

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a federal prisoner, submitted a document [Doc. #74] entitled “Petitioner’s Motion Requesting a Downward Variance in Light of his Postsentencing Conduct Pursuant [to] 18 U.S.C.S. § 3661” in which he seeks a sentence reduction “in light of his postsentencing conduct.” Petitioner separately filed a Motion for Compassionate Release [Doc. #76] that has been briefed for consideration. Therefore, to the extent Petitioner’s Motion for Downward Variance requests compassionate release, those claims are being considered in the separate pending proceeding. However, in his attachment to the present Motion for Downward Variance, Petitioner also quotes the Sentencing Transcript and points to sections of the plea colloquy that he alleges he did not understand. Therefore, out of an abundance of caution and because Petitioner seeks to attack the conviction or sentence he received in this Court, the Court treated his filing for administrative purposes as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. To the extent

Petitioner does intend to raise such a Motion, it cannot be further processed because court records reveal that he previously attacked the same conviction and sentence in a prior § 2255 motion (Case No. 1:13CV741). Consequently, if Petitioner seeks to proceed under § 2255, he must move in the United States Court of Appeals for the Fourth Circuit for an order authorizing this district court to consider the current Motion, as required by 28 U.S.C. § 2255 and 28 U.S.C. § 2244. Because of this pleading failure, this particular Motion should be filed and then dismissed. If Petitioner seeks to file a motion under § 2255, he should request the proper forms from the Clerk's Office and use them to seek permission to file. As noted above, to the extent he is requesting compassionate release, that request has been separately briefed and remains pending.

IT IS THEREFORE RECOMMENDED that this action be denied as filed and, to the extent it may be a motion under § 2255, dismissed *sua sponte* for failure to obtain certification for this § 2255 application by filing a Motion for Authorization in the Court of Appeals as required by 28 U.S.C. §§ 2255 and 2244 and Fourth Circuit Local Rule 22(d) and that, there being no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction nor a debatable procedural ruling, a certificate of appealability not issue.

This, the 30th day of November, 2020.

/s/ *Joi Elizabeth Peake*
United States Magistrate Judge