

FILED: October 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6502
(3:11-cr-00404-FDW-DSC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ZONTA TAVARUS ELLISON

Defendant - Appellant

ORDER

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/ Nwamaka Anowi, Clerk

① UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

vs.

No. 24-6502, US v. Zonta Ellison

3:11-cr-00404-FDW-DSC-1

ZONTA VARAS ELLISON,
Defendant

PETITION FOR REHEARING EN BANC

FED.R.App.P. RULE 35

THE PANEL'S DECISION, ENTERED ON SEPTEMBER 24, 2024, DENYING DEFENDANT'S APPEAL FOR THE DENIAL OF HIS MOTION FOR COMPASSIONATE RELEASE, FILED ON JUNE 26, 2023 IN THE UNITED STATES DISTRICT COURT CHARLOTTE, CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT IN THE FOLLOWING CASES;

STRICKLAND V. WASHINGTON, 466 US 668 (1984)

UNITED STATES V. CRONIC, 466 US 648 (1984)

ROVIAZO V. UNITED STATES, 353 US 53 (1956)

SHERMAN V. UNITED STATES, 356 US 369 (1958)

BRADY V. MARYLAND, 373 US 83 (1963)

BURKS V. UNITED STATES, 437 US 1 (1978)

NAPUE V. ILLINOIS, 360 US 264 (1959)

(2)

SHEPARD v. UNITED STATES, 544 U.S. 13 (2005);

NORTH CAROLINA v. ALFORD, 400 U.S. 25 (1970);

DORSEY v. UNITED STATES, 567 U.S. 260 (2012);

AND THE DECISIONS OF THIS HONORABLE FULL COURT IN THE FOLLOWING CASES;

UNITED STATES v. ALSTON, 611 F.3d 219 (4th Cir. 2010);

UNITED STATES v. JENKINS, 22 F.4th 162, 167 (4th Cir. 2021);

UNITED STATES v. COLLINGTON, 995 F.3d 347, 357 (4th Cir. 2021);

USA v. VENABLE, 943 F.3d 187, 2019 U.S. App. LEXIS 34497;

AND CONSIDERATION BY THE FULL COURT IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS; ALSO

THE PROCEEDING INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE WHEN THE DEFENDANT ASKED THE PANEL,

"WAS IT AN ABUSE OF DISCRETION, RESULTING IN A MISCARRIAGE OF JUSTICE, FOR THE DISTRICT COURT TO DEPRIVE ELLISON OF HIS RIGHT TO LIBERTY, ARBITRARILY, IMPOSING A SENTENCE UNWARRANTED BY LAW, WHEN IT RELIED ON ELLISON'S JUNE 11, 2010 ALFORD PLEA CONVICTION, PURSUANT TO 21 U.S.C. § 851, TO SENTENCE HIM AS A CAREER OFFENDER?"

(3)

Shown unto the panel, that the trial judge in his 60 DAY ORDER NOTED AND STATED, "PETITIONER HAS ~~MADE~~ ASSERTED A COLORABLE CLAIM FOR RELIEF COGNIZABLE UNDER § 2255(a), BACK 2016 in his ORDER FOR THE UNITED STATES TO RESPOND TO THE 28 U.S.C. § 2255 WRIT OF HABEAS CORPUS, RAISED THE QUESTION TO THIS HONORABLE COURT,

"CAN THE 4TH CIRCUIT JUDICIALLY REOPEN APPELLANT'S § 2255 PETITION GRANTING A CERTIFICATE OF APPEALABILITY, WITH THE SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT PURSUANT TO 28 U.S.C. § 2253(c)(2)?"

NO RULING WAS MADE BY THE COURT AS TO WHAT THE COLORABLE CLAIM WAS, CITING THE DEFENSE OF ENTRAPMENT AND BEING DENIED THE RIGHT TO SUBPOENA THE UNITED STATES FEMALE INFORMANT USED IN ITS SCHEME THAT WAS NOT PRESENTED TO THE JURY BECAUSE SHE WAS EXONERATORY AND IMPEACHING AS WELL AS FAVORABLE.

RESPECTFULLY SUBMITTED THIS 3RD DAY OF OCTOBER, 2024

Zonta Callion

COPY MAILED THIS 3RD DAY OF OCTOBER
2024, TO THE USAO 227 WEST TRADE STREET SUITE 1650
CHARLOTTE NC 28202 VIA ECF.

UNPUBLISHED

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

No. 24-6502

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ZONTA TAVARUS ELLISON,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Frank D. Whitney, District Judge. (3:11-cr-00404-FDW-DSC-1)

Submitted: September 19, 2024

Decided: September 24, 2024

Before NIEMEYER, RICHARDSON, and HEYTENS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Zonta Tavarus Ellison, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Zonta Tavarus Ellison appeals the district court's order denying his motion for compassionate release, brought 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 have reviewed the record and conclude that the district court did not abuse its discretion in denying Ellison's motion. *See United States v. Brown*, 78 F.4th 122, 127 (4th Cir. 2023) (stating standard of review). Accordingly, we affirm the district court's order. *United States v. Ellison*, No. 3:11-cr-00404-FDW-DSC-1 (W.D.N.C. Apr. 15, 2024). 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

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
INFORMAL BRIEF

No. 24-6502, US v. Zonta Ellison

3:11-cr-00404-FDW-DSC-1

1. Declaration of Inmate Filing

An inmate's notice of appeal is timely if it was deposited in the institution's internal mail system, with postage prepaid, on or before the last day for filing. Timely filing may be shown by:

FILED a postmark or date stamp showing that the notice of appeal was timely deposited in the institution's internal mail system, with postage prepaid, or a declaration of the inmate, under penalty of perjury, of the date on which the notice of appeal was deposited in the institution's internal mail system with postage prepaid. To include a declaration of inmate filing as part of your informal brief, complete and sign the declaration below:

Declaration of Inmate Filing

Date NOTICE OF APPEAL deposited in institution's mail system: 6-12-2024

I am an inmate confined in an institution and deposited my notice of appeal in the institution's internal mail system. First-class postage was prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Signature: Zonta Ellison

Date: 6-12-2024

[Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).]

2. Jurisdiction

Name of court or agency from which review is sought: UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Date(s) of order or orders for which review is sought:

April 15, 2024, April 27, 2016

3. Issues for Review

JANUARY 14, 2014 JANUARY 10, 2013

Use the following spaces to set forth the facts and argument in support of the issues you wish the Court of Appeals to consider. The parties may cite case law, but citations are not required.

Issue 1.

WAS IT A ABUSE OF DISCRETION OR MISCARIAIGE OF JUSTICE, FOR THE DISTRICT COURT TO DEPRIVE ELLISON OF HIS RIGHT TO LIBERTY, ARBITRARILY, IMPOSING A SENTENCE UNWARRANTED BY LAW, WHEN IT RELIED ON ELLISON'S JUNE 11, 2010 ALFORD PLEA CONVICTION, TO SENTENCE HIM AS A CAREER OFFENDER?

Supporting Facts and Argument.

ON JUNE 26, 2023 APPELLANT FILED A MOTION FOR COMPASSIONATE RELEASE REDUCTION IN SENTENCE, PURSUANT TO 18 U.S.C §§ 3582(c)(1)(A), (c)(1)(B), FIRST STEP ACT OF 2018 & THE FAIR SENTENCING ACT OF 2010, IN THE US DISTRICT COURT CHARLOTTE. CITING THAT IT WAS AN UNREASONABLE DETERMINATION, RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE, FOR THE DISTRICT COURT TO RELY ON APPELLANT'S "JUNE 11, 2010 ALFORD PLEA CONVICTION," ARBITRARILY, TO SENTENCE HIM AS A CAREER OFFENDER, WHEN THE COURT WAS FULLY AWARE OF THE FACT, THAT APPELLANT WAS NOT IN FACT, A CAREER OFFENDER, BECAUSE, SUCH CONVICTION WAS INVALID, AND DID NOT QUALIFY PURSUANT TO UNITED STATES V. ALSTON, 611 F.3d 219 (4TH CIR. 2010), SHEPARD V UNITED STATES, 544 U.S. 13 (2005) AND NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970)). (SEE ATTACHED FOR CONTINUE).

Issue 2.

CAN THE 4TH CIRCUIT JUDICIALLY REOPEN APPELLANT'S § 2255, GRANTING A CERTIFICATE OF (SEE ATTACHED)

Supporting Facts and Argument.

IN JANUARY 2016 APPELLANT FILED A PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2255(a), CITING "ACTUAL INNOCENCE" TO BEING IN POSSESSION WITH THE INTENT TO DISTRIBUTE COCAINE BASE AS CHARGED, DUE TO THE UNITED STATES INDUCING AND ENTRAPPING APPELLANT FOR FEDERAL PROSECUTION. AS THE RECORD REFLECTS, APPELLANT WAS DENIED OF HIS SIXTH AMENDMENT RIGHT TO THE REPRESENTATION OF COUNSEL, FOR IT TO BE SAID APPELLANT RECEIVED A FAIR TRIAL, WHEN THE DISTRICT COURT ALLOWED DEFENSE COUNSEL TO WITHDRAW BEFORE THE SELECTION OF THE JURY, AND THEN APPOINTED DEFENSE COUNSEL, AS STANDBY COUNSEL, FORCING APPELLANT TO REPRESENT HIMSELF. APPELLANT "NEVER" HAD A "FARETTA" HEARING. (SEE ATTACHED).

Issue 3.

Supporting Facts and Argument.

Issue 4.

Supporting Facts and Argument

FILED

JUN 24 2024

**U.S. Court of Appeals
Fourth Circuit**

ISSUE 1. (CONTINUED)

ATTACHMENT 1

THE DISTRICT COURT IN ITS "STATEMENT OF REASONS" DOCUMENT #52 PAGE 4, MADE THE ABOREMENTIONED FACT KNOWN WHEN IT CITED AS SHOWN UNTO THIS HONORABLE CIRCUIT COURT:

"COURT OVERRULES CRIMINAL HISTORY OBJECTION TO PARAGRAPH 20. COURT NOTES THAT SHOULD THE 4TH CIRCUIT OVERRULE THE COURT'S RULING, THE COURT WOULD GRANT A VARIANCE TO THE CAREER OFFENDER OFFENSE LEVEL DUE AND IMPOSE THE SAME SENTENCE.

AS THE DISTRICT COURT RELIED ON APPELLANT'S BOP DISPLINARY RECORD, AS REASON TO DENY APPELLANT'S MOTION, THE COURT FAILED TO TAKE INTO ACCOUNT HIS PROMOTION IN CUSTODY CLASSIFICATION LEVEL, FROM MEDIUM TO LOW TO MINIMUM DUE TO HIS GOOD CONDUCT. THE MULTIPLE EDUCATIONAL COURSES AND TRADES COMPLETED TO BETTER TRANSITION BACK INTO SOCIETY, HIS CONTINUED EMPLOYMENT HISTORY IN THE BOP, AS WELL AS HIS RECENTLY WINNING OF AN APPEAL FOR AN UNLAWFUL DISPLINARY SANCTION.

RELYING ON THE ERRONEOUS SENTENCING REFORM ACT OF 1984, UNITED STATES V. BOOKER, 125 S. CT. 738 (2005), 18 U.S.C. § 3553 (a) SENTENCING FACTORS, THE INVALID JUNE 11, 2010 ALFORD CONVICTION, ENHANCING APPELLANT'S SENTENCE 12 LEVELS WITHOUT REASON VALIDATED, ADDED 20+ YEARS TO AN ALLEGED CRIME THAT CARRIED A MAXIMUM OF ONE (1) YEAR, PURSUANT TO THE USAGE OF AN OBSOLETE STATUTE 21 U.S.C. § 841(a)(1) & (b)(1)(C) CODIFIED IN 21 U.S.C. § 844(a). IRRESPECTIVE OF THE FAIR SENTENCING

ISSUE 1. (CONTINUED)

Attachment 2

Act of 2010. (USA v. VENABLE, 943 F.3d 187, 2019 U.S. App. LEXIS 34497).

ON APRIL 15, 2024 THE DISTRICT COURT ISSUED AN ORDER DENYING THE MOTION FOR COMPASSIONATE RELEASE REDUCTION IN SENTENCE, yet failed to rule on and adjudicate the challenge of the imposition of the "ERONIOUS" CAREER OFFENDER SENTENCE.

APPELLANT HAS DONE NEARLY 13 THIRTEEN YEARS.

ISSUE 2. (CONTINUED)

APPEALABILITY, WITH THE SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT PURSUANT TO 28 U.S.C. § 2253 (C)(2)?

JUST AS THE DISTRICT COURT HAS DONE WITH THE COMPASSIONATE RELEASE MOTION, AND FAILED TO ADJUDICATE EVERY MATERIAL CONSTITUTIONAL ISSUE, IT HAS DONE THE VERY SAME THING WITH ITS FAILURE, TO ADJUDICATE AND CITE, WHAT "COLORABLE CLAIM" FOR RELIEF APPELLANT SHOWED UNTO THE COURT, CITED IN ITS 60-DAY ORDER, FOR THE UNITED STATES TO RESPOND TO THE 2255 PETITION.

4. Relief Requested

Identify the precise action you want the Court of Appeals to take:

ORDER THE IMMEDIATE RELEASE OF APPELLANT ELLISON, GRANTING HIS MOTION FOR COMPASSIONATE RELEASE, GRANT ELLISON A C.O.A AND REOPEN THE 52255 PETITION AND GRANT ELLISON AN EVIDENTIARY HEARING UPON THE ACTUAL INNOCENCE CLAIMS IN LIGHT OF 28 U.S.C. §2253(C)(2), SHOWN UNTO THE COURT.

5. Prior appeals (for appellants only)

A. Have you filed other cases in this court? Yes No

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

can't recall off hand but they were all denied. 23-138, 3:11-cr-00404-FDW-DSC-1
IN RE: ZONTA TAVARU ELLISON
2244 MOTION

Zonta Ellison

Signature

[Notarization Not Required]

Zonta Ellison

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

I certify that on 6-12-2024 I served a copy of this Informal Brief on all parties, addressed as shown below: MRS. KIMANI M. FORD, ^{ME} ELIZABETH M. GREENOUGH, MS. CORTNEY RANGALL AND MS. MARIA K. VENTO, OFFICE OF THE UNITED STATES ATTORNEY WESTERN DISTRICT OF NORTH CAROLINA 289 WEST TRADE STREET SUITE 1650 CHARLOTTE NC 28202

Zonta Ellison

Signature

NO STAPLES, TAPE OR BINDING PLEASE

FILED: September 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6502
(3:11-cr-00404-FDW-DSC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ZONTA TAVARUS ELLISON

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

DEFENDANT: Zonta Tavarus Ellison
CASE NUMBER: DNCW3:11CR00404-001
DISTRICT: North Carolina - Western

STATEMENT OF REASONS
(Not for Public Disclosure)

VII COURT DETERMINATIONS OF RESTITUTION

A Restitution Not Applicable.

B Total Amount of Restitution: \$Not applicable

C Restitution not ordered (Check only one.):

- 1 For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
- 2 For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
- 3 For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
- 4 Restitution is not ordered for other reasons. (Explain.)

D Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Court overrules Criminal history objection to paragraph 20. Court notes that should the 4th Circuit overrule the Court's ruling, the Court would grant a variance to the career offender offense level due and impose the same sentence.

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: ██████████

Date of Imposition of Judgment: 1/14/2014

Defendant's Date of Birth: 02/27/1978

Signed: 2/6/2014

Defendant's Residence Address: 2428 Pitts Drive

Charlotte, NC Address Zip Code

Defendant's Mailing Address: ██████████ Detained


Frank D. Whitney
Chief United States District Judge



APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO. 3:11-CR-00404-FDW-DSC

UNITED STATES OF AMERICA)
)
 v.)
)
 ZONTA TAVARUS ELLISON,)
)
 Defendant.)
)
 _____)
)
 ORDER

THIS MATTER is before the Court on Defendant's pro se Motion for Compassionate Release. (Doc. No. 84.) The United States responded, (Doc. No. 88), and this matter is ripe for ruling. For the reasons set forth below, Defendant's Motion is **DENIED**.

I. BACKGROUND

On June 15, 2011, as part of an ongoing narcotics investigation, an undercover detective arranged to purchase crack cocaine from Defendant. (Doc. No. 49, p. 3.) Defendant conducted the transaction through the detective's driver's side window and handed the detective 1.82 grams of crack cocaine in exchange for \$180.00. (*Id.*) Later that month, on June 28, 2011, Defendant agreed to sell the undercover detective an additional 7 grams of crack cocaine in exchange for \$350.00. (*Id.*) On that date, Defendant delivered 4.62 grams of crack cocaine to the detective in exchange for \$350.00. (*Id.*) Two days later, on June 30, 2011, Defendant arranged with the detective to sell him 14 grams of crack cocaine, and the detective agreed to pay \$700.00. (Doc. No. 49, p. 4.) After several phone conversations, Defendant delivered 11.01 grams of crack cocaine to the detective for which he was paid \$700.00. (*Id.*)

Subsequently, Defendant was arrested and charged with three counts of possession with intent to distribute cocaine base in violation of 18 U.S.C. §§ 841(a)(1), (b)(1)(C). (Doc. No. 1, pp.

1-2.) On January 10, 2013, a jury convicted Defendant of all three counts. (Doc. No. 31.) This Court sentenced Defendant to 262 months imprisonment and six years supervised release. (Doc. No. 51.) The Fourth Circuit affirmed Defendant's conviction and sentence on direct appeal, United States v. Ellison, 588 F. App'x 266 (4th Cir. 2014), and this Court denied his subsequent Motion to Vacate under 28 U.S.C. § 2255. (Doc. No. 81.)

In March 2023, Defendant submitted a request to the warden for a reduction in his sentence. (Doc. No. 84, p. 8.) The warden denied his request on April 18, 2023, (Doc. No. 84-1, p. 1), and Defendant subsequently filed this pro se motion for compassionate release under 18 U.S.C. § 3582. (Doc. No. 84.) The Court ordered the United States to respond to Defendant's Motion, (Doc. No. 86), and on August 1, 2023, the United States responded in opposition, (Doc. No. 88).

Defendant's projected release date is June 24, 2029. See <https://www.bop.gov/inmateloc> (last visited Apr. 5, 2024).

I. STANDARD OF REVIEW

Defendant's motion seeks a reduction in his sentence in this case under 18 U.S.C. § 3582(c)(1)(A). A defendant may seek a modification of his sentence from the court under § 3582(c)(1)(A) for "extraordinary and compelling reasons" if the defendant has "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's 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." If a defendant has administratively exhausted a claim for release (or the Government does not contest the exhaustion requirement),¹ the district court generally conducts a two-step inquiry when deciding whether to reduce a defendant's sentence under § 3582(c)(1)(A). United States v. Bond, 56 F.4th 381, 383 (4th Cir. 2023).

¹ United States v. Muhammad, 16 F.4th 126, 130 (4th Cir. 2021) (recognizing the exhaustion requirement in § 3582(c)(1)(A) is not jurisdictional, and it may be waived or forfeited).

First, the court determines whether the defendant is eligible for a sentence reduction. “A defendant is eligible if the court finds ‘extraordinary and compelling reasons warrant such a reduction,’” id. (quoting § 3582(c)(1)(A)), and the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A)(i).

In 2023, the United States Sentencing Commission amended its policy statement to apply to defendant-filed motions for compassionate release, as permitted under the First Step Act of 2018, and expanded the list of circumstances sufficient to support such a motion under § 3582(c)(1)(A). See United States Sent’g Guidelines Manual § 1B1.13. The amendments became effective on November 1, 2023. Id. They supersede much of the case law that developed over the past several years while there was no policy statement applicable to defendant-filed motions. See United States v. McCoy, 981 F.3d 271, 283 (4th Cir. 2020). However, while drafting the new policy statement, the Sentencing Commission considered case law that developed after the enactment of the First Step Act in the absence of a binding policy statement. See United States Sent’g Guidelines Manual § 1B1.13 amend. 814 (Supp. to App. C 2023) (discussing Amendment 814 in light of the Supreme Court’s decision in Concepcion v. United States, 142 S. Ct. 2389 (2022)). While Defendant filed his Motion before the amendment became effective, this Court will evaluate the Motion under the current policy statement.

“Second, the court considers ‘the factors set forth in section 3553(a) to the extent that they are applicable.’” Bond, 56 F.4th at 384 (quoting 18 U.S.C. § 3582(c)(1)(A)) (citing United States v. Kibble, 992 F.3d 326, 331 (4th Cir. 2021)). Section 3553(a) requires the court to “impose a sentence sufficient, but not greater than necessary” to comply with the basic aims of the statute. In considering whether a reduced sentence is warranted given the applicable § 3553(a) factors, the court considers, among others: “the nature and circumstances of the offense;” “the history and

characteristics of the defendant;” the need for the sentence to “provide just punishment,” “afford adequate deterrence,” “protect the public,” and “provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner;” the kinds of sentences available and sentencing ranges; and “the need to avoid unwarranted sentence disparities.” 18 U.S.C. § 3553(a). Notwithstanding the existence of “extraordinary and compelling reasons,” the court retains the discretion to deny a defendant’s motion after balancing the applicable 18 U.S.C. § 3553(a) factors. United States v. High, 997 F.3d 181, 186 (4th Cir. 2021) (“[I]f a court finds that a defendant has demonstrated extraordinary and compelling reasons, it is still not required to grant the defendant’s motion for a sentence reduction.”).

The Government does not contest Defendant exhausted his administrative remedies. (Doc. No. 88, p. 7.) Thus, the Court’s analysis turns to whether Defendant presents extraordinary and compelling reasons supporting his release or a sentence reduction in light of the applicable § 3553(a) factors.

II. ANALYSIS

Defendant argues the following constitute “extraordinary and compelling” reasons for the Court to grant his motion for compassionate release: (1) he is the primary caretaker to his daughter, who has an autoimmune disease; (2) he is at high risk of contracting COVID-19; and (3) his conviction and sentence are unlawful, at least in part because the Court improperly enhanced his sentence based on a predicate North Carolina conviction he contends resulted from a coerced Alford plea.

Defendant argues he is the primary caregiver to his adult child who has an autoimmune disease, and this family circumstance constitutes an extraordinary and compelling reason justifying his release. A defendant may show extraordinary and compelling reasons for compassionate

release based on family circumstance involving “[t]he death or incapacitation of . . . the defendant’s child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.” See United States Sent’g Guidelines Manual § 1B1.13(b)(3)(A).

However, courts generally only grant compassionate release for family circumstances “where a defendant is the sole available caregiver for his or her minor child or a closely related and incapacitated adult.” See United States v. Burrough, No. 3:04-CR-00191-FDW, 2022 WL 2318512 (W.D.N.C. June 28, 2022), reconsideration denied, No. 3:04-CR-00191-FDW, 2023 WL 4534919 (W.D.N.C. July 13, 2023); see also United States v. Barlow, No. 7:19-CR-00024-4, 2023 WL 2755598, at *3 (W.D. Va. Mar. 31, 2023) (noting “as a whole, case law indicates that extraordinary and compelling circumstances based on the need to care for a child or incapacitated adult are found only where the defendant is the only possible caregiver.”). Defendant alone bears the “burden of establishing that compassionate release is warranted.” See United States v. Allen, No. 4:13-CR-00024, 2021 WL 3025458, at *1 (W.D. Va. July 16, 2021).

Defendant submitted a letter from his twenty-six-year-old daughter’s doctor as evidence she is incapacitated. While this letter indicates Defendant’s adult daughter has been diagnosed with an autoimmune disorder, the letter only states that his daughter is “unable to work.” (Doc. No. 85, p. 2.) The doctor does not indicate Defendant’s daughter is unable to care for herself or that she needs a caregiver.

Even if Defendant had shown his daughter is incapacitated, he failed to show he is the only available caregiver. Before this Court sentenced Defendant, a United States Probation Officer prepared a Presentence Report that included information about Defendant and the offense conduct underlying this case. (Doc. No. 49.) That report includes a statement from Defendant reporting his mother and four half-siblings all lived in the area and he had good relationships with them all. (Id.,

Defendant does not show a particularized susceptibility or risk of contracting COVID-19.

Defendant states that he has breathing difficulties in his sleep but provides no evidence or medical records to support his claim. Additionally, the Warden's April 2023 Response to Defendant's request for a reduction in sentence indicated that he had not requested to be seen by Health Services since 2021. (Doc. No. 84-1, p. 1.)

Defendant also indicates he is fully vaccinated against COVID-19, (Doc. No. 84, p. 2), and according to the CDC, vaccines are "highly effective in preventing the most severe outcomes from a COVID-19 infection." Benefits of Getting a COVID-19 Vaccine, Centers for Disease Control and Prevention (Sept. 22, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html>.

Moreover, Defendant is not housed at a correctional facility "affected or at imminent risk of being affected" by an ongoing COVID-19 outbreak. While Defendant was housed at FCI Ray Brook at the time he filed his Motion, he is now housed at FMC Butner. See <https://www.bop.gov/inmateloc/>. FMC Butner currently reports zero active cases of COVID-19, and approximately 66.5 percent of the population—including Defendant—is fully vaccinated against the virus. See https://www.bop.gov/about/statistics/statistics_inmate_covid19.jsp (last visited Apr. 4, 2024). On this record, Defendant's health and alleged susceptibility to COVID-19 do not present extraordinary and compelling reasons to reduce his sentence.

Even if Defendant had demonstrated extraordinary and compelling reasons for compassionate release, the applicable § 3553(a) factors do not support a reduction in Defendant's sentence. The nature and circumstances of the offense weigh against a sentence reduction. A jury found Defendant guilty of three counts of possession with intent to distribute cocaine base in violation of 18 U.S.C. §§ 841(a)(1), (b)(1)(C). (Doc. No. 31.) Additionally, with a criminal history

score of 11, the Defendant has a lengthy and serious criminal history. Defendant was also determined to be a career offender which places him in a criminal history category of VI. Further, Defendant has committed numerous disciplinary infractions during his term of imprisonment. (Doc. No. 88-1, pp. 1-3; Doc. No. 88-2.) See United States v. Kirk Pryor, No. 1:01-cr-00048, 2021 WL 3044226, at *3 (W.D.N.C. July 19, 2021) (finding that a reduction in defendant's sentence was unwarranted when defendant engaged in distributing "a significant amount of . . . crack cocaine" and had "numerous disciplinary infractions").

The Court determines the § 3553(a) factors weigh against a reduction of Defendant's sentence given the seriousness of the crime, the history and characteristics of the defendant, and the need to promote respect for the law.

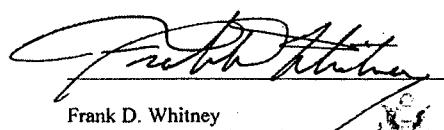
Because Defendant "cannot challenge the validity of his . . . sentence through a compassionate release motion," the Court declines to address his third contention for compassionate release. See United States v. Ferguson, 55 F.4th 262, 265 (4th Cir. 2022), cert. denied, No. 22-1216, 2024 WL 759802 (U.S. Feb. 26, 2024) (holding that a compassionate release motion cannot be used to challenge the validity of a defendant's conviction or sentence). Further, the Court already addressed the arguments Defendant raises in denying his petition under 28 U.S.C. § 2255. (Doc. No. 81, p. 11.) The Fourth Circuit has dismissed Defendant's appeal of that order. (Doc. No. 82.)

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant's pro se Motion for Compassionate Release, (Doc. No. 84), is **DENIED**.

IT IS SO ORDERED.

Signed: April 15, 2024



Frank D. Whitney
United States District Judge

①

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:11-CR-00404-FDW, 3:16-CV-00040-FDW

ZONTA ELLISON,

Petitioner Prose

v.

Compassionate Release Motion
for Reduction in sentence pur-
suant to 18 U.S.C. §§ 3582(c)(1)(A),
(c)(1)(B), First Step Act of 2018 &
Fair Sentencing Act of 2010

UNITED STATES OF AMERICA,

Respondent

NOW COMES, the petitioner, Zonta Ellison, Prose, with this compassionate release motion for reduction in sentence, for the following extraordinary and compelling reasons pursuant to 18 U.S.C. §§ 3582(c)(1)(A), (c)(1)(B), First Step Act of 2018 Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018) and the Fair Sentencing Act of 2010.

BACKGROUND

On March 29, 2023 Petitioner filed the initial compassionate release motion for reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), First Step Act of 2018 and the Fair sentencing Act of 2010. Petitioner cited his being incarcerated under an unconstitutional and illegal sentence, his daughter, who was present at both his trial and sentencing

②

battling an Auto Immune Disease and his being her primary care taker, and his risk of damage caused to his health by the coronavirus.

continued risk in the BOP, as compelling and extraordinary reasons for granting the motion. (see attached CR/RIS form).

On April 18, 2023 warden E. Rickard responded to petitioner's motion for compassionate reduction in sentence addressing only two of the claims. (see attached warden's response).

In 2021 Petitioner was housed in Genesee B unit cell #133 at FCI Raybrook with an inmate who tested positive for COVID-19. The inmate was taken from the cell and transferred to Saranac housing unit, where inmates who tested positive for coronavirus were sent to be administered treatment.

Petitioner and two other inmates whom were cellmates with the COVID-19 positive inmate, were sent to Mohawk housing unit, then, at the time used by Raybrook staff for quarantine, which was locking petitioner in a single cell and medical staff checking his temperature everyday for 14 days. (see BOP medical records).

Even after petitioner has taken it upon himself to take both vaccines, it is duly noted that even so petitioner still, is at risk to catch COVID-19 if not all ready. As a result of FCI Raybrook's medical staff negligence, there is a substantive probability that damage has been done to petitioner's lungs.

(3)

Petitioner has made it known to medical staff that he has been experiencing loss of breath in his sleep and trouble breathing.

As for petitioner's daughter battling an Auto Immune Disease, when petitioner submitted the motion he did not have the medical documentation. Since then, petitioner has received his daughter's medical documentation explaining her diagnosis, treatments, etc. (see attached daughter's medical document from specialist).

Finally, raising the issue that petitioner is under an illegal sentence, on May 3, 2023 petitioner submitted to his case manager for processing and forwarding to FCI Raybrook warden E. Rickard, a Bp-9 request for administrative remedy appeal, appealing the warden's response denial. (see attached Request for Administrative Remedy Form with attached page).

On Wednesday June 14, 2023 petitioner received from FCI Raybrook unit manager M. Rivera a notice for extension of time to file a response, after the allotted deadline to initially respond. (see attached notices of extension of time).

On ~~December~~ December 13, 2011 petitioner was indicted for three counts of possession with intent to distribute cocaine base (crack cocaine). The United States charged that on June 15, 2011, June 28, 2011 and June 30, 2011, petitioner sold a detectable amount of cocaine base to an undercover officer pursuant to 21 U.S.C. § 841(a)(1) and 841(b)(1)(C).

(4)

The indictment failed to charge a drug quantity.

January 12, 2012 petitioner was arraigned where he entered a plea of "NOT GUILTY" and proceeded to trial.

February 2, 2012 the United States filed a bill of information pursuant to 21 U.S.C § 851 seeking an enhanced penalty using petitioner's invalid June 11, 2010 "Alford Plea" conviction. (United States v. Alston, 611 F.3d 219 (4th Cir. 2010); (Shepard v. United States, 544 U.S. 13 (2005). (North Carolina v. Alford, 400 U.S. 25 (1970)).

January 9, 2013 petitioner trial began and defense counsel SM was allowed to withdraw before the selection of the jury, aiding the government in a surprise attack, forcing Ellison to represent himself. (United States v. Cronie, 466 U.S. 648 (1984). (Strickland v. Washington, 466 U.S. 668 (1984). (Roe v. Flores Ortega, 528 U.S. 470 (2000). (Garza v. Idaho, 203 F.3d 77, 568 U.S. __, 139 S.Ct. (2018).

Citing the defense of entrapment, petitioner filed an oral motion to subpoena the government's paid female informant "FS" according to defendant's exhibit one (1), who was used in the United States scheme to entrap petitioner, by inducing him to commit the charged offense, from his lesser offense of selling marijuana, by obtaining some crack cocaine to sell her so that the government could prosecute him. (Fed. R. Evi. Rule 615(c). (Sherman v. United States, 356 U.S. 369 (1958). (Roviaro v. United States, 353 U.S. 553 (1956).

⑤

The United States acknowledged the aforementioned fact, when it stated pursuant to trial transcript document #67 page 164,

"Your Honor, we would object to this coming in. It's too different. It happened months before. Involved a CI. It was marijuana. Not even crack cocaine. (Brady v. Maryland, 373 U.S. 83 (1963). (Burks v. United States, 437 U.S. 1 (1978). (United States v. Coley 447 Fed. Appx. 501 (4th Cir. 2011).

On January 10, 2013 petitioner was illegally convicted in a jury trial.

Petitioner custody level was erroneously enhanced 12 levels from level 22 to level 34. The court utilized the invalid "Alford Plea" conviction, unlawfully obtained and imposed by the state of North Carolina, for a January 27, 2007 possession of cocaine case and April 25, 2008 sell cocaine case. (United States v. Alston, 611 F.3d 219 (4th Cir. 2010). (Shepard v. United States, 544 U.S. 13 (2005)). The cases were consolidated.

On January 14, 2014 petitioner was sentenced to 262 months, and given a 262 month alternative sentence ran concurrent pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005) and 18 U.S.C. § 3553(a) sentencing factors, irrespective of the Fair Sentencing Act and the fact that Ellison is not a career offender. (USA v. Venable, 943 F.3d 187, 2019 U.S. App. LEXIS 34497).

(6)

The court acknowledged the fact and was fully aware that Ellison was and is not a "career offender" when it stated in the statement of reasons document #52 page 4,

"Court overrules criminal history objection to paragraph 20, court notes that should the 4th circuit overrule the court's ruling, the court would grant a variance to the career offender offense level due and impose the same sentence. (quoting United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021)).

The United States concealing such key element of the alleged crime, finally, mentioned the alleged quantity base foreseeable to petitioner at petitioner's sentencing. Alleging a total of 17.45 grams of cocaine base, which is well under the required 28 grams to impose a five (5) year sentence. (Fair Sentencing Act § 3, 124 Stat. at 2372 (codified at 21 U.S.C. § 844(a))). (Dorsey v. United States, 567 U.S. 260 (2012), (United States v. Collington, 995 F.3d 347, 357 (4th Cir. 2021)).

Petitioner has served 11 years 8 months 15 days for a sentence he was never suppose to receive and was not authorized by statutory or constitutional law.

CONCLUSION:

It is for above the cited extraordinary and compelling reasons that this motion for compassionate release reduction in sentence should be granted and petitioner immediately released from all custody.

(7)

RESPECTFULLY SUBMITTED this 20 day of June 2023.

Zonta Ellison
Zonta Ellison #37066-058

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY, that a true and correct copy of this foregoing motion for compassionate release reduction in sentence, has been mailed postage prepaid on this 20 day of June 2023, to the Assistant United States Attorney, at

OFFICE OF THE UNITED STATES ATTORNEY suite 1650
Carillon Building 227 West Trade Street Charlotte NC 28202.
Kimlani M. Ford, Courtney Randall, Elizabeth M. Greenough & Maria
K. Vento.

Executed under penalty of perjury pursuant to 28 U.S.C. § 1746.

This the 20 day of June 2023

Zonta Ellison