UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. DONNIE BRYANT, Defendant.	Case No.: 2:06-cr-00234-GMN-GWF-1 **ORDER DENYING MOTION FOR SENTENCE REDUCTION**

Pending before the Court is Defendant Donnie Bryant's Motion for Sentence Reduction ("MSR") under 18 U.S.C. § 3582(c)(1)(A)(i), (ECF No. 849). The Court appointed Defendant counsel, (Order Appointing Counsel, ECF No. 853), who subsequently filed a Supplement to Defendant's Motion, (ECF No. 857). The Government filed a Response to Defendant's Motion and Supplement, (ECF No. 859), to which Defendant filed a Reply, (ECF No. 864).

For the reasons discussed below, the Court **DENIES without prejudice** Defendant's Motion for Sentence Reduction because he has not met his burden of showing extraordinary and compelling reasons warranting such a reduction.

I. BACKGROUND

The Court incorporates the background and procedural history of this case from its Order Granting in Part and Denying in Part Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. (Order 1:15–4:5, ECF No. 838). In short, in 2008 Defendant was convicted on several counts of Violent Crimes in Aid of Racketeering Activity ("VICAR") in violation of 18 U.S.C. § 1959 and Use of a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c) for acts he committed when he was 16. (J., ECF No. 18). Defendant was sentenced to life imprisonment for the VICAR murder counts, plus an

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additional 50 years for his firearm offenses. (*Id.*). Defendant's judgment of conviction has been amended several times following his sentence. (First Am. J., ECF No. 617); (Second Am. J., ECF No. 694); (Third Am. J., ECF No. 828); (Fourth Am. J., ECF No. 840). Defendant is now sentenced to 70 years imprisonment for his VICAR murder counts and firearm offenses. (*See generally* Fourth Am. J.). Defendant filed the instant Motion for Sentence Reduction, (ECF No. 849), which the Court discusses below.

II. LEGAL STANDARD

Under 18 U.S.C. § 3582(c)(1)(A), a court may, in certain circumstances, grant a defendant's motion to modify his or her term of imprisonment. Before filing such a motion, the defendant must first petition the Bureau of Prisons ("BOP") for compassionate release. *Id.* A court may grant the defendant's motion for a modification in sentence only if the motion was filed "after the defendant has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant's behalf" or after thirty (30) days have lapsed "from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.*

If the exhaustion requirement is met, a court may modify or reduce the defendant's term of imprisonment "after considering the factors set forth in [18 U.S.C.] section 3553(a)]" if the Court finds, as relevant here, that "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* As the movant, the defendant bears the burden to establish that he is eligible for compassionate release. *See United States v. Wright*, 46 F.4th 938, 951 (explaining it is the defendant's burden to establish his eligibility for compassionate release")

The Sentencing Commission has recently passed guidance as to when "extraordinary and compelling reasons" exist for compassionate release. U.S.S.G. § 1B1.13(b). Such circumstances include, among others: (1) the medical circumstances of the defendant, (2) the advanced age of the defendant resulting in "a serious deterioration in physical or mental

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health," (3)"[t]he death or incapacitation of the caregiver of the defendant's minor child," (4) the defendant, while in custody was the victim of sexual or physical abuse, or (5) "other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4)." *Id.*

III. DISCUSSION

The Government does not dispute that Defendant has exhausted his administrative remedies. (*See generally* Resp., ECF No. 859). As such, the Court turns to whether Defendant has shown extraordinary and compelling reasons warranting a sentence reduction. Here, Defendant argues that a sentence reduction is warranted because: (1) there is an impermissible sentencing disparity between his sentence and that of his codefendant Johnathon Toliver; (2) there may be a sentencing disparity between the sentence he received and the sentence he would likely receive under present sentencing law; and (3) he may have been deprived of the opportunity to earn good time credit under the FSA. (*See* MSR); (Supplement). The Court examines each reason in turn.

A. Impermissible Sentencing Disparity Between Codefendants

First, Defendant argues a sentence reduction is warranted because his sentence is "double that of his-codefendant Johnathon Toliver." (Reply 4:1–3, ECF No. 864). Specifically, Toliver was re-sentenced in 2018 to 420 months, or 35 years of imprisonment as opposed to Defendant's 70-year sentence. (*Id.* 3–7). Here, the Court finds the difference in length between Toliver and Defendant's sentence, standing alone, is insufficient to warrant a sentence reduction because Toliver's judgment of conviction is materially different than Defendant's.

Like Defendant, Toliver was convicted on several counts of VICAR in violation of 18 U.S.C. § 1959 and Use of a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c) and sentenced to life imprisonment plus an additional 90 years in July 2008. (J., ECF

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No. 560 in *United States v. Bryant et al.*, No. 2:06-cr-00234-RHW-GWF-2). However, in 2018, Toliver was resentenced based on a plea agreement he entered with the Government in which he pled guilty to one count of Use of a Firearm During and In Relation to a Crime of Violence in violation of 18 U.S.C. § 925(j)(1). (Plea Agreement, ECF No. 812 in *United States v. Bryant et al.*, No. 2:06-cr-00234-RHW-GWF-2). Thus, Toliver's judgment of conviction and corresponding sentence is materially different than Defendant's because it does not include a VICAR murder count, nor does it include as many counts for the related firearm offenses. (*Compare* Second Am. J., ECF No. 820 in *United States v. Bryant et al.*, No. 2:06-cr-00234-RHW-GWF-2 *with* Fourth Am. J, ECF No. 840 in *United States v. Bryant et al.*, No. 2:06-cr-00234-RHW-GWF-1). And the Ninth Circuit has made clear that acceptance of a guilty plea is a permissible explanation for a sentencing disparity. *See, e.g., United States v. Valdez-Lopez*, 4 F. 4th 886, 893 (9th Cir. 2021) ("Valdez-Lopez's codefendants had received shorter sentences after pleading guilty, and a codefendant's acceptance of a guilty plea is a permissible explanation for a sentencing disparity.")

Currently, Defendant's argument rests on the proposition that a sentence reduction is warranted merely because of the difference in length between his and Toliver's sentence. While the difference in length is significant, Defendant bears the burden of explaining why this disparity results from "extraordinary and compelling" reasons as opposed to the permitted reason identified by the Court. *See United States v. Grummer*, 519 F. Supp. 3d 760, 762 (S.D. Cal. 2021) ("As the movant, Defendant bears the burden of establishing that he is eligible for a sentence reduction.") He has not done so here.

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B. Sentencing Disparity Following Passage of the First Step Act ("FSA")

Next, Defendant argues that a sentence reduction is warranted because his sentence may have been impermissibly "stacked" as to his convictions under 18 U.S.C. § 924(c). (Supp. 6:6–8). However, Defendant's counsel acknowledges that she "cannot determine whether the subject sentence was 'stacked' as to his several convictions under . . . . § 924(c)." (*Id.*).

Prior to the FSA, prosecutors could "stack" multiple counts of § 924(c) firearm violations, which resulted in defendants without previous convictions being charged for both a first offense—carrying a five-year mandatory minimum—and a "second or subsequent offense"—carrying a mandatory twenty- or twenty-five-year sentence, to be served consequently—in the same indictment. *United States v. Jones*, 482 F. Supp. 3d 969, 978 (N.D. Cal. 2020) (citing *Deal v. United States*, 508 U.S. 129, 132 (1993)). Thus, someone convicted of two § 924(c) counts in a single offense automatically faced a minimum sentence of 25 to 30 years.

In 2018, Congress enacted the FSA. Section 403(a) of the FSA revised § 924(c) by eliminating the twenty-five-year stacking provision for a "second or subsequent count of conviction" under § 924(c). Instead, the twenty-five-year mandatory-minimum sentence applies only on a second § 924(c) conviction if the defendant has a prior § 924(c) conviction that has become final. The FSA did not make § 403(a) retroactive. *See* FSA § 403(b). However, in *United States v. Chen*, the Ninth Circuit held that "district courts may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant, when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)." 48 F.4th 1092, 1098 (9th Cir. 2022). The *Chen* court further articulated that "[t]here is no textual basis for precluding district courts from considering non-retroactive changes in sentencing law when determining what is extraordinary and compelling." *Id.* Accordingly, pursuant to *Chen*, this Court must consider the changes in sentencing law to determine whether "extraordinary and compelling" purposes exist.

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