

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION NO. 12-324  
 :  
 STEVEN D. WARREN :

**MEMORANDUM OPINION**

Smith, J.

March 12, 2020

The *pro se* movant has filed a motion under the First Step Act of 2018 and 18 U.S.C. § 3582(c) to modify a sentence imposed in 2013. The court denies the motion because (1) the movant is ineligible for relief under section 404 of the First Step Act because he committed the offenses in this matter after August 3, 2010, (2) he cannot obtain relief under 18 U.S.C. § 3582(c)(1) at this time because he did not allege that he submitted a request with the warden of his place of incarceration to bring a motion to modify sentence on his behalf or that he otherwise exhausted his administrative rights after the Bureau of Prisons failed to file a motion to modify his sentence, and (3) he cannot obtain relief under 18 U.S.C. 3582(c)(2) because the Sentencing Commission has not made the amendment at issue (Amendment 798) retroactive for purposes of this section by listing it in section 1B1.10(d) of the United States Sentencing Guidelines.

**I. PROCEDURAL HISTORY**

On June 26, 2012, a grand jury returned a multiple-count indictment charging the movant, Steven D. Warren (“Warren”), with (1) knowingly and intentionally distributing 1.5 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) on May 24, 2011; (2) knowingly and intentionally distributing 5.7 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) on June 3, 2011; (3) knowingly and intentionally distributing 12.1 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C)

on June 17, 2011; (4) knowingly and intentionally distributing 5.8 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) on July 21, 2011; (5) knowingly and intentionally distributing .27 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) on June 3, 2011; (6) knowingly and intentionally distributing 28 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) on November 16, 2011; and (7) knowingly and intentionally distributing 2.4 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) on May 29, 2012. Indictment, Doc. No. 9. The government filed an Information Charging Prior Offense on September 4, 2012, which indicated that in August 2007, the Court of Common Pleas of Schuylkill County sentenced Warren to 18 to 36 months' imprisonment for his conviction for a felony controlled substance violation (under 35 Pa. C.S. § 780-113(30)).<sup>1</sup> Doc. No. 31.

Warren pleaded guilty to the entire indictment before the Honorable James Knoll Gardner, now deceased, on October 26, 2012.<sup>2</sup> Doc. No. 35. Judge Gardner sentenced Warren on February 26, 2013, to an overall sentence of 13 years of federal incarceration, to be followed by eight years of supervised release.<sup>3</sup> Doc. No. 43.

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<sup>1</sup> According to the government, “[t]he charges arose from Warren’s sales of cocaine base and heroin to a confidential informant in monitored and recorded transactions on six separate occasions between May 24, 2011, and May 29, 2012.” Gov’t’s Resp. to Def.’s “Pro Se Mot. for ‘Second Look’ Under First Step Act 2018. Mot. Under 3582” (“Gov’t’s Second Look Resp.”) at 1, Doc. No. 96.

<sup>2</sup> As part of the plea, Warren entered into a plea agreement in which he, *inter alia*, waived all rights to appeal or collaterally attack his conviction or sentence with the following limited exceptions: (1) he could file a direct appeal if the government appealed from the sentence; and (2) he could file a direct appeal asserting (a) his sentence on any count exceeds the statutory maximum, (b) the sentencing judge erroneously departed upward under the Sentencing Guidelines, or (c) the sentencing judge imposed an unreasonable sentence above the final sentencing guideline range determined by the court. Doc. Nos. 34, 36. In addition, during Warren’s guilty plea and as part of the parties’ plea agreement, Warren admitted to having been convicted of conspiracy to commit burglary and possession of a controlled substance with intent to distribute. *See* Gov’t’s Mot. to Dismiss Pet. Under 28 U.S.C. § 2255 (“Mot. to Dismiss”), at Ex. A, Doc. No. 45-1, Tr. of Guilty Plea Hr’g at 34 (setting forth stipulation), 37 (Warren agreeing that Government’s summary of plea agreement was accurate and agreeing to terms and conditions of agreement); *see also* Guilty Plea Agreement at 5, ¶ 8c.

<sup>3</sup> In sentencing Warren, Judge Gardner determined that he qualified as a career offender under U.S.S.G. § 4B1.1, the applicable offense level under the advisory sentencing guidelines was 34, and his criminal history category was VI. Tr. of May 11, 2015 Sentencing Hr’g, Doc. No. 53. The parties had jointly moved for a downward variance, *see* Gov’t’s Sentencing Mem. and Mot. for Downward Variance at 2–4, Doc. No. 40, which Judge Gardner granted, *see*

Warren did not file a direct appeal from his judgment of sentence; instead, he filed a *pro se* Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 by a Prisoner in Federal Custody on April 18, 2013.<sup>4</sup> Doc. No. 44. Although Judge Gardner did not order the government to file a response, it filed a motion to dismiss the section 2255 motion on May 29, 2013. Doc. No. 45. Predictably, the government based its motion on Warren’s appellate and collateral review waiver and that he had not shown that there was a miscarriage of justice. Mot. to Dismiss at 4–14. On August 5, 2013, Warren filed a “Supplement and Addendum to 2255 Motion.”<sup>5</sup> Doc. No. 48.

Judge Gardner entered an order on November 26, 2014, granting the government’s motion to dismiss, dismissing the section 2255 motion, and declining to issue a certificate of appealability. Doc. No. 49. In granting the motion to dismiss and dismissing the section 2255 motion, Judge Gardner agreed with the government that Warren had waived his right to file the section 2255 motion. *Id.* at 4 and n.4. He also determined that enforcing the waiver would not constitute a miscarriage of justice because Warren’s claims lacked merit.<sup>6</sup> *Id.* at 4–5 and n.4.

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Tr. of May 11, 2015 Sentencing Hr’g, although Judge Gardner imposed a sentence higher than the parties’ proposed recommendation of ten years. *See* Gov’t’s Sentencing Mem. and Mot. for Downward Variance at 3 (“[T]he parties jointly recommend that the Court grant a downward variance and impose a sentence of imprisonment of 120 months, to be followed by eight years of supervised release.”).

<sup>4</sup> In the motion, Warren asserted that he was entitled to relief because (1) he was unlawfully designated as a career offender based on a conviction for conspiracy to commit burglary (he claimed that it was second degree burglary – as no one was present at the time of the crime), and (2) his attorney was ineffective for failing to contest the career offender designation under U.S.S.G. § 4B1.1(a). Appl. for Leave to File a Second or Successive Mot. to Vacate, Set Aside or Correct Sentence 28 U.S.C. § 2255 by a Prisoner in Fed. Custody at ECF p. 3.

<sup>5</sup> In this document, Warren asserted that there was a miscarriage of justice and he was seeking to have the court modify his 13-year sentence to a sentence for the statutory minimum under 21 U.S.C. § 841(b)(1)(A). Suppl. and Addendum to 2255 Mot. at ECF p.1. He again reiterated his claim that his trial counsel was ineffective for failing to object to his career offender designation, and that the designation itself was unconstitutional. *Id.* at ECF pp. 1–2. He claimed that the career offender designation should have been given to a jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). *Id.* at ECF pp. 2–3. Warren further asserted that the ten-year mandatory sentence under 21 U.S.C. § 841(b)(1)(B) was improper under *Alleyne* and that Judge Gardner improperly considered relevant conduct related to firearms in sentencing him. *Id.* at ECF p. 3.

<sup>6</sup> Regarding the merits of Warren’s claims, Judge Gardner determined that the Application Notes to U.S.S.G. § 4B1.2 provided that a “crime of violence” included conspiring to commit a crime of violence, and burglary of a dwelling was listed as a crime of violence. Order at 4–5 and n.4. Also, Judge Gardner explained that because burglary was a crime of violence, Warren’s counsel could not have been ineffective for failing to contest its

Warren filed a motion for reconsideration of Judge Gardner’s order that the clerk of court docketed on December 8, 2014.<sup>7</sup> Doc. No. 50. On the same date the clerk of court docketed the motion for reconsideration, it also docketed Warren’s “Supplemental Brief in Support of Motion to Correct Sentence Under 18 [sic] U.S.C. § 2255.”<sup>8</sup> Doc. No. 51. Warren also filed a motion to modify his sentence under 18 U.S.C. § 3582(c)(2) that the clerk of court docketed on December 14, 2014.<sup>9</sup> Doc. No. 52.

While the aforementioned documents were under consideration with Judge Gardner, Warren filed a document titled “Supporting Facts to Defendants [sic] Second or Successive 2255 Motion” that the clerk of court docketed on August 14, 2015.<sup>10</sup> Doc. No. 54. Warren then filed a “Supplemental Brief and Supporting Facts to Second/Successive 2255” that the clerk of court docketed on September 3, 2015.<sup>11</sup> Doc. No. 55. It appears that on November 1, 2015, Warren

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characterization as such. *Id.* Further, Judge Gardner determined that *Apprendi* and *Alleyne* were not violated by him considering that Warren apparently was involved in the straw purchase of five firearms as this uncharged conduct did not impact the applicable statutory maximum possible punishment or mandatory minimum punishment. *Id.*

<sup>7</sup> In the motion, Warren indicated that the United States Attorney General was developing a uniform policy that federal prosecutors would (1) no longer seek to have waivers of ineffective assistance of counsel claims in plea agreements, and (2) decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when a defendant’s claim raises a serious debatable issue that a court should resolve. Mot. for Recons. at 1–2, 5. Warren also alleged that his trial counsel was ineffective because he essentially forced Warren to plead guilty, told Warren he would get no more than ten years in prison, and told Warren that if he objected to any stipulation his plea would be null and void and he would have to go to trial. *Id.* at 3–5. He further repeated his prior arguments about his improper classification as a career offender and Judge Gardner improperly considering the straw purchases of five firearms. *Id.* at 4.

<sup>8</sup> In the brief, Warren asserted that due to *Descamps v. United States*, 570 U.S. 254 (2013), his prior burglary conviction is not a crime of violence. Suppl. Br. in Supp. of Mot. to Correct Sentence Under 18 U.S.C. § 2255 at 1–5. He claimed that because he was deemed a career offender, his guideline sentence range was 262 to 327 months, and without it, he would have had a guideline range of 57 to 71 months. *Id.* at 1. He also sought to address issues with his state criminal records, which, while he did not attach them to his brief, supposedly showed that he was not a career offender insofar as he pleaded guilty to “the lesser charge of F2 Nonviolent Burglary.” *Id.* at 5.

<sup>9</sup> In the motion, Warren claimed that he was entitled to a sentence reduction due to Amendment 782. Modification of Sentence Under 18 U.S.C. § 3582(c)(2) Pursuant to Amendment 782, Which Became Retroactive Nov. 1, 2014 at 1–3.

<sup>10</sup> In this document, he claimed to be entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015) saying that the Armed Career Criminal Act and the career offender provision under U.S.S.G. § 4B1.1 are identical. Supporting Facts to Def.’s Second or Successive 2255 Mot. at ECF pp. 1–2. Warren also included an application to file a second or successive section 2255 motion with this document. *Id.* at ECF pp. 3–6.

<sup>11</sup> In this document, Warren essentially argued that the court should grant him leave to file a second 2255 motion for relief based on *Johnson* and the improper career offender designation. Suppl. Br. and Supporting Facts to Second/Successive 2255 at ECF pp. 1–3.

filed a motion under 28 U.S.C. § 2244(b) for leave to file a second or successive 2255 motion in the Third Circuit.<sup>12</sup> *See In re: Steven Warren*, No. 15-3746 (3d Cir.).

On November 19, 2015, Judge Gardner entered an order dismissing without prejudice Warren's August 2015 "Supporting Facts" and "Supplemental Brief" submissions because they were actually second or successive habeas motions and Warren did not first obtain approval from the Third Circuit before filing them. Nov. 19, 2015 Order at 1–2, Doc. No. 56. On November 20, 2015, Judge Gardner entered an order requiring the government to file a response to Warren's motion for reconsideration. Doc. No. 57. Warren filed an addendum to his motion for reconsideration on January 19, 2016.<sup>13</sup> Doc. No. 60.

The government filed its response to the motion for reconsideration on February 11, 2016.<sup>14</sup> Doc. No. 62. The government also filed a response to the motion to reduce sentence on February 16, 2016.<sup>15</sup> Doc. No. 63. On February 25, 2016, the clerk of court docketed Warren's "Addendum in Support of Government's motion [sic] to Dismiss Motion for Reconsideration."<sup>16</sup>

On April 11, 2016, Judge Gardner entered an order denying Warren's motion for modification. Doc. No. 65. On April 26, 2016, Judge Gardner entered an order appointing the Federal Community Defender's Office to assist Warren with litigating a section 2255 motion

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<sup>12</sup> The Third Circuit denied his motion on March 2, 2016. *See* Docket, *In re: Steven Warren*, No. 15-3746 (3d Cir.).

<sup>13</sup> This document appears to be Warren's summary of many, if not all, of his prior arguments in support of relief. Addendum to Def.'s Mot. for Recons. at 1–3.

<sup>14</sup> The government essentially argued that the court should deny the motion because Warren's motion was basically a rehash of the groundless arguments he raised in his original section 2255 motion. Gov't's Resp. to Def.'s Mot. for Recons., Doc. #50, and Def.'s Suppl. Br. in Supp. of Mot. to Correct Sentence Under 18 U.S.C. § 2255, Doc. #51 at 3, 6–7. In addition, the government noted that Warren pleaded guilty to conspiracy to commit burglary as a felony of the first degree, which involved a dwelling and a victim (but victim may not have been present). *Id.* at 9–12. Thus, it was not a second-degree felony burglary as Warren argued. *Id.* at 9–10.

<sup>15</sup> In its response, the government pointed out that because Warren's guideline range was set by the career offender guideline and not by U.S.S.G. § 2D1.1, he was not entitled to relief because Amendment 782 only affected the base offense levels on the section 2D1.1 drug quantity table for most drug offenses, by two levels. Gov't's Resp. to the Def.'s Pro Se Mot. for a Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 at ECF pp. 5–10.

<sup>16</sup> In this document, Warren mostly addresses the arguments as to why a Pennsylvania first degree felony burglary is not a crime of violence. Doc. No. 64 at ECF pp. 1–2.

based on *Johnson*. Doc. No. 66. The Federal Community Defenders, acting for Warren, filed a protective section 2255 motion based on *Johnson* on June 19, 2016.<sup>17</sup> Doc. No. 67.

On August 10, 2016, Judge Gardner entered an opinion and order which (1) granted the motion for reconsideration insofar as Warren sought reconsideration of the part of the November 25, 2014 order in which Judge Gardner declined to issue a certificate of appealability, (2) issued a certificate of appealability as to “whether enforcement of the appellate waiver in defendant’s guilty plea agreement would work a miscarriage of justice in light of the Supreme Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)[,]” and (3) denied the motion for reconsideration in all other respects. Doc. Nos. 68, 69. Despite the issuance of a certificate of appealability, Warren did not file an appeal to the Third Circuit.

On March 22, 2017, Warren (through the Federal Defenders) filed a motion to withdraw the counseled June 19, 2016 section 2255 motion.<sup>18</sup> Doc. No. 70. Judge Gardner granted the motion to withdraw on March 28, 2017. Doc. No. 71.

Warren then filed a “Motion for Reconsideration Under Rule 60B,” which the clerk of court docketed on April 13, 2017.<sup>19</sup> Doc. No. 72. On May 23, 2017, then-Chief Judge Petrese B. Tucker, reassigned this matter from Judge Gardner’s calendar to the undersigned’s calendar. Doc. No. 73. On June 1, 2017, the court entered an order on Warren to show cause why the court should not deny the April 13, 2017 motion for reconsideration as an improperly filed second or successive habeas motion. Doc. No. 74. The court gave Warren until June 30, 2017, to respond to the show cause order. *Id.* Also on June 1, 2017, the Third Circuit, because of *Beckles*, denied

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<sup>17</sup> In the motion, the Federal Defenders indicated that they had also filed an application for leave to file a second or successive section 2255 motion with the Third Circuit.

<sup>18</sup> It appears that the motion to withdraw was filed due to the Supreme Court’s ruling in *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that the Sentencing Guidelines, including section 4B1.2(a)’s residual clause, are not subject to vagueness challenges under the Due Process Clause.

<sup>19</sup> In the motion, Warren acknowledged that *Beckles* precluded his vagueness challenge to U.S.S.G. § 4B1.1, but he asked that the court take a “second look” at his ineffective assistance of counsel claims and illegal sentence claim. Mot. for Recons. Under Rule 60(b) at ECF pp. 1, 3–5.

Warren’s application to file a second or successive habeas motion based on *Johnson*.<sup>20</sup> Doc. No. 75; *see In re: Steven D. Warren*, No. 16-2193 (3d Cir.).

Because Warren did not timely respond to the order to show cause, the court denied the motion for reconsideration on July 7, 2017. Doc. No. 76. The clerk of court then docketed Warren’s response to the order to show cause on July 24, 2017. Doc. No. 77. In response to Warren’s response, the court entered an order on July 26, 2017, which vacated the July 7, 2017 order denying the motion for reconsideration, but still denied the motion with prejudice (after considering Warren’s response to the order to show cause) because the motion for reconsideration was actually an unauthorized second or successive section 2255 motion. Doc. No. 78. The court also declined to issue a certificate of appealability. *Id.*

Warren filed a notice of appeal from the court’s July 26, 2017 order, which the clerk of court docketed on September 19, 2017. Doc. No. 79. The Third Circuit denied Warren’s request for a certificate of appealability on January 25, 2018. Doc. No. 82; *see Docket, United States v. Warren*, No. 17-3199 (3d Cir.).

Warren then filed another section 2255 motion on February 20, 2018.<sup>21</sup> Doc. No. 83. The Third Circuit appears to have entered an order on April 5, 2018, denying another of Warren’s

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<sup>20</sup> The Third Circuit denied the application because

Petitioner was sentenced under the advisory Sentencing Guidelines. In his § 2244/ 2255(h) application, he initially sought leave to challenge his sentence on the ground that the definition of “crime of violence” contained in the residual clause of U.S.S.G. § 4B1.2(a) is unconstitutionally vague. Petitioner relied for that proposition on *Johnson v. United States*, 135 S. Ct. 2551 (2015), and he argued that *Johnson* constitutes a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2). The Supreme Court, however, has since held that the analysis in *Johnson* does not apply to the advisory Sentencing Guidelines and that, as a result, “§ 4B1.2(a)’s residual clause is not void for vagueness.” *Beckles v. United States*, 137 S. Ct. 886, 897 (2017). Thus, petitioner has not made a prima facie showing that his proposed § 2255 motion satisfies the § 2255(h) standard because, under *Beckles*, *Johnson* did not announce a new rule of constitutional law invalidating § 4B1.2(a)’s residual clause. Petitioner also has not responded to the Clerk’s order to show cause why his petition should not be denied in light of *Beckles*.

attempts to file a second or successive section 2255 motion. Doc. No. 84; *see In re: Steven Warren*, No. 17-3300 (3d Cir.).

On September 17, 2018, the court dismissed Warren's section 2255 motion because it was an improperly filed second or successive section 2255 motion insofar as he had not received authorization from the Third Circuit before filing it. Doc. No. 85. Although the court also declined to issue a certificate of appealability, *id.*, Warren filed a notice of appeal to the Third Circuit on September 21, 2018. Doc. No. 87. Warren also filed a motion for reconsideration in which he requested that the court, *inter alia*, issue a certificate of appealability. Doc. No. 86. The court denied the motion for reconsideration on October 16, 2018. Doc. No. 88.

Apparently, on November 7, 2018, the Third Circuit denied another attempt by Warren for permission to file a second or successive habeas petition. Doc. No. 90; *see In re: Steven Warren*, No. 18-3141 (3d Cir.). On February 8, 2019, the Third Circuit denied Warren's motion for a certificate of appealability (related to the court's dismissal of his section 2255 motion on September 17, 2018). Doc. No. 91; *see In re: Steven Warren*, No. 18-3291 (3d Cir.). It appears that the Third Circuit denied another application from Warren for leave to file a second or successive section 2255 motion on June 6, 2019. Doc. No. 92; *see In re: Steven Warren*, No. 19-1892 (3d Cir.).

Warren then filed a "Pro Se Motion for 'Second Look' under First Step Act 2018. Motion Under 3582(c)(2)" ("Motion for a Second Look") on December 9, 2019. Doc. No. 93. On December 10, 2019, the court entered an order directing the government to file a response to this

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<sup>21</sup> In the motion, Warren appeared to assert the following claims: (1) ineffective assistance of trial counsel insofar as (a) counsel failed to file a direct appeal relating to his career offender designation and enhancement, (b) counsel failed to file a motion to reduce his "drug ratio" based on sentencing entrapment, and (c) counsel generally provided deficient service during the course of the representation; (2) Judge Gardner incorrectly applied the sentencing guidelines; (3) Judge Gardner incorrectly applied the career offender enhancement; and (4) the arresting agents used "sentence manipulation" when they made seven different narcotics purchases so as to obtain a higher sentence against him. Mot. Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Fed. Custody at 6-11.

motion by January 10, 2020. Doc. No. 94. The court then entered another order on January 22, 2020, giving the government until February 12, 2020, to file a response to the motion. Doc. No. 95. The government filed its response to the motion on January 23, 2020. Doc. No. 96. Warren then filed an addendum and brief in support of his motion and a “Response to Governments [sic] Motion to Dismiss His 3582 Motion” that the clerk of court docketed on February 3, 2020, and February 10, 2020, respectively. Doc. Nos. 97, 98.

Warren’s Motion for a Second Look is now ripe for disposition.

## II. DISCUSSION

### A. Summary of the Parties’ Arguments

In the instant motion, Warren yet again argues that he is entitled to relief in the nature of a sentence reduction because the career offender provision of U.S.S.G. § 4B1.1 was incorrectly applied to him based on his conviction for criminal conspiracy to commit second degree burglary. Def.’s Pro Se Mot. for “Second Look” Under First Step Act 2018. Mot. Under 3582(c)(2) (“Mot.”) at ECF p. 4, Doc. No. 93. He then argues that after *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), “[18 U.S.C. §] 16 has now become a poisonus [sic] tree and the fruits there of [sic] (2k2, 2L2, 4B1, 924) have all be poisoned by a vague rule” because “[t]hese enhancements violate the constitutions [sic] prohibition of vague criminal Laws [sic].” *Id.* He also contends that the United States Sentencing Commission’s (“Commission”) removal of burglary from the career offender guidelines in 2015, along with the Commission’s removal of the residual clause of U.S.S.G. § 4B1.2 under Amendment 798 to the sentencing guidelines, permits the court to remove the enhancements under *United States v. Frates*, 896 F.3d 93 (1st Cir. 2018). *Id.* at ECF p. 5.

In his addendum to the motion, Warren claims that he has demonstrated extraordinary and compelling reasons for the court to reduce his sentence under 18 U.S.C. § 3582(c)(1)(A). Addendum and Br. in Supp. of Mot. Under 18 U.S.C. 3582(c)(1)(A) at ECF p. 1, Doc. No. 97. He appears to assert that agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) caused a confidential informant to purchase higher amounts of cocaine base and heroin from him so he would face higher sentencing guidelines. *Id.* This action by the ATF constituted “sentencing manipulation,” which Warren claims is a due process violation. *Id.* at ECF p. 2. Warren also again repeats his assertion that he was improperly designated as a career offender. *Id.* at ECF pp. 2–3.

The government did not have the opportunity to view Warren’s addendum prior to submitting its response to the instant second look motion. Nonetheless, the government contends that Warren is not entitled to relief under section 3582 or the First Step Act of 2018 because (1) the First Step Act only applies “if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed” and (2) Warren committed his offenses in 2011 and 2012, and Judge Gardner sentenced him 2014. Gov’t’s Second Look Resp. at 7, Doc. No. 96. In addition, the government points out that Warren is actually seeking relief from his career offender designation under *Johnson*, and the Third Circuit denied his request to file a successive habeas petition on that basis pursuant to *Beckles*. *Id.* at 7–8. The government further asserts that “[t]he First Step Act has no bearing on [Warren’s] career offender status under the Guidelines,” and “although the 2016 amendment to the career offender guidelines eliminated burglary as an enumerated crime of violence, this amendment was not given retroactive application by the Sentencing Commission, and provides no basis for relief.” *Id.* at 8.

In response to the government's opposition, Warren argues that he has demonstrated extraordinary and compelling circumstances warranting a reduction in his sentence under *United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391 (D. Neb. Nov. 14, 2019). Resp. to Gov't's Mot. to Dismiss His 3582 Mot. at ECF p. 2, Doc. No. 98. Those circumstances include the fact that burglary is no longer an offense that supports designation as a career offender under section 4B1.1 and that the Third Circuit, in *Garrus v. Secretary of Pennsylvania Department of Corrections*, 694 F.3d 394 (2012), determined that burglarizing an unoccupied building is graded as a second degree felony under Pennsylvania law. *Id.* Warren also notes that, *inter alia*, (1) he has "completed numerous occupational and therapeutic programs in the [Bureau of Prisons]," (2) his is "considered a medium risk recidivist" now, (3) his wife is a Deferred Action for Childhood Arrivals ("DACA") recipient and her status (along with her parents and siblings) is now deportable, (4) his three children need him to provide support, (5) he has a terminally ill, 31-year-old sister, and (6) his mother is now disabled. *Id.* at ECF pp. 3–4. Warren further asserts that the court should reduce his sentence pursuant to Amendment 798 and *Frates*. *Id.* at ECF p. 6. As a final argument, Warren asserts that Judge Gardner never intended him to serve more than ten years in prison and he is ineligible for "one year off" of his sentence because he received a two-level enhancement for firearms. *Id.* at ECF p. 7.

### **B. Analysis**

As indicated by the court's lengthy recitation of the procedural history in this matter, Warren has been unsuccessfully litigating his career offender designation for numerous years. Here, Warren is attempting to use the First Step Act of 2018 and 18 U.S.C. § 3582(c)(2) as vehicles for relief. Unfortunately for Warren, neither of them provides a basis for relief at this time.

In the first instance, it is somewhat unclear how Warren is asserting that the First Step Act applies to his case. It appears that he is referring to the Act only insofar as it amended 18 U.S.C. § 3582(c)(1)(A).<sup>22</sup> See Addendum and Br. in Supp. of Mot. Under 18 U.S.C. § 3582(c)(1)(A) (“The defendant basing [sic] his motion solely on the First [S]tep [A]ct of 2018 which allows this court to grant motions to reduce sentences under 18 U.S.C. [§] 3582(c)(1)(A) due to extraordinary or compelling reasons[.]” Then, he relies on the District of Nebraska’s decision in *Urkevich*, claiming that the district court granted a motion to modify a sentence under the First Step Act where Congress amended 18 U.S.C. § 924(c)(1)(C) after the movant’s sentencing. See Resp. to Gov’t’s Mot. to Dismiss His 3582 Mot. at ECF p. 2. These arguments demonstrate that Warren is not arguing that he is entitled to relief under section 404 of the First Step Act, as the government discusses in its responsive brief.<sup>23</sup>

Nonetheless, while he does not articulate it as such, it appears that Warren is focusing on the portion of the First Step Act that amended 18 U.S.C. § 3582(c)(1). Prior to the First Step Act, section 3582(c)(1)(A) only permitted the Bureau of Prisons to move to have a court reduce a prisoner’s term of imprisonment under the circumstances set forth in the statute. See 18 U.S.C. §

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<sup>22</sup> This portion of the statute is commonly referred to as the “‘compassionate release’ provision.” *United States v. Handerhan*, 789 F. App’x 924, 925 (3d Cir. 2019) (per curiam).

<sup>23</sup> If Warren was attempting to assert a claim under section 404, the government correctly points out that he is ineligible for relief under section 404. Under the First Step Act, district courts can “impose a reduced sentence for covered crack cocaine offenses where the statutory penalties of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, §§ 2-3, would have applied had the Act been in effect when the covered offense was committed.” *United States v. Patterson*, Crim. No. 1:08-CR-383, 2019 WL 7290436, at \*2 (M.D. Pa. Dec. 30, 2019). The First Step Act defines a “covered offense” as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010.” First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222 (Dec. 21, 2018).

As the government points out in its brief, Warren’s offenses occurred in 2011 and 2012, see Indictment, Doc. No. 9, and Judge Gardner sentenced him in 2013. Doc. Nos. 41, 43. Thus, section 404 is inapplicable here. See *United States v. Surine*, No. 4:07-CR-304-1, -- F. Supp. 3d --, 2019 WL 6699914, at \*2 (M.D. Pa. Dec. 9, 2019) (“Section 404 of the First Step Act authorizes courts to resentence defendants if they were sentenced for a ‘covered offense’ **prior to August 3, 2010**, the date that the Fair Sentencing Act of 2010 was enacted.” (emphasis added)); *United States v. Willis*, Crim. A. No. 07-205-2, -- F. Supp. 3d --, 2019 WL 4849435, at \*3 (E.D. Pa. Sept. 30, 2019) (“One aspect of eligibility [under section 404 of the First Step Act] is explicit: only persons sentenced before August 3, 2010 are entitled to relief.”), *appeal filed*, No. 19-3249 (3d Cir.).

3582(c)(1) (2002); *see United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020) (“Prior to the First Step Act of 2018, a district court could grant relief under § 3582(c)(1)(A) only on a motion by the BOP.” (citations omitted)). The First Step Act amended section 3582(c)(1)(A) to allow a defendant to file a motion as well, 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.” 18 U.S.C. § 3582(c)(1)(A) (2019); First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5239 (Dec. 21, 2018).

Unfortunately for Warren, the language in the amended section 3582(c)(1)(A) provides an initial threshold that his submissions do not overcome, namely, he needed to show that (1) he “fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion” on his behalf, or (2) 30 days has passed “from the receipt of such a request [for the Bureau of Prisons to bring a motion on his behalf] by the warden of the defendant’s facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). At no point in his submissions does Warren allege that he requested that the Bureau of Prisons bring a motion on his behalf or that he fully exhausted all of his administrative rights to appeal from the Bureau of Prisons failing to bring a motion for a reduction of sentence on his behalf. Thus, the court must deny the instant motion on that ground alone. *See, e.g., United States v. Alejo*, No. CR 313-009-2, 2020 WL 969673, at \*1 (S.D. Ga. Feb. 27, 2020) (denying motion for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i) because defendant “failed to show that he has requested compassionate release from the BOP or otherwise exhausted his administrative remedies”); *United States v. Paz*, Crim. No. 92-172 (JMV), 2020 WL 360625, at \*3 (D.N.J. Jan. 22, 2020) (denying motion for reduction in sentence, to extent based on First Step Act and 18 U.S.C. § 3582(c)(1)(A), because defendant

did not “ma[k]e the requisite showing of exhaustion”); *see also Urkevich*, 2019 WL 6037391 at \*1 (explaining that section 3582(c)(1) movant “submitted evidence of his exhaustion of his administrative remedies through the Bureau of Prisons”).<sup>24</sup>

### III. CONCLUSION

While it is unclear in his original motion which provision of the First Step Act of 2018 Warren claims supports his request to modify his sentence, he is ineligible for relief under section 404 of the Act because he committed offenses after August 3, 2010. In addition, although Warren no longer mentions section 3582(c)(2) as a basis in support of his request, the court cannot modify his sentence under this section because the Commission has not made Amendment 798 retroactive by listing it in by listing it in U.S.S.G. § 1B1.10(d). Finally, the court cannot resolve Warren’s request for a sentence modification under section 3582(c)(1) because he does not allege that he submitted a request to the warden of his place of incarceration or assert that he fully exhausted his administrative rights to appeal a failure of the Bureau of Prisons to bring a motion for a sentence reduction on his behalf. Accordingly, the court denies

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<sup>24</sup> In his initial motion, Warren also mentioned that he was seeking relief under 18 U.S.C. § 3582(c)(2). Mot. at ECF pp. 1, 5. Section 3582(c)(2) states that a court may modify a term of imprisonment

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

Even if Amendment 798 to the Sentencing Guidelines may have lowered Warren’s sentencing range, modifying his sentence would not be “consistent with applicable policy statements” because the Commission did not make Amendment 798 retroactive by listing it in U.S.S.G. § 1B1.10(d). *See* U.S.S.G. § 1B1.10(b)(1) (“In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced.”); *see also Handerhan*, 789 F. App’x at 927 (“Nevertheless, to the extent that Handerhan’s motion could be construed as one under § 3582(c)(2), we note that Handerhan is not eligible for relief under that provision because the Commission has not made Amendment 801 retroactive for purposes of § 3582(c)(2) by listing it in U.S.S.G. § 1B1.10(d) (formerly § 1B1.10(c)).” (citations omitted)).

the motion for a “second look” under the First Step Act and motion to modify sentence under 18 U.S.C. § 3582(c).

The court will enter a separate order.

BY THE COURT:

/s/ Edward G. Smith  
EDWARD G. SMITH, J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

STEVEN D. WARREN

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:  
:  
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CRIMINAL ACTION NO. 12-324

**ORDER**

**AND NOW**, this 12th day of March, 2020, after considering (1) the “Pro Se Motion for ‘Second Look’ under First Step Act 2018. Motion Under 3582(c)(2)” filed by the *pro se* movant, Steven D. Warren (“Warren”), Doc. No. 93, (2) the government’s response to Warren’s motion, Doc. No. 96), (3) Warren’s “Addendum and Brief in Support of Motion Under 18 U.S.C. § 3582(c)(A)(1) [sic],” Doc. No. 97, and (4) Warren’s “Response to Governments [sic] Motion to Dismiss His 3582 Motion,” Doc. No. 98; and for the reasons set forth in the separately filed memorandum opinion, it is hereby **ORDERED** as follows:

1. The “Pro Se Motion for ‘Second Look’ under First Step Act 2018. Motion Under 3582(c)(2)” (Doc. No. 93), to the extent it asserts a claim under section 404 of the First Step Act of 2018, is **DENIED**;

2. The “Pro Se Motion for ‘Second Look’ under First Step Act 2018. Motion Under 3582(c)(2)” (Doc. No. 93), to the extent it asserts a claim under 18 U.S.C. § 3582(c)(2), is **DENIED**; and

3. The “Pro Se Motion for ‘Second Look’ under First Step Act 2018. Motion Under 3582(c)(2)” (Doc. No. 93), to the extent it asserts a claim under 18 U.S.C. § 3582(c)(1), is **DENIED WITHOUT PREJUDICE**.

BY THE COURT:

/s/ Edward G. Smith  
EDWARD G. SMITH, J.