FILED
United States Court of Appeals
Tenth Circuit

February 28, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTERIAL WESLEY,

Defendant - Appellant.

No. 22-3066

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:07-CR-20168-JWL-2)

Kayla Gassmann, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, Kansas City, Kansas, for Plaintiff-Appellee.

Jared S. Maag, Assistant United States Attorney (Duston J. Slinkard, United States Attorney, District of Kansas, and James A. Brown, Assistant United States Attorney, Chief, Appellate Division, with him on the brief), Office of the United States Attorney, Topeka, Kansas, for Defendant-Appellant.

Before **TYMKOVICH**, **SEYMOUR**, and **PHILLIPS**, Circuit Judges.

TYMKOVICH, Circuit Judge.

A federal jury convicted defendant Monterial Wesley of drug trafficking. In a post-conviction motion, Wesley alleged his prosecutor suborned perjury about the

drug quantities attributable to him, in turn increasing his sentencing exposure. But, rather than asking the district court to vacate his sentence under 28 U.S.C. § 2255, he asked for a sentence reduction under the compassionate release statute, which permits a sentencing court to reduce a federal prisoner's sentence for "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A)(i).

Wesley's motion asserted various grounds for finding extraordinary and compelling reasons in his case, including the alleged prosecutorial misconduct. The district court concluded that the claim of prosecutorial misconduct must be interpreted as a challenge to the constitutionality of his conviction and sentence, which can only be brought under § 2255. Because Wesley had previously brought a § 2255 motion attacking the same judgment, and because this court had not authorized him to file another one, the district court dismissed that portion of Wesley's motion for lack of jurisdiction. *See United States v. Harper*, 545 F.3d 1230, 1232 (10th Cir. 2008) ("In order to file a second or . . . successive § 2255 motion, a petitioner must first move the court of appeals for an order authorizing the district court to hear the motion."). As to the remaining grounds for relief, the district court found they did not justify a sentence reduction.

On appeal, Wesley challenges the district court's jurisdictional dismissal.[1] He has not moved for a certificate of appealability (COA), but our case law requires one

[1] He has not appealed the portion of the district court's order denying relief on the merits, but the upshot of this appeal, if successful for Wesley, would be vacatur of the district court's order and remand for reconsideration based on all asserted "extraordinary and compelling reasons," including alleged prosecutorial misconduct.

for this appeal to proceed. *See id.* at 1233 ("[T]he district court's dismissal of an unauthorized § 2255 motion is a 'final order in a proceeding under section 2255' such that § 2253 requires petitioner to obtain a COA before he or she may appeal."). "This in turn requires us first to consider whether jurists of reason would find debatable the district court's decision to construe [Wesley's compassionate release] motion as a motion to vacate, set aside, or correct his sentence pursuant to § 2255." *Id.* (internal quotation marks and ellipsis omitted).

We find the question debatable among jurists of reason, so we grant a COA. On the merits, however, we agree with the district court that Wesley's motion included a successive § 2255 claim because it attacked the validity of his sentence. Accordingly, we affirm the district court's jurisdictional dismissal.

I. Background

A grand jury indicted Wesley on twelve counts relating to a conspiracy to distribute cocaine and cocaine base. After the court impaneled the jury but before the parties presented any evidence, Wesley pled guilty to four counts of the indictment without the benefit of a plea agreement. He went to trial on the eight other counts, and the jury subsequently convicted him of two more drug-related counts.

The district court sentenced Wesley to thirty years' imprisonment, which was within the Guidelines-recommended range based on the quantity of drugs attributed to him. Specifically, the court found that Wesley was accountable for more than 150 kilograms of cocaine. Few drugs were entered into evidence, so information about the type and quantity of drugs involved in the conspiracy rested almost entirely on

cooperating government witnesses. The court particularly relied on the trial testimony and sentencing-hearing testimony of two witnesses the court found credible, Thomas Humphrey and Cruz Santa-Anna.

Wesley unsuccessfully requested relief three times: on direct appeal, through a § 2255 motion, and in a pandemic-related motion for compassionate release. Then, in December 2021, Wesley filed a second compassionate release motion. He asserted the district court should re-sentence him to fifteen years (about one year more than what he had already served) based on the combined effect of three considerations: (1) the prosecutor in his case solicited false testimony about drug quantities, on which the district court relied when calculating his Guidelines range; (2) his choice to go to trial resulted in a much longer sentence as compared to co-defendants who pleaded guilty; and (3) his sentence was excessive as compared to more culpable co-conspirators.

The bulk of Wesley's motion focused on the prosecutor's alleged misconduct. His theory depended on showing that the two witnesses on whom the district court relied in determining the drug quantity—Humphrey and Santa-Anna—knowingly testified to more drugs than were actually involved, and they did so because the prosecutor convinced them to. He did not have evidence directly from Humphrey or Santa-Anna, but he did present statements (some of them sworn) from others who testified, or who were asked to testify, at his trial. Specifically:

- One witness who testified against Wesley now says he lied about the nature of his dealings with Wesley. The witness testified at trial that he sold cocaine to Wesley when in fact he sold only marijuana. The witness asserts that the

prosecutor knew his testimony was false, but wanted him to testify that he sold cocaine to Wesley. The witness also states that the prosecutor asked him to "add weight" to the drug quantities in his trial testimony, R., Vol. I at 513, ¶ 5 (internal quotation marks omitted), although it's not clear from his statement if he followed that request.

- Another witness who testified against Wesley was pressured by the prosecutor "to make the drug weight to be more than what it really was," but he refused to do so. *Id.* at 529.
- A witness who did not testify at trial claims the prosecutor asked him to testify to buying more cocaine from Wesley than he did.
- All three witnesses recall talking with each other at the county jail, realizing they were there to testify in the same case, and discussing the prosecutor's similar tactics.

Wesley said this conduct provides reason to believe the prosecutor took a similar approach with other witnesses, such as Humphrey and Santa-Anna. Thus, Wesley believed he could show they testified falsely, in turn affecting his sentence.

Wesley further supported his motion with allegations that the prosecutor engaged in misconduct or untruthfulness in other cases, including five examples of misconduct or alleged misconduct by the same prosecutor in other cases. Given all this, Wesley asserted that he had been convicted and sentenced in "an unconstitutional proceeding." R., Vol. I at 412. He suggested an evidentiary hearing would be appropriate because "[t]he gravity and character of the prosecutorial misconduct allegations warrant further inquiry." *Id.* at 394.

As noted, the district court held that the allegations regarding prosecutorial misconduct amounted to an unauthorized successive § 2255 motion, so the court dismissed that portion of Wesley's motion for lack of jurisdiction. The district court

denied relief on the two other asserted bases for compassionate release. Wesley now appeals from the court's refusal to consider the asserted prosecutorial misconduct alongside the other asserted grounds for relief.

II. Analysis

If Wesley's allegations against the prosecutor are true, her conduct would violate the Fifth Amendment's due process clause. *See Giglio v. United States*, 405 U.S. 150, 153–54 (1972). This is the sort of claim the court normally sees in a § 2255 context. If a federal prisoner "claim[s] the right to be released upon the ground that [his] sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack," that section allows him to "move the court which imposed the sentence to vacate, set aside or correct the sentence." § 2255(a). But the right to file a § 2255 motion does not last forever. It must be brought within one year of certain triggering events, such as the conviction becoming final, or the discovery of supporting evidence. § 2255(f). And if the prisoner has previously brought a § 2255 motion, any later § 2255 motion attacking the same conviction is limited to claims based on

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2255(h).

Wesley insists he is not invoking § 2255. He asserts that the evidence of prosecutorial misconduct supports a sentence reduction under the compassionate release statute, without regard to whether the alleged misconduct is also a constitutional violation that might justify § 2255 relief. The advantage of this approach is that he can raise the basis for what would otherwise be a § 2255 claim, yet without the restrictions imposed by § 2255. As we discuss below, we disagree that § 3582 can be used to circumvent the procedural and substantive requirements of § 2255.

A. Statutory and Procedural Background

A prisoner must normally use § 2255 to challenge a conviction and sentence outside a direct appeal. We will begin, therefore, by explaining Wesley's resort to the compassionate release statute instead of § 2255.

1. The Compassionate Release Statute

Congress enacted the original version of the compassionate release statute, 18 U.S.C. § 3582(c)(1), as part of the Sentencing Reform Act of 1984. *See* Pub. L. No. 98-473, tit. II, ch. II, § 212(a)(2), 98 Stat 1837. "[U]pon motion of the Director of the Bureau of Prisons," the statute permitted a sentencing court to reduce a prisoner's sentence upon three conditions: (1) the existence of "extraordinary and compelling reasons"; (2) "consisten[cy] with applicable policy statements issued by the Sentencing Commission"; and (3) "consider[ation of] the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable." *Id.* The only limit Congress explicitly put on "extraordinary and compelling reasons" was a directive

that the Sentencing Commission's explanatory policy statements could not designate "[r]ehabilitation of the defendant alone [as] an extraordinary and compelling reason." 28 U.S.C. § 994(t).

The Sentencing Commission did not issue a relevant policy statement until 2006. That policy statement began with language mimicking the statute (and which would turn out to be significant in the context of later developments): "Upon motion of the Director of the Bureau of Prisons . . . ." U.S.S.G. § 1B1.13 (2006). And the original policy statement, without further guidance, only identified as an extraordinary and compelling reason "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons." *Id.* cmt. n.1(A).

By 2018, the Sentencing Commission had more fully fleshed out that standard to include, for example, terminal illness or the death of the caregiver for the defendant's minor children. *See* U.S.S.G. § 1B1.13 cmt. n.1(A)(i), (C)(i) (2018). But the policy statement still began with the words of the statute, "Upon motion of the Director of the Bureau of Prisons . . . ." *See id.*, main text.

The month following the effective date of the 2018 Guidelines, Congress passed the First Step Act. *See* Pub. L. No. 115-391, 132 Stat. 5194 (2018). Among many other things, the First Step Act amended the compassionate release statute to permit prisoners to bring motions on their own behalf if they ask the BOP to bring a motion and it does not respond within thirty days. *See id.*, tit. VI, § 603(b)(1), 132 Stat. at 5239 (codified at 18 U.S.C. § 3582(c)(1)(A)).

Given this authorization, prisoners understandably began bringing compassionate release motions on their own behalf. At first, some district courts continued to apply the Sentencing Commission's 2018 policy statement (§ 1B1.13) when adjudicating these motions. *See, e.g.*, *United States v. McGee*, 992 F.3d 1035, 1041 (10th Cir. 2021) (describing such an order). But others reasoned that the 2018 policy statement, by its own terms, applies only to motions brought by the BOP. *See, e.g.*, *United States v. Maumau*, 993 F.3d 821, 828 (10th Cir. 2021) (describing such an order).

In *Maumau*, we went further and held

> that Congress intended to afford district courts with discretion, in carrying out the first part of the statutory test in § 3582(c)(1)(A)(i), to independently determine the existence of "extraordinary and compelling reasons," and for that discretion to be circumscribed under the second part of the statutory test by requiring district courts to find that a sentence reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Id. at 832. But because the Sentencing Commission had never had enough voting members to form a quorum since enactment of the First Step Act (a situation that persisted until August 2022), no policy statement existed to constrain the district court's evaluation of extraordinary and compelling reasons. *Id.* at 836.

Wesley interprets *Maumau* to stand for the proposition that "extraordinary and compelling reasons" is limitless, subject only to the district court's discretion. *See* Aplt. Opening Br. at 20 ("Under this open-ended statutory language, district courts are empowered to consider ***any*** extraordinary and compelling reason for release that a

defendant might raise." (internal quotation marks omitted)). Thus, "extraordinary and compelling reasons" could include the sorts of attacks on a conviction or sentence that prisoners normally bring through § 2255 motions—yet not subject to any of the statutory restraints imposed by § 2255, such as timing, the content of the motion, and the grounds on which one can bring additional motions.

But in *Maumau*, whether "extraordinary and compelling reasons" can include matters that, if true, would demonstrate the invalidity of the conviction or sentence, was not before this court.[2]

2. Wesley's Motion for Compassionate Release

Wesley has not yet asserted the alleged prosecutorial misconduct in a motion for authorization under § 2255(h). Instead, he has insisted that compassionate release and § 2255 are independent forms of relief, so it does not matter if he could have brought his claim through § 2255. *See* Aplt. Opening Br. at 45–46 ("Whether a particular extraordinary and compelling reason could be repackaged as a constitutional claim in a § 2255 petition has nothing to do with a motion for a discretionary reduction under § 3582(c)(1)(A)(i)."). Notably, at oral argument Wesley's counsel asserted the district court motion should not have been treated as a § 2255 motion because it could not have satisfied § 2255(h). Oral Argument at 32:11. Specifically, counsel pointed to § 2255(h)(1)'s requirement that successive

[2] In unpublished decisions, this court has consistently ruled against Wesley's position. *See, e.g.*, *United States v. Mata-Soto*, 861 F. App'x 251, 255 (10th Cir. 2021).

motions based on new evidence must put the case in such a new light that "no reasonable factfinder would have found the movant guilty of the offense." Counsel says Wesley is challenging only his sentence, not his guilt, so a motion for authorization under § 2255(h)(1) based on prosecutorial misconduct was not available.[3] Regardless, Wesley does not claim his presumed inability to satisfy § 2255(h)(1) should be accepted as a reason to deem his circumstances extraordinary and compelling for purposes of compassionate release. Rather, as noted, he believes this court has already held that "extraordinary and compelling reasons" is limitless. Thus, from his perspective, inability to satisfy § 2255(h)(1) is irrelevant. Likewise irrelevant is the choice to limit his attack to the sentence only. Under his interpretation of the compassionate release statute, he *could* permissibly claim that some of his convictions are invalid, but he has chosen not to do so.

B. Does § 2255 Control When a Prisoner Asserts an Argument Attacking His Conviction or Sentence?

To answer this question, we "must examine the disputed language in context, not in isolation," looking both to the "the language and design of the statute as a whole." *True Oil Co. v. Comm'r*, 170 F.3d 1294, 1299 (10th Cir. 1999) (internal quotation marks omitted). And we must keep in mind the canon of statutory

[3] We have not yet held that "guilty of the offense" in § 2255(h)(1) excludes arguments attacking the length of the sentence only. Other courts have held as much. *See, e.g.*, *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997).

construction that specific controls over general.[4] "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). "What counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 648 (2012).

Here, the scope of § 2255 is more specific, indeed, directly targeted at the claims that Wesley is making. In Wesley's view, a compassionate release motion could include the sorts of claims normally raised in a § 2255 motion, but there is no argument that a § 2255 motion can include the sorts of claims raised in a compassionate release motion (*e.g.*, rehabilitation, medical challenges, etc.). Similarly, the compassionate release statute says nothing about the timing of such motions, or whether a prisoner can bring them serially, whereas § 2255 places explicit restrictions on both. Thus, looking at the two statutes in context, § 2255 is presumptively the vehicle by which federal prisoners must raise challenges to their convictions or sentences.

"Of course the general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction." *RadLAX*, 566 U.S. at 646–47. Wesley offers no such textual indications. In our view, moreover, all indications point in the other

[4] At oral argument, counsel for Wesley claimed the government never briefed the general/specific question. Counsel is incorrect. *See* Resp. Br. at 14–16.

direction, especially when one looks at the sort of system that would result from the ability to use the compassionate release statute to assert errors in a conviction or sentence.

First, Congress required district courts considering compassionate release motions to ensure that any sentence reduction "is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). If Wesley's position is correct, this means Congress authorized use of the compassionate-release vehicle to raise errors in the conviction or sentence and then delegated to the Sentencing Commission the authority to revoke that use of compassionate release via a policy statement. Wesley gives us no reason to believe that Congress would grant this authority—effectively, the authority to decide whether federal postconviction challenges must proceed through § 2255 or not—to an administrative agency. Nor can we find anything from the Sentencing Commission claiming such authority. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress does not "hide elephants in mouseholes").

Second, a prisoner may not bring a motion on his own behalf without first asking the BOP to bring one. The benefits of an exhaustion requirement such as this include allowing the agency to "apply its special expertise" and to "produce a useful record for subsequent judicial consideration." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds*, Prison Litigation Reform Act of 1995, 110 Stat. 1321–71, as amended, 42 U.S.C. § 1997e et seq., *as recognized in Woodford v. Ngo*, 548 U.S. 81, 84–85 (2006). The BOP undoubtedly has expertise

in, for example, evaluating prisoner behavior and prisoners' medical needs, and it can produce a useful record on those topics. The BOP has no expertise in evaluating alleged trial errors. Rather, federal courts acting under § 2255 have the relevant expertise and mechanisms to evaluate claims of error.

Third, Wesley asserts that compassionate release and § 2255 can harmoniously coexist because "ultimate relief [in a compassionate release proceeding] is highly individualized and always remains discretionary," in contrast to "a § 2255 proceeding, [in which] a court does not have discretion to refuse to grant relief." Aplt. Opening Br. at 37, 38. Thus, under the system for which Wesley advocates, a district court has discretion to deny relief even if the prisoner proves an error or defect of constitutional magnitude. It is hard to imagine a court denying relief to such an error. Yet this incongruous outcome allowed by Wesley's interpretation of § 3582 as compared to § 2255 seems to be precisely the sort of thing for which we would expect to see a "clear intention," *Morton*, 417 U.S. at 550, yet Wesley offers none.

Fourth, the compassionate release statute requires the district court to "consider[] the factors set forth in section 3553(a) to the extent that they are applicable." § 3582(c)(1)(A). Those factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established [by the Sentencing Commission] . . . .
>
> (5) any pertinent policy statement [issued by the Sentencing Commission] . . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). Arguably, none of these factors applies to someone wrongfully convicted and sentenced. There is no indication Congress intended to create the possibility of a sentencing proceeding in which all § 3553(a) factors are irrelevant.

Even if the situation were more like Wesley's, where he claims an unlawfully long prison term (rather than wrongful conviction), highly unusual results might follow. "[C]onduct since [a defendant's] initial sentencing constitutes a critical part of the 'history and characteristics' of a defendant that Congress intended sentencing courts to consider [in any re-sentencing proceedings]." *Pepper v. United States*, 562 U.S. 476, 492 (2011) (quoting § 3553(a)(1)). Thus, a district court considering a

compassionate release motion challenging only the length of the sentence could conclude that a defendant's poor behavior in prison shows his sentence remains appropriate, even if he has overserved the maximum sentence he could have received but for error.

Fifth, the most a district court can do for a defendant who merits relief under § 3582(c)(1)(A)(i) is re-sentence him to time served, thereby releasing him. But there is still a criminal judgment against him—it will remain on his record, potentially influencing the rest of his life. Again, as compared to the more-specific remedy in § 2255 (through which the district court can vacate the conviction), we would expect a clear intent from Congress that it intended the compassionate release statute to preserve the trailing consequences of a criminal sentence, even for those who were convicted or sentenced erroneously.

For all these reasons, we hold that § 2255 applies to Wesley's claims.[5]

C. Other Circuits

Our holding is consistent with holdings or considered dicta from the Second, Fourth, Sixth, Seventh, Eighth, and D.C. Circuits—the majority of circuits to have

[5] The Sixth Circuit offers another interpretive insight. When Congress enacted the First Step Act, it did not touch the "extraordinary and compelling reasons" standard. Thus, Congress is presumed to carry forward the Sentencing Commission's interpretation of that phrase, which consistently focused on factors such as the prisoner's health, age, and family-caretaking responsibilities. *See United States v. McCall*, 56 F.4th 1048, 1059–60 (6th Cir. 2022) (en banc). In other words, there is a fair argument that "extraordinary and compelling reasons," by its own terms, excludes matters that stray too far from the core established by the Sentencing Commission, including assertions that call into doubt the validity of the conviction or sentence.

issued a published decision on this issue. *See United States v. Amato*, 48 F.4th 61, 63 (2d Cir. 2022); *United States v. Ferguson*, 55 F.4th 262, 270 (4th Cir. 2022); *United States v. Hunter*, 12 F.4th 555, 562, 566–68 (6th Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021); *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States v. Jenkins*, 50 F.4th 1185, 1200–06 (D.C. Cir. 2022).

Nonetheless, Wesley points to a First Circuit case, which takes a different view. In *United States v. Trenkler*, 47 F.4th 42, 48 (1st Cir. 2022), the court held that, save for rehabilitation alone, district courts may consider literally anything, including errors normally raised through § 2255, when deciding whether extraordinary and compelling reasons exist. *Trenkler* says its holding is dictated by the statute's plain language, *see id.* at 47–48, but we have already explained why this view cannot prevail in light of § 2255's more-specific focus.

Furthermore, *Trenkler* actually departs from the plain language of the compassionate release statute. It says that "correct application of the 'extraordinary and compelling' standard for compassionate release naturally precludes classic post-conviction arguments, *without more*, from carrying such motions to success." *Id.* at 48 (emphasis added). But it does not explain where it finds this limitation in the statute's text. If a defendant can prove, say, the prosecutor framed him for a crime he did not commit, we do not see any reason in the text of the statute requiring the defendant to prove something more to merit relief. Indeed, this is precisely where context matters. Congress designed § 2255 to address that sort of claim, and to provide complete relief if appropriate.

The facts and disposition of *Trenkler* illustrate well the textual difficulties we have been pointing out. In that case, no one disputed that the defendant erroneously received a life sentence. And, as described, the First Circuit held that the district court could properly consider that error, among other factors, when considering the defendant's compassionate release motion. In fact, that is essentially what the district court had done, but the First Circuit was unsure if the district court had fully weighed all the relevant considerations together, so it vacated and remanded for further proceedings. In doing so, it said it "express[ed] no view as to what should happen on remand." *Id.* at 51. In other words, despite universal agreement that the defendant was serving an unlawful sentence, the First Circuit remanded to ensure that the district court would take "a holistic approach when reviewing Trenkler's proposed reasons [for re-sentencing]," *id.* at 50, potentially including denial of relief. Adhering to § 2255 avoids such unusual results.

D. The Concepcion *Decision*

Wesley also points to the Supreme Court's recent decision in *Concepcion v. United States*, 142 S. Ct. 2389 (2022). *Concepcion* involved a part of the First Step Act permitting district courts to re-sentence certain defendants convicted of crack cocaine offenses. The basic question was the scope of information the district court could consider in those re-sentencing proceedings. Specifically, could district courts consider "intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison)"? *Id.* at 2396. Or were they instead required to assume the facts as they were at the original sentencing, modified only by

the changes Congress later enacted to reduce the severity of crack cocaine sentences? *See id.* at 2397–98.

The Supreme Court held that district courts could consider intervening changes of law and fact. In doing so, it employed very broad language: "It 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." *Id.* at 2396. Nothing in the First Step Act limited that discretion when re-sentencing eligible crack cocaine offenders, so district courts were not limited to taking account solely of the change in law.

A compassionate release proceeding is *not* a re-sentencing proceeding under the First Step Act—again, the only thing the First Step Act changed about compassionate release was to authorize prisoners to bring their own motions. But a compassionate release proceeding *is* a proceeding to "decid[e] whether, and to what extent, to modify a sentence." *Id.* Thus, in Wesley's view, the district court cannot be restrained from considering any information the defendant puts before it, including alleged errors in the conviction or sentence.

The important distinction between this case and *Concepcion* is that there was no doubt the district court in *Concepcion* was applying the correct statute. The parties only disputed its interpretation. But Wesley raises the question *Concepcion* never had to answer—which is the correct statute for this kind of claim. We therefore find *Concepcion* inapplicable.

E. Wesley's Appeal to Discretion

Wesley next points to our statement that "[i]t is the relief sought, not [the] pleading's title, that determines whether the pleading is a § 2255 motion," *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006). He insists that compassionate release—which is discretionary, and which can lead, at most, to a reduced sentence—was the only "relief sought," in contrast to claiming a right to be released under § 2255. So, following *Nelson*, he says the district court should have treated his motion as a genuine compassionate release motion.

We disagree. Our statement in *Nelson* regarding "relief sought" does not establish a pleading exercise only. When a federal prisoner asserts a claim that, if true, would mean "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack," § 2255(a), the prisoner is bringing a claim governed by § 2255. He cannot avoid this rule by insisting he requests relief purely as an exercise of discretion rather than entitlement.[6] *Cf. Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (discussing "the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of

[6] This is why Wesley's presumed inability to bring a successful motion under § 2255(h)(1), *see supra* Part II.A.2, makes no difference here. If a prisoner claims his sentence "was imposed in violation of the Constitution or laws of the United States, [etc.]," § 2255(a), the district court must apply § 2255, potentially including its restrictions on the kinds of claims that are cognizable after the prisoner has filed an earlier § 2255 motion attacking the same judgment.

their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody").

F. Appropriate Procedure in the District Courts

A final question remains. If a district court receives a compassionate release motion that comprises or includes a claim governed by § 2255, should the court (1) treat it as a compassionate release motion, although with a flawed (or partially flawed) basis; or (2) treat the part governed by § 2255 as if explicitly brought under § 2255 and handle it accordingly (including dismissal for lack of jurisdiction if appropriate)? Here, the district court took the second approach, but other courts in this circuit have occasionally taken the first, *see Mata-Soto*, 861 F. App'x at 253–55.

We conclude the district court's approach in this case was correct. In all other contexts in which defendants have (following direct appeal) attempted to raise § 2255-like claims outside of § 2255, we have held that such a motion, however captioned or argued, must be treated as a § 2255 motion. *See, e.g.*, *United States v. Williams*, 790 F.3d 1059, 1066–68 (10th Cir. 2015) (motion to withdraw guilty plea); *United States v. Baker*, 718 F.3d 1204, 1208 (10th Cir. 2013) (Federal Rule of Civil Procedure 60(d)(3)); *Nelson*, 465 F.3d at 1148–49 (10th Cir. 2006) (Federal Rule of Civil Procedure 15); *United States v. Torres*, 282 F.3d 1241, 1245–46 (10th Cir. 2002) (writs of coram nobis and audita querela); *United States v. Gieswein*, 814 F. App'x 428, 429–30 (10th Cir. 2020) (Federal Rule of Criminal Procedure 52(b)); *United States v. Beadles*, 655 F. App'x 706, 707–08 (10th Cir. 2016) (Federal

Rule of Criminal Procedure 33). The parties give us no reason to treat a motion filed under § 3582(c)(1)(A)(i) differently. Thus, as to the portion of Wesley's motion arguing a defect in his sentence based on prosecutorial misconduct, the district court correctly refused to exercise jurisdiction.

III. Conclusion

We hold that an 18 U.S.C. § 3582(c)(1)(A)(i) motion may not be based on claims specifically governed by 28 U.S.C. § 2255. We therefore affirm the district court.

FILED
United States Court of Appeals
Tenth Circuit

August 28, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

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Plaintiff - Appellee,

v.

MONTERIAL WESLEY,

Defendant - Appellant.

No. 22-3066
(D.C. No. 2:07-CR-20168-JWL-2)
(D. Kan.)

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on Appellant's *Petition for Rehearing En Banc* and Appellee's *Response in Opposition to Petition for Rehearing En Banc*. The petition and the response were circulated to all judges of the court who are in regular active service, and a poll was called. The poll did not carry. Consequently, Appellant's request for en banc rehearing is DENIED.

Judge Rossman would grant the petition. Judge Tymkovich has filed a separate concurrence in support of the denial of rehearing en banc, which is joined by Judge Eid.

Judge Rossman has written separately in dissent.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

22-3066, *United States v. Wesley*

TYMKOVICH, Circuit Judge, joined by **EID**, Circuit Judge, concurring in the denial of rehearing en banc.

I agree that this case need not be reviewed by the full court. The panel opinion explains in detail why the compassionate release statute does not apply to Mr. Wesley's claims of prosecutorial misconduct. Rather, § 2255 applies, and § 2255 (not § 3582(c)(1)(A)) is the source of the jurisdictional inquiry—in this case, whether Mr. Wesley is attempting to bring a second or successive § 2255 claim without this court's authorization. *See* 28 U.S.C. § 2255(h). He is, so the district court properly dismissed that portion of his compassionate release motion for lack of jurisdiction.

In addition, the panel opinion creates no conflict with our decisions in *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021), and *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021). Nor is there any conflict with the Sentencing Commission's forthcoming amended policy statement regarding compassionate release motions (which, notably, contains not a word about errors in a conviction or sentence as a basis for compassionate release). *See* 88 Fed. Reg. 28,254 (May 3, 2023). The discretion afforded to district courts under those authorities will continue to apply when the prisoner brings a motion actually governed by § 3582(c)(1)(A). The panel opinion establishes, however, that not all motions invoking § 3582(c)(1)(A) are actually governed by § 3582(c)(1)(A).

Nor will the holding established in this case burden the district courts with a difficult task to identify § 2255-like claims within motions brought under § 3582(c)(1)(A). As we explained:

> When a federal prisoner asserts a claim that, if true, would mean "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack," § 2255(a), the prisoner is bringing a claim governed by § 2255.

United States v. Wesley, 60 F.4th 1277, 1288 (10th Cir. 2023). And "such a motion, however captioned or argued, must be treated as a § 2255 motion." *Id.* District courts have for decades been screening postconviction motions for claims that are, in substance, § 2255 claims, even though ostensibly brought under some other authority. There is no reason to believe district courts will have more difficulty isolating § 2255 claims brought in the guise of compassionate release compared to § 2255 claims brought in some other guise. *See Wesley*, 60 F.4th at 1288–89 (cataloguing the various types of motions through which prisoners have attempted to bring claims actually governed by § 2255).

United States v. *Wesley*, No. 22-3066

ROSSMAN, J., dissenting from the denial of rehearing *en banc*

Mr. Wesley moved for a sentence reduction in federal district court in Kansas under 18 U.S.C. § 3582(c)(1)(A) (or "the compassionate release statute"). He advanced a combination of "extraordinary and compelling reasons" to support his request—including that a prosecutor in his underlying criminal case had suborned perjury and coerced witnesses.[1] Mr. Wesley did not challenge the validity of his conviction or sentence.

The district court concluded it lacked statutory authority under § 3582(c)(1)(A)(i) to consider prosecutorial misconduct as an "extraordinary and compelling" reason for compassionate release. According to the district court, some of the arguments Mr. Wesley advanced under § 3582(c)(1)(A) were actually claims under 28 U.S.C. § 2255. The district court then dismissed Mr. Wesley's motion for compassionate release, in part, for lack of jurisdiction. Mr. Wesley appealed the jurisdictional dismissal, and the *Wesley* panel affirmed. *See United States* v. *Wesley*, 60 F.4th 1277 (10th Cir.

[1] As Mr. Wesley observed in his opening brief, our court is familiar with this prosecutor's "pattern of . . . misconduct or untruthfulness." Appellant's Opening Br. at 8; *see, e.g.*, *United States* v. *Spaeth*, 69 F.4th 1190 (10th Cir. 2023); *United States* v. *Carter*, 995 F.3d 1214 (10th Cir. 2021); *United States* v. *Orozco*, 916 F.3d 919 (10th Cir. 2019).

2023). Today, the court denies Mr. Wesley's petition for rehearing. In my view, we have missed an important opportunity for *en banc* review.

"En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." 10th Cir. R. 35.1(A); *accord* Fed. R. App. P. 35(a). Both components of this exacting standard are satisfied here.

This case undoubtedly involves an issue of exceptional public importance. And it involves an issue appearing before Tenth Circuit courts on, literally, a daily basis. Between October 2019 and March 2023, federal courts decided 29,440 motions for a sentence reduction under § 3582(c)(1)(A). *See* U.S. Sent'g Comm'n, Compassionate Release Data Report (May 2023) at 4. During that same time, our own circuit adjudicated almost 1,200 of these motions. *Id.* at 9; U.S. Sent'g Comm'n, Compassionate Release Data Report (2020 to 2022), at 9 (Dec. 2022). There is nothing surprising about these numbers.[2] As this court has observed, "[W]e know

[2] Congress enacted 18 U.S.C. § 3582(c)(1)(A)(i) as part of the Comprehensive Crime Control Act of 1984. *See* Pub. L. No. 98-473, 98 Stat. 1837, 1998-99. From the enactment of § 3582(c)(1)(A)(i) until the First Step Act of 2018, any sentence-reduction motion under this section had to be made by the BOP Director. *See United States* v. *McGee*, 992 F.3d 1035, 1041 (10th Cir. 2021). An inmate could not file his own motion, and if the BOP did not file for compassionate release on an inmate's behalf, the BOP's decision was not judicially reviewable. In 2013, the Office of the Inspector

that Congress, by way of § 603(b) of the First Step Act, intended to increase the use of sentence reductions under § 3582(c)(1)(A)." *United States* v. *McGee*, 992 F.3d 1035, 1046 (10th Cir. 2021). It is critical to all stakeholders in the criminal justice process that our very busy federal trial courts apply the correct applicable law when adjudicating compassionate release motions.

The rule announced in *Wesley*—that a defendant is barred from raising "§ 2255-like claims" as "extraordinary and compelling reasons" for compassionate relief—runs afoul of the plain text of the compassionate release statute, precedent in our circuit interpreting it, the First Circuit's well-reasoned decision on the same issue, and the Sentencing Commission's view. *Wesley* seems to impose a new extra-textual threshold inquiry in § 3582(c)(1)(A) cases but leaves district courts without clear guidance on how to undertake it. Because *Wesley* reaches the wrong result on a recurring

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General issued a highly critical report, noting that the BOP "inconsistently implemented and poorly managed" its authority, "resulting in overlooked eligible inmates and terminally ill inmates dying while their requests were pending." *Id.* at 1041-42. Congress sought to address these problems in § 603 of the First Step Act, which amended § 3582(c)(1)(A)(i) to remove the BOP as gatekeeper and to permit defendants to file their own motions for reduced sentences directly in federal district court. First Step Act of 2018, § 603, Pub. L. 115-391, 132 Stat. 5194, 5239. The title of § 603—"Increasing the Use and Transparency of Compassionate Release"—makes its purpose clear.

issue of exceptional importance, I respectfully dissent from the denial of rehearing *en banc*.

I

A

"We start, as always, with the language of the statute." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (citation omitted). The compassionate release statute, as amended by the First Step Act, provides, in pertinent part:

> (c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--
>
> (1) in any case--
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> (i) extraordinary and compelling reasons warrant such a reduction; . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

§ 3582(c)(1)(A)(i).

"[N]either § 3582(c)(1)(A)(i), nor any other part of the statute, defines the phrase 'extraordinary and compelling reasons' . . . ." *McGee*, 992 F.3d at 1043. The text of § 3582(c)(1)(A)(i) excludes no categories of reasons from the grounds that could constitute "extraordinary and compelling reasons" warranting a sentence reduction. As *Wesley* acknowledges, "The only limit Congress explicitly put on 'extraordinary and compelling reasons' was a directive that the Sentencing Commission's explanatory policy statements could not designate '[r]ehabilitation of the defendant alone [as] an extraordinary and compelling reason.'" *Wesley*, 60 F.4th at 1282 (alterations in original) (quoting 28 U.S.C. § 994(t)).

Congress also did not clearly state any threshold jurisdictional element in § 3582(c)(1)(A)(i). Still, *Wesley* held when a district court "receives a compassionate release motion that comprises or includes a claim governed by § 2255" it must now "treat the part governed by § 2255 as if explicitly brought under § 2255 and handle it accordingly (including dismiss[ing] for lack of jurisdiction if appropriate)." *Id.* at 1288; *see also id.* at 1280 (affirming "the district court's jurisdictional dismissal"). As the rehearing petition correctly observes, "Moving forward, before resolving a [compassionate release] motion, district courts must first address a judicially-created jurisdictional threshold requirement." Appellant's Pet. Reh'g at 1.

Previously, our circuit has declined "to read a jurisdictional element into § 3582(c)(1)(A)'s 'extraordinary and compelling reasons' requirement when the statute itself provides no indication (much less a 'clear statement') to that effect." *United States* v. *Hald*, 8 F.4th 932, 942 n.7 (10th Cir. 2021). This is consistent with the Supreme Court's directive to "inquire whether Congress has 'clearly stated' that the rule is jurisdictional," and "absent such a clear statement" the restriction should be treated as "nonjurisdictional in character." *Id.* (brackets omitted) (quoting *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)).[3] Congress's choice not to limit a district court's discretion to find "extraordinary and compelling reasons" must be given effect, and not constrained by a court-imposed jurisdictional element absent from the statutory text.

The Supreme Court has warned the over-labeling of statutory requirements as jurisdictional can have "drastic" consequences. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011). The enforcement of statutory criteria as jurisdictional "alters the normal operation of our

[3] In *United States* v. *Hemmelgarn*, 15 F.4th 1027, 1030-31 (10th Cir. 2021), the panel determined § 3582(c)(1)(A)'s exhaustion requirement was not jurisdictional. In explaining this conclusion, the panel acknowledged "we have recently applied similar reasoning in determining that § 3582(c)(1)(A)'s 'extraordinary and compelling reasons' requirement is not jurisdictional." *Id.* at 1031 (citing *Hald*, 8 F.4th at 942 n.7). *Wesley* appears singular in its extra-textual approach.

adversarial system" by compelling the courts to raise an issue *sua sponte*. *Id.* at 434. And here, the ambiguous language used in *Wesley* will compound the burden on district courts, exposing the administrability problems the opinion creates. Although the Supreme Court has instructed we should not impose "difficult to apply" standards or an "indeterminable line-drawing exercise on the lower courts," *Stokeling* v. *United States*, 139 S. Ct. 544, 554 (2019), *Wesley* now requires them to ferret out "§ 2255-like claims." Is a "§ 2255-like claim" the same thing as a § 2255 claim? Unclear. *See, e.g.*, *Life Techs. Corp.* v. *Promega Corp.*, 580 U.S. 140, 149 (2017) (adopting interpretation that "provides an administrable construction" and rejecting construction that provided no way to determine how to meet standard).

With *Wesley* as circuit precedent, we send mixed signals to district courts about the extent of their authority under the compassionate release statute—or whether their authority to hear certain claims to relief exists at all.

B

Notwithstanding the plain statutory language, *Wesley* invokes the general/specific canon of statutory construction to support its novel rule. *Wesley* concludes "the scope of § 2255 is more specific" than the scope of § 3582(c)(1)(A)(i) and "[t]hus, looking at the two statutes in context, § 2255 is presumptively the vehicle by which federal prisoners must raise

challenges to their convictions or sentences." 60 F.4th at 1284. The existence of a conflict is the condition precedent to the application of the canon on which the panel relies, *Sierra Club* v. *EPA*, 964 F.3d 882, 892 (10th Cir. 2020), but the opinion never establishes any conflict between § 2255 and § 3582(c)(1)(A)(i). It cannot, because there is none.

There is obviously no conflict for purposes of the general/specific canon where two distinct statutory schemes—habeas on the one hand and compassionate release on the other—provide for *different forms of relief*. As the rehearing petition correctly explains, "[A] defendant who seeks a reduced sentence under § 3582(c)(1)(A) (without seeking the vacatur of the judgment) is necessarily not seeking relief under § 2255." Appellant's Pet. Reh'g at 8. I see no tension to be reconciled, and thus no reason to invoke a principle of statutory interpretation designed to aid in that endeavor.

Deploying the general/specific canon, *Wesley* appears concerned with defendants using § 3582(c)(1)(A) "to circumvent the procedural and substantive requirements of § 2255." 60 F.4th at 1282. The *Wesley* opinion says a defendant "cannot avoid [§ 2255] by insisting he requests relief purely as an exercise of discretion rather than entitlement." *Id.* at 1288. I understand *Wesley*'s "§ 2255-like claims" limitation, *id.*, to be animated by a legitimate and long-standing concern—prisoners may not make an end-run around § 2255 when seeking to vacate their conviction or sentence. But

this concern is simply not presented here, where the defendant invokes what Congress has codified in the compassionate release statute—namely, not a habeas remedy. It bears repeating: "[A] motion under 18 U.S.C. § 3582 . . . is distinct from a § 2255 claim." *United States* v. *Randall*, 666 F.3d 1238, 1240 n.4 (10th Cir. 2011).

Mr. Wesley was not using the compassionate release statute to secure habeas relief. He "never challenged his conviction" nor "claimed that a defendant can 'attack[]' a conviction, allege 'the invalidity of the conviction,' 'assert error in a conviction,' 'raise errors in the conviction,' challenge a 'wrongful conviction,' 'call into doubt the validity of the conviction,' or 'include[] alleged errors in the conviction' in a § 3582(c)(1)(A) motion." Appellant's Pet. Reh'g at 5 (quoting *Wesley*, 60 F.4th at 1283, 1284, 1286 & n.5, 1287). Rather, he called on the district court's authority and its discretion under § 3582(c)(1)(A) to discern whether the remedy of compassionate release, not habeas relief, was warranted.

Even if the canon applies here, how can § 2255 reasonably be understood as the more specific statute of the two? "What counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 648 (2012). As the rehearing petition correctly explains, § 2255 "broadly covers all situations where the sentence

is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus." Appellant's Pet. Reh'g at 9 (quoting *Davis* v. *United States*, 417 U.S. 333, 344 (1974)). The compassionate release statute, by contrast, "provides a limited remedy (a reduced sentence) in limited situations (extraordinary and compelling reasons)." *Id.*

Moreover, using the general/specific canon in this context is at odds with a different (and far more germane) statutory construction principle—the related-statutes canon, which requires harmonious interpretation of statutes. *See Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" (quoting *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972))). When, as here, we are "confronted with two Acts of Congress allegedly touching on the same topic," we are "not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). So when, as here, the two statutes are readily harmonized, it is our obligation, absent clear contrary congressional intent, to give effect to each.

Under the compassionate release statute, district courts have authority only to modify a sentence based on an individualized and holistic

review of a defendant's circumstances—not to vacate it or the underlying conviction, as § 2255 authorizes. A prisoner making a compassionate release argument is not claiming his sentence is invalid or unlawful. "Rather, the prisoner concedes, at least for the purpose of his motion for compassionate release, that the sentence is currently valid and lawful, but nevertheless appeals to the equitable discretion of the judge for a sentence modification." *United States* v. *Jenkins*, 50 F.4th 1185, 1213 (D.C. Cir. 2022) (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). When it comes to compassionate release, a modified sentence is the only remedy a prisoner can seek and the only remedy a district court can grant. Properly understood, therefore, the compassionate release statute is "an additional, alternative, or supplemental remedy to 28 U.S.C. § 2255." *Bradshaw* v. *Story*, 86 F.3d 164, 166 (10th Cir. 1996).

II

Wesley is hard to reconcile not just with the text of the compassionate release statute but also with cases interpreting it. Our court has confirmed district courts have discretion under § 3582(c)(1)(A)(i) to decide for themselves what constitutes "extraordinary and compelling reasons" for a sentence reduction. And the First Circuit, in a similar case, correctly held "habeas and compassionate release are distinct vehicles for relief," and that district courts had the discretion to consider any argument as an

"extraordinary and compelling reason" under § 3582(c)(1)(A). *United States* v. *Trenkler*, 47 F.4th 42, 48 (1st Cir. 2022). *Wesley* therefore conflicts with our own precedent and entrenches a divide among the federal courts of appeals.

A

We have understood the "plain language of the [compassionate release] statute" to state three requirements for granting motions under § 3582(c)(1)(A)(i):

> (1) the district court finds that extraordinary and compelling reasons warrant such a reduction; (2) the district court finds that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) the district court considers the factors set forth in § 3553(a), to the extent that they are applicable.

McGee, 992 F.3d at 1042.

Our circuit precedent makes clear district courts have the power to independently decide what are "extraordinary and compelling reasons" for granting a sentence reduction under the first part of § 3582(c)(1)(A)'s statutory test. *Id.* at 1045; *United States* v. *Maumau*, 993 F.3d 821, 834 (10th Cir. 2021). Two cases are particularly relevant here—*United States* v. *McGee* and *United States* v. *Maumau*.

In *McGee*, the defendant moved for compassionate release, contending changes under the First Step Act would make his sentence considerably

lower if he were sentenced today. 992 F.3d at 1039-40. This change in the law, taken in combination with his rehabilitation, constituted extraordinary and compelling reasons for a sentence reduction. *Id.* The district court denied the motion, concluding it lacked authority to consider the First Step Act changes as an "extraordinary and compelling reason" because Congress chose not to make them retroactive. *Id.* at 1040-41. We reversed.

First, *McGee* rejected the district court's apparent conclusion that "its authority at step one of the statutory test was constrained by the Sentencing Commission's policy statements." *Id.* at 1043. Instead, we clarified "district courts, in applying the first part of § 3582(c)(1)(A)'s statutory test, have the authority to determine *for themselves* what constitutes 'extraordinary and compelling reasons.'" *Id.* at 1045 (emphasis added). We recognized this discretion is not limitless but constrained by the second part of the statutory test—the requirement that district courts find a sentence reduction is consistent with the Sentencing Commission's applicable policy statements. *Id.* We also reversed the district court's conclusion that it could not consider the First Step Act's changes at sentencing, explaining "nothing in § 401(c) or any other part of the First Step Act indicates that Congress intended to prohibit district courts, on an

individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i).” *Id.* at 1047.

In *Maumau*, we reaffirmed district courts have broad discretion to determine what constitutes “extraordinary and compelling reasons” for a sentence reduction under § 3582(c)(1)(A). 993 F.3d at 832. The defendant in *Maumau* sought compassionate release based, in part, on the First Step Act’s elimination of the “stacking” provision for sentences under § 924(c), the disproportionate sentence he received compared to his co-defendants, and his rehabilitation efforts. *Id.* at 827. The district court granted the motion, and we affirmed. Again, we concluded “Congress intended to afford district courts with discretion, in carrying out the first part of the statutory test in § 3582(c)(1)(A)(i), to independently determine the existence of ‘extraordinary and compelling reasons,’ and for that discretion to be circumscribed under the second part of the statutory test.” *Id.* at 832.

As *McGee* and *Maumau* make clear, the district court’s discretion at step one *is* expansive.[4] *Wesley* is at odds with this fundamental premise.

[4] Though *Wesley* resists the conclusion, Congress still meaningfully cabined the district court’s broad discretion at the first statutory step. The statutory language itself—“extraordinary and compelling”—sets a high bar for relief. Then discretion is limited expressly at step two by the mandate that any sentence reduction must be consistent with the Sentencing Commission’s policy statements. *McGee*, 992 F.3d at 1045; *Maumau*, 993 F.3d at 834. Congress also made explicit “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” 28

Still, the panel in *Wesley* insists there is no intra-circuit conflict because "in *Maumau*, whether 'extraordinary and compelling reasons' can include matters that, if true, would demonstrate the invalidity of the conviction or sentence, was not before this court." *Wesley*, 60 F.4th at 1283. But *Maumau* and *McGee* say what they say—the compassionate release statute provides district courts with "discretion to consider whether *any* reasons are extraordinary and compelling." *Maumau*, 993 F.3d at 837 (emphasis added) (quoting *United States* v. *Brooker*, 976 F.3d 228, 236 (2d Cir. 2020)); *McGee*, 992 F.3d at 1050 (same). As the Supreme Court has explained, "Read naturally, the word 'any' has an expansive meaning." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). While "[t]he design of Congress in amending § 3582(c)(1)(A) was not to create an open season for resentencing (after all, the title of the amendment speaks in terms of 'Compassionate' release . . . .)," our precedent confirms "*McGee* and *Maumau* suggest that the district court has substantial discretion." *Hald*, 8 F.4th at 938 n.4.

In his compassionate release motion, Mr. Wesley expressly tied the prosecutor's misconduct to the severity of his sentence, and argued that reason, in combination with other reasons, satisfied the "extraordinary and

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U.S.C. § 994(t). And, even if a defendant establishes extraordinary and compelling reasons, discretion is further cabined at step three, which imposes another limitation, requiring district courts to consider the § 3553(a) factors before granting relief.

compelling" requirement of § 3582(c)(1)(A)(i). Nothing in our circuit precedent, until *Wesley*, denies a district court the *power* to consider any number of reasons for compassionate release as part of the holistic review of "unique circumstances" which, in the district court's judgment, might (or might not) constitute "extraordinary and compelling reasons." *McGee*, 992 F.3d at 1048; *see Maumau*, 993 F.3d at 837 ("[T]he district court's . . . finding of 'extraordinary and compelling reasons' was based on its individualized review of all the circumstances of Maumau's case and its conclusion 'that a combination of factors' warranted relief . . . .").

B

Wesley acknowledges it "takes a different view" from the First Circuit in *Trenkler*.[5] 60 F.4th at 1286. The question presented in *Trenkler* was

[5] *Wesley* says its "holding is consistent with holdings or considered dicta from the Second, Fourth, Sixth, Seventh, Eighth, and D.C. Circuits." *Wesley*, 60 F.4th at 1286. However, as the rehearing petition explains, most of those opinions are in tension with the holdings of *McGee* and *Maumau*. Appellant's Pet. Reh'g at 13. Four of our sister circuits reject the ability of district courts to consider non-retroactive changes in the law when determining what counts as "extraordinary and compelling reasons." *See United States* v. *Hunter*, 12 F.4th 555, 568 (6th Cir. 2021); *United States* v. *Thacker*, 4 F.4th 569, 574 (7th Cir. 2021); *United States* v. *Crandall*, 25 F.4th 582, 585-86 (8th Cir. 2022); *United States* v. *Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022). In those circuits, district court discretion under the compassionate release statute is viewed more narrowly than in our own. *Cf. United States* v. *McCall*, 56 F.4th 1048, 1065 (6th Cir. 2022) (*en banc*) (acknowledging split from *McGee*).

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whether a "sentencing error [could] constitute[] an 'extraordinary and compelling' reason to grant compassionate release." 47 F.4th at 46. The government said no, contending such a conclusion would circumvent AEDPA's "limitations on successive habeas petitions, [and] supplant[] habeas law generally." *Id.*

The First Circuit rejected the government's position. The *Trenkler* court started from first principles: "[H]abeas and compassionate release exist under two distinct statutory schemes" and thus "are distinct vehicles for relief." *Id.* at 48. *Trenkler* then distinguished "what may be *considered* in an 'extraordinary and compelling' determination . . . from the secondary, individualized question of what can actually *qualify* as extraordinary and compelling." *Id.* In explaining what "may be considered," *Trenkler* reinforced "district courts have the discretion to review prisoner-initiated motions by taking the holistic, any-complex-of-circumstances approach"

In any case, the Sentencing Commission's promulgated amendments considered this split and "agree[d] with the circuits"—like ours—"that authorize a district court to consider non-retroactive changes in the law as extraordinary and compelling circumstances." Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28258 (May 3, 2023). Once these promulgated amendments become effective November 1, 2023, they will moot the existing split in favor of our previous *McGee* and *Maumau* approach. *See Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (discussing Commission's "duty" to "review the work of the courts[] and . . . make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest").

that "contemplates that any number of reasons may suffice on a case-by-case basis." *Id.* at 49-50.

According to *Wesley*, *Trenkler* holds that, "save for rehabilitation alone, district courts may consider literally anything . . . when deciding whether extraordinary and compelling reasons exist." *Wesley*, 60 F.4th at 1286. *Wesley* offers only the general/specific canon argument to explain why *Trenkler*'s textual analysis is wrong. As explained, that canon cannot bear the weight of *Wesley*'s conclusion. *Wesley* also criticizes *Trenkler*'s holding that "'correct application of the "extraordinary and compelling" standard . . . naturally precludes classic post-conviction arguments, *without more*, from carrying such motions to success.'" *Id.* (quoting *Trenkler*, 47 F.4th at 48). *Wesley* insists *Trenkler* fails to "explain where it finds this limitation in the statute's text" *Id.* at 1287.

Properly understood, however, the phrase "extraordinary and compelling" provides the textual support for *Trenkler*'s correct understanding. *Trenkler* recognizes that a classic post-conviction argument alone is unlikely to satisfy the "extraordinary and compelling" standard.[6]

[6] We recognized the same in-combination principle in *McGee*. *See McGee*, 992 F.3d at 1048 ("[W]e conclude that it can only be the combination of [a pre-First Step Act] sentence and a defendant's unique circumstances that constitute 'extraordinary and compelling reasons' for purposes of § 3582(c)(1)(A)(i)."). Such a view is consistent with the Supreme Court's characterization of compassionate release as a broad "mechanism for relief,"

Thus, focusing on the combination of circumstances is a wise limiting principle: it correctly understands any argument, including a sentencing-error argument like Mr. Wesley's, as going to the merits of the compassionate release claim, not to the court's very power (jurisdiction) to consider it. Put differently, it understands the distinction between what arguments can be properly raised under the compassionate release statute—anything consistent with applicable policy statements—and what arguments will actually succeed on such a motion—any combination of circumstances the court finds "extraordinary and compelling." *See also United States* v. *Ruvalcaba*, 26 F.4th 14, 26 (1st Cir. 2022) ("To serve as a safety valve, section 3582(c)(1)(A) must encompass an individualized review of a defendant's circumstances and permit a sentence reduction – in the district court's sound discretion – based on any combination of factors . . . .").

I am persuaded by *Trenkler*'s analysis. Like our pre-*Wesley* precedents, *Trenkler* accords with the statutory command and imposes no "§ 2255-like claims" limitation on a district court's jurisdiction and

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Setser v. *United States*, 566 U.S. 231, 242-43 (2012), and accords with Congress's recognition of "the need for a 'safety valve' with respect to situations in which a defendant's circumstances had changed such that the length of continued incarceration no longer remained equitable," *United States* v. *Ruvalcaba*, 26 F.4th 14, 26 (1st Cir. 2022) (quoting S. Rep. No. 98-225, 55-56, 121 (1983)).

authority under § 3582(c)(1)(A). Just as I see no support for overlaying an extra-textual gloss on an otherwise plain text, I can discern no reason for *Wesley*'s departure from these precedents.

III

Wesley also brings our circuit out of alignment with the views of the Sentencing Commission. Unlike this court, the Sentencing Commission has not limited a district court's authority to decide that arguments like Mr. Wesley's could qualify as extraordinary and compelling reasons for compassionate release, nor identified any purported conflict between § 2255 and the compassionate release statute.[7]

Under the Sentencing Reform Act, "Congress directed the Commission to 'describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.'" Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28259 (May 3, 2023) (quoting 28 U.S.C. § 994(t)); *see McGee*, 992 F.3d at 1045 (the Sentencing Commission is tasked with identifying the "characteristic or significant qualities or features that

[7] To the contrary, the Sentencing Commission identifies "Conviction/sentencing errors" as legitimate bases for compassionate release under § 3582(c)(1)(A). *See* U.S. Sent'g Comm'n, Compassionate Release Data Report (2020 to 2022), at 19, 21 (Dec. 2022); U.S. Sent'g Comm'n, Compassionate Release Data Report (May 2023) at 17.

typically constitute 'extraordinary and compelling reasons.'"). Congress also directed the Commission to promulgate general policy statements regarding the appropriate use of the compassionate release statute. *See* 28 U.S.C. § 994(a)(2)(C). At the time *Wesley* was decided, "no policy statement existed to constrain the district court's evaluation of extraordinary and compelling reasons." *Wesley*, 60 F.4th at 1283.

Recently, the Sentencing Commission promulgated new Guideline amendments on compassionate release. Though the Commission had the opportunity to narrow the scope of what qualifies as an extraordinary and compelling reason under § 3582(c)(1)(A)(i), it did just the opposite. The amendments expand the list of expressly enumerated extraordinary and compelling reasons and confirm "any other circumstance or combination of circumstances that, considered by themselves or together . . . are similar in gravity" to the specified reasons may be considered. Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28258. The Commission explained it "considered but specifically rejected a requirement that 'other reasons' be similar in nature and consequence to the specified reasons" and instead adopted the requirement that "they need be similar only in gravity." *Id.* The Commission emphasized "what circumstances or combination of circumstances are sufficiently extraordinary and compelling to warrant a reduction in sentence *is best provided by reviewing courts*." *Id.* (emphasis

added). The proposed amendments, unlike *Wesley*, do not constrain the discretion of district courts at the first statutory step.[8] They certainly do not suggest the threshold jurisdictional inquiry now required in this circuit.

IV

Nearly every day, a petitioner files for compassionate release in one of the judicial districts in our circuit. Where Congress intended compassionate release to equip district court judges with broad discretion in considering sentencing adjustments, *Wesley* tightly circumscribes their power to consider and grant relief.

And for the first time, *Wesley* will also burden those district courts with a *sua sponte* jurisdictional analysis, under which judges must now

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[8] As explained, there are already constraints built into the statute. One of them, rehabilitation, alone cannot be an extraordinary and compelling reason. 28 U.S.C. § 994(t). Still, the promulgated amendments make explicit that rehabilitation can "be considered in combination with other circumstances" in deciding "whether and to what extent" a sentence reduction is warranted. Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28255.

The amendments also confirm "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing." *Id.* Elaborating further, the proposed amendments expressly state "the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction." *Id.* This language seems to contemplate—and at least does not curtail—a district court's power to consider arguments like Mr. Wesley's in deciding whether to grant compassionate release. This is true even if those arguments were available to the defendant as a basis for pursuing habeas relief—a wholly different remedy.

determine whether § 3582(c)(1)(A) claims are actually "§ 2255-like claims." This test does not derive from the statutory text, conflicts with precedent from within our circuit and without, and cannot be read consistently with the Sentencing Commission's view.

Our *en banc* procedure permits us to address and rectify such errors. We should have done so here.

Respectfully, I dissent from the denial of *en banc* review.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 07-20168-02-JWL
	)	
MONTERIAL WESLEY,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM AND ORDER

Defendant Monterial Wesley was indicted on twelve counts relating to a conspiracy to distribute cocaine and cocaine base in and around Kansas City. In April 2009, after the jury was impaneled but before any evidence was presented, Mr. Wesley pled guilty to four counts of the indictment (without the benefit of a plea agreement), including conspiracy to manufacture, to possess with intent to distribute, and to distribute fifty grams or more of cocaine base and to possess with intent to distribute and to distribute five kilograms or more of cocaine. He went to trial on the eight other counts, along with a number of co-defendants, and was subsequently convicted on two of them.

In October 2009, the court sentenced Mr. Wesley to 360 months imprisonment. This sentence was driven by the significant quantity of drugs attributed to Mr. Wesley and the inherent violence associated with the related firearms offense. Specifically, the court found that Mr. Wesley was accountable for more than 150 kilograms of cocaine which

corresponded to the highest base offense level at the time and, as noted by the Tenth Circuit, was a conservative estimate. *United States v. Wesley*, 423 Fed. Appx. 838, 840 (10th Cir. 2011) (district court's "conservative estimate" concerning drug quantity was based on "conservative, cautious interpretations" of the evidence). In holding Mr. Wesley accountable for more than 150 kilograms of cocaine, the court relied on the trial testimony of Mr. Thomas Humphrey and the sentencing hearing testimony of Mr. Cruz Santa Anna, both of whom the court found credible. Mr. Wesley's base offense level was increased based on Mr. Wesley's possession of a firearm, for a total offense level of 40. The court rejected Mr. Wesley's argument that he was entitled to a two-point reduction for acceptance of responsibility because he pled guilty to the most serious charge in the indictment. With a criminal history category of II, the resulting guideline range was 324 to 405 months. As noted, the court sentenced Mr. Wesley to 30 years. The Circuit affirmed the sentence on direct appeal. *United States v. Wesley*, 423 Fed. Appx. 838, 839 (10th Cir. 2011). He is presently scheduled for release in February 2034.

This matter is now before the court on Mr. Wesley's second motion to reduce sentence under 18 U.S.C. § 3582(c)(1)(A) (doc. 1993), a motion that has been filed through counsel.[1] The Tenth Circuit has endorsed a three-step test for district courts to utilize in connection with motions filed under § 3582(c)(1)(A). *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021) (citing *United States v. Jones*, 980 F.3d 1098, 1107 (6th Cir.

[1] Mr. Wesley's first motion was filed in May 2020 and was based on Mr. Wesley's argument that his medical conditions placed him at an elevated risk of harm from COVID-19. The court denied the motion and the Circuit affirmed that decision. *United States v. Hald*, 8 F.4th 932 (10th Cir. 2021).

2020)). Under that test, a court may reduce a sentence if the defendant administratively exhausts his or her claim and three other requirements are met: (1) "extraordinary and compelling" reasons warrant a reduction;[2] (2) the "reduction is consistent with applicable policy statements issued by the Sentencing Commission;" and (3) the reduction is consistent with any applicable factors set forth in 18 U.S.C. § 3553(a). *Id.*[3] A court may deny compassionate-release motions when any of the three prerequisites is lacking and need not address the others. *Id.* at 1043. But when a district court grants a motion for compassionate release, it must address all three steps. *Id.* As will be explained, defendant has not come forward with extraordinary and compelling reasons sufficient to warrant a reduction in his sentence. The court, then, declines to address the other prerequisites.

In his motion, Mr. Wesley maintains that extraordinary and compelling reasons exist in this case for a sentence reduction. First, he argues that the prosecutor in this case, AUSA Terra Morehead, solicited false testimony about drug quantities in this case from at least three witnesses and that one of those witnesses has admitted to testifying falsely about drug quantity in light of threats made by Ms. Morehead. Second, Mr. Wesley argues that his sentence is excessive and disproportionate when compared to co-defendants who did not go to trial and when compared to, as he characterizes them, more culpable cooperating co-conspirators. Mr. Wesley seeks an evidentiary hearing to resolve his prosecutorial

[2] A district court has the authority to exercise its discretion to independently determine the existence of "extraordinary and compelling reasons." *McGee*, 992 F.3d at 1043-44.
[3] The government does not dispute that Mr. Wesley has satisfied the statute's exhaustion requirement such that this court has jurisdiction to resolve the merits of Mr. Wesley's motion.

misconduct allegations and, putting aside those allegations, a sentence reduction to 15 years based on his argument that his sentence is comparatively excessive and disproportionate.

Prosecutorial Misconduct

The primary thrust of Mr. Wesley's motion concerns conduct by the prosecutor in this case, AUSA Terra Morehead. In support of his motion, Mr. Wesley has come forward with evidence that Ms. Morehead engaged in misconduct in connection with Mr. Wesley's jury trial and sentencing. Specifically, Mr. Wesley submits evidence that a witness who testified against Mr. Wesley lied about the nature of his dealings with Mr. Wesley and testified that he sold cocaine to Mr. Wesley when in fact he sold only marijuana to Mr. Wesley. He states under penalty of perjury that Ms. Morehead knew that his testimony was false but that Ms. Morehead wanted him to testify that he sold cocaine to Mr. Wesley. This witness also states that Ms. Morehead wanted the witness to "add weight" to the drug quantities in his trial testimony, but he refused to do so. Mr. Wesley also submits evidence that another witness who testified against Mr. Wesley was pressured by Ms. Morehead to "to make the drug weight more than it really was" but that he refused to do so and that his trial testimony was truthful despite Ms. Morehead's efforts. A third individual indicates that Ms. Morehead asked him to testify to buying more cocaine from Mr. Wesley than he actually did. This witness, however, did not testify at trial.

Mr. Wesley asserts that the evidence concerning these witnesses significantly undermines the reliability of the drug quantities attributed to Mr. Wesley by the court in its

relevant conduct calculations and requires an evidentiary hearing to explore whether Ms. Morehead pressured Mr. Humphrey and Mr. Santa-Anna to falsely inflate drug quantities in their testimony and, if so, whether they in fact testified falsely. Mr. Wesley further supports his motion with evidence that Ms. Morehead, in the context of other cases, has a practice of engaging in abusive, "reprehensible," and untruthful conduct. *See, e.g.*, United States v. Orozco, 916 F.3d 919, 924 (10th Cir. 2019) (describing district court's conclusion that AUSA Morehead had violated the defendant's Sixth Amendment rights by intimidating a witness); *CCA Recordings 2255 Litig. v. United States*, 2021 WL 5833911, at *24 (D. Kan. Dec. 9, 2021) (court concluded that AUSA Morehead engaged in "reprehensible" conduct when she intruded into attorney-client relationship by intentionally becoming privy to attorney-client phone call). According to Mr. Wesley, all of this evidence undermines the reliability of the drug quantities attributed to Mr. Wesley—quantities that unquestionably drove his 30-year sentence—and supports a reduction in his sentence.

The threshold issue presented by Mr. Wesley's motion is whether his arguments and evidence about Ms. Morehead's conduct—and, more specifically, his express assertion that Ms. Morehead's conduct "undermine[d] the constitutional integrity of the trial and sentencing"—can be remedied under 18 U.S.C. § 3582(c)(1)(A). The government, in response to Mr. Wesley's motion, contends that Mr. Wesley's argument concerning Ms. Morehead can only be pursued through 28 U.S.C. § 2255. In pertinent part, a § 2255 motion is one "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255.

such that the court must dismiss this aspect of the motion as an unauthorized successive §2255 petition. *See United States v. Harper*, 545 F.3d 1230, 1232 (10th Cir. 2008) (court must either dismiss unauthorized successive § 2255 petition for lack of jurisdiction or transfer it to the Tenth Circuit for a determination whether the successive petition should be permitted). The government further contends that the court should not transfer the motion to the Circuit because Mr. Wesley's claim of prosecutorial misconduct "lacks specificity tied to the alleged perjured testimony presented to this Court." As will be explained, the court agrees with the government that Mr. Wesley's claim, which clearly alleges that he is entitled to release because his sentence was based on the unconstitutional acts of the prosecutor in this case, must be asserted in the context of a § 2255 petition. Because defendant's motion unquestionably attacks the validity of his conviction, as opposed to asserting a defect in the integrity of the habeas proceeding, the motion is subject to authorization under § 2255(h). The court, then, dismisses this aspect of the motion for lack of jurisdiction. The court need not address whether to transfer the motion to the Circuit because Mr. Wesley, who is represented by experienced counsel, asserts that there is no mechanism to transfer his § 3582(c) motion and clearly does not desire to take this claim to the Circuit under § 2255.

In support of his assertion that his claim that Ms. Morehead solicited false testimony about drug type and weight is properly resolved in the context of these § 3582(c) proceedings, Mr. Wesley directs the court to just four district court cases. None of these cases are persuasive to the court on this issue. In *United States v. Jackson*, an unpublished decision from the Eastern District of California dated June 21, 2021, the district court

simply checked the "granted" box on a form order concerning the defendant's motion for sentence reduction under § 3582(c)(1)(A). While Mr. Wesley has submitted the defendant's corresponding 35-page motion for sentence reduction, that motion contains a number of distinct bases for relief (indeed, most of the motion is dedicated to a COVID-19 outbreak at the defendant's facility and the defendant's numerous chronic health conditions) and the judge's order does not indicate what reason or combination of reasons warranted relief. Thus, the mere fact that the defendant argued for a reduction in part because, according to the defendant, the judge improperly relied on "biased and unreliable" co-conspirator testimony in attributing drug quantities to defendant does not suggest that the court credited that argument.

Mr. Wesley also relies on two cases where the underlying criminal convictions were based on undercover sting operations—*United States v. Steele* and *United States v. White*. In *United States v. Steele*, 2021 WL 2711176 (D. Kan. July 1, 2021), this court granted the compassionate release motion of the defendant based on numerous factors including a change in the mandatory minimum sentence from 20 years to 10 years and the defendant's age, deteriorating health, rehabilitative efforts and clean disciplinary record. While Mr. Wesley contends that the court also relied on the fact that the defendant presented a "viable entrapment defense to the jury in light of certain government conduct relating to the underlying crimes," the court mentioned this fact only in connection with its analysis of the § 3553(a) factors and not as an extraordinary and compelling reason for the reduction. And while the court appropriately described Mr. Steele as a "scoundrel" who served over

12 years for operating a "small time criminal ring," the same cannot be said about Mr. Wesley.

The defendant in *United States v. White,* an unpublished case from the Northern District of Illinois, was convicted in connection with a fake stash house sting orchestrated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). By way of background, the ATF's "controversial and now-abandoned practice of conducting fake stash house stings" involved enticing unsophisticated, often desperate individuals (and typically poor people of color) into "conspiring to rob fictitious stash houses of fictitious drugs or money operated by fictitious drug dealers." *United States v. Paxton*, No. 13 CR 0103, 2018 WL 4504160, at *1 (N.D. Ill. Sept. 20, 2018); *Conley v. United States*, 5 F.4th 781 (7th Cir. 2021). As described by the Seventh Circuit, because the stash house is fictional, the government "decides which and what quantity of drugs it will have" and, by manipulating the amount and type of drugs "in" the fictitious stash house, has nearly unfettered ability to control the defendant's sentence. *United States v. Conley*, 875 F.3d 391, 394 (7th Cir. 2017). The defendant in *White* was the least culpable defendant and received a mandatory minimum of 25 years despite his minimal participation based on the fictitious circumstances described by the undercover ATF agent. In granting the defendant's motion for compassionate release, the court in *White* noted the unique circumstances of the defendant's prosecution and conviction and highlighted that fake stash house cases are "the types of cases where compassionate release is warranted based on the injustice and unfairness of a prosecution and resultant sentence." The unique facts of the *White* decision render it distinguishable from Mr. Wesley's case.

The last case referenced by Mr. Wesley in support of his motion is *United States v. Williams*, an unpublished decision from the Central District of California dated July 19, 2021. The district court in that case granted the defendant's motion for compassionate release under § 3582(c)(a)(A) based on the defendant's evidence that his trial counsel provided ineffective assistance at trial and, more importantly, in the context of advising the defendant on whether to proceed to trial or pursue a plea agreement. While the court had previously rejected the defendant's 2255 petition based on ineffective assistance claims, the defendant presented new information in his 3582(c) proceedings that his counsel never advised him that he could plead guilty, mispresented the strength of the government's case, never tried to negotiate a plea agreement, and led him to believe the case against him would be dismissed for lack of evidence. According to the court, had the defendant been advised by competent counsel, he would have pled guilty and would have already been released from custody like his co-defendants who entered guilty pleas.

The *Williams* case is somewhat difficult to analyze because it is unclear from the district court's memorandum and order whether the government disputed the defendant's evidence regarding his trial counsel. The motion was resolved without oral argument, which suggests that the government did not dispute the evidence. Regardless, while the court, distinguishing the defendant's prior § 2255 petition, stated that the defendant was not raising claims of ineffective assistance to undermine his conviction, but only "to argue why his motion should be granted," this court is not persuaded that those claims were appropriately resolved in the context of a § 3582(c) motion. And the court is not prepared to permit Mr. Wesley to assert in these proceedings what is undoubtedly a Sixth

Amendment claim challenging his conviction and sentence based on an isolated unpublished decision from the Central District of California.

The court, then, puts aside the cases set forth by Mr. Wesley in support of his motion and begins its own analysis with a Tenth Circuit opinion that, albeit unpublished and not referenced by the parties here, is relevant to the issue here. In *United States v. Read-Forbes*, 843 Fed. Appx. 131 (10th Cir. 2021), the defendant sought compassionate release under 18 U.S.C. § 3582(c)(1)(A) based on, among other things, her claim that the government's conduct in her underlying criminal proceeding (specifically, the government's possession of recorded phone calls between her and her attorneys) violated her Sixth Amendment rights. On appeal, the Circuit refused to address the claim, noting that "federal habeas corpus proceedings are the exclusive remedy for a prisoner 'claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution.'" *Id*. at 134 n.2. In so noting, the Circuit cited the Supreme Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In *Preiser*, the Supreme Court held that habeas corpus is the exclusive remedy when a prisoner asserts a claim that "goes directly to the constitutionality of [the movant's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id* at 489.

Mr. Wesley suggests that even though his claim is one that could be asserted under 28 U.S.C. § 2255, he can still properly raise it under 18 U.S.C. § 3582(c) in light of the court's broad discretion to fashion relief under that statute. According to Mr. Wesley, the Circuit in *McGee* and *Maumau* implicitly recognized that certain claims could properly be asserted under both § 2255 and § 3582(c). A reading of those cases, however, reflects that

the defendants' § 2255 and § 3582(c) proceedings were substantively distinct. In *McGee*, the defendant's § 2255 claim was based on his argument that his sentence was unconstitutional in light of state law changes that occurred after his federal conviction and sentence. In his subsequent § 3582(c) proceedings, he asserted that he was entitled to a sentence reduction based on a number of factors, including the fact that his sentence would be substantially lower in light of the First Step Act's reduction of the mandatory minimum sentence under § 841(b)(1)(A). The defendant in *Maumau* asserted in his § 2255 proceedings that his state convictions did not qualify as valid § 924(c) predicates under the unconstitutional residual clause. In contrast, the defendant sought a sentence reduction under § 3582(c) for a number of reasons, including the First Step Act's elimination of § 924(c)'s stacking provision. Neither *McGee* nor *Maumau* suggests that Mr. Wesley's prosecutorial misconduct claim can be asserted under both § 2255 and § 3582(c).

And despite Mr. Wesley's suggestion to the contrary, even though the broad language of § 3582(c)(1)(A) seems to cover his claim that, in his words, his sentence was "artificially inflated" due to prosecutorial misconduct, the Supreme Court in *Preiser* cautioned that the more specific federal habeas corpus statute is the "exclusive" remedy in situations where it "so clearly applies." 411 U.S. at 489. In *Preiser*, state law prisoners who alleged that they were deprived of good-conduct credits without due process of law brought actions under 42 U.S.C. § 1983. The defendants in that case conceded that they could have proceeded under 28 U.S.C. § 2254, but argued that they were nonetheless entitled to pursue their claims under the "broad remedial protections" of the civil rights statute because that statute clearly covered their claims. *Id*. at 488-89.

The Supreme Court rejected that argument and held that § 1983 was not a permissible alternative to the traditional remedy of habeas corpus and that when a state prisoner "is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Id. at 500. As the Court explained:

> Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

Id. at 489-90. Similarly, Mr. Wesley here seeks to avoid the stringent requirements of § 2255(h) by reframing his Sixth Amendment prosecutorial misconduct claim as one for "discretionary" relief under the compassionate release statute. He urges that he is not claiming that his conviction is invalid or that his sentence is unlawful. But despite his efforts to cast his claim as one for a discretionary reduction, it is clear that Mr. Wesley asserts—as he must—that Ms. Morehead's conduct as alleged renders his conviction and sentence unconstitutional. Indeed, even Mr. Wesley asserts in his motion that the evidence he has marshaled about Ms. Morehead undermines "the constitutional integrity of the trial and sentencing" and that whether Ms. Morehead "suborned perjury or just refused to correct false testimony, the result is the same: an unconstitutional proceeding." Doc. 1993 at 20. Thus, regardless of how hard Mr. Wesley tries to sidestep the issue, his claim is a

constitutional challenge to his underlying conviction and sentence that must be pursued through the federal habeas corpus statute.

For the foregoing reasons, the court concludes that Mr. Wesley's claim that the prosecutor in this case suborned perjury that resulted in an increased or inflated sentence falls squarely within § 2255's ambit. *See United States v. Williams*, 2020 WL 6059738, at *5 (D. Kan. Oct. 14, 2020) (compassionate release provision in § 3582(c)(1)(A) does not authorize relief based on a legal challenge to a defendant's conviction or sentence; claim that government violated defendant's Sixth Amendment rights would not be considered in § 3582(c) proceedings); *United States v. Warren*, 2020 WL 5253719, at *4 (D. Kan. Sept. 3, 2020) (§ 2255 motion, not compassionate release motion under § 3582, was appropriate avenue to address prosecutorial misconduct based on recording of defendant's conversations with counsel). The court will not consider this claim in analyzing whether Mr. Wesley has shown extraordinary and compelling reasons for release.

To the extent the court must assess whether to grant or deny a certificate of appealability (COA) to Mr. Wesley in connection with any appeal of the court's dismissal of Mr. Wesley's § 3582(c) motion as a successive § 2255 petition, the court declines to issue a COA. To obtain a COA where, as here, the court has dismissed a filing on procedural grounds, the movant must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court need not address the constitutional question if it concludes that reasonable jurists would not debate

the court's resolution of the procedural one. *Id*. at 485. Because reasonable jurists would not debate the correctness of this court's conclusion that this aspect of Mr. Wesley's § 3582(c) motion must be construed as an unauthorized second § 2255 petition, the court declines to issue a COA.

Excessive and Disproportionate Sentence

Mr. Wesley contends that his 30-year sentence is excessively long and disproportionate compared to his co-defendants who chose not to go to trial and compared to, as described by Mr. Wesley, more culpable cocaine suppliers who testified for the government. The court begins with what Mr. Wesley calls the "trial penalty" that he received for insisting on his right to trial by jury. Mr. Wesley contends that he received a sentence three- to six-times longer than those co-defendants who accepted plea agreements from the government. He further contends that the sentencing disparities cannot be explained simply by the three-level acceptance of responsibility adjustment or by criminal history differences. As will be explained, the court concludes that the disparity between Mr. Wesley's sentence and other individuals who entered guilty pleas or cooperated with the government does not constitute an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A).

To begin, the court notes that Mr. Wesley makes no argument that his sentence is disproportionate when compared to his co-defendants who, like Mr. Wesley, proceeded to trial. He also does not suggest that his sentence would be lower if he were sentenced today for the same conduct. He asserts only that he was penalized for exercising his right to a

jury trial as opposed to accepting a guilty plea and cooperating with the government. Without question, Mr. Wesley received a significantly lengthier sentence than those defendants who entered guilty pleas and those who cooperated with the government. Our criminal justice system rewards such conduct through specific provisions in the sentencing guidelines, *see* U.S.S.G. § 3E1.1 (adjustments for acceptance of responsibility) and the broad discretion of an individual prosecutor to confer substantial benefits through the plea negotiation process and any § 5K.1 recommendations. *See United States v. Williams*, 2022 WL 267890, at *3 (E.D. Wis. Jan. 28, 2022) ("Rather than penalizing a defendant for choosing to stand trial, the guidelines reward defendants who accept responsibility for their criminal conduct by reducing their offense level by two to three points.") (citing *United States v. Elmer*, 980 F.3d 1171, 1177 (7th Cir. 2020) (rejecting defendant's argument that district court imposed a "trial tax" in violation of the Sixth Amendment right to a speedy and public trial by denying defendant's request for acceptance of responsibility credit)). The court, then, does not accept the notion that Mr. Wesley was penalized for exercising his right to a jury trial; he elected not to accept the benefits that were available to him by resolving the case prior to trial.[4]

Of course, Mr. Wesley was well within his rights to proceed to trial and insist that a jury resolve this case. By doing so, he retained the chance that he would be found not guilty on those charges—a chance necessarily relinquished by his codefendants who pled guilty or cooperated. But his decision to exercise his right to trial also carried with it the

[4] Mr. Wesley has no independent evidence that the government penalized him for going to trial, such as an eleventh-hour superseding indictment containing additional counts.

risk that the jury would convict him of those charges which, of course, is what happened in this case. At that point, the sheer quantity of drugs attributable to Mr. Wesley, coupled with his decision to carry a firearm in connection with his drug trafficking activity, largely determined his lengthy sentence under the guidelines. Stripped down, then, Mr. Wesley's challenge to his lengthy sentence is one to the sentencing guidelines themselves and the prosecutor's broad discretion in the plea negotiation context. These are complaints that are likely shared by a significant number of individuals who are serving lengthy sentences after drug convictions. But, as explained by the Tenth Circuit, § 3582(c)(1)(A) is designed to remedy a defendant's "unique circumstances." *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021). Mr. Wesley has failed to identify any circumstances, unique to him, that warrant a reduction in his sentence. The motion is denied. *See United States v. Georgiou*, 2021 WL 1122630, at *10 (E.D. Pa. Mar. 23, 2021) (rejecting argument that defendant's 300-month sentence was disproportionately long or a "trial penalty;" defendant's challenge was to the guidelines themselves, a challenge that § 3582(c) was not designed to remedy) (citing *United States v. Williams*, 2020 WL 5573046, at *4 (E.D. Pa. Sept. 17, 2020) ("The remedy that [defendant] seeks is reserved for circumstances peculiar to an individual—his health, his age—and is not designed to challenge the guidelines themselves . . . [This] would undermine the very function of the federal sentencing regime: to provide certainty and consistency across sentences.").

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's second motion to reduce sentence under 18 U.S.C. § 3582(c)(1)(A) (doc. #1993) is **dismissed in part for lack of jurisdiction** and **denied in part**.

IT IS FURTHER ORDERED BY THE COURT THAT the court **declines** to issue a certificate of appealability on that portion of the court's memorandum and order dismissing defendant's § 3582(c) motion as an unauthorized successive § 2255 motion.

IT IS SO ORDERED.

Dated this 10th day of March, 2022, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter D. Imprisonment (Refs & Annos)

18 U.S.C.A. § 3582

§ 3582. Imposition of a sentence of imprisonment

Effective: December 21, 2018
Currentness

(a) Factors to be considered in imposing a term of imprisonment.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

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

(d) Notification requirements.--

(1) Terminal illness defined.--In this subsection, the term "terminal illness" means a disease or condition with an end-of-life trajectory.

(2) Notification.--The Bureau of Prisons shall, subject to any applicable confidentiality requirements--

(A) in the case of a defendant diagnosed with a terminal illness--

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)--

(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of--

(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

(3) Annual report.--Not later than 1 year after December 21, 2018, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year--

(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.

(e) Inclusion of an order to limit criminal association of organized crime and drug offenders.--The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998; amended Pub.L. 100-690, Title VII, § 7107, Nov. 18, 1988, 102 Stat. 4418; Pub.L. 101-647, Title XXXV, § 3588, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title VII, § 70002, Sept. 13, 1994, 108 Stat. 1984; Pub.L. 104-294, Title VI, § 604(b)(3), Oct. 11, 1996, 110 Stat. 3506; Pub.L. 107-273, Div. B, Title III, § 3006, Nov. 2, 2002, 116 Stat. 1806; Pub.L. 115-391, Title VI, § 603(b), Dec. 21, 2018, 132 Stat. 5239.)

Notes of Decisions (1453)

18 U.S.C.A. § 3582, 18 USCA § 3582
Current through P.L. 118-22. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

Effective: January 7, 2008
Currentness

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Pub.L. 104-132, Title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub.L. 110-177, Title V, § 511, Jan. 7, 2008, 121 Stat. 2545.)

Notes of Decisions (5783)

28 U.S.C.A. § 2255, 28 USCA § 2255
Current through P.L. 118-22. Some statute sections may be more current, see credits for details.

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