He also argued that the 18 U.S.C. § 3553(a) factors weighed in favor of release. The district court denied the motion for compassionate release, concluding that Gaines's arguments regarding stacked sentences failed under this Court's recent decision in *Bryant*. The district court also found that the § 3553(a) factors did not weigh in favor of release.

Gaines appealed. The government has moved for summary affirmance, arguing that *Bryant* forecloses Gaines's stacked-sentences argument. The government further asserts that the district court properly weighed the § 3553(a) sentencing factors. In response, Gaines concedes that *Bryant* forecloses his stacked-sentences argument and therefore forecloses the merits of his appeal, rendering a decision on the district court's weighing of the § 3553(a) factors unnecessary. We agree.

Summary disposition is appropriate, as relevant here, where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[2] Under our prior panel precedent rule, a prior

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

panel's holding is binding unless it has been overruled or abrogated by the Supreme Court or by us sitting en banc. *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998).

In *Bryant*, this Court concluded that a district court may not reduce a sentence unless a reduction would be consistent with United States Sentencing Guidelines § 1B1.13's definition of extraordinary and compelling reasons. *Bryant*, 996 F.3d at 1252–62. The *Bryant* panel further concluded that the catch-all provision in the commentary to § 1B1.13 did not grant district courts the discretion to develop other reasons outside those listed in § 1B1.13 that might justify a reduction in a defendant's sentence. *Id.* at 1248, 1263, 1265.

Bryant binds this panel. *See Steele*, 147 F.3d at 1317–18. And, as Gaines concedes, that a defendant received stacked sentences is not a reason listed in § 1B1.13. Thus, under *Bryant*, Gaines cannot show extraordinary and compelling reasons justifying his release, and so he cannot prevail in his appeal as a matter of law. *See United States v. Tinker*, 14 F.4th 1234, 1237–38 (11th Cir. 2021). We therefore **GRANT** the government's motion for summary affirmance. *See Groendyke Transp., Inc.*, 406 F.2d at 1162.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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October 06, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-10587-DD
Case Style: USA v. Leetavious Gaines
District Court Docket No: 0:96-cr-06159-KMM-1

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jenifer L. Tubbs
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:96-cr-06159-KMM-1

UNITED STATES OF AMERICA,

v.

LEETAVIOUS M. GAINES,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant Leetavious M. Gaines's ("Defendant") Motion to Modify Sentence. ("Mot.") (ECF No. 291). Therein, Defendant requests that the Court order his release from prison due to the "stacking" of his convictions under 18 U.S.C. § 924(c) and the risks posed by COVID-19. *See generally* Mot. The Government filed a response in opposition. ("Resp.") (ECF No. 296). Defendant filed a reply. ("Reply") (ECF No. 296). The Motion is now ripe for review.[1]

I. BACKGROUND

On September 18, 1997, Defendant was found guilty by a jury on all counts of the Superseding Indictment, which charged: one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 1); six counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951 & 2 (Counts 2, 4, 6, 8, 10, and 12); six counts of using or carrying a firearm during

[1] Defendant requests the appointment of counsel in connection with his request for compassionate release. Mot. at 5. However, the Eleventh Circuit has consistently held that there is no federal constitutional right to counsel in postconviction proceedings. *United States v. Webb*, 565 F.3d 789, 794 (11th Cir. 2009) (quoting *Barbour v. Haley*, 471 F.3d 1222, 1227 (11th Cir. 2006)). The Eleventh Circuit has also held that the statutory right to counsel for an indigent party pursuant to 18 U.S.C. § 3006A(c) only provides for counsel during the original proceeding and not for challenges to the defendant's sentence. *Id.* at 795. Here, therefore, Defendant does not have a constitutional or statutory right to counsel. Accordingly, Defendant's request for counsel is DENIED.

and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Counts 3, 5, 7, 9, 11, and 13); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 992(g) (Count 14). (ECF Nos. 53, 161, 162). On January 30, 1998, Defendant was sentenced to 1330 months imprisonment, to be followed be a three (3) year term of supervised release. (ECF No. 212).

Now, Defendant moves the Court to order his release, pursuant to 18 U.S.C. § 3582(c)(1)(A), because: (1) his sentence should be reduced retroactively due to subsequent changes to § 924(c) in the First Step Act, and (2) he is at an increased risk for severe illness from COVID-19. *See generally* Mot. With respect to the risk of COVID-19, Defendant contends that the following medical conditions put him at an increased risk: "hypertension that is sufficiently severe that he takes daily medication to treat it; and Crohn's colitis, a chronic autoimmune disorder for which he receives infusions of Remicade, an immunosuppressive drug, every six weeks." *Id*. at 22–23.

Finally, Defendant contends that the factors set forth under 18 U.S.C. § 3553(a) weigh in favor of his release because he has served twenty-four (24) years in prison, which is a substantial portion of what his sentence would have been, but for the stacking of his six § 924(c) offenses. *Id*. at 26. Defendant contends that this length of time is sufficient to provide adequate deterrence. *Id*. Defendant also asserts that he has been rehabilitated in prison and has taken advantage of educational opportunities. *Id*. at 27. Defendant states that he has an adequate release plan, which is to live with his mother in Lauderhill, Florida. *Id*.

II. LEGAL STANDARDS

Generally, once a term of imprisonment has been imposed, a court may not modify it. *United States v. Moreno*, 421 F.3d 1217, 1219 (11th Cir. 2005). However, a defendant may move for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). "[T]he defendant bears the

burden of establishing that compassionate release is warranted." *United States v. Rodriquez-Orejuela*, 457 F. Supp. 3d 1275, 1282 (S.D. Fla. 2020) (citation and internal quotation marks omitted).

A court may grant a motion for compassionate release upon a finding that there are extraordinary and compelling reasons for release that are "consistent with applicable policy statements issued by the [United States] Sentencing Commission." *See id* (quoting 18 U.S.C. § 3582(c)(1)(A)). The applicable policy statement issued by the Sentencing Commission is found in U.S.S.G. § 1B1.13 and provides that a court may reduce a term of imprisonment if "(1) extraordinary and compelling reasons warrant the reduction"; "(2) the defendant is not a danger to the safety of any other person or to the community"; and "(3) the reduction is consistent with this policy statement." U.S.S.G. § 1B1.13.

The application notes to § 1B1.13 define the phrase "extraordinary and compelling reasons" as follows:

> (1) **Extraordinary and Compelling Reasons.—**Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:
>
> (A) **Medical Condition of the Defendant.**—
>
> (i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> (ii) The defendant is—
>
> (I) suffering from a serious physical or medical condition,
>
> (II) suffering from a serious functional or cognitive impairment, or
>
> (III) experiencing deteriorating physical or mental health because of the aging process,

> that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
>
> (B) **Age of the Defendant.**—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (C) **Family Circumstances.**—
>
> (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
>
> (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
>
> (D) **Other Reasons.**—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. § 1B1.13, Application Note 1.

Section 3582(c)(1)(A) also requires a court "to consider the factors set forth in [§] 3553(a) to the extent they are applicable." *Rodriquez-Orejuela*, 457 F. Supp. 3d at 1282. The applicable § 3553(a) factors include, among other things, "(1) the nature and circumstances of the offense and the history and characteristics of the defendant," as well as (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; [and] (C) to protect the public from further crimes of the defendant." § 3553(a).

III. DISCUSSION

For the reasons discussed below, the Court finds that Defendant has not met his burden to establish extraordinary and compelling reasons for release under § 3582(c)(1)(A)(i).

A. Defendant's Arguments Relating to 18 U.S.C. § 924(c) Do Not Provide a Cognizable Basis for Release under § 3582(c)(1)(A)(i).

At the time of the Government's initial response, the Government did not have the benefit of the Eleventh Circuit's opinion in *United States v. Bryant,* 996 F.3d 1243, 1247–48 (11th Cir. 2021). In *Bryant,* the Eleventh Circuit concluded that § 1B1.13 is an applicable policy statement under Section 3582(c)(1)(A) for the purposes of defining "extraordinary and compelling reasons." 996 F.3d at 1248. As discussed above, Application Note 1 to § 1B1.13 creates four categories for circumstances in which "extraordinary and compelling reasons" exist: (A) Medical Condition of the Defendant, (B) Age of the Defendant, (C) Family Circumstances, and (D) Other Reasons. U.S.S.G. § 1B1.13, Application Note 1.

Under Application Note 1(D), circumstances that may qualify as "other reasons" must be "determined by the Director of the Bureau of Prisons[.]" U.S.S.G. § 1B1.13, Application Note 1(D). In *Bryant,* the Eleventh Circuit expressly held that "Application Note 1(D) does not grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence." 996 F.3d at 1248. Thus, with respect to defendant-filed motions under § 3582(c)(1)(A), defendants are not able to seek relief under Application Note 1(D) for "other reasons" and are limited to the first three categories for medical condition, age, and family circumstances. *See id.* at 1263–64.

Here, Defendant has alleged that an extraordinary and compelling reason for his release exists based on the disparity between penalties under 18 U.S.C. § 924(c) today in comparison to the time of Defendant's sentencing. *See generally* Mot. The only category under Application Note 1 in which Defendant's arguments for his release could fit is Application Note 1(D) for "other reasons." However, as set forth in *Bryant,* only the BOP can file a motion that relies on Application Note 1(D). *See Bryant,* 996 F.3d at 1264 ("The BOP may still file motions, and Application Note

1(D) can apply to those motions."). Thus, Defendant has failed to allege the existence of an extraordinary and compelling reason that is consistent with the applicable policy statements issued by the United States Sentencing Commission.

For the reasons discussed above, the Court finds that Defendant has failed to satisfy his burden to demonstrate extraordinary and compelling circumstances warranting release. *See* U.S.S.G. § 1B1.13, Application Note 1; *see also United States v. White*, No. 695CR179ORL22DCI, 2021 WL 2784325, at *3 (M.D. Fla. July 2, 2021) (citing *Bryant*, 996 F.3d at 1265 ("Because Bryant's motion does not fall within any of the reasons that 1B1.13 identifies as 'extraordinary and compelling,' the district court correctly denied his motion for a reduction of his sentence."); *United States v. Griffin*, No. 20-12215, —— F. App'x ——, 2021 WL 2179331 (11th Cir. May 28, 2021) (citing *Bryant*, 996 F.3d 1243) (finding that the defendant's argument "[that] anything can be considered as extraordinary and compelling reasons to justify a sentence reduction[,] . . . is foreclosed by [Eleventh Circuit] precedent." (internal quotation marks omitted)))

B. The Risk of COVID-19 Does Not Provide an Extraordinary and Compelling Reason for Release in This Case.

Defendant argues his health conditions, listed above, put him at a high risk for severe illness or death as a result of COVID-19. *See* Mot at 22–23. However, at this point, vaccines for COVID-19 are widely available to individuals in BOP custody. In *United States v. Burcks*, the Eleventh Circuit affirmed a district court's finding that the risk of COVID-19 to an individual with hypertension did not constitute an extraordinary and compelling reason for relief because the individual was vaccinated. No. 20-14865, 2022 WL 275271, at *4 (11th Cir. Jan. 31, 2022). Additionally, courts throughout the Southern District of Florida have found that even under circumstances where an individual refuses a vaccine, requests for compassionate release still fail

because it cannot be shown that there has been a denial of necessary medical treatment. *United States v. Barbieri*, No. 18-20060-CR, 2021 WL 2646604, at *2 (S.D. Fla. June 28, 2021) (citing *United States v. Rojas*, No. 18-20923-CR, 2021 WL 1895810, at *6 (S.D. Fla. May 11, 2021) (recognizing that the defendant's once-legitimate concerns about Covid-19 would become moot upon availability of a vaccine to protect against serious Covid-19 infections); *see also United States v. Parker*, No. 06-60130-CR, 2021 WL 2434270, at *3 (S.D. Fla. June 14, 2021) (denying motion for compassionate release for failure to identify extraordinary circumstances, explaining "Defendant argues that he has a high probability of being exposed to COVID-19 but the extensive availability of vaccines clearly rebuts that dated argument."); *see also United States v. Kurbatov*, No. 18-CR-20172, 2021 WL 1923289, at *3 (S.D. Fla. May 13, 2021) (collecting cases). Thus, given the widespread availability of the vaccine, the Court finds that Defendant's medical conditions, considered in combination with the risk of illness from COVID-19, do not constitute extraordinary and compelling circumstances warranting release. U.S.S.G. § 1B1.13, Application Note 1(A).

Moreover, the only condition cited by Defendant that is recognized by the CDC to increase his risk of severe illness is his hypertension. Mot. at 22 –23 (citing *United States v. Gutman*, 2020 WL 2467435, *2 (D. Md. May 13, 2020) (citing Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory Confirmed Coronavirus Disease 2019, CTRS. FOR DISEASE CONTROL & PREVENTION, available at https://www.cdc.gov/mmwr/volumes/69/wr/mm61915e3.htm)). However, Defendant's Motion makes clear that he receives daily medication to treat his hypertension. *Id.* Additionally, insofar as Crohn's colitis may increase the risk of severe illness from COVID-19, Defendant's Motion indicates that he receives treatment for that condition as well. *Id.* Thus, regardless of the vaccine, the Court finds

that Defendant's conditions, considered in connection with the risk of COVID-19, do not rise to the level of an extraordinary and compelling reason for release. *See United States v. Ballesteros*, 2020 WL 2733647, at *1 (S.D. Fla. May 26, 2020) (finding that an inmate who, during the COVID-19 pandemic, was 50 years old and suffered from hypertension had failed to satisfy the "extraordinary and compelling reasons" test).

Further, in any event, the § 3553(a) factors strongly weigh against Defendant's release at this time. Defendant has a serious criminal history that involves multiple arrests for armed robbery. PSI ¶¶ 26–27. The fourteen (14) offenses for which Defendant is now incarcerated relate to a string of armed robberies that Defendant and his co-defendant carried out from August 20, 1996, to September 4, 1996—which occurred while Defendant was on probation. *Id*. ¶¶ 4–9. Defendant's propensity to carry out a string of armed robberies, while on probation, speaks to the risk of recidivism that would accompany Defendant's early release. The Court finds that maintaining Defendant's sentence remains necessary to protect the public from further crimes of the defendant and to reflect the seriousness of Defendant's offenses. § 3553(a)(2).

Insofar as Defendant contends that his rehabilitation weighs in favor of his early release, the Court finds that Defendant's arguments as to his rehabilitation do not outweigh the Court's above-stated concerns. For example, Defendant argues in his Motion that he is working toward his GED. Mot. at 27. Yet, Defendant's BOP records reflect that he has been taking GED classes since 1998, but still had not obtained his GED. (ECF No. 291-3) at 1–2. While Defendant's utilization of educational opportunities weighs in his favor, this is not the sort of rehabilitation that would outweigh the Court's above-stated concerns regarding the seriousness of Defendant's offenses and the need to protect the public.

Additionally, while Defendant has served a long period of time in prison, Defendant's Motion reflects that if his six § 924(c) offenses did not stack, his sentence would be between 30 to 55 years under current law. Mot. at 26. Yet, at the time of Defendant's Motion, he had only served 24 years in prison. *Id.* Thus, Defendant does not even claim to have served what he suggests would be his minimum sentence under current law. *Id.* Therefore, the Court finds that the basis of this assertion is unfounded because there is no indication that Defendant has served what his minimum sentence would be today. *Id.* In fact, this weighs against Defendant because his argument indicates that his release, at this time, would result in a sentencing disparity even with those who would receive the *minimum* sentence under current law. § 3553(a)(6).

IV. CONCLUSION

Accordingly, UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Motion to Modify Sentence (ECF No. 291) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of February, 2022.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record