APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
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CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

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Filed: May 13, 2022

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Mr. Derrick Brown
U.S.P. Florence - High
P.O. Box 7000
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Mr. David Norfleet Pritchard
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Re: Case No. 21-5486/21-5623/21-5625/21-5626 *USA v. Derrick Brown*
Originating Case No. : 2:06-cr-20180-1

Dear Sir or Madam,

The Court issued the enclosed Order and Judgment today in this case.

Sincerely yours,

s/C. Anthony Milton
Case Manager
Direct Dial No. 513-564-7026

cc: Mr. Thomas M. Gould

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

Nos. 21-5486/5623/5625/5626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
DERRICK BROWN,	)	TENNESSEE
	)	
Defendant-Appellant.	)	

ORDER

Before: McKEAGUE, WHITE, and READLER, Circuit Judges.

In these consolidated appeals, Derrick Brown, a pro se federal prisoner, appeals the district court's denial of his motions for compassionate release, filed pursuant to 18 U.S.C. § 3582(c)(1)(A), as well as the district court's denial of his motion for reconsideration of its denial of his pleading captioned as "Ineffective Assistance of Counsel Complaint." The government requests that we take judicial notice that on May 3, 2021, Brown refused to take the COVID-19 vaccine. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

I. Background & Procedural History

In August 2007, a federal jury convicted Brown of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); being a felon in possession of body armor, in violation of 18 U.S.C. § 931(a); possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1); and possessing with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Brown under the Armed Career Criminal Act, 18 U.S.C. § 924(e), to a total term of 387 months' imprisonment, to be followed by six years of supervised release. We affirmed Brown's convictions and sentence on direct appeal. *United States v. Brown*,

Nos. 08-5319/5402/5515 (6th Cir. June 19, 2009) and denied Brown a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, *Brown v. United States*, Nos. 14-5147/5311/5314 (6th Cir. Sept. 8, 2014).

In December 2019, Brown moved for a sentence reduction pursuant to § 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, with the assistance of appointed counsel. The district court denied that motion without a hearing, holding that Brown was not eligible for a reduction and that, even if he were, he did not merit one. We affirmed. *United States v. Brown*, No. 20-5312, 2020 WL 10140812 (6th Cir. Oct. 22, 2020).

In November 2020, Brown filed a pleading captioned as "Ineffective Assistance of Counsel Complaint," in which he argued that his appointed counsel had rendered ineffective assistance during his § 404 First Step Act proceeding by acting under a conflict of interest, failing to investigate and raise certain issues, and failing to consult with him about an appeal. The district court denied Brown's complaint on the merits and denied Brown's subsequent motion for reconsideration. Brown's appeal from the district court's order denying his reconsideration motion was docketed here as Case Number 21-5626.

Since October 2020, Brown has filed five motions for compassionate release. In those motions, Brown argued that he should be released from prison in light of the COVID-19 pandemic, his health conditions (degenerative disc disease and mental health afflictions), and the change in the law made by the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). He also argued that his release was warranted because he is actually innocent of being an armed career criminal. Brown further argued that the § 3553(a) factors weighed in favor of release, asserting that he is "a first-time and non-violent federal offender" who has always maintained his innocence. The district court denied all of those motions because Brown failed to demonstrate extraordinary and compelling reasons to warrant his release and because the § 3553(a) factors weighed against his release.

We previously dismissed one of Brown's appeals for lack of jurisdiction. *United States v. Brown*, No. 21-5045, 2021 WL 3027858, at *1-2 (6th Cir. June 2, 2021). Brown's remaining appeals from the district court's denial of his motions for compassionate release are docketed as Case Numbers 21-5486 and 21-5623. He also moved the district court to reconsider one of its

denials, accusing the district judge of being retaliatory and racially biased. The district court denied that motion as well, and Brown's appeal from that order was docketed as Case Number 21-5625.

On the government's motions after briefing, we consolidated Brown's four appeals for submission. *United States v. Brown*, Nos. 21-5486/5623/5625/5626 (6th Cir. Mar. 4, 2022). In Case Number 21-5626, Brown argues that the district court erred in denying his "Ineffective Assistance of Counsel Complaint." In Case Numbers 21-5486, 21-5623, and 21-5625, he challenges the district court's denial of his compassionate-release motions, arguing that the district court erred in finding that he did not identify extraordinary and compelling circumstances that warranted compassionate release. He also contends in Case Number 21-5486 that he is actually innocent of his crimes, that his sentence is unlawful, and that the district judge was biased against him.

II. Law & Analysis

a. Case Nos. 21-5486/5623/5625

We review the district court's denial of compassionate release for an abuse of discretion. *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020). An abuse of discretion occurs when the district court "relies on clearly erroneous findings of fact, applies the law improperly, or uses an erroneous legal standard." *United States v. Jones*, 980 F.3d 1098, 1112 (6th Cir. 2020) (quoting *United States v. Pembrook*, 609 F.3d 381, 383 (6th Cir. 2010)).

The compassionate release statute allows the district court to reduce a defendant's sentence if it finds that (1) "extraordinary and compelling reasons warrant such a reduction," (2) "a reduction is consistent with applicable policy statements issued by the Sentencing Commission," and (3) the § 3553(a) factors, to the extent applicable, support a reduction. 18 U.S.C. § 3582(c)(1)(A); *see Ruffin*, 978 F.3d at 1004-05. But no policy statement currently applies to defendant-filed motions for a reduction in sentence. *United States v. Sherwood*, 986 F.3d 951, 953-54 (6th Cir. 2021). Consequently, the second requirement plays no role in this case.

When reviewing the district court's discretionary decision to deny compassionate release based on the § 3553(a) factors, we consider the entire sentencing record, "including the records from the original sentencing, records on the modification motion, and the final compassionate

release decision." *Jones*, 980 F.3d at 1112; *see also United States v. Elias*, 984 F.3d 516, 520 (6th Cir. 2021). Overall, the record should reflect that the district court "considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority." *Ruffin*, 978 F.3d at 1008 (alterations in original) (quoting *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1967 (2018)); *see United States v. Quintanilla Navarro*, 986 F.3d 668, 672 (6th Cir. 2021).

We need not address whether Brown demonstrated extraordinary or compelling reasons warranting a sentence reduction because the district court's § 3553(a) analysis is sufficient to uphold its denial of Brown's compassionate-release motions. *See Ruffin*, 978 F.3d at 1008. Having reviewed the district court's order and the record as a whole, we find it apparent that the district court carefully considered the record and weighed the pertinent sentencing factors as required. Specifically, the district court focused on the need for the sentence imposed, *see* 18 U.S.C. § 3553(a)(2), considering the serious nature of Brown's crimes, Brown's failure to accept responsibility for those crimes, Brown's long history of committing violent crimes, and Brown's history of not complying with the terms of his probation. Based on those considerations, the district court reasonably concluded that reducing Brown's sentence when he has served less than half of it "would minimize the offense and Brown's criminal history" and "fail to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, or protect the public from further criminal conduct." *See Ruffin*, 978 F.3d at 1008 (recognizing "that some of the § 3553(a) factors, including the 'need to provide just punishment' and 'to reflect the seriousness of the offense,' allow courts to consider the 'amount of time' that a defendant has served on a sentence when deciding whether to grant a sentence reduction" (quoting *United States v. Kincaid*, 802 F. App'x 187, 188 (6th Cir. 2020) (order))); *see also United States v. Wright*, 991 F.3d 717, 719 (6th Cir. 2021) (noting that district courts have substantial discretion when balancing the § 3553(a) factors and "wide latitude to deny compassionate release based on the seriousness of the underlying offense").

Brown argues that the district judge exhibited bias against him "by deliberately and intentionally" denying his compassionate-release motions because the judge believed that he had murdered a police officer who was related to a fellow federal judge. But judicial rulings, "[a]lmost

of themselves," are almost always insufficient to establish a claim of judicial bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994), and Brown's allegation of bias is wholly conclusory and unsupported. *See Burley v. Gagacki*, 834 F.3d 606, 617 (6th Cir. 2016) (holding that "conclusory allegations to support [a] claim that the district court was biased" are insufficient to prove impermissible judicial bias (citation omitted)).

b. Case No. 21-5626

Brown argues that the district court erred by rejecting his claims that appointed counsel provided ineffective assistance during his First Step Act proceeding. But Brown may not assert an ineffective-assistance claim because he had no constitutional or statutory entitlement to appointed counsel in a proceeding for resentencing under § 404 of the First Step Act. *See United States v. Manso-Zamora*, 991 F.3d 694, 696 (6th Cir. 2021) ("[T]here is no constitutional (or statutory) right to appointed counsel in § 3582(c) proceedings."); *see also United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020) ("Section 3582(c)(1)(B) serves as the vehicle for proceeding under § 404 of the First Step Act."). Where there is no right to counsel, there can be no right to effective counsel. *See Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam).

III. Conclusion

Accordingly, we **GRANT** the government's motion to take judicial notice and **AFFIRM** the district court's orders.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 21-5486/5623/5625/5626

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

DERRICK BROWN,

Defendant-Appellant.

Before: McKEAGUE, WHITE, and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgments of the district court are AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DERRICK BROWN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 06-cr-20180-STA-jay**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR COMPASSIONATE RELEASE

Before the Court is Derrick Brown's Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), the First Step Act's compassionate release provision in light of the ongoing COVID-19 pandemic. (ECF No. 240.) and Brown's Motion for Compassionate Release (ECF No. 241, 242.) The Court also takes note of Brown's Notice of Additional Citations filed on February 1, 2021 (ECF No. 248.) Because Brown has not shown that he is entitled to relief, the motions are **DENIED**.

Brown has several times petitioned this Court for compassionate release under the First Step Act, arguing that he is entitled to relief under various theories, including the general presence of the COVID-19 pandemic; under Attorney General William Barr's directives to the F.B.O.P. director; his medical and mental health diagnoses; and the unconstitutionality of his sentence. On November 9, 2020, the Court denied Brown's latest request for compassionate release. On the merits of his present request for compassionate release, the Court finds that Brown is again not

entitled to relief.[1] The First Step Act gives a sentencing court discretion to "reduce the term of imprisonment" and replace "the unserved portion of the original term of imprisonment" with a term of supervised release. 18 U.S.C. § 3582(c)(1)(A). The Court must first find that "extraordinary and compelling reasons warrant such a reduction" and "that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i); *see also United States v. Kincaid*, 802 F. App'x 187 (6th Cir. 2020).[2] Once those showings are made, the Court must then decide whether a reduction in sentence is consistent with the factors listed in 18 U.S.C. § 3553(a). *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020) (citing *United States v. Ruffin*, 978 F.3d 1000, 1003–06 (6th Cir. 2020)). Nevertheless, the Court need not address all three factors "when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking . . . ." *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021) (citing *Jones*, 980 F.3d at 1108, and *Ruffin*, 978 F.3d at 1006).

The Court finds that Brown has not demonstrated extraordinary and compelling reasons for a sentence reduction. The United States Sentencing Guidelines define certain factors that constitute extraordinary and compelling grounds for compassionate release where the Bureau of

[1] The First Step Act permits courts to act only on motion of (1) the Bureau of Prisons or (2) the defendant himself after 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." 18 U.S.C. § 3582(c)(1)(A)(i). Exhaustion of all administrative remedies is mandatory. *United States v. Alam*, 960 F.3d 831, 833–34 (6th Cir. 2020). Defendant has satisfied the exhaustion requirement by showing that more than 30 days have passed since he made his request for relief to the warden on August 28, 2020.

[2] The statute also permits relief in cases where "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g)." § 3582(c)(1)(A)(ii). The Court finds that this paragraph is not relevant in Defendant's case.

Prisons files such a motion on an inmate's behalf. *See* U.S.S.G. § 1B1.13 cmt. n.1 (listing the (1) the inmate's medical condition; (2) the inmate's age and the amount of his sentence served; (3) the needs of the inmate's spouse or minor children; and (4) other reasons "[a]s determined by the Director of the Bureau of Prisons" as "extraordinary and compelling" circumstances for a sentence reduction). As Brown correctly points out, the Sixth Circuit recently held that the Sentencing Guidelines do not contain an applicable policy statement where a motion for compassionate release is filed by the inmate, and not the Bureau of Prisons. *Jones*, 980 F.3d at 1108 ("[Section] 1B1.13 does not 'appl[y]' to cases where an imprisoned person files a motion for compassionate release."). This means that "in the absence of an applicable policy statement for inmate-filed compassionate-release motions, district courts have discretion to define 'extraordinary and compelling' on their own initiative." *Elias*, 984 F.3d at 519–20 (citing *Jones*, 980 F.3d at 1111; *Ruffin*, 978 F.3d at 1007).

In the instant motions, Brown argues that he is entitled to relief because of the COVID-19 pandemic in connection with 1) being a "first-time and non-violent federal offender with a criminal history of 'Alford Plea' deals;" 2) his mental health afflictions; 3) suffering from degenerative discogenic disease of the lower spinal disc; and 4) the illegality of his conviction and sentence in light of recent Supreme Court treatment of 18 U.S.C. § 922(g) and his incorrectly being categorized as an Armed Career Criminal. Brown further alleges a conspiracy against his "rights and life" by prison officials.

The Court finds that Brown does not meet the requirements for compassionate release because he has not demonstrated extraordinary and compelling reasons for a sentence reduction. The COVID-19 pandemic alone, even considering the pernicious spread of the pandemic in prisons, is insufficient to justify compassionate release. P;gvs6*See United States v. Raia*, 954 F.3d

594, 597 (3d Cir. 2020) ("[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release[.]") As this Court has previously addressed, Brown has not shown that his medical conditions qualify him for relief. The Centers for Disease Control lists underlying conditions for which evidence exists to indicate that adults of any age who have those conditions are at increased risk for severe illness from COVID-19.[3] The CDC also lists certain medical conditions which *may* place people at increased risk of severe illness.[4] Neither one of Brown's conditions are on those lists. Further, Brown, at forty-six years-old is not in the age range (65 years-old and over) of adults who are at greatest risk of requiring hospitalization or dying if they are diagnosed with COVID-19. *See* Centers for Disease Control, *Increased Risk of Hospitalization or Death,* (Dec. 7, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html. Therefore, in the absence of evidence that Brown has pre-existing conditions which increase his risk of complications from COVID-19, and determining that his age does not place him at high risk of severe illness from COVID-19, the Court cannot conclude that extraordinary or compelling reasons exist warranting the rare remedy of compassionate release.

Further, Brown's allegations that his sentence is illegal or unconstitutional are frivolous. This Court has previously addressed Mr. Brown's request for resentencing under the First Step Act. *See Order Denying Defendant's Motion for Reduced Sentence Pursuant to the First Step Act of 2018*, March 2, 2020 (ECF No. 222). At that time, the Court reviewed Brown's sentence, noting that, based on his prior drug crimes, the determination that he was an Armed Career Criminal, and his criminal history category of VI, a Guidelines range of 262 to 327 months, the

[3] Centers for Disease Control, People with Certain Medical Conditions, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (Updated Feb. 3, 2021).
[4] *Id.*

range relied upon at sentencing, was appropriate. Brown further had the opportunity to appeal his sentence and conviction and the United States Court of Appeals for the Sixth Circuit affirmed the Court's judgment. *United States v. Brown*, Nos. 08–5319/5402/5515 (6th Cir. June 19, 2009). Brown's contention that his conviction was illegal in light of the Supreme Court's decision in *Reihaf v. United States* is also unfounded. *Reihaf* is inapplicable here. In *Rehaif*, the Supreme Court held that "in a prosecution under 18 U.S.C. § 922(g) and [its associated sentencing statute] § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019). The defendant in *Rehaif* was convicted of possessing a firearm while being an alien illegally or unlawfully in the United States under § 922(g)(5), *see id.* at 2194–95, not for being felon in possession of a firearm as Brown was in this case. The Supreme Court stated, "We express no view ... about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here." *Id.* at 2200. Accordingly, *Rehaif* is not directly applicable to Brown's case because the method of proof related to the knowledge requirement relevant to one's status as a previously convicted felon may be different than the method of proof related to the knowledge requirement relevant to one's status as an alien illegally or unlawfully in the United States. Moreover, there is no indication that the Supreme Court has made the holding in *Rehaif* retroactively applicable to invalidate an otherwise final conviction under § 922(g).

Alternatively, and as the Court has previously stated, Brown's request for a sentence reduction is denied because he has failed to demonstrate that he is not a danger to the safety of the community or otherwise merits release under the § 3553(a) factors. This Court must consider the § 3553(a) factors, as "applicable," as part of its analysis. See § 3582(c)(1)(A); *United States v.*

Chambliss, 948 F.3d 691, 694 (5th Cir. 2020). Here, the § 3553(a) factors disfavor a sentence reduction.

Although Brown characterizes himself as a "first-time and non-violent federal offender of four simple possession counts," both the facts underlying the instant crimes for which he was convicted, and Brown's criminal history suggests otherwise. The instant offense involved the robbery of an off-duty police officer's car and the use of the officer's bullet proof vest and latex gloves stored in the car to rob another person at gunpoint. Further, Brown did not take an Alford plea, as he suggests here. Rather, the instant case went to trial and Brown was convicted by a jury of his peers. Additionally, Brown has over twenty-six convictions, several of which involve assault, sexual battery, attempted rape, and gun crimes. The Court cannot therefore determine that Brown will not present a danger to the safety of the community upon release. Further, Brown's record reveals that he has been unsuccessful in meeting the conditions of probation in the past, indicating that he would have difficulty in adhering to the Court's conditions of early release in this instance. To release Brown after having served less than half of his sentence would minimize the offense and Brown's criminal history, as well as fail to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, or protect the public from further criminal conduct.

To the extent Brown requests relief under the First Step Act based on the conditions of his confinement or his treatment by prison officials, the Court is constrained to deny his request for sentence modification. Brown has other vehicles to bring such claims. *Wright v. United States Bd. of Parole,* 557 F.2d 74, 78 (6th Cir. 1977) (holding that 28 U.S.C. § 2241 is the correct mechanism for habeas relief if "the issues raised more accurately challenged the execution of the sentence than its imposition"); *see also* 42 U.S.C. § 1983 and *Bivens v. Six Unknown Federal*

Narcotics Agents, 403 U.S. 388 (1974) (recognizing a right of action similar to 42 U.S.C. § 1983 against federal employees who violate an individual's constitutional rights).

Therefore, for the afore-stated reasons, Brown's Motion for Compassionate Release; (ECF No. 240.); Motion for Compassionate Release (ECF No. 241); and Motion for Compassionate Release (ECF No. 242) are **DENIED**.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
CHIEF UNITED STATES DISTRICT JUDGE

Date: February 26, 2021.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DERRICK BROWN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 06-cr-20180-STA**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR RECONSIDERATION[1]

Before the Court is Derrick Brown's Motion for Reconsideration (ECF No. 253) of this Court's Order denying Brown's Ineffective Assistance of Counsel Complaint. (ECF No. 243.) For the foregoing reasons, Brown's motion is **DENIED**.

Brown asserts that the Court misconstrued Brown's Ineffective Assistance of Counsel Complaint by falsely declaring that his conflict of interest with attorney Paylor was solely based on complaints filed against Edwin A. Perry, an Assistant Federal Defender appointed to represent Brown, in 2006. Brown claims that the Court willfully ignored the fact that Brown had a "recent and pending" complaint against Paylor with the Consumer Assistance Program which created a conflict of interest in Paylor's representation of Brown

First, and as the Court addressed in its December 11, 2020 order, the Constitution does not entitle a criminal defendant to the assistance of counsel for a discretionary appeal such as Brown's

[1] Brown alleges that he did not receive a copy of the Court's order filed on December 11, 2020. The Clerk of Court is directed to mail a copy of this order to the return address listed on the envelope in which Brown sent this Motion for Reconsideration (ECF No. 252) to the Court.

motion for a reduced sentence pursuant to the First Step Act of 2018. *Ross v. Moffitt,* 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Brown did not have a constitutional right to counsel during his motion to reduce his sentence under the First Step Act, so there could not have been a deprivation of effective assistance by attorney Paylor. *See Coleman v. Thompson,* 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Second, Brown's claim of ineffective assistance of counsel fails on the merits. To demonstrate deficient performance by counsel, a petitioner must demonstrate (1) that "counsel's representation fell below an objective standard of reasonableness" *and* (2) that the deficient performance prejudiced the defense, which requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As to the former prong of the *Strickland* analysis, the Court rejected the "specific instances" articulated by Brown, which allegedly proved that Paylor's representation fell below an objective standard of reasonableness. Those are specifically addressed in the Court's December 11, 2020 order, and include Paylor's alleged "failure to investigate," objections to sentencing enhancements, failure of trial counsel to object to the application of the Sentencing Guidelines at sentencing, and failure to raise the claim that Brown's sentence exceeded the statutory maximums of the offenses he was convicted of. Such arguments are outside of the scope of Paylor's representation of Brown's First Step Act of 2018 claims and therefore are not a basis for ineffective assistance. On the basis of failing to show that Paylor's representation fell below an objective standard of reasonableness alone, Brown's claim cannot succeed. But Brown also fails to show that he was prejudiced. Brown's claim of a conflict of interest hinges on a letter from the Board of Professional Responsibility of the Supreme Court of Tennessee dated September 14, 2016. The letter merely

states that the organization had received Brown's complaint regarding attorney Tyrone Paylor and that they would contact him after determining the most appropriate action. The letter also notes that the mediation mechanism that the Consumer Assistance Program typically uses to resolve these complaints takes about two to four weeks. Without further context, the Court is unable to determine whether a conflict exists. Brown provides no context regarding the basis of the complaint or the resolution of the complaint, which is now over three years old. Further, Brown's claims of conflict of interest are severely undercut by his failure to raise this issue with the Court during the First Step Act litigation and request that counsel from the CJA panel represent him, a process that Brown is familiar with, having twice successfully petitioned for substitute counsel in the past. Far from requesting substitute CJA counsel, according to his Complaint, Brown solicited the Office of the Federal Public Defender for assistance with his First Step Act Claims. Finally, the Office of the Federal Public Defender, pursuant to Court Administrative Order No. 19-07, screened representation of Brown for conflicts of interest and evidently found none.

Brown's Motion for Reconsideration (ECF No. 253) is therefore **DENIED**.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
CHIEF UNITED STATES DISTRICT JUDGE

Date: April 21, 2021.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DERRICK BROWN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 06-cr-20180-STA**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR COMPASSIONATE RELEASE

Before the Court is Derrick Brown's Motion for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), the First Step Act's compassionate release provision. (ECF No. 256.) Brown devotes the bulk of the motion to establishing that he has exhausted his administrative remedies. The First Step Act permits courts to act only on motion of (1) the Bureau of Prisons or (2) the defendant himself after 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." 18 U.S.C. § 3582(c)(1)(A)(i). Exhaustion of all administrative remedies is mandatory. *United States v. Alam*, 960 F.3d 831, 833–34 (6th Cir. 2020). Based on attached proof of the Bureau of Prisons' rejection of Brown's appeal of the warden's denial of his reduction of sentence request, the Court finds that Brown has exhausted his administrative remedies before pursuing his request for a sentence reduction with the Court.

Brown writes, "as a brief in support of this compassionate release motion, please make full and complete reference to the Removal Emergency Motion from the F.B.O.P. at docket entries #228 and #230 and the briefs in support concerning the First Step Act's compassionate release statute at docket entries #234, #241, and #242." Brown is referencing motions for transfer from Bureau of Prisons custody to the Shelby County Jail in Memphis, Tennessee (ECF Nos. 228, 230) which the Court denied in its July 20, 2020 order, (ECF No. 229) and motions for compassionate release under the First Step Act, (ECF Nos. 234, 241, 242) which the Court denied in its November 9, 2020 order and February 26, 2021 order. (ECF Nos. 238, 255.) Because the Court reached the merits of Brown's arguments in the above-referenced orders, the fact that Brown has produced new proof of exhaustion of his administrative remedies does not alter the Court's denials of Brown's motions. Therefore, for the reasons stated in the above-referenced Court orders, Brown's instant motion for compassionate release (ECF No. 256) is **DENIED**.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
CHIEF UNITED STATES DISTRICT JUDGE

Date: April 21, 2021.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DERRICK BROWN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 06-cr-20180-STA-jay**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR RECONSIDERATION[1]

Before the Court is Derrick Brown's Motion for Reconsideration with Proposed Notice of Appeal. (ECF No. 257.) Brown asserts that, in retaliation for Brown's numerous letters and complaints, the Court denied Brown's motions for compassionate release (ECF Nos. 240, 241, 242.) Brown also alleges that he has not received physical copies of the Court's orders. Finally, Brown requests that the Court reconsider its denial of his motions for compassionate release in light of the Sixth Circuit's recent decision in *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020).

"Motions for reconsideration are disfavored, and a motion for reconsideration is unfounded unless it either calls...attention to an argument or controlling authority that was overlooked or disregarded in the original ruling, presents evidence or argument that could not previously have been submitted, or successfully points out a manifest error of fact or law." *Davie v. Mitchell*, 291 F.Supp.2d 573, 634 (N.D. Ohio 2003); *see also U.S. v. Cintron*, 724 F.3d 32 (1st

[1] The Clerk of Court is directed to mail a copy of this order to the return address listed on the envelope in which Brown sent this Motion for Reconsideration. (ECF No. 257.)

Cir. 2013). Here, Brown moves for reconsideration of the Court's February 26, 2021 order on the basis of *United States v. Jones*. In relevant summary, to grant relief under the compassionate release provision of the First Step Act, the Court must first find that "extraordinary and compelling reasons warrant such a reduction" and "that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i); *see also United States v. Kincaid*, 802 F. App'x 187 (6th Cir. 2020).[2] The Court must then decide whether a reduction in sentence is consistent with the factors listed in 18 U.S.C. § 3553(a). *Id.* (citing *United States v. Ruffin*, 978 F.3d 1000, 1003–06 (6th Cir. 2020)). The *Jones* court clarified that the Sentencing Commission has not promulgated an applicable policy statement for instances where inmates file motions for compassionate release on their own behalf and provided that, "[i]n cases where incarcerated persons file motions for compassionate release, federal judges may skip step two of the § 3582(c)(1)(A)(i) inquiry and have full discretion to define 'extraordinary and compelling' without consulting the policy." *Jones*, 980 F.3d 1098, 1108. Brown suggests that the Court disregarded *Jones* in its February 26, 2021 order denying Brown's motions for compassionate release. However, that is not the case. The Court specifically cites to *Jones* in its order, noting that the Court has discretion to define "extraordinary and compelling" on its own initiative. In applying its discretion, the Court found that Brown did not cite any extraordinary and compelling reasons warranting compassionate release and, in the alternative, found that he is also not eligible for a sentence reduction under the § 3553(a) factors. Therefore, having failed to state a basis for reconsideration by calling attention to an argument or

[2] The statute also permits relief in cases where "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g)." § 3582(c)(1)(A)(ii). The Court finds that this paragraph is not relevant in Defendant's case.

controlling authority that was overlooked or disregarded in the original ruling, the Court is constrained to **DENY** Brown's motion for reconsideration. (ECF No. 257.) Should Brown choose to do so, he is instructed to file a notice of appeal upon receipt of the Court's order.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
CHIEF UNITED STATES DISTRICT JUDGE

Date: April 21, 2021.