Appendix A - 2 pages

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6956

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONNIE BOWMAN, a/k/a Young,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, Senior District Judge. (3:01-cr-00349-CMC-1)

Submitted: February 16, 2023 Decided: February 22, 2023

Before GREGORY, Chief Judge, RUSHING, Circuit Judge, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Ronnie Bowman, Appellant Pro Se. Benjamin Neale Garner, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina.

PER CURIAM:

Ronnie Bowman appeals the district court's order denying his motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5239. We review a district court's order granting or denying a compassionate release motion for abuse of discretion. *See United States v. Kibble*, 992 F.3d 326, 329 (4th Cir.) (providing standard), *cert. denied*, 142 S. Ct. 383 (2021). We have reviewed the record and conclude that the district court did not abuse its discretion in denying relief after analyzing the relevant 18 U.S.C. § 3553(a) factors. *See United States v. High*, 997 F.3d 181, 189 (4th Cir. 2021). Accordingly, we affirm for the reasons stated by the district court. *United States v. Bowman*, No. 3:01-cr-00349-CMC-1 (D.S.C. Aug. 8, 2022). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America, v. Ronnie Bowman, Defendant.	Cr. No. 3:01-349-CMC Order

This matter is before the court on Defendant's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). ECF No. 158. Defendant argues he is actually innocent of the "death results" offense to which he pled guilty, citing the Supreme Court's decision in Burrage v. United States, 571 U.S. 204 (2014). Therefore, he asserts his guilty plea was constitutionally invalid and his life sentence should be reduced to Time Served.

Although Defendant filed his motion as one under § 3582(c)(1)(A), it is, in reality, a successive § 2255 motion, as it challenges the validity of one of the counts of conviction. "[A] motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application [under § 2255], . . ." United States v. Winestock, 340 F.3d 200, 207 (4th Cir. 2003); see also United States v. McRae, 793 F.3d 392, 397 (4th Cir. 2015). Although Defendant cites United States v. McCoy, 981 F.3d 271 (4th Cir. 2020), for the proposition "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i) includes "any reason a defendant may raise" (id. at 2), McCoy concerned sentencing disparities, not attacking a conviction. As such, it does not provide an avenue for Defendant to challenge his conviction for distribution of heroin resulting in death of another person by asserting the victim did not die from the heroin Defendant distributed.

As an initial matter, this motion is one properly brought under 28 U.S.C. § 2255. Defendant has filed previous motions under § 2255. In 2005, he filed his initial § 2255 motion, alleging he was factually innocent of the charge of distributing heroin resulting in death (Ground One), challenging the basis of his guilty plea (Ground Two), arguing the district court's denial of his motion to withdraw his guilty plea was error (Ground Three), that his guilty plea was invalid (Ground Four), prosecutorial misconduct (Ground Five), and ineffective assistance of counsel (Ground Six). **Bowman v. United States**, No. 3:05-677, ECF No. 1 (D.S.C. March 3, 2005). The court granted the Government's motion for summary judgment, finding Grounds One-Four were decided by the Fourth Circuit on appeal or procedurally defaulted. ECF No. 12. Specifically, Ground Three was decided against him on direct appeal by the Fourth Circuit, and Grounds One, Two, and Four were procedurally defaulted and Defendant was unable to show cause and actual prejudice, or a miscarriage of justice. **Id.** at 3. Ground Five was determined to be without merit, and on Ground Six the court found trial and appellate counsel were not ineffective. **Id.** at 5, 7, 8. Defendant filed a motion for reconsideration regarding the affidavit of Daniel Spitz, who opined drugs did not cause or contribute to the death of the victim and there was no evidence to suggest the victim died secondary to drug intoxication. ECF No. 14. The district court denied the motion, finding the affidavit was consistent with the negative toxicology report and did not alter the ruling on Defendant's motion. ECF No. 15.

Defendant appealed, and the Fourth Circuit affirmed. ECF No. 25. The Appeals Court granted a certificate of appealability to consider (1) whether there was sufficient factual basis to support Defendant's guilty plea to distribution of a controlled substance resulting in death, such that the district court committed error in accepting his plea, and (2) whether the district court erred in its instruction regarding the elements of conspiracy to distribute one kilogram or more of heroin.

Id. at 2. It determined both issues were procedurally defaulted, and Defendant was unable to show cause and actual prejudice to excuse default. Id. On grounds related to Count Four, regarding Defendant's guilty plea to distribution resulting in death, Defendant alleged appellate counsel was ineffective for failing to raise the ground on appeal. The court determined counsel's "failure to bring this claim was not even a miscalculation given our conclusion regarding the factual basis supporting Bowman's plea on Count Four." Id. at 8. It further found Defendant could not show actual innocence because his "new" evidence did not show the Government's theory of the death was false or irrational, and did not meet his burden to show innocence by clear or convincing evidence. Id. at 9. The court held Defendant was unable to show actual prejudice related to Count One because he admitted guilt to distributing more than a kilogram of heroin, and the admission was supported by witness testimony. Id. at 4.

Since then, Defendant has filed motions seeking to vacate his conviction on grounds similar to those alleged in his § 2255 motion. ECF Nos. 137, 151, 152, 153, 154. In 2012, he filed a Rule 60(b) motion contending his conviction on Count Four was procured through fraud on the court because the Government knew "no such crime existed." ECF No. 137 at 5. The court construed that motion as a second or successive § 2255 motion, and dismissed for lack of jurisdiction as Defendant had not received permission to file it. ECF No. 138.

In 2018, Defendant filed four motions: a "Motion titled Order Certified Copy of Coronars [sic] Report, Pathology and Forensic Laboratory Report" (ECF No. 151); "Motion for Certified Copies" (ECF No. 152); "Motion to take Judicial Notice" (ECF No. 153); and "Notice of Addendum Memorandum of Law in Support for Certified Copy of Coronars [sic] Report" (ECF No. 154). His motions argued grounds already litigated, including prosecutorial misconduct for withholding evidence as to the victim's death, ineffective assistance of counsel for, among other

things, "coercing" him to enter a guilty plea and failing to file motions. ECF Nos. 151, 152. His motion for judicial notice argued the court should take judicial notice of the lab results showing negative screens for alcohol and drugs in the victim's system, that his guilty plea was entered unknowingly and unintelligently, and that Dr. Spitz found the victim died of cardiac arrhythmia and there was no evidence the death was secondary to drug intoxication. ECF No. 153. Finally, his "addendum memorandum of law" referenced **Burrage v. United States**, 571 U.S. 204 (2014), contending that case should apply to vacate the penalty enhancement for death results unless the drug use was the but-for cause of the victim's death. ECF No. 154.

This court denied the motions for lack of jurisdiction, as they challenged his conviction and therefore were successive § 2255 motions. ECF No. 155. The court noted Defendant had attempted to obtain permission from the Fourth Circuit to file a § 2255 motion with claims related to **Burrage**; however, the Fourth Circuit denied him permission. **In re: Ronnie Bowman**, No. 19-319 at ECF No. 7 (4th Cir. Aug. 28, 2019). In that motion to the Fourth Circuit, Defendant argued appellate counsel was ineffective for failing to raise arguments and effectively waiving Defendant's ability to later raise them. He also submitted he was actually innocent of the death results charge, it should be vacated, and his sentence recalculated without it. No. 19-319 at ECF No. 2-1 at 4. He attached a proposed § 2255 motion with the same arguments and also arguing the new rule of law set forth in **Burrage** applied to his conviction on the death results count. ECF No. 2-3 at 10. His § 2244 motion was denied by the Fourth Circuit. No. 19-319 at ECF No. 7.

Prior to filing the instant motion, Defendant filed a motion in the Fourth Circuit under § 2244 seeking permission to file a successive § 2255 motion. **In re: Ronnie Bowman**, No. 21-265, ECF No. 2 (4th Cir. Oct. 8, 2021). Defendant argued **Burrage** applies to his case, acknowledged **Burrage** was made retroactive to cases on collateral review in 2014, but contended he could not

seek permission to file a successive § 2255 motion until the Fourth Circuit's decision in Young v. Antonelli, 982 F.3d 914 (2020). Id. at 5. He noted the court in Young decided Burrage applied to the death results provision in the United States Sentencing Guidelines, "at least to those in effect prior to the decision in United States v. Booker, 542 U.S. 220 (2005)" (finding the Guidelines advisory, instead of mandatory, as they were pre-Booker).[1] Id. The Fourth Circuit denied permission. No. 21-265, ECF No. 7. Defendant filed a motion for reconsideration , but that motion was also denied. No. 21-265, ECF Nos. 8, 9.

Undeterred, Defendant switched tactics and now seeks to raise his actual innocence challenge by a motion for compassionate release, citing McCoy. However, the compassionate release statute, 18 U.S.C. § 3582, is not a proper avenue for relief for the claims made by Defendant here. As explained in pages 8-15 of the Government's response in opposition (ECF No. 178), a compassionate release motion is not a vehicle for Defendant to challenge his conviction and sentence. McCoy does not alter this conclusion. An intervening change in law regarding the validity of a conviction, such as Burrage, does not transform Defendant's claim into one that may be brought under § 3582(c)(1)(A)(i) instead of § 2255.

Appellate and district courts around the country have determined claims of actual innocence raised in compassionate release motions are disallowed as more properly brought under § 2255, not § 3582(c)(1)(A). See, e.g., United States v. Jacques, No. 20-3276, 21-1277, 2022 WL 894695, at *2 (2d Cir. Mar. 28, 2022) ("While the earlier motions raised claims regarding the validity of Jacques's conviction and sentence that were not renewed in the latter motion, those

[1] It appears Defendant was attempting to avoid an untimeliness challenge by relying on Young. However, Defendant was convicted of a statutory death results provision, as in Burrage.

arguments were not a proper basis for a § 3582(c)(1)(A) motion in any event. . . .Permitting Jacques to make actual innocence arguments in this manner would enable to him to pursue habeas relief through a compassionate release motion and thereby evade the procedural limitations on bringing habeas claims."); **United States v. Musgraves**, 840 F. App'x 11, 13 (7th Cir. 2021) ("Compassionate release is a mechanism for inmates to seek a sentence reduction for compelling reasons, not for remedying potential errors in a conviction."); **United States v. Chambers**, Case No. 1:18-cr-76-BLW, 2022 WL 60598, at *2 (D. Idaho Jan. 5, 2022) ("Chambers' motion for compassionate release is, as noted, based solely on his claim of actual innocence. As such, the motion presents a challenge to Chambers' underlying conviction. This challenge is not properly brought in a motion for reduction of sentence under § 3582(c)(1)(A), but must, instead, be brought through a motion under 18 U.S.C. § 2255."); **United States v. Pahutski**, Criminal No. 3:07-cr-211, 2021 WL 5043369, at * 4 (W.D.N.C. Oct. 29, 2021) ("If the Defendant had a valid claim of actual innocence, . . . he had ample opportunity to present that claim . . . A defendant cannot use compassionate release to circumvent the law that governs when and how defendants can seek relief for legal errors they allege. Defendant's motion is, in substance, an attempt to circumvent the limitation on successive § 2255 motions by dressing his claim as one seeking compassionate release."); **United States v. Pizarro**, 17-cr-151(AJN), 2021 WL 4665044, at *2 (S.D.N.Y. Oct. 6, 2021) ("[F]ederal prisoners challenging the legality of their convictions or sentences must proceed by way of motion pursuant to 28 U.S.C. § 2255. . . . Mr. Pizarro's attempt to obtain a "second bite at the apple" by filing a motion to vacate his sentence [via compassionate release] outside of a § 2255 motion is without merit."); **United States v. Serrano**, Case No. EDCR 13-00005-VAP, 2021 WL 5504885, at *4 (C.D. Cal. Jan. 11, 2021) (dismissing defendant's actual innocence claim based on **Rehaif** in compassionate release motion and explaining "[i]n any event, Defendant has not

shown the Court can or should consider an untimely "actual innocence" claim pursuant to 28 U.S.C. § 2255 as an extraordinary and compelling reason to grant compassionate release."). Here, Defendant has raised his actual innocence argument through the proper channels, including appeal and on motions pursuant to § 2255 and § 2244, and has been unsuccessful. He cannot circumvent these statutory avenues for challenging a conviction via compassionate release.

a. Section 3582(c)(1)(A)

Even if the court were to consider Defendant's claim under the compassionate release statute,[2] Defendant cannot prevail. Defendant argues he is actually innocent of the "death results" charge because he did not cause the death of the victim by selling him drugs. In support, he attaches the toxicology report that was negative for drugs and alcohol. ECF No. 158-1. He asserts the holding in **Burrage** supports his argument. He submits this is an extraordinary and compelling reason justifying a reduction in sentence.

Defendant raised this very argument in support of his claim of actual innocence before the Fourth Circuit nearly twenty years ago. **United States v. Bowman**, 348 F.3d 408 (4th Cir. 2003). The court acknowledged the negative toxicology report, but explained the Government had been prepared to prove, through an expert witness, that a negative toxicology report was not unusual, and the evidence showed the victim's death was drug induced. **Id.** at 414-15. The Fourth Circuit noted Defendant was aware of the toxicology report prior to his guilty plea, and admitted he distributed heroin to the victim, who consumed it and died as a result. **Id.** at 415. The court therefore affirmed the District Court's rejection of Defendant's motion to withdraw his guilty plea.

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[2] Defendant states he submitted a request to the Warden of his facility and 30 days have lapsed without response. The Government acknowledges Defendant has satisfied the exhaustion requirement.

Id. at 417. As explained above, Defendant's subsequent attempts to challenge his plea and conviction on Count Four have been unsuccessful.

Based on the above, the court finds extraordinary and compelling reasons do not exist based on Defendant's argument, already rejected by the Fourth Circuit, regarding the toxicology report. However, in an abundance of caution, the court will proceed to evaluate the § 3553(a) factors.

b. The § 3553(a) factors

i. Nature and Circumstances of the Offense

Defendant was part of a drug conspiracy distributing heroin in the Columbia area of South Carolina. Numerous witnesses reported buying heroin from Defendant or seeing drug transactions in which Defendant was the seller. Defendant distributed heroin to an individual who died of an apparent drug overdose in Defendant's apartment. Defendant then obstructed justice by removing the victim's body from his apartment and instructing witnesses to the victim's death not to discuss it, as well as by threatening other witnesses who cooperated against him. Defendant pled guilty to Count One, conspiracy to possess with intent to distribute and distribution of one kilogram or more of heroin and aiding and abetting; and Count Four, distribution of a quantity of heroin to another person resulting in the death of that person.

ii. History and Characteristics

Defendant was 38 years old when he was sentenced. Prior to the instant offense conduct, he had a previous juvenile conviction for possession of a controlled substance, PCP, as well as adult convictions for disorderly conduct, criminal possession of a controlled substance, resisting arrest, criminal sale of a controlled substance (two convictions), possession of heroin, and possession with intent to distribute heroin. Based on his convictions for criminal sale of a controlled substance and possession with intent to distribute heroin, he was designated a career

offender and his criminal history category was VI. He was a high school dropout and single with three children. He is currently 59 years old and is serving a Life sentence.

iii. Kinds of Sentences Available and Sentencing Range Established

Defendant pled guilty to Count One, conspiracy to possess with intent to distribute and distribution of a kilogram of heroin, and Count Four, distribution of heroin resulting in the death of another person. The statutory minimum on both counts was 20 years, with maximums of Life. Based on a total offense level of 43[3], criminal history category VI, the guideline range was Life imprisonment. The court sentenced Defendant to a term of Life imprisonment for each count, concurrent.

iv. Need to Avoid Unwarranted Sentencing Disparities

The co-defendant received a sentence of 78 months after she pled guilty to Count Seven of the Superseding Indictment, which charged her with assisting Defendant in order to hinder and prevent his apprehension, trial, or punishment for drug distribution resulting in the death of another person. Given the two co-defendant's charges, roles, and convictions, the court finds no unwarranted sentencing disparity exists.

v. The need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, and adequately deter Defendant and others.

Defendant has served over twenty years of his Life sentence. His offense was extremely serious. He had a significant criminal history, mainly of drug possession and distribution, starting before the age of majority. He has had disciplinary infractions in the BOP, including making sexual

[3] Defendant's total offense level was 45, but pursuant to U.S.S.G. Chapter 5, Part A, Application Note 2, an offense level of more than 43 is to be treated as an offense level of 43.

proposal/threat (2004), receiving money from another inmate (2012), possessing unauthorized item (2013), possessing drugs/alcohol (2013), possessing a non-hazardous tool (tobacco) (2015), and use of drugs (2016). He has worked as a cook in the BOP, preparing inmate meals. He notes he would return to his home in New York if released to care for his mother, who is 93 years old and recently broke her hip. However, given his criminal history, BOP disciplinary history, and seriousness of his crime, to reduce his sentence would not reflect the seriousness of his offense, promote respect for the law or deterrence, or provide just punishment.

c. Conclusion

Defendant's motion (ECF No. 158) is dismissed as this court is without jurisdiction to consider it. In the alternative, the court declines to order release of Defendant pursuant to § 3582(c)(1)(A)(i), especially where, as here, the § 3553(a) factors weigh against release.

IT IS SO ORDERED.

s/Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
August 8, 2022