APPENDIX

A

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROY CHRISTOPHER WEST, Defendant-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
70 F.4th 341; 2023 U.S. App. LEXIS 14424; 2023 FED App. 0122P (6th Cir.)
23a0122p.06No. 22-2037
June 9, 2023, Decided
June 9, 2023, Filed

Editorial Information: Prior History

{2023 U.S. App. LEXIS 1}Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:06-cr-20185-1-Victoria A. Roberts, District Judge.United States v. West, 2022 U.S. Dist. LEXIS 202370, 2022 WL 16743864 (E.D. Mich., Nov. 7, 2022)

Counsel ON BRIEF: Jessica Currie, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellant.

Craig A. Daly, CRAIG A. DALY, P.C., Royal Oak, Michigan, for Appellee.

Judges: Before: BOGGS, GIBBONS, and McKEAGUE, Circuit Judges.

CASE SUMMARY Abiding by the spirit and language of case law, as well as the persuasive authority of at least five sibling circuits, the court held that the presumed sentencing error in defendant's case, an Apprendi violation, could not serve as an extraordinary and compelling reason for his compassionate release under 18 U.S.C.S. § 3582(c)(1)(A)(i).

OVERVIEW: HOLDINGS: [1]-Abiding by the spirit and language of case law, as well as the persuasive authority of at least five sibling circuits, the court held that the presumed sentencing error in defendant's case, an Apprendi violation, could not serve as an extraordinary and compelling reason for his compassionate release under 18 U.S.C.S. § 3582(c)(1)(A)(i); [2]-Sentencing disparity was also insufficient to justify compassionate release here; as it would be improper to use compassionate release to address sentencing errors and thereby circumvent 28 U.S.C.S. § 2255, then it would be improper to allow a defendant or court to further avoid this limitation by reframing a sentencing error as a sentencing disparity; [3]-Defendant did not provide any extraordinary and compelling reasons to justify his early release and the district court abused its discretion in reaching the contrary conclusion.

OUTCOME: Reversed and remanded.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion
Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

A district court's grant of compassionate release is reviewed for abuse of discretion. An abuse of discretion occurs when the district court applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact. The court might abuse its discretion if, for example, its denial was based on a purely legal mistake such as a misreading of the extraordinary-and-compelling-reasons requirement. The district court might also have abused its discretion if it engaged in a substantively unreasonable balancing of the 18 U.S.C.S. § 3553(a) factors.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

The First Step Act allows prisoners to move for sentence reduction under a variety of circumstances, including when extraordinary and compelling reasons warrant sentence reduction-also called compassionate release. 18 U.S.C.S. § 3582(c)(1)(A)(i). The Sixth Circuit has predominantly defined what can constitute extraordinary and compelling reasons for release by defining what circumstances cannot be extraordinary and compelling.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Sentences
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

Compassionate release cannot provide an end run around habeas. Because 28 U.S.C.S. § 2255 provides a specific, comprehensive statutory scheme for post-conviction relief, any attempt to attack a prisoner's sentence or conviction must abide by its procedural strictures. Once a prisoner has already filed and appealed the denial of a § 2255 motion, relief cannot be obtained in a successive § 2255 motion unless new evidence or a new rule of constitutional law is announced. 28 U.S.C.S. § 2255(b), (h)(1)-(2). And a defendant cannot avoid these restrictions on post-conviction relief by resorting to a request for compassionate release instead.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

Sibling circuits have held that sentencing errors cannot provide an extraordinary and compelling reason for compassionate release. This conclusion fits the judiciary's intuition that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

Non-retroactive changes in sentencing law cannot be considered; the text of the compassionate-release statute itself supports categorical exclusions.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

Congress has instructed that rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason for compassionate release. 28 U.S.C.S. § 994(t).

Opinion

Opinion by: JULIA SMITH GIBBONS

Opinion

JULIA SMITH GIBBONS, Circuit Judge. Roy **West** was convicted for his participation in a murder-for-hire conspiracy and sentenced to life in prison. After his direct appeals and 28 U.S.C. § 2255 motion failed, **West** sought **compassionate release** under 18 U.S.C. § 3582. In that motion, he argued for the first time that his sentence violated ***Apprendi*** *v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He claimed that the jury instructions given at his trial did not sufficiently require the jury to find that death resulted from the conspiracy-a necessary finding for the court to impose a life sentence for the crime. The district court found that the ***Apprendi*** error and West's rehabilitation constituted "extraordinary and compelling reasons" to reduce his sentence and granted **West compassionate release** after seventeen years' imprisonment. 18 U.S.C. § 3582(c)(1)(A).

On appeal, the government argues that the judgment of the district{2023 U.S. App. LEXIS 2} court should be reversed because it improperly used **compassionate release** as a vehicle for second or successive § 2255 motions. We agree and reverse.

I.

In November 2005, the Federal Bureau of Investigation ("FBI") began wire intercepts of cellular telephones, including one used by **West**, as part of an unrelated drug investigation. Over the course of those calls, the FBI learned that a man named Leonard Day had stolen over $300,000 in cash and jewelry, a .40-caliber gun, and car keys from **West** while hiding out in West's home in Akron, Ohio. FBI agents began to suspect that Day's life was in danger from **West** and his associates.

Once **West** learned of the theft, he immediately began searching for Day. Upon learning that Day might be at the Akron Greyhound bus station, **West** offered $1,000 to anyone who would go to the station and search for Day to get West's jewelry back, instructing them to take a gun with them because "ain't nothing to talk about." DE 726-1, Wiretap Tr., Page ID 8685. Two of West's associates accepted this offer and searched the station for Day but could not find him. FBI agents also attempted to find Day on the Greyhound bus from Akron to Michigan but were unsuccessful.

The next{2023 U.S. App. LEXIS 3} day, November 11, the manhunt extended to Day's hometown of Detroit. **West** brought "an army" of at least eight other people, as well as firearms and bulletproof vests, to aid in the search for Day. DE 677, Trial Tr., Page ID 7926-29. The group went to various locations where Day had been sighted but could not find him. The group spotted Day's girlfriend outside of a hotel and attempted to confront her, but she escaped into a store where she asked for police assistance. Although **West** and several associates were arrested in connection with the incident, they were never charged.

Released days later, **West** returned home to Akron. With Day and **West** once again in separate cities, the FBI believed that the threat to Day had diminished but continued the wiretap on West's phone. The arrests had also spooked some of West's associates, including Michael Bracey, who testified that **West** offered him $50,000 to kill Day after Bracey expressed reservations about continuing to look for Day.

Marcus Freeman, another associate of **West**, befriended Day's cousins in an attempt to discover his location. **West**, Freeman, and Christopher Scott, another associate, frequently communicated over the coming weeks. Freeman**{2023 U.S. App. LEXIS 4}** repeatedly assured **West** that he was "on it" and "fittin' to wrap this up" for **West** because he was "embarrassed" that it had taken so long. DE 726-1, Wiretap Tr., Page ID 8753.

The hunt for Day came to a head in mid-December. On December 17, Freeman called **West** for help locating a property on Kilbourne Street in Detroit. Three days later, Day was fatally shot outside a house on Kilbourne Street. Cellular data showed a cellphone linked to Freeman and Scott making calls in the area of the killing for hours leading up to Day's death. Three minutes after a 911 call was made to report the shooting, Freeman called **West** and repeatedly sang "We get rich, Ohio." *Id.* at Page ID 8760. Freeman apologized that he could not "get the bonus"-which the government interpreted as West's jewelry-but that "the situation is over with." *Id.* **West** then called Bracey to inform him that "motha' fuckers just called" and told **West** that "dude is up out of here." *Id.* at Page ID 8761. Minutes later, **West** called his brother and told him that "somebody done murdered that n***** Buck man"-referring to a nickname of Day. *Id.* at Page ID 8765; *see* DE 677, Trial Tr., Page ID 7919.

In the early hours of December 21, Freeman**{2023 U.S. App. LEXIS 5}** and Scott drove to meet **West** at his home in Akron. Later in the day, Scott called **West** and said, "Did you count that?" and then told **West** that the "count" was "fifty-six twenty." DE 726-1, Wiretap Tr., Page ID 8773-75. The prosecution argued that this was a reference to the amount of money collected from **West**, possibly $5,620.

The defense's theory was that **West** was just one of many people with incentive to harm Day. Cross-examination of multiple prosecution witnesses revealed that Day's sudden return to Detroit with flashy jewelry and extra cash had caught the attention of "haters" in the neighborhood. DE 679, Trial Tr., Page ID 8078-80. Just a week before his murder, Day was robbed at gunpoint for the chain he was wearing-one he had stolen from **West**.

West was indicted in the Eastern District of Michigan for conspiracy to use interstate commerce facilities in the commission of a murder-for-hire under 18 U.S.C. § 1958. After West's first trial ended in a mistrial, he was retried. Relevant to this appeal, the court instructed the jury that a guilty verdict required finding that one or more members of the conspiracy had (1) "traveled in interstate commerce"; (2) "done so with the intent that a murder**{2023 U.S. App. LEXIS 6}** be committed"; and (3) "intended that the murder be committed as consideration for the promise or agreement to pay anything of pecuniary value." DE 679, Trial Tr., Page ID 8106. While the court defined "murder" under Michigan law, it did not require the jury to make a finding about whether Day's death was the result of the murder-for-hire conspiracy. *See generally, id.* at Page ID 8106-08. With these instructions, the jury returned a guilty verdict.

On August 25, 2011, the court held West's sentencing hearing. The Presentence Investigation Report ("PSR") stated that the offense carried a mandatory life sentence. The court, prosecutor, and West's trial counsel all agreed with this assessment and the court sentenced **West** to life in prison without the possibility of parole. On direct appeal, West's conviction and sentence were affirmed by this court, *United States v.* ***West*** (***"West I"***), 534 F. App'x 280 (6th Cir. 2013), and the Supreme Court denied certiorari.

On December 16, 2014, **West** moved to vacate his sentence under 28 U.S.C. § 2255. The court denied both the § 2255 motion and his subsequent motion for reconsideration. When **West** sought to appeal, this court denied him a certificate of appealability. ***West*** *v. United States*, No. 18-1441 (6th

Cir. Sept. 11, 2018) (order). He then petitioned this court to{2023 U.S. App. LEXIS 7} consider a second or successive § 2255 motion on the ground that the Armed Career Criminal Act's "residual clause" was unconstitutionally vague. We denied that motion as **West** was not convicted under the residual clause.

On June 17, 2022, **West** moved for sentence reduction under 18 U.S.C. § 3582(c)(1)(A). He claimed that the jury instructions in his trial of conviction violated ***Apprendi*** *v. New Jersey*, because the instructions only required that the jury find that **West** conspired to violate the statute. Conspiracy alone carries a maximum sentence of ten years' imprisonment under the statute. 18 U.S.C. § 1958(a). Life imprisonment requires a jury finding that "death result[ed]" from the conspiracy. *Id.* **West** argued that, because the jury did not make that finding, his sentence was in error, thus justifying his early release. He also argued that his obesity, hypertension, and other medical conditions supported his early release.

The district court found that an ***Apprendi*** violation had occurred and created harmful error in West's sentencing. It granted **compassionate release** based on that violation, West's rehabilitation efforts, and other reasons, though it rejected his argument that his medical conditions supported his release. The government appealed, and we granted the government's emergency{2023 U.S. App. LEXIS 8} order to stay West's release pending appeal.

II.

A district court's grant of **compassionate release** is reviewed for abuse of discretion. *United States v. Hunter*, 12 F.4th 555, 561 (6th Cir. 2021). An abuse of discretion occurs when the district court "applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *United States v. McKinnie*, 24 F.4th 583, 586 (6th Cir. 2022) (quoting *United States v. Moore*, 582 F.3d 641, 644 (6th Cir. 2009)). "The court might abuse its discretion if, for example, its 'denial was based on a purely legal mistake' such as a misreading of the extraordinary-and-compelling-reasons requirement." *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020) (quoting *United States v. Richardson*, 960 F.3d 761, 764 (6th Cir. 2020) (per curiam)). The district court might also have abused its discretion "if it engaged in a substantively unreasonable balancing of the § 3553(a) factors." *Id.* (citations omitted).

III.

The First Step Act allows prisoners to move for sentence reduction under a variety of circumstances, including when "extraordinary and compelling reasons" warrant sentence reduction-also called "**compassionate release**." 18 U.S.C. § 3582(c)(1)(A)(i); *see United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc). Our court has predominantly defined what can constitute "extraordinary and compelling" reasons for release by defining what circumstances *cannot* be "extraordinary and compelling." *See, e.g., Hunter*, 12 F.4th at 570 ("[F]acts that existed at sentencing cannot later be construed as 'extraordinary{2023 U.S. App. LEXIS 9} and compelling reasons' to reduce a final sentence."); *McCall*, 56 F.4th at 1066 ("Nonretroactive legal developments do not factor into the extraordinary and compelling analysis."); *United States v. Sherwood*, 986 F.3d 951, 953-54 (6th Cir. 2021) (holding that district courts cannot solely rely on U.S.S.G. § 1B1.13 to deny **compassionate release**).

West, however, argues that this circuit has never directly addressed whether sentencing errors can be considered "extraordinary and compelling" reasons for **compassionate release**. He claims that his case is distinguishable from *Hunter* and *McCall* because he does not seek release based on a nonretroactive legal development. Instead, he asserts that his circumstances are narrow and rare: a prisoner with an unconstitutional sentence, with no remaining post-conviction avenues for relief, who

would be free today if not for failures of the government, the court, and his counsel at every turn. For our purposes, we presume that **West** is correct that a harmful ***Apprendi*** violation occurred and consider whether such an error can be considered by district courts in deciding **compassionate release** motions.

Despite West's claims to the contrary, our en banc opinion in *McCall* dispositively explained that **compassionate release** cannot "provide an end run around habeas." 56 F.4th at 1058. Because § 2255 provides a**{2023 U.S. App. LEXIS 10}** specific, comprehensive statutory scheme for post-conviction relief, any attempt to attack a prisoner's sentence or conviction must abide by its procedural strictures. *Id.*; *see generally Preiser v. Rodriguez*, 411 U.S. 475, 485-86, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). Once a prisoner has already filed and appealed the denial of a § 2255 motion (as **West** has done), relief cannot be obtained in a successive § 2255 motion unless new evidence or a new rule of constitutional law is announced. *McCall*, 56 F.4th at 1057; *see* 28 U.S.C. §§ 2255(b), (h)(1)-(2). And **West** "cannot avoid these restrictions on 'post-conviction relief' by 'resorting to a request for **compassionate release** instead.'" *McCall*, 56 F.4th at 1057 (quoting *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022)).1

Even if we could distinguish *McCall*, sibling circuits have held that sentencing errors cannot provide an "extraordinary and compelling" reason for **compassionate release**. *See United States v. Jenkins*, 50 F.4th 1185, 1200 (D.C. Cir. 2022) ("Legal errors at sentencing are neither extraordinary nor compelling."); *United States v. Escajeda*, 58 F.4th 184, 188 (5th Cir. 2023) ("Because Escajeda's claims would have been cognizable under § 2255, they are not cognizable under § 3582(c)."); *United States v. Amato*, 48 F.4th 61, 65 (2d Cir. 2022) (per curiam) ("[A]rguments challenging the validity of an underlying conviction cannot be raised in a § 3582 motion . . . . Rather, such arguments are properly raised on direct appeal or collateral review pursuant to 28 U.S.C. § 2255."); *United States v. Ferguson*, 55 F.4th 262, 270 (4th Cir. 2022) ("Appellant's attempt to collaterally attack his convictions and sentence via a**{2023 U.S. App. LEXIS 11}** **compassionate release** motion ignores the established procedures for doing so. Namely, 28 U.S.C. § 2255 is '[t]he exclusive remedy' for challenging a federal conviction or sentence after the conclusion of the period for direct appeal[.]" (first alteration in original) (quoting *United States v. Simpson*, 27 F. App'x 221, 224 (4th Cir. 2001) (Traxler, J., concurring))); *Crandall*, 25 F.4th at 586. This conclusion fits the judiciary's intuition that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

The First Circuit alone has allowed that a sentencing error *might* provide "extraordinary and compelling" reasons for **compassionate release**. *See United States v. Trenkler*, 47 F.4th 42, 49-50 (1st Cir. 2022). Trenkler's case was similar to West's: he was sentenced to life in prison on facts that required a jury finding, but no such jury finding was made, and no one uncovered this error until nearly ten years after his conviction and well past his direct appeals and exhaustion of the § 2255 process. *Id.* at 45-46. The district court in *Trenkler* was similarly sympathetic to this combination of institutional errors and granted **compassionate release**. *Id.* at 46. But on appeal, the First Circuit refused to either "reject[] or endorse[] . . . the district court's outcome" and instead**{2023 U.S. App. LEXIS 12}** vacated and remanded the case for further consideration in light of the recently decided *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022). *Id.* at 50.

Trenkler, however, cannot support West's argument because the First Circuit's **compassionate-release** jurisprudence is far broader than our own. *Ruvalcaba* emphasized an "individualized consideration of a defendant's circumstances in connection with a **compassionate-release** motion," rather than an absolute, "categorial" exclusion of nonretroactive

changes in sentencing law. 26 F.4th at 27-28. This view is at odds with the view expressed by our court in *McCall*. *See McCall*, 56 F.4th at 1063 (holding that non-retroactive changes in sentencing law cannot be considered, arguing that "the text of the **compassionate-release** statute itself" supports "categorical exclusion[s]" (citation omitted)).

Abiding by the spirit and language of *McCall*, as well as the persuasive authority of at least five sibling circuits, we must conclude that the presumed sentencing error in West's case cannot serve as an extraordinary and compelling reason for his **compassionate release**.

IV.

West is left with the district court's other two "extraordinary and compelling" grounds for relief: sentencing disparity and rehabilitation. Both are insufficient to justify **compassionate release** here.**{2023 U.S. App. LEXIS 13}** First, the district court reasoned that other defendants sentenced under the murder-for-hire conspiracy statute have been sentenced to the ten-year statutory maximum-not life imprisonment without the possibility of parole-and therefore a sentencing disparity existed that could be considered by the court as extraordinary and compelling. DE 973, Order, Page ID 12931-32; *see* 18 U.S.C. § 3553(a)(6). But this identified disparity is just the same alleged ***Apprendi*** error by a different name. If it would be improper to use **compassionate release** to address sentencing errors and thereby circumvent § 2255, then it would be improper to allow a defendant or court to further avoid this limitation by reframing a sentencing error as a sentencing disparity.

Without the sentencing error or disparity arguments, **West** is left only with rehabilitation as the basis for his **compassionate release**. Congress has instructed that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for **compassionate release**. 28 U.S.C. § 994(t). Thus, **West** has not provided any extraordinary and compelling reasons to justify his early release and the district court abused its discretion in reaching the contrary conclusion.

V.

For the**{2023 U.S. App. LEXIS 14}** foregoing reasons, we reverse the judgment of the district court and remand with instructions to deny the motion for **compassionate release**.

Footnotes

1

McCall's breadth is evident in its application here. A once highly discretionary decision of the district court, as broadly suggested by the Supreme Court in *Concepcion v. United States*, 142 S. Ct. 2389, 213 L. Ed. 2d 731 (2022), has been severely and categorically cabined. *See McCall*, 56 F.4th at 1074-76 (Gibbons, J., dissenting).

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff, v. ROY WEST, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
2022 U.S. Dist. LEXIS 202370
Case No. 06-20185
November 7, 2022, Decided
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Editorial Information: Prior History

United States v. West, 2008 U.S. Dist. LEXIS 107250 (E.D. Mich., Dec. 23, 2008)

Counsel **{2022 U.S. Dist. LEXIS 1}**For U.S. Attorneys: Elizabeth A. Stafford, LEAD ATTORNEY, Dawn N. Ison, Mark Chutkow, Patricia G. Gaedeke, U.S. Attorney's Office, Detroit, MI USA; Michael C. Leibson, LEAD ATTORNEY, Jessica Vartanian Currie, Margaret M Smith, United States Attorney's Office, Detroit, MI USA.

Judges: Victoria A. Roberts, United States District Judge.

Opinion

Opinion by: Victoria A. Roberts

Opinion

ORDER GRANTING DEFENDANT'S MOTION FOR SENTENCE REDUCTION UNDER 18 U.S.C. § 3582(c)(1)(A) [ECF No. 969]

I. INTRODUCTION

Roy **West** is in year 17 of a life without parole sentence. The indictment and case submitted to the jury should have netted **West** not more than ten years in prison.

Errors on the part of competent people - prosecutors, defense counsel, probation officers and, ultimately, this judge at the time of sentencing - resulted in the imposition of a sentence in violation of the law on **West**. Even skilled appellate counsel failed to raise the sentencing error.

West has no way to correct this extraordinary and compelling error - and end his days in prison - but through his now pending motion for sentence reduction (**compassionate release**).

18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, opens an avenue for this Judge to correct a fundamentally unfair sentence that did not exist**{2022 U.S. Dist. LEXIS 2}** before. Justice and faith in our judicial system demand correction for the benefit of Roy **West**.

This human error on multiple levels, the resulting sentencing disparity, the absence of any other avenue for relief, and West's extraordinary rehabilitation constitute extraordinary and compelling reasons for sentence reduction. The 18 U.S.C. § 3553(a) factors support a sentence reduction as

well.

The Court **GRANTS** West's motion. [ECF No. 969].

II. BACKGROUND

A grand jury returned a first superseding indictment in June 2010 charging **West** with conspiracy to use interstate commerce facilities in the commission of murder for hire in violation of 18 U.S.C. § 1958. **West** was tried twice on this charge.

The first time around, the jury failed to reach a verdict. The Court declared a mistrial. A second jury convicted **West** in April 2011.

On August 25, 2011, the Court imposed a life sentence on **West**.

The Sixth Circuit affirmed West's conviction on direct appeal. *United States v.* ***West***, 534 Fed. Appx. 280 (6th Cir. 2013). Thereafter, **West** filed a motion for a new trial followed by a motion to vacate his sentence under 28 U.S.C. § 2255. The Court denied both motions.

West filed this motion in June 2022. In it, he raises for the first time an unmistakable sentencing error which everyone overlooked until now. The motion**{2022 U.S. Dist. LEXIS 3}** is fully briefed.

III. DISCUSSION

Section 3582(c)(1)(A) authorizes the Court to reduce a defendant's sentence if he demonstrates that: (1) "extraordinary and compelling reasons" warrant a reduction; (2) a reduction is "consistent with applicable policy statements issued by the Sentencing Commission"; and (3) the relevant § 3553(a) factors support a reduction. *United States v. Hunter*, 12 F.4th 555, 561 (6th Cir. 2021) (quoting § 3582(c)(1)(A)). "Currently, no policy statement applies where a defendant (as opposed to the Bureau of Prisons) files a motion seeking a sentence reduction." *United States v. McKinnie*, 24 F.4th 583, 586 (6th Cir. 2022). Therefore, the Court "must deny a defendant's motion if the defendant fails to show either that extraordinary and compelling reasons warrant a sentence reduction or that the § 3553(a) factors support a reduction." *Id.*

West says an extraordinary and compelling reason for a sentence reduction is that the Court imposed a life sentence on him even though the jury did not make a finding that death resulted from the conspiracy. He says this violated his constitutional rights as set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

West also contends that his medical conditions, race, and age place him at a higher risk for serious illness from COVID-19. Finally, **West** says that § 3553(a) factors - and in particular, the disparate sentences imposed on his co-defendants -**{2022 U.S. Dist. LEXIS 4}** support his request for relief.

The government opposes West's motion. It says: (1) the evidence at trial overwhelmingly showed a causal link between West's conspiracy and Leonard Day's death, so any *Apprendi* violation was harmless; (2) even if **West** could overcome the harmlessness threshold, **compassionate release** is not a proper remedy for an *Apprendi* violation, and finding otherwise would allow prisoners to bypass the strictures of habeas law, effectively abrogating AEDPA's limitations on successive § 2255 motions; and (3) **West** fails to establish extraordinary and compelling reasons based on his medical conditions and risk from COVID-19.

IV. EXTRAORDINARY AND COMPELLING REASONS SUPPORT SENTENCE REDUCTION

A. This Court Imposed an Illegal Sentence on Roy West

The statute of conviction - 18 U.S.C. § 1958 - provides alternative, enhanced punishments:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as**{2022 U.S. Dist. LEXIS 5}** consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and **if personal injury results**, shall be fined under this title or imprisoned for not more than twenty years, or both; and **if death results**, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both. 18 U.S.C. § 1958(a) (emphasis added).

The first superseding indictment charged **West** with conspiring to travel in interstate commerce, and to use a facility of interstate commerce ***with the intent to murder*** Leonard Day. The indictment did not include any allegation that personal injury or death ***actually*** resulted from the conspiracy, and it did not charge **West** with any substantive count requiring the jury to decide if murder occurred. Indeed, in denying West's motion to vacate, the Court found that: "The cause of Leonard Day's death is not pertinent to West's criminal charge. **West** was charged with the crime of conspiracy to use interstate facilities in the commission of a murder for hire. Day's cause of death was not an element of this offense." [ECF No. 923, PageID.12302].

Moreover,**{2022 U.S. Dist. LEXIS 6}** as **West** points out, "The jury was not instructed that . . . death was an element, nor was there any special finding[] by the jury that the government proved beyond a reasonable doubt that there was a death." [ECF No. 969, PageID.12798].

Nonetheless, at sentencing, the Court noted: "[The Probation Officer] concludes and everyone is in agreement that . . . the Court is bound to impose a mandatory life sentence on Mr. **West**." [ECF No. 682, PageID.8190]. **West** did not object at sentencing, nor did he raise it on appeal or in post-trial motions for relief.

West now argues that the life sentence violated *Apprendi*, and that the *Apprendi* violation constitutes an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A).

The Court agrees with **West**: imposition of a life sentence without submitting the question of whether death resulted from the conspiracy to the jury violated *Apprendi*, because: (1) § 1958(a) imposes three distinct penalties; and (2) the alternatives under § 1958(a) are elements for conviction that must be submitted to the jury and found beyond a reasonable doubt. *See Mathis v. United States*, 579 U.S. 500, 518, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016) ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."); *Burrage v. United States*, 571 U.S. 204, 210, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014) ("Because the 'death results' enhancement increased**{2022 U.S. Dist. LEXIS 7}** the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt.").

The government argues that the *Apprendi* violation is harmless and not extraordinary and compelling. *See United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008).

But the government relies on the incorrect standard for harmlessness. The government says harmlessness may be found where the fact not submitted to the jury "was uncontested ***or*** was supported by overwhelming evidence." [ECF No. 971, PageID.12898 (emphasis added)]. However, for an error to be found harmless, the actual standard requires that "the omitted element was 'uncontested ***and*** supported by overwhelming evidence.'" *Kuehne*, 547 F.3d at 681 (emphasis added) (citation omitted).

While trial evidence may satisfy the overwhelming evidence prong, **West** contested that death

resulted from the conspiracy. Indeed, **West** presented substantial evidence related to Day's long criminal history in support of his defense that a party outside of the conspiracy caused Day's murder. For example, he: (1) introduced evidence that a thief who robbed Day at gunpoint - and shot at Day while he ran away - might want him dead; (2) "elicit[ed] testimony that various persons in the neighborhood**{2022 U.S. Dist. LEXIS 8}** did not like Day, that Day made himself a target for violence, and that people likely wanted him dead"; and (3) "informed the jury that Day was wanted for 'very serious crimes,' had been involved with illegal drugs, and was thought to be 'armed and dangerous.'" *See United States v. **West***, 534 Fed. Appx. 280, 284 (6th Cir. 2013).

The error is far from harmless under *Kuehne*. Instead, it is extraordinary and compelling.

1. Finality in Judgments Cannot Trump Fundamental Fairness

The legal system has a strong interest in the finality of judgments. Indeed, most sentencing errors will likely not qualify as extraordinary and compelling reasons for sentence reduction which outweigh the interest in protecting finality of judgments. Courts have granted very few **compassionate release** motions based on sentencing errors. *See **Compassionate Release**: The Impact of the First Step Act and COVID-19 Pandemic*, U.S. Sentencing Comm'n (March 2022), at 31, 34, available at https://www.ussc.gov/sites/default/files/pdf/research-andpublications/research-publications/2022/20220310_compassionate-release.pdf.

However, this case is far from typical, and the vehicle **West** relies upon for a sentence reduction is a statute whose very purpose is to reopen final judgments. *Cf. Concepcion v. United States*, __ U.S. __, 142 S. Ct. 2389, 2399 n.3, 213 L. Ed. 2d 731 (2022) ("No one doubts**{2022 U.S. Dist. LEXIS 9}** the importance of finality [of criminal judgments]. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments."). *See also United States v. Trenkler*, 47 F.4th 42, 48 (1st Cir. 2022) ("**Compassionate release** is a narrow exception to the general rule of finality in sentencing.").

B. West's Illegal Sentence Results in an Unwarranted Sentencing Disparity

Congress instructed courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(*a*)(6). Other defendants convicted of conspiracy to use interstate commerce facilities in the commission of murder for hire under § 1958 - without the "death results" or "personal injury results" enhancements - faced a statutory maximum sentence of ten years.

Furthermore, West's guideline range when scored and based on the offense of conviction was 121 to 151 months. Therefore, even if there was not a ten-year statutory maximum, **West** would have faced a guideline range that is less than the time he has already served - and far less than the life sentence imposed.

West's life sentence is significantly out-of-line with similarly situated defendants charged with conspiracy under § 1958. The need to avoid this unwarranted, substantial**{2022 U.S. Dist. LEXIS 10}** sentencing disparity - and further the goals of Congress - constitutes an extraordinary and compelling reason to reduce West's sentence. § 3553(a)(6).

In making this finding, the Court acknowledges that the Sixth Circuit in *Hunter* held that facts that existed at sentencing cannot later be construed as extraordinary and compelling reasons to reduce a sentence, and that the sentencing disparities between Hunter and his co-defendants existed at sentencing. *See Hunter*, 12 F.4th at 570. Here, however, because of human error, the Court sentenced **West** as if the jury convicted him under the "death results" enhancement in § 1958.

At the time of sentencing, the Court was not presented with the ten-year statutory maximum or the 121-151 month guideline range since all presumed **West** faced a mandatory life sentence. Unwarranted sentencing disparity was never raised as a consideration at sentencing.

C. West Has No Other Avenue of Relief Open to Him

The government argues that relief is not available under § 3582(c)(1)(A) because West's motion amounts to an unauthorized successive § 2255 motion. Importantly, the habeas route for a successive petition is not available to **West**. And if this Court declined to exercise the discretion available to it, the last opportunity **West**{**2022 U.S. Dist. LEXIS 11**} has available to him for freedom would be foreclosed.

The United States Supreme Court recently held, "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." *Concepcion*, 142 S. Ct. at 2396.

Habeas is a distinctive vehicle for relief that deals with the legality and validity of a conviction. *Trenkler*, 47 F.4th at 48. Habeas allows for the automatic vacation of a sentence through legal-based arguments. **Compassionate release** is different in purpose and scope. It gives courts significant discretion to exercise leniency based on the unique and individualized circumstances of a defendant. *Id.*

The Sixth Circuit placed its imprimatur on the discretion district courts enjoy in considering motions for sentence reductions. It ruled that because Congress has not defined what constitutes an "extraordinary and compelling reason" - except to state that rehabilitation alone may not be considered an extraordinary and compelling reason - district courts have discretion to freely determine what constitutes extraordinary and compelling reasons under § 3582(c)(1)(A). *See United States v. Elias*, 984 F.3d 516, 518-20 (6th Cir. 2021) ("Congress{**2022 U.S. Dist. LEXIS 12**} provided no statutory definition of 'extraordinary and compelling reasons,'" and "district courts have discretion to define 'extraordinary and compelling' on their own initiative").

West asks the Court to exercise its discretion broadly in his favor because he has no other options open to him. Failure to consider West's request would amount to an abuse of discretion and miscarriage of justice. The circumstances **West** raises are extraordinary and compelling reasons to reduce his sentence.

D. West's Rehabilitative Efforts

While Congress made clear that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," *Hunter*, 12 F.4th at 572 (quoting 28 U.S.C. § 994(t)), West's rehabilitative efforts are commendable, extraordinary, and strongly support reducing his sentence.

West earned his GED while in the BOP after taking a number of classes and adult education courses. He also completed courses in Drug Education, Basic Cognitive Skills, the National Parenting Program, Financial Planning, Speech, Etiquette, the Electoral College, the Study of the Winter Solstice, Money Management, Investment Choices, Marketing, Gold, Income Annuities, and Life Lessons. Most recently, **West** completed a class{**2022 U.S. Dist. LEXIS 13**} for his commercial driver's license which would allow him to work as a truck driver if he passes a driving test. In total, **West** has participated in a total of 236 educational and vocational hours, which does not include the 206 hours for the GED Prep Course. **West** also has a consistent work history in prison.

West has maintained a close relationship with his children and grandchildren. It is evident from the

15 letters of support family, friends, and fellow inmates submitted on his behalf, that **West** has a substantial support system. The letters also demonstrate that **West** maintains a commitment to family, and they are a tribute to his continued efforts to live a better life, help and mentor others, and embrace rehabilitation.

West says that, if released, he plans to return to his community in Akron, Ohio - where his family lives and where he has two offers for employment. **West** also says he is eligible for the South Street Ministries Reentry Program - which assists those reintegrating into society in Akron (and the surrounding Summit County) to find secure housing, long-term employment, and reliable transportation. South Street can have **West** employed as soon as three days after he returns**{2022 U.S. Dist. LEXIS 14}** to the community.

West's post-release plans and his rehabilitation while imprisoned are extraordinary and compelling.

V. THE § 3553 FACTORS SUPPORT A SENTENCE REDUCTION

Since **West** establishes extraordinary and compelling reasons, the Court considers the 18 U.S.C. § 3553(a) factors.

The Court begins with the nature and circumstances of the offense. 18 U.S.C. § 3553(a)(1). A jury convicted **West** of conspiring to travel in interstate commerce and to use a facility of interstate commerce with the intent to murder Leonard Day.

The evidence showed that in November 2005, Day - wanted for murder in Detroit - stole about $100,000 in cash, $250,000 in jewelry, a gun, and car keys from **West** while hiding out at West's home in Akron, Ohio. **West** organized and participated in a search for Day across state lines and offered money to others for Day's murder.

The details of West's crime show that the nature and circumstances of the offense were, without question, serious. 18 U.S.C. § 3553(a)(1).

The sentence must "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," and "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(A), (B).

The life sentence imposed does not satisfy these requirements. Because the "death results" enhancement**{2022 U.S. Dist. LEXIS 15}** under 18 U.S.C. § 1958 was not charged or submitted to the jury, the conviction carried a statutory maximum penalty of ten years. Importantly, "[a] sentence that is too harsh undermines respect and confidence in the criminal justice system just as does a sentence that is too lenient. And the sentence here actually works an injustice." *See United States v. McDonel*, 513 F. Supp. 3d 752, 759 (E.D. Mich. 2021).

Based on West's conviction, a sentence of ten years would be sufficient to achieve the goals under § 3553(a)(2)(A) and (B). Nearly seven years beyond that is greater than necessary to "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," and "afford adequate deterrence to criminal conduct."

Finally, the remaining relevant factors - i.e., the "history and characteristics of the defendant" and the need "to protect the public from further crimes of the defendant" - support a sentence reduction.

At the age of eleven, West's older brother - his father figure - was murdered in his presence. That traumatic experience had an adverse impact on West's schooling, his maturity, and mental health.

Despite this, **West** does not have an extensive criminal history. Per his Presentence Investigation Report, **West** had one criminal history point**{2022 U.S. Dist. LEXIS 16}** - which was for a domestic

violence offense in 1998.

West has a relatively clean BOP disciplinary record. He has been in custody since 2006. His record has three incidents: fighting with inmates in January 2007; verbal insolence in August 2011; and possessing a dangerous weapon in June 2014. Over the past eight years, **West** has been a model prisoner, with no disciplinary infractions. Notably, BOP records indicate that **West** is classified as "Low Risk Recidivism Level."

The relevant § 3553(a) factors support reducing West's sentence.

VI. WEST'S ARGUMENTS REGARDING COVID-19 AND HIS HEALTH CONDITIONS DO NOT CONSTITUTE EXTRAORDINARY AND COMPELLING REASONS FOR SENTENCE REDUCTION

West is a 47-year-old black male. He says extraordinary and compelling reasons warrant his release because his age, race, and medical conditions (i.e., obesity, hypertension, and pre-diabetes) place him at higher risk for serious illness from COVID-19.

Under Sixth Circuit precedent, "a defendant's incarceration during the COVID-19 pandemic-when the defendant has access to the COVID-19 vaccine-does not present an 'extraordinary and compelling reason' warranting a sentence reduction." *United States v. Lemons*, 15 F.4th 747, 751 (6th Cir. 2021). West's medical records show that he received**{2022 U.S. Dist. LEXIS 17}** Pfizer's two-dose COVID-19 vaccine in spring 2021. Although **West** has not received the booster, booster shots are available from the Bureau of Prisons ("BOP") upon request. *See United States v. Butler*, No. 18-20256, 2022 U.S. Dist. LEXIS 92107, 2022 WL 1617999, at *2 (E.D. Mich. May 23, 2022).

Moreover, at the time the government filed its response (i.e., June 30, 2022), there was only one reported case of COVID-19 at West's facility - USP Big Sandy. As of September 30, 2022, the BOP reports that no inmates at USP Big Sandy have COVID-19. *See* https://www.bop.gov/coronavirus/index.jsp.

West fails to demonstrate his health conditions and COVID-19 constitute extraordinary and compelling reasons for release.

VII. THE COURT WILL NOT STAY THE ENFORCEMENT OF THIS ORDER

The government asks the Court to stay any order granting West's motion through the completion of appellate proceedings.

The party requesting a stay bears the burden to show that the circumstances justify a stay. *United States v. Bass*, 843 Fed. Appx. 733, 734 (6th Cir. 2021). The Court "balance[s] four factors to determine whether a stay is appropriate: (1) whether the government has made a strong showing that it is likely to succeed on the merits; (2) whether the government will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other interested parties; and**{2022 U.S. Dist. LEXIS 18}** (4) where the public interest lies." *Id.* (citation and internal quotation marks omitted). The Court may consider any danger a defendant might pose to the public if released, and the government's interest in continuing custody pending a decision on the merits of an appeal. *Id.*

The government fails to satisfy its burden to show a stay is necessary. Indeed, the sentencing error is extraordinary and compelling. The maximum sentence West's conviction carried was ten years; yet, he has already served nearly 17 years. This is more than sufficient to achieve the goals under § 3553(a). **West** does not pose a specific risk to the public. The balance of the four factors weighs against granting a stay.

The Court declines the government's request to stay enforcement of this order pending an appeal.

VIII. CONCLUSION

In *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996), the Supreme Court held that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." This admonishment and duty pertain at sentencing modification hearings as well. *Pepper v. United States*, 562 U.S. 476, 490, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011).**{2022 U.S. Dist. LEXIS 19}** Federal judges may conduct inquiries broad in scope, "largely unlimited either as to the kind of information [s]he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972).

That discretion is not unfettered. *Hunter*, 12 F.4th at 562. And although § 3582 does not define "extraordinary and compelling," courts must give those words their "ordinary meaning at the time Congress enacted the statute." *Id.* (citation omitted). When Congress enacted § 3582, "extraordinary" meant "most unusual," "far from common," and "having little or no precedent" and "compelling" meant "forcing, impelling, driving." *Id.* (citations omitted).

The circumstances of this case are far from common and are most unusual. The government failed to properly charge **West** with the "death results" enhancement under § 1958; trial counsel failed to submit a verdict form for the jury to answer the death question; the Probation Department erroneously concluded that the conviction carried a mandatory life sentence; and this Judge did not notice that the "death results" enhancement was not submitted to the jury. The guideline range based on what **West** was indicted for and convicted of was 121 to 151 months, restricted to 120 months based on the ten-year statutory maximum sentence.**{2022 U.S. Dist. LEXIS 20}** *See* U.S.S.G. § 5G1.1(a). Defense counsel failed to raise the sentencing error on appeal or in a habeas petition. The circumstance is extraordinary.

This Court's clear sentencing error is a compelling reason for sentence reduction. It is the only reason **West** is still behind bars and not a free citizen.

Allowing the sentence to stand would undermine respect for and trust in the judicial process. Uncovering the error required no investigation, fact-finding or credibility determinations. The error does not turn on the retroactive application of a new legal principle. *Apprendi* and its holding were well established at the time of sentencing, and it is clear from the plain language of the statute that § 1958 contains statutory alternatives with different punishments which constitute elements that must be submitted to the jury. The error should have been apparent from the face of the indictment and § 1958.

Moreover, the need to avoid unwarranted sentencing disparities, West's commendable rehabilitative efforts, and the relevant § 3553(a) factors all strongly support sentence reduction.

Finally, **West** has not previously raised this challenge - so no court has reviewed it - and if this Court does not review the error now, **West** will have no other**{2022 U.S. Dist. LEXIS 21}** avenue for correction. Without this remedy, **West** will spend the rest of his life in prison. A true miscarriage of justice.

The Court concludes there are "extraordinary and compelling reasons" for sentence reduction, all supported by § 3553(a) factors.

The Court:

(1) **GRANTS** West's motion for sentence reduction [ECF No. 969];

(2) **REDUCES** his sentence to time served; and

(3) **REDUCES** the originally imposed supervised release term from five years to three.

The other terms and conditions of West's original sentence remain unchanged.

IT IS ORDERED.

/s/ Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: 11/7/2022