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#### APPENDIX A

# NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

### UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Submitted April 28, 2023\* Decided April 28, 2023

#### **Before**

MICHAEL B. BRENNAN, Circuit Judge MICHAEL Y. SCUDDER, Circuit Judge AMY J. ST. EVE, Circuit Judge

No. 22-2465

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Appeal from the United States District Court for the Central District of

Illinois.

v.

No. 4:12-cr-40031-SLD-

JEH

JERRY L. BROWN,

Defendant-Appellant.

Sara Darrow, Chief Judge.

<sup>\*</sup> We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

#### ORDER

Jerry Brown, who is serving a term of life imprisonment for conspiring to distribute crack cocaine, appeals the denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). He argues that a change in the law under which he was sentenced provides an extraordinary and compelling reason for his release, and that we should overrule our existing precedent holding that it does not. We affirm.

Brown was sentenced in 2014 after he was convicted of one count of conspiracy to distribute crack cocaine. See 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846. Because of his multiple prior convictions for felony drug offenses, he faced a statutory minimum sentence of life in prison, which the Sentencing Guidelines also recommended. The district court imposed that sentence, plus ten years of supervised release.

This appeal involves Brown's second motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). In his first in 2021, he argued, among other things, that his life sentence was not proportional to the seriousness of the offense. The district court denied the motion because Brown had not exhausted his administrative remedies. His second motion came a year later. This time, Brown relied primarily on an amendment to § 841(b) enacted in the First Step Act of 2018 that non-retroactively reduced the statutory minimum sentence for an offender in Brown's position from life in prison to 25 years. See Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5194, 5220 (2018). Brown argued that the non-retroactive change to § 841(b) was an extraordinary and compelling reason for a sentence reduction. He added that our precedent in United States v. Thacker, 4 F.4th 569 (7th Cir. 2021), which undermined his argument, was "on questionable ground" after *Concepcion v. United States*, 142 S. Ct. 2389 (2022). *Concepcion* held that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." *Id.* at 2404. Finally, Brown urged that his rehabilitative efforts in prison were also an extraordinary and compelling reason for release.

The district court denied Brown's motion. Applying our precedent in *Thacker*, the court first found relief unwarranted because non-retroactive sentencing changes cannot establish an extraordinary and compelling reason for release under § 3582(c)(1)(A)(i). *Thacker*, 4 F.4th at 575–76. The court also cited our decision in *United States v. King*, 40 F.4th 594 (7th Cir. 2022), which explained that "Concepcion is irrelevant to the threshold question whether any given prisoner has established an 'extraordinary and compelling' reason for release." *Id.* at 596. Finally, the court concluded that Brown's rehabilitative efforts alone could not be an extraordinary and compelling reason for release. *See United States v. Peoples*, 41 F.4th 837, 842 (7th Cir. 2022).

On appeal, Brown maintains that he qualifies for compassionate release based on the First Step Act and urges us to reconsider *Thacker* in light of *Concepcion*. (He does not revive his argument about rehabilitation.) In support, he points to a 4-3 circuit split and asks that we adopt the Ninth Circuit's reasoning in *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022). That case—contrary to *Thacker*—permitted district courts in the Ninth Circuit to consider the First Step Act's non-retroactive changes to sentencing laws, in combination with other factors, in assessing whether extraordinary and compelling reasons exist under § 3582(c)(1)(A)(i). *Chen*, 48 F.4th at 1098. Brown urges us to accept *Chen*'s rationale that Congress

did not in the compassionate-release statute expressly limit a court's ability to consider the First Step Act's non-retroactive statutory changes. See id. at 1098–99. In addition to Chen, Brown cites decisions of the First, Fourth, and Tenth Circuits adopting similar reasoning. See United States v. Ruvalcaba, 26 F.4th 14 (1st Cir. 2022); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021); United States v. McCoy, 981 F.3d 271 (4th Cir. 2020). On the other side of the split, the Third and Eighth Circuits have ruled in alignment with Thacker. See United States v. Andrews, 12 F.4th 255 (3d Cir. 2021); United States v. Crandall, 25 F.4th 582 (8th Cir. 2022).

We will not overturn our precedent without a "compelling reason." Sotelo v. United States, 922 F.3d 848, 851–52 (7th Cir. 2019). Principles of stare decisis require that we give considerable weight to prior decisions unless their rationale has been undermined by a higher court or a supervening statutory development. Id. at 852. Moreover, "the mere existence of a circuit split does not justify overturning precedent." United States v. Lamon, 893 F.3d 369, 371 (7th Cir. 2018) (citation omitted); see also Buchmeier v. United States, 581 F.3d 561, 566 (7th Cir. 2009) (en banc) ("Any one circuit's restless movement from one side of a conflict to another won't reduce the workload of the Supreme Court.").

Brown has not identified a "compelling reason" to overrule *Thacker*. As we explained in that case, Congress confines resentencing discretion and it decided to make the sentence reductions of the First Step Act apply only prospectively. *Thacker*, 4 F.4th at 574–75. Brown points to no higher-court decision or statutory development that would require us to reconsider this reasoning. And we have repeatedly rejected Brown's argument that *Concepcion* called *Thacker*'s holding into question. *See Peoples*, 41 F.4th at 842. "We take the Supreme Court at

its word that *Concepcion* is about the matters that district judges may consider when they resentence defendants ... [and not] the threshold question whether any given prisoner has established an 'extraordinary and compelling' reason for release." *King*, 40 F.4th at 596.

We thus apply that precedent to Brown's appeal. The non-retroactive sentencing changes enacted in the First Step Act alone—including the changes to § 841(b)—cannot establish an extraordinary and compelling release for Brown's release under § 3582(c)(1)(A)(i). See Thacker, 4 F.4th at 575; Peoples, 41 F.4th at 842.

**AFFIRMED** 

#### APPENDIX B

Jerry L Brown

Illinois Central District Court

Case no. 4:12-cr-40031-SLD-JEH-2 (C.D. Ill.)

Filed date: August 04, 2022 Docket entry no.: N/A

Docket text:

TEXT ORDER entered by Chief Judge Sara Darrow on August 4, 2022 as to Defendant Jerry L. Brown. Defendant, through counsel, filed a 502 motion for compassionate release under 18 U.S.C. 3582(c)(1)(A). He asserts that "the dramatic reduction in the mandatory minimum that would now apply to" him, along with postsentencing rehabilitation, constitutes an extraordinary and compelling reason for release. See 502 Mot. 7-8. The Government 504 opposes Defendant's motion. It argues that neither a non-retroactive change in sentencing law nor a claim of errors in a sentence are extraordinary and compelling reasons for release. 504 Resp. 5-7 (citing, for example, United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021), United States v. Martin, 21 F.4th 944, 946 (7th Cir. 2021), and *United States v. Brock*, 39 F.4th 462, 464 (7th Cir. 2022)). Defendant acknowledges the caselaw cited by the Government but argues that it is "on questionable ground" after Concepcion v. United States, 142 S. Ct. 2389 (7th Cir. 2022). 502 Mot. 6-7. As the Government notes, see 504 Resp. 7, however, the Seventh Circuit has held that "Concepcion is irrelevant to the threshold question whether any given prisoner has established an 'extraordinary and compelling' reason for release." United States v. King, 40 F.4th 594, 596 (7th Cir. 2022). As Defendant's sentencing argument is barred by Seventh Circuit caselaw, all he is left with is his claim that his rehabilitation is an extraordinary and compelling reason for release. But as he acknowledges, see 502 Mot. 7, rehabilitation alone is not an extraordinary and compelling reason for release. See United States v. Peoples, -- F.4th --, 2022 WL 2825834, at \*3 (7th Cir. July 20, 2022). The 502 motion is therefore DENIED. (AV) (Entered: 08/04/2022)

#### APPENDIX C

# 18 U.S.C. § 3582 - Imposition of a sentence of imprisonment

# (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.

#### APPENDIX D

#### 21 U.S.C. § 841 (2012)

#### (a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

#### (b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

- (1)(A) In the case of a violation of subsection (a) of this section involving--
  - (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
  - (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of-
    - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
    - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
    - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

- (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
- (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
- (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
- (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
- (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
- (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or
- (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or

suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

#### APPENDIX E

#### 21 U.S.C. § 841

#### (a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

#### (b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

- (1)(A) In the case of a violation of subsection (a) of this section involving--
  - (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
  - (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of-
    - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
    - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
    - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

- (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
- (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
- (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
- (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
- (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
- (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or
- (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on

probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

#### APPENDIX F

Amendments to the U.S. Sent'g Guidelines Manual (U.S. Sent'g Comm'n effective Nov. 1, 2023)

#### 1. Amendment:

Section 1B1.13 is amended—

by inserting at the beginning the following new heading:

"(a) In General.—";

by striking "Bureau of Prisons under" and inserting "Bureau of Prisons or the defendant pursuant to";

and by inserting at the end the following:

"(b) Extraordinary and Compelling Reasons.— Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

. . .

- (6) Unusually Long Sentence.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.
- (c) Limitation on Changes in Law.—Except as provided in subsection (b)(6), a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling

reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

. . .

The Commentary to § 1B1.13 captioned "Application Notes" is amended—

by striking Notes 1 through 5 as follows:

"1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

. . .

- (D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).
- 2. Foreseeability Extraordinary and Compelling Reasons.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, 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 under this policy statement.

...."

## APPENDIX G

<b>Sentencing Computation</b>	Data (as of July 12,	2023)		
REGNO: 18080-026	NAME: BROWN, J	ERRY L		
FBI NO	5-1979 L/A-DES P QUARTERS:			
THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT.				
THE INMATE IS PROJE LIFE	CTED FOR RELE	ASE:		
— CURRENT JUDGME	ENT/WARRANT NO	0: 010		
COURT OF JURISDICTI ILLINOIS, CENTRAI DOCKET NUMBER JUDGE DATE SENTENCED/PR 02-13- 2014 DATE COMMITTED HOW COMMITTED US DISTRICT COUR' PROBATION IMPOSED	L DISTRICT: 12-CR-40: DARROV OBATION IMPOSE: 03-25-201: Γ COMMITMENT	V D:		
NON-COMMITTED:	FELONY ASSESS \$100.00			
MISDMNR ASSESS \$00.00	FINES \$00.00	COSTS \$00.00		
RESTITUTION: SERVICES: NO	PROPERTY: NO AMOUNT: \$00.00			

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REMARKS: 9-18-17 UPDTD DIS/GCT SUBJECT SERVING LIFE SENTENCE D/R/DJC.
10-2-19 UPDTD GED SERVING LIFE SENTENCE R/SDS
G0000 TRANSACTION SUCCESSFULLY