IN THE

Supreme Court of the United States

MONTERIAL WESLEY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

ATTACHMENT B

FILED
United States Court of Appeals
Tenth Circuit

August 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
(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*).

continued

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.