No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN G. WESTINE — PETITIONER
(Your Name)

vs.

U.S.A. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN G. WESTINE
(Your Name) 93555-012
F.M.C. BUTNER
BOX 1600
(Address)
BUTNER, N.C. 27509
(City, State, Zip Code)
NONE
(Phone Number)

QUESTION(S) PRESENTED

(1) By the Sixth Circuit Court of Appeals application of Martinez v State of California 145 Led 2d 597, Was it structural error to deny Westine a Federal Prisoner his constitutional and statutory right under 28 USC 1654, to present his own direct appeal as Pro-Se "Counsel of Choice"? Cites: United States v Gonzalez-Lopez, 165 Led 2d 409, Winkelman vs Parma, 167 L Ed2d 904, United States v Davila, 186 L ed 2d 139

APPENDIX C, D, E

(2) Did the Sixth Circuit Court of Appeals deny Westine "procedural due process" under United States v Booker, 160 Led 2d 621, by not addressing the Objections to the Presentence Report presented to the district court that violated Federal Rule of Criminal Procedure 32 (i)(3)(B), based on the unconstitutional sentence enhancements base on 3553(a) factors? We the Six Circuit Court of Appeals consider the entire record including the original sentencing hearing. Cite: Chavez-Meza vs United States, 210 L ed 2d 359, United States v Ruffin, 978 F3d 1008, United States v Elias, 984 F3d 519 as abuse of discretion.?

APPENDIX F

(3) Under Federal Rule of Criminal Procedure 32 (i)(3)(B):... Once the government waived and forfeited their right to object to Westine's 36 plus pages of "Objections to The Presentence Report", clearly identifying the errors by suppling trial transcripts exhibits, and the unconstitutional sentence enhancements under the Guidelines. Does the sentencing court have jurisdiction to merely, summarily adopt the disputed facts in the Presentence Report in violation of United States v Booker, 160 Led 2d621?

APPENDIX F

4) Is it legal or extraordinary and compelling under 18 USC 3582 (c)(1)(A)(i). As the Federal Bureau of Prisons has now given, Westine a DEATH SENTENCE, by denying Westine a 'Stem Cell Transfusion', that is the only cure for Westine's terminal illness, .
of Aplastic Anemia ? ..... SEE: APPENDIX "G"

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

(1) In re: Westine, No. 21-6119, 5/10/2022, Sixth Circuit

(2) In re: Westine, No. 18-5893, 11/7/2018, Sixth Circuit

(3) In re: Westine, No.18-5393, 7/27/2018, Sixth Circuit

(4) In re: Westine, No. 17-6305, 2/16/2018, Sixth Circuit .... Denied Counsel of Choice (Pro-se status)

(5) In re: Westine, No. 18-5093, 5/30/2016. Sixth Circuit ..... Rule 32 (i)(3)(B) Violation

(6) In re: Westine, No. 16-5356, 12/20/2016, Sixth Circuit .... Denied Pro-se appeal rights, Counsel of Choice

(7) Westine v Warden, No. 2:17-cv-501, 7th Circuit ..... 28 USC 2241 denied to rule on constitutional right to pro-se and unconstitutional sentencing enhancements. Cite: United States v Booker, 160 L. ed 2d 621

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was APRIL 14, 2022.

[ ] ~~No petition for rehearing was timely filed in my case.~~

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: MAY 26, 2022, and a copy of the order denying rehearing appears at Appendix "B".

[ ] ~~An extension of time to file the petition for a writ of certiorari was granted~~ to and including _____ (date) on _____ (date) in Application No. ___A_____. N/A

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**: N/A

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Sixth and Fourteenth Amendments to pro-se as pro-se.

(2) Denied Procedural Due Process, 5th Amendments.

(3) Federal Rule of Criminal Procedure 32 (i)(3)(B).

(4) 18 USC 3553(a).

(5) 28 USC 1654 statutory right to represent my self as Pro-se in any federal court.

(6) 18 USC 3582 (c)(1)(A)(i) terminally ill.

(7) Federal Rule of Civil Procedure 15 (c)(2) relates back to the original motions.

STATEMENT OF THE CASE

1) In Case No. 3:14-CR-00010-GFVT, Frankfort, Kentucky.

2) After a Feretta hearing was proceeded at trial as Pro-se with a two week trial with forced upon standby counsel.

3) At trial the judge denied Westine a "Complete Defense" by denying a "expert rebuttal witness" to prove no securities sold under Kentucky law as only a Real Estate Liscense is required to assign a "royalty interest".

4) The government continued to provide perjured testimony by Mark Cornell, 3 times caught lying. APPENDIX "F"

5) Westine was found not guilty on Count One, and guilty on all other counts, Westine objected as the verdicts were inconstitutent with no intent..... See: Objections to PSR Dockets No. 366, 503, 390, ETC. APPENDIX "F"

6) Westine filed 36 plus pages of Objections to the Presentence Report and strictly followed Federal Rule Criminal Procedure 32 (i)(3)(B) that clearly identified the errors with trial transcripts, testimony, and the United States Sentencing Guideline . errors clearly identifying in the Guidelines the applications. APPENDIX "F"

7) At sentencing the government waived and forfeited their burden to object via Federal Rule of Criminal Procedure Rule 32 (i)(3)(B) APPENDIX "F". a violation under "BOOKER".

8) The sentencing judge does not have JURISDICTION to deny objections under 32 (i)(3)(B) without a ruling or objections by the government without a formal inquiry..... A DENIAL OF PROCEDURAL DUE PROCESS. All circuits concur that a compliance to Rule 32 (i)(3)(B) must be enforced. APPENDIX "F"

9) Westine filed a Writ of Mandamus to the Sixth Circuit Case No. 18-5393 to enforce this mandatory rule and DENIED! Procedural Error under UNITED STATES V BOOKER, 160 Led 2d 621. APPENDIX "F"

10) Westine file a Pro-se "Notice to Appeal" Case No. 16-5356 (6th Cir.) and to proceed as Pro-se on direct appeal.

STATEMENT OF THE CASE

11) The Sixth Circuit Case No. 16-5356 (Docket #20-1) denied Westine his constitutional and statutory right to proceed as pro-se on direct appeal in violation of 28 USC 1654 and the Sixth and Fourteenth Amendments , forced Westine to proceed or direct appeal with counsel by illegally applying Cite: Martinez v State of California, 145 Led 2d 597.

Appeal § 1248; Constitutional Law § 850 - self-representation by criminal appellant

1a, 1b, 1c, 1d, 1e, 1f. On direct appeal from a state criminal conviction, **a state is not required to recognize a federal constitutional right to self-representation**-and thus, state courts do not deprive a lay appellant of a federal constitutional right in requiring the appellant to accept a state-appointed attorney against the appellant's will-for (1) although historical evidence arguably demonstrates that early lawmakers intended to preserve the right of self-representation at trial, the historical evidence does not provide any support for an affirmative federal constitutional right to appellate self-representation; (2) neither the structure of the Federal Constitution's Sixth Amendment nor inquiries into historical English practices provide any basis for finding a right to self-representation on appeal; (3) although there is a risk that the appellant will be skeptical as to whether a government-appointed lawyer will serve the appellant's cause with undivided loyalty, the risk of either disloyalty or suspicion of disloyalty is not a sufficient concern-under currently prevailing <***pg. 599***> practices-to conclude that a right of self-representation is a necessary component of a fair appellate proceeding under the Constitution's due process guarantee; and (4) the states are within their discretion to conclude that in the appellate context, the government's

12) After numerous request counsel finally withdrew as counsel.

13) Yet again the Sixth Circuit Court of Appeals again appointed a Federal Public Defender to represent Westine on direct appeal. Westine sent numerous request to that forced upon counsel to withdraw to NO AVAIL!

14) Westine filed a Writ of Mandamus to the Sixth Circuit Case No. 17-6305 to protect Wes tine's statutory and Sixth and Fourteenth Amendments and 28 USC 1654 asking to force court appointed counsel to withdraw ..... DENIED! APPENDIX "E-C"

15) Westine was denied the filing of a Supplemental Appeal Brief to present all these claims.\

16) All input to forced appeal counsel was completely ignored.

17) While a Writ of Certitori was pending Case No. ?.

18) Westine became "terminally ill" with "Aplastic Anemia" and was given Three to Six months to live, by FMC Butner.

19) Westine is now given a 'Death Sentence' by FMC Butner as they have refuse to give Westine the only known cure for his terminal illness, that is a "Stem Cell Transfusion" yet others are given this cure. The Veterans Administration in West L.A. will provide Westine with this cure when released as an Honorable Discharged Veteran. APPENDIX "G"

TABLE OF AUTHORITIES CITED

CASES

STATUTES AND RULES

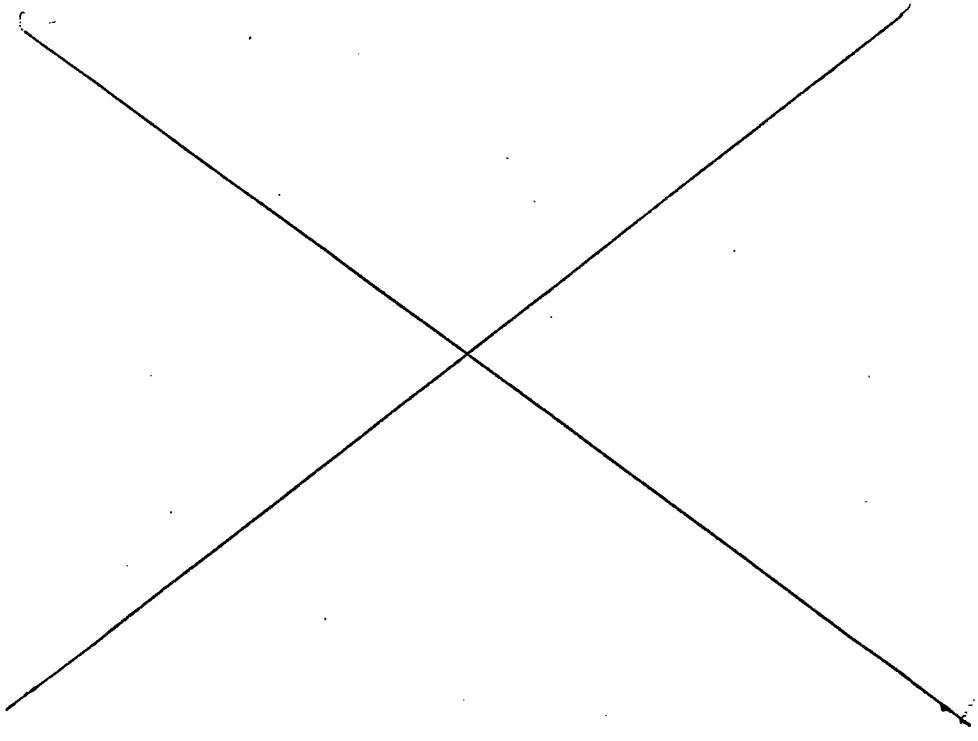
OTHER

STATEMENT OF THE CASE

20) All request for "Compassionate Release" 18 USC 3582(c)(1)(A)(i) and a Rule 15 (c)(2) 'Relation Back Theory' based on new

case law have been denied without a formal inquiry into the entire record and the original sentencing hearing required by The\ Sixth Circuit Case Law and The United States Supreme Court. Cite: Chavez-Meza v United States, 201 Led 2d 359 (2018).

21) The Sixth Circuit has refused to follow its own dicta under Federal Rule of Criminal Procedure 32 (i)(3)(B) as it relates to an evaluation of 3553(a) factors and the entire record, as Westine has presented these claims to no avail. Cites: Elias, 984 F3d 512 (2021), Ruffin, 978 F3d 1008 (2020), Chavez-Meza v Unite States, 201 Led 2d 359 (2018) States: When reviewing a denial of "Compassionate Release", we review the entire record and the 3553 (a) factors at the original sentencing hearing .....NOT DONE! APPENDIX "A" AND "B"



REASONS FOR GRANTING THE PETITION

1) To provide uniformity and dicta to the courts that Cite: Martinez vs Court of Appeal of California, 145 L..ed 2d 597 used by the Sixth Circuit Court of Appeals Case No.. 16-5356 does not apply to Westine a federal defendant. Westine has a Sixth and Fourteenth Amendment and a statutory right under 28 USC 1654 to self-representation as 'Pro-se' in any federal court. Cite: Gonzalez-Lopez, 548 U.S. at 148-150, Winkelman, 167 Led 2d 904 is this 'Structural Error'?

The Sixth Circuit Court of Appeals has allowed others (federal defendants) to proceed as pro-se on direct appeal. Cite: United States v Morgan, No.21-2628, 10/28/2021, United States v Dorman, No. 19-3925, 3/9/2020.

2) CIRCUIT SPLIT to provide a formal dicta and to provide uniformity within the federal courts, that a violation of Federal Rule of Criminal Procedure 32(i)(3)(B) by the sentencing court is procedural error and the sentencing enhancements are deemed unconstitutional and to provide 'Procedural Due Process' under Cite: United States v Booker, 160 Led 2d 621, United States v Gall, 169 Led 2d 490, United States v Curry, 461 F3d 452 (4th Cir. 2006), United States v White, 492 F3d 380 (6th Cir 2007), United States v Vonner, 516 F3d 382-389 (6th Cir. 2008), United States V Castro-Juarez, 425 F3d 430-434 (CA7 2005), United States v Autery, 555 F3d 364 (CA9 2018), Chavez-Meza v United States, 201 Led 2d 359 (2008) United States vs Aloba, No, 19-50343 (9th cir. 2002).

3) To provide a dicta and uniformity, as the circuit's are split on the inquiry provided for a "Compassionate Release Motion" via 18 USC 3582 (c)(1)(A)(i). The courts must formally review the entire record and the 3553(a) factors at the original sentencing hearing, when it is brought to the court's attention. Some court's state the factual errors in the record and at the original sentencing hearing should be corrected when it is brought to their attention.

Cites: United States v Booker,, 160 Led 2d 621, Chavez-Meza, 201 Led 2d 359, United States v Ruffin, 978 F3d 1000 (6th Cir), United States v Jones, 980 F3d 1098 (6th Cir), United States v Rogers, 610 F3d 774 (7th Cir), United States v Burrasi, 639 F3d 774 (7th Cir), United States v Osman, No. 21-7150 (4th Cir 2022).

4) To prevent the Federal Bureau of Prisons from killing Westine, by not providing the only know cure to his terminal illness Aplastic Anemia which is a 'Stem Cell Transfusion' ..... SEE: APPENDIX G/G The F.B.O.P. has refused to provide Westine with the only cure ..... Now gave Westine a "Death Sentence".

CONCLUSION

The petition for a writ of certiorari should be granted, TO KEEP WESTINE ALIVE

Respectfully submitted,

JOHN G WESTINE

Date: JULY 17TH 2022
SEPT 12, 2022
3RD TIME

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN G. WESTINE, JR., Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2022 U.S. App. LEXIS 10231
No. 21-6099
April 14, 2022, Filed

Notice:

CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.United States v. Westine, 2014 U.S. Dist. LEXIS 171906, 2014 WL 7004930 (E.D. Ky., Dec. 10, 2014)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Charles P. Wisdom, Jr., Assistant U.S. Attorney, Lauren Tanner Bradley, Kenneth R. Taylor, Assistant U.S. Attorney, Office of the U.S. Attorney, Eastern District of Kentucky, Lexington, KY.

JOHN G. WESTINE, JR., Defendant - Appellant, Pro se, Butner, NC.

Judges: Before: SUHRHEINRICH, GILMAN, and KETHLEDGE, Circuit Judges.

Opinion

ORDER

John G. Westine, Jr., a federal prisoner proceeding pro se, appeals the district court's denial of his third motion for compassionate release, filed under 18 U.S.C. § 3582(c)(1)(A). He has also filed a motion asking that we declare that the district court lacked jurisdiction to sentence him based on its failure to comply with Rule 32(i)(3)(B) of the Federal Rules of Criminal Procedure. 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).

In 1992, Westine was convicted of multiple fraud charges stemming from a scheme in which he and others conspired to induce victims to invest in non-existent oil and gas interests and tanker loads of crude oil. The district court sentenced him to 235 months' imprisonment for those offenses, and he began serving{2022 U.S. App. LEXIS 2} a subsequent term of supervised release in 2011. Within months of his release, however, Westine embarked on a similar fraud scheme, in which he and his coconspirators used shell companies, aliases, and false information to induce victims to invest in fractional royalty interests in oil wells. A federal jury consequently convicted Westine in 2015 of conspiracy to commit money laundering, securities fraud, and twenty-six counts of mail fraud. *See* 18 U.S.C. §§ 1341, 1956; 15 U.S.C. § 78j(b). The district court sentenced Westine to a total of 480 months' imprisonment, and we affirmed Westine's convictions and sentence on direct appeal. *United States v. Ramer*, 883 F.3d 659 (6th Cir. 2018).

APPENDIX - A

In November 2019, Westine, then 74 years old, filed a pro se motion for compassionate release, asserting that he had been diagnosed with a terminal illness (aplastic anemia), that his life expectancy was less than three months, and that no further treatment was available to him in prison. The district court denied Westine's motion in February 2020, concluding that his terminal illness was an extraordinary and compelling reason warranting compassionate release but that releasing him after he had served only 65 months in prison would not reflect the seriousness of his offense, promote respect**{2022 U.S. App. LEXIS 3}** for the law, or provide adequate deterrence. The district court expressed sympathy for Westine's condition but noted that he was in his late sixties when he was sentenced, making it unsurprising that his health would decline while in custody, and that he was receiving treatment for his condition from the Bureau of Prisons ("BOP"). Westine appealed, arguing in part that the COVID-19 pandemic undermined the district court's finding that he could receive adequate treatment in prison, and he provided an additional basis for compassionate release. We vacated the district court's order and remanded the case so that the district court could consider whether the risk to Westine's health posed by COVID-19 affected its analysis of the 18 U.S.C. § 3553(a) sentencing factors. *United States v. Westine*, No. 20-5233 (6th Cir. Aug. 25, 2020).

On remand, Westine argued that he was particularly vulnerable to COVID-19 based on his age, illness, and compromised respiratory and circulatory systems, and that the positivity rate at his facility created an unacceptable risk of "certain and sudden death." He also noted that, according to BOP physicians, he was likely to die within months from complications from aplastic anemia.**{2022 U.S. App. LEXIS 4}** In light of those facts, he argued that the § 3553(a) factors were satisfied and that it was hard "to imagine anything less compassionate" than forcing him to spend his last months in prison and in fear of contracting COVID-19. In a second supplemental brief, Westine claimed, without documentation, that he could receive a "life-saving" stem-cell transplant at a facility in California if he were released. Although the district court recognized the risks posed by COVID-19, it denied Westine compassionate release after again concluding that releasing him after he had served just a fraction of his 480-month sentence "would undermine the seriousness of the crime and respect for the law" and would not "adequately deter future criminal conduct." The district court further noted that Westine was receiving ongoing treatment from the BOP, had lived well beyond his initial prognosis, and was in a single room, thus reducing his chance of contracting COVID-19. We affirmed the district court's order. *United States v. Westine*, No. 20-6197 (6th Cir. Feb. 8, 2021).

In March 2021, Westine filed another motion for compassionate release, in which he again requested a stem-cell transfusion, asserting that it was**{2022 U.S. App. LEXIS 5}** the "only known cure" for his medical condition. The district court denied Westine's motion on the grounds that he had "cited no legal authority in his [m]otion and simply relitigate[d] arguments presented twice before this Court." We affirmed. *United States v. Westine*, No. 21-5248 (6th Cir. Sept. 30, 2021).

In October 2021, Westine filed a third motion for compassionate release, which is at issue here. Although Westine's most recent motion is somewhat difficult to decipher, he appears to argue that he is entitled to compassionate release because the district judge failed to comply with Rule 32(i)(3)(B) at his sentencing hearing by not making specific findings when faced with disputes concerning his presentence report. The district court denied Westine's motion, concluding that he had "provided no new factual basis in support of his request for compassionate release and ha[d] failed to cite to proper authority which would permit [it] to grant his [m]otion."

On appeal, Westine challenges the validity of his 480-month sentence, reiterating his contention that the district court failed to strictly comply with Rule 32(i)(3)(B)'s dictates at his sentencing hearing. But such an argument is better suited for a motion to vacate,**{2022 U.S. App. LEXIS 6}** set aside, or correct his sentence under 28 U.S.C. § 2255. *See, e.g., United States v. Musgraves*, 840 F. App'x

11, 13 (7th Cir. 2021) (noting that "the correct vehicle to challenge a conviction or sentence is 28 U.S.C. § 2255 or, in rare circumstances, 28 U.S.C. § 2241"); *United States v. Handerhan*, 789 F. App'x 924, 926 (3d Cir. 2019) (per curiam) (noting that § 3582(c)(1)(A) is a "mechanism to seek a reduction in the term of a sentence, not to challenge its validity"); *see also United States v. Mattice*, No. 20-3668, 2020 WL 7587155, at *2 (6th Cir. Oct. 7, 2020).

To the extent that Westine argues that his aplastic anemia and the availability of a stem-cell transplant outside of prison entitles him to compassionate release, his argument is unavailing. As mentioned above, we affirmed the denial of Westine's initial compassionate-release motion upon finding that the district court had reasonably determined that the § 3553(a) factors-namely, the needs to reflect the seriousness of the offense, promote respect for the law, and afford adequate deterrence-counseled against compassionate release notwithstanding Westine's terminal illness and the added risks posed by COVID-19. *Westine*, No. 20-6197, slip op. at 3-4. Westine, who had served only a few more months of his sentence since his previous compassionate-release motion, offered no new information in his most recent compassionate-release motion that would warrant a different outcome.

Accordingly, we **DENY** Westine's jurisdiction-related motion and **AFFIRM**{2022 U.S. App. LEXIS 7} the district court's order.

JUDGMENT

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 judgment of the district court is AFFIRME

No. 21-6099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 26, 2022
DEBORAH S. HUNT, Clerk

USA,

Plaintiff-Appellee,

v.

JOHN G. WESTINE, JR.,

Defendant-Appellant.

ORDER

BEFORE: Judges Suhrheinrich, Gilman and Kethledge

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

B

APPENDIX B

6/2/22 Sent Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-6099

UNITED STATES OF AMERICA, APPELLEE
vs
JOHN G. WESTINE, APPELLANT

APPELLATE RULE 40(a)(2)
OPINION FILED 4/14/22

"INTRODUCTION"

1 INFORMAL PETITION FOR REHEARING AND SUGGESTION FOR EN BANC TO PROVIDE UNIFORMITY WITHIN THE CIRCUITS AND THE DECISIONS OF THE SUPREME COURT

"GROUNDS FOR REHEARING"

1. A material factual or legal matter was overlooked in the decision.

THIS COURT MUST CONSIDER THE ENTIRE RECORD "IT DID NOT"

A. WESTINE'S The district court denied ~~Parets~~ motion based on its evaluation of the § 3553(a) factors, which is an independently sufficient basis to uphold its denial. *See Ruffin*, 978 F.3d at 1008; *see also United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021). When reviewing the district court's denial of compassionate release based on the § 3553(a) factors, "we consider the entire record, including the court's balancing of the § 3553(a) factors at the original sentencing." *Ruffin*, 978 F.3d at 1008 (citing ***Chavez-Meza v. United States***, 138 S. Ct. 1959, 1966-67, 201 L. Ed. 2d 359 (2018)). This review is deferential; the district court does not abuse its discretion as long as the record demonstrates that it "considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority." *Id.* (alterations in original) (quoting *Chavez-Meza*, 138 S. Ct. at 1967). The district court might abuse its discretion, however, if it relies{2022 U.S. App. LEXIS 5} "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Jones*, 980 F.3d at 1112 (quoting *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2, 134 S. Ct. 1744, 188 L. Ed. 2d 829 (2014)).

AFFD
DENIED 6/2/22

APPENDIX - "B" 1 OF 8

B. AT SENTENCING, THE GOVERNMENT WAIVED AND FORFEITED ANY OF WESTINE'S 36 PAGES OF OBJECTIONS V/A RULE 32(i)(3)(B) NO OBJECTIONS

At sentencing, the government bears the burden to establish enhancement factors, where contested. The preponderance of the evidence standard applies to contested facts in sentencing proceedings. Fed. R. Crim. P. 32 dictates when a district court must make such factual findings. For sentencing matters that are undisputed, the court may accept any undisputed portion of the presentence report as a finding of fact. Fed. R. Crim. P. 32(i)(3)(A). Not so, however, for matters in dispute. For any disputed portion of the presentence report or other controverted matter, the court must rule on the dispute or determine that a ruling is unnecessary., Fed. R. Crim. P. 32(i)(3)(B).

FEDERAL QUESTION?
ONCE THE GOVERNMENT WAIVED & FORFEITED ITS DUTY TO OBJECT TO WESTINE'S 36+ PAGES OF OBJECTIONS VIA RULE 32(i)(3)(B) --- THE COURT MAY NOT MERELY SUMMARILY ADOPT THE PRESENTENCE REPORT --- 'NO JURISDICTION'

United States v. Adcock, 534 F.3d 635, 641 (7th Cir. 2008). And even if the argument had been merely forfeited, it's a loser. Loss amount is a fact question, *United States v. Borrasi*, 639 F.3d 774, 783 (7th Cir. 2011), and sentencing judges are permitted to adopt the proposed facts in the presentence report to which there are no objections, FED. R. CRIM. P. 32(i)(3)(A); *United States v. Rodgers*, 610 F.3d 975, 979 (7th Cir. 2010); *United States v. Sonsalla*, 241 F.3d 904, 907-08 (7th Cir. 2001); {2012 U.S. App. LEXIS 6}*United States v. Wing*, 135 F.3d 467, 469 (7th Cir. 1998). Renard misleadingly quotes *United States v. Ross*, 502 F.3d 521, 531 (6th Cir. 2007), as saying that a "Court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." Renard has left {492 Fed. Appx. 674} out, however, the crucial first clause of that sentence: "*[I]f the defendant raises a dispute to the presentence report*, **the court may not merely** summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." *Ross*, 502 F.3d at 531 (quotation marks and citation omitted) (emphasis added). Renard, as explained, did not dispute the report: he endorsed it.

"When selecting an appropriate sentence, the district court 'must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.'" *United States v. Fowler*, 819 F.3d 298, 304 (6th Cir. 2016) (quoting *United States v. Recla*, 560 F.3d 539, 547 (6th Cir. 2009). For a sentence to be procedurally reasonable, a district court must make adequate factual findings as to the imposition of contested sentencing enhancements. *United States v. Davis*, 924 F.3d 899, 904 (6th Cir. 2019). "[I]f the defendant raises a dispute to the presentence report, **the 'court may not merely** summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence.'" *United States v. Ross*, 502 F.3d 521, 531 (6th Cir. 2007) (quoting *United States v. Solorio*, 337 F.3d 580, 598 (6th Cir. 2003).

C. BASED ON THE VIOLATIONS OF RULE 32 (i)(3)(B) AS PRESENTED, A VIOLATION OF PROCEDURAL DUE PROCESS & JURISDICTIONAL CLAIMS ... COURTS MUST CORRECT THEIR FACTUAL & LEGAL ERRORS, IT DID NOT!

In the Jones decision, the United States Court of Appeals for the Sixth Circuit elaborated in detail on what is required to strike the proper balance between according due deference to district judges **while still correcting** their factual and legal errors in the context of a motion for compassionate release. In so doing, it acknowledged that district courts are not required to pen a full opinion in every sentencing or sentencing-modification decision. So, where a matter is conceptually simple and the record makes clear that the sentencing judge considered the evidence and arguments, a district court is not required to render an extensive decision.

2)

The opinion is in conflict with a decision of the United States Supreme Court, another Fourth Circuit panel, or another court of appeals, and the conflict is not addressed in the opinion.

A

When reviewing the denial of compassionate release based on the § 3553(a) factors, "we consider the entire record, including the court's balancing of the § 3553(a) factors at the original sentencing." *Id.* at 1008 (citing *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1966-67, 201 L. Ed. 2d 359 (2018)). This review is deferential; the district court does{2021 U.S. App. LEXIS 5} not abuse its discretion as long as the record demonstrates that it "considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority." *Id.* (alterations in original) (quoting *Chavez-Meza*, 138 S. Ct. at 1967).

B RULE 15(C)(2) RELATES BACK TO WESTINE'S ORIGINAL 18 USC § 3582 (c)(1)(A) CITE: MAYLE V FELIX ___ S CT ___

C. JURISDICTIONAL CLAIMS ARE REVIEWED DE NOVO CITE: 558 F3d 512 (6TH CIR)

However, because **jurisdictional issues can** never be waived, *U.S. v. County of Cook, Ill.*, 167 F.3d 381, 387 (7th Cir. 1999), the Court must consider these new facts, and hereby reverses its decision. In its sur-reply, 1100WP does not dispute any of the additional facts put forth by Wober, but argues that they are irrelevant. For the reasons stated below, the Court now grants the Plaintiff's motion to remand.

D WESTINE WAS DENIED HIS STATUTORY RIGHT TO APPEAL PRO SE, COUNSEL OF CHOICE & 28 USC § 1654

CITE: US VS GONZALEZ-LOPEZ 165 L.Ed 2d 409

FEDERAL DEFENDANTS HAVE A STATUTORY RIGHT TO APPEAL IN FEDERAL COURT

NOT SO FOR STATES

CITE: MARTINEZ VS STATES OF CALIF

Neither Faretta's holding nor its reasoning requires a State to recognize a constitutional **right to self-representation on** direct appeal from a criminal conviction. Although some of Faretta's reasoning is applicable to appellate proceedings as well as to trials, there are significant distinctions. First, the historical evidence Faretta relied on as identifying a right of self-representation, 422 US, at 812-817, 45 L Ed 2d 562, 95 S Ct 2525, is not useful here because it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime, whereas it has since been recognized that every indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel, see Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792. Moreover, unlike the right recognized in Faretta, the historical evidence does not provide any support for an affirmative constitutional right to appellate self-representation. Second, Faretta's reliance on the Sixth Amendment's structure interpreted in light of its English and colonial background, 422 US, at 818-832, 45 L Ed 2d 562, 95 S Ct 2525, is not relevant here. Because the Amendment deals strictly with trial rights and does not include any right to appeal, see Abney v United States, 431 US 651, 656, 52 L Ed 2d 651, 97 S Ct 2034, it necessarily follows that the Amendment itself does not provide any basis for finding a right to appellate self-representation. Faretta's inquiries into historical English practices, 422 US, at 821-824, 45 L Ed 2d 562, 95 S Ct 2525, do not provide a basis for extending that case to the appellate process because there was no appeal from a criminal conviction in England until 1907. Third, although Faretta's conclusion that a knowing and intelligent waiver of the right to trial counsel must be honored out of respect for individual autonomy, id., at 834, 45 L Ed 2d 562, 95 S Ct 2525, is also applicable in the appellate context, this Court has recognized that the right is not absolute, see id., at 835, 45 L Ed 2d 562, 95 S Ct 2525. Given the Court's conclusion that the Sixth Amendment does not apply to appellate proceedings, any individual **right to self-representation on** appeal based on autonomy principles must be grounded in the Due Process Clause. Under the practices prevailing in the Nation today, the Court is entirely unpersuaded that the risk of disloyalty by a court-appointed attorney, or the suspicion of such disloyalty, that underlies the constitutional right of self-representation at trial, see id., at 834, 45 L Ed 2d 562, 95 S Ct 2525, is a sufficient concern to conclude that such a right is a necessary component of a fair appellate proceeding. The States are clearly within their discretion to conclude that the government's interests in ensuring the integrity and efficiency of the appellate process outweigh an invasion of the appellant's interest in self-representation, although the Court's narrow holding does not preclude the States from recognizing a constitutional right to appellate self-representation under their own constitutions.

E. NO OPINION GIVEN

Finally, we note that an alleged **misapplication of the sentencing guidelines** is not cognizable under § 2255 and is reviewable only on direct appeal. *Cortez v. United States,* No. 93-2799, 1994 U.S. App. LEXIS 4000, at *5 {1994 U.S. App. LEXIS 4} (8th Cir. March 8, 1994) (per curiam); *Scott v. United States,* 997 F.2d 340, 342-43 (7th Cir. 1993); *see also United States v. Walsh,* 733 F.2d 31, 35 (6th Cir. 1984) (claims challenging a defendant's sentence are considered waived if no objection is lodged at sentencing and no argument is raised on direct appeal)

First, as discussed earlier, a request for a sentence reduction, which is what Petitioner effectively is seeking, does not state a cognizable claim that qualifies for § 2255 review. **Sentencing claims are** to be raised on direct appeal. *Wheeler v. United States*, 329 F. App'x 632, 634-36 (6th Cir. 2009). Even if review of Petitioner's claim were appropriate in a § 2255 motion, Amendment 794, as Petitioner recognizes, is a "clarifying amendment." *See United States v. Carter*, 662 F. App'x 342, 349 (6th Cir. 2016). If a petitioner does not attack her sentence on direct appeal (and Petitioner did not), "a clarifying amendment may provide the basis for § 2255 relief only if it brings to light{2019 U.S. Dist. LEXIS 16} a 'complete miscarriage of justice.'" *Diaz v. United States*, No. 16-6834, 2017 U.S. App. LEXIS 27864, 2017 WL 6569901, at *1 (6th Cir. June 23, 2017) (quoting *Grant v. United States*, 72 F.3d 503, 506 (6th Cir. 1996)). "A prisoner may challenge a sentencing error as a 'fundamental defect' on collateral review when [s]he can prove that [s]he is either actually innocent of h[er] crime or that a prior conviction used to enhance h[er] sentence has been vacated." *Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (alteration added).

F NO OPINION BY THE 6TH C.I.R.

{201 L. Ed. 2d 362}{138 S. Ct. 1961} The Federal Sentencing Guidelines require a sentencing judge to first identify the recommended Guidelines sentencing range based on certain offender and offense characteristics. The judge might choose a penalty within that Guidelines range, or the judge may ``depart" or ``vary" from the Guidelines and select a sentence outside the range. See *United States* v. *Booker,* 543 U. S. 220, 258-265, 125 S. Ct. 738, 160 L. Ed. 2d 621. Either way, the judge must take into account certain statutory sentencing factors, see 18 U. S. C. § 3553(a), and must ``state in open court the reasons for [imposing] the particular sentence," § 3553(c). But when it comes to how detailed that statement of reasons must be, ``[t]he law leaves much . . . to the judge's own professional judgment." *Rita* v. *United States,* 551 U. S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203. The explanation need not be lengthy, especially where ``a matter is . . . conceptually simple . . . and the record makes clear that the sentencing judge considered the evidence and arguments." *Id.*, at 359, 127 S. Ct. 2456, 168 L. Ed. 2d 203, 219.

BASED ON THE FORE GOING VIOLATION OF RULE 32(i)(3)(B) AND WESTINE'S JURISDICAL CLAIMS PRESENTED THE COURT IS BARRED FROM USING ANY DISPUTED FACTS IN THE PSR.

However,{2015 U.S. App. LEXIS 23} failure to actually find facts by a preponderance of the evidence on contested matters during sentencing is error. Federal Rule of Criminal Procedure 32(i)(3)(B) requires the district court to rule on "any disputed portion of the presentence report or other controverted matter," at sentencing. *White*, 492 F.3d at 415 (quoting Fed. R. Crim. P. 32(i)(3)(B)). In *White*, we stated that **the "'court may not merely** summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence.'" *Id.* (internal citation omitted). Rather, once the defendant raises a dispute regarding the presentence report during sentencing, the district court must "*actually find facts*, and it must do so by a preponderance of the evidence." *Id.* at 416 (emphasis in original). And we reiterated that "literal compliance" with Rule 32 is required "'for a variety of reasons, such as enhancing the accuracy of the sentence and the clarity of the record.'" *Id.* at 415. Furthermore, "[w]hen a defendant raises a particular[, nonfrivolous] argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *Wallace*, 597 F.3d at 803 (internal quotation marks omitted).

No Jurisdiction to Use PSR.

Because the majority invalidates 18 U.S.C. § 3553(b)(1)(Supp. IV)[18 USCS § 3553(b)(1)] on its face, it is driven also to invalidate § 3742(e) (2000 ed. and Supp. IV) [18 USCS § 3742(e)], which establishes standards of review for sentences and is premised on the binding nature of the Guidelines. See, *e.g.*, § 3742(e)(2) (2000 ed.)) (directing the court of appeals to determine whether the sentence "was imposed as a result of an incorrect application of the sentencing guidelines"); § 3742(e)(3)) (directing the court of appeals to determine whether the sentence "is outside the applicable guideline range" and satisfies other factors). Given that (as I explain) there is no warrant for striking § 3553(b)(1) on its face, striking § 3742(e) as well only does further needless violence to the statutory scheme.

{2005 U.S. LEXIS 178} The majority's excision of § 3553(b)(1) is at once too narrow and too broad. It is too narrow in that it focuses only on § 3553(b)(1), when Booker's **unconstitutional sentence enhancements** stemmed not from § 3553(b)(1) alone, but from the combination of § 3553(b)(1) and individual Guidelines. Specifically, in Booker's case, the District Court increased the base offense level 2 under these Guidelines: 3 USSG § 1B1.3(a)(2), which instructs that the base offense level shall (for certain offenses) take into account all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction"; § 2D1.1(c)(2), which sets the offense level for 500g to 1.5kg of cocaine base at 36; and § 3C1.1, which provides for a two-level increase in the offense level for obstruction of justice. The court also implicitly applied § 1B1.1, which provides general instructions **{160 L. Ed. 2d 695}** for applying the Guidelines, including determining the base offense level and applying appropriate adjustments; § 1B1.11(b)(2), **{543 U.S. 316}** which requires that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety"; § 6A1.3(b)**{2005 U.S. LEXIS 179}** p. s., 4 which provides that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P."; and Rule 32(c)(1), 5 which in turn provided:

{125 S. Ct. 797}"At the sentencing hearing, the court . . . must rule on any unresolved objections to the presentence report. . . . For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."

2

Booker's base offense level (supported by the facts the jury found) was 32. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c)(4) (Nov. 2003) (USSG) (setting the base offense level for the crime of possession with intent to sell 50 to 150 grams of cocaine base at 32).

NO OPINION

G. INEFFECTIVE §3006A FAILED TO ADDRESS ANY OF THESE CLAIMS FOR COMPASSIONATE RELEASE 18 USC § 3582 (C)(1)(A) — LACK OF KNOWLEDGE, NO UP TO CURRENT CASE LAW

WESTINE'S

We do not reach the merits of ~~Aloba's~~ specific challenges to his sentence on appeal because a procedural error requires remand for resentencing. In imposing the sentence, the district court did not address any of Aloba's objections to the calculation of the Sentencing Guidelines or analyze any of the 18 U.S.C. § 3553(a) factors. Despite the government's efforts to create a record on these issues, the court simply stated, "[t]he Court . . . has accepted the presentence report," and "[t]he Court has considered and has adopted the presentence report's calculations and the reasons in the presentence report calculation." That explanation is not sufficient in light of the specific objections and arguments raised by the defendant. *See* Fed. R. Crim. P. **32(i)(3)(B)**; *United States v. Doe*, 705 F.3d 1134, 1153 (9th Cir. 2013) ("The Ninth Circuit has mandated strict compliance with Rule 32, explaining that the rulings must be express or explicit.") (quotation marks omitted); *United States v. Carty*, 520 F.3d 984, 992-93 (9th Cir. 2008) ("[W]hen**{2022 U.S. App. LEXIS 4}** a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position."). The district court's "total omission goes against the explicit policy" that a sentencing judge "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *United States v. Trujillo*, 713 F.3d 1003, 1010 (9th Cir. 2013) (quoting *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)). Because the failure to calculate the Guidelines correctly and consider the § 3553(a) factors is a "significant procedural error," *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *see also* 18 U.S.C. § 3553(c) (requiring a district court to "state in open court the reasons for its imposition of the particular sentence"), remand for a complete resentencing is required.

IN CONCLUSION

WILL THIS COURT GRANT REHEARING TO PROTECT WESTINE'S CONSTITUTIONAL & PROCEDURAL DUE PROCESS RIGHTS AS PRESENTED?

SIGNED DATED
& MAILED
4/21/22

RESPECTFULLY SUBMITTED
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-6099

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN G. WESTINE, JR.,

Defendant-Appellant.

Before: SUHRHEINRICH, GILMAN, and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.

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 judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.