NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Joel S. Elliott,

Petitioner,

v.

United States of America,

Respondent.

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

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

2024 WL 4100574
Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Joel S. ELLIOTT, Defendant - Appellant.

No. 24-8019
|
FILED September 6, 2024

(D.C. No. 1:15-CR-00042-SWS-1) (D. Wyoming)

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Before PHILLIPS, BRISCOE, and CARSON, Circuit Judges.

ORDER DENYING CERTIFICATE OF APPEALABILITY *

Gregory A. Phillips, Circuit Judge

***1** Joel S. Elliott, a federal prisoner, filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), alleging that three extraordinary and compelling reasons warranted relief. Of these, the district court ruled that one of the reasons implicated 28 U.S.C. § 2255 by challenging the validity of Elliott's conviction and sentence. Adhering to this court's decision in *United States v. Wesley*, 60 F.4th 1277, 1288 (10th Cir. 2023), which requires district courts to treat such arguments as § 2255 claims, the court dismissed that ground as an unauthorized successive § 2255 motion. The court then rejected Elliott's remaining arguments on the merits. Elliott now seeks to have *Wesley* revisited. But to appeal the district court's dismissal of his § 2255 argument, he must first obtain a certificate of appealability (COA). Exercising jurisdiction under 28 U.S.C. § 1291 and § 2253, we deny Elliott a COA.

BACKGROUND

I. Conviction and Sentence

In 2015, Elliott was convicted by a jury of four counts: (1) arson of a building receiving federal funds, in violation of 18 U.S.C. § 844(f); (2) using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c); (3) possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d); and (4) making a false declaration before a grand jury, in violation of 18 U.S.C. § 1623(a). The arson charge served as the predicate felony for the crime-of-violence conviction, which carried a mandatory 30-year consecutive sentence because Elliott's "firearm" was "a destructive device." 18 U.S.C. § 924(c)(1)(B)(ii). Constrained by § 924(c), the district court sentenced Elliott to 444 months' imprisonment—84 months for arson plus 360 months for the crime-of-violence charge. This court affirmed his conviction on direct appeal. *See United States v. Elliott*, 684 F. App'x 685, 698 (10th Cir. 2017) (unpublished).

II. Motions to Vacate

In 2018, Elliott filed his first motion to vacate under § 2255, claiming that he received ineffective assistance of counsel and that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied Elliott's motion, and this court denied Elliott a COA. *United States v. Elliott*, 753 F. App'x 624, 626–27 (10th Cir. 2018) (unpublished).

In 2020, Elliott sought authorization for a second § 2255 motion. He argued that his § 924(c) conviction was invalid after the Supreme Court struck down part of that statute in *United States v. Davis*, 588 U.S. 445, 470 (2019) (holding that § 924(c)(3)(B) is unconstitutionally vague). [1] We authorized his second § 2255 motion, allowing Elliott to challenge his § 924(c) conviction and sentence. The district court denied Elliott's motion. The court ruled that *Davis* had no impact on Elliott's conviction, because he was convicted under § 924(c)(3)'s elements clause—not the residual clause struck down by *Davis*. We agreed. *United States v. Elliott*, No. 22-8046, 2023 WL 4196838, at *7 (10th Cir. June 27, 2023) (unpublished).

III. Motion for Compassionate Release

***2** In 2023, Elliott filed a motion for compassionate release, claiming three grounds as extraordinary and compelling reasons. [2] With some finetuning and reframing, Elliott reasserts his argument that his § 924(c) conviction is invalid. [3]

He also argues that "the severity of [his] sentence far outweighs the gravity of the offense." R. vol. 2, at 80. And he contends that his rehabilitative efforts support his request for a reduced sentence.

The district court dismissed in part and denied in part Elliot's motion. The court determined that Elliott's § 924(c) argument "implicate[s] the validity of his conviction and sentence." R. vol. 1, at 325. And so, relying on *Wesley*, 60 F.4th at 1284–85, the district court dismissed that argument as an unauthorized, successive § 2255 motion, *see* § 2253. Considering Elliott's other claimed extraordinary and compelling reasons, the district court ruled that his "sentence is commensurate with the crime" and that his "rehabilitation does not carry him across the line to extraordinary and compelling circumstances." *Id.* at 327. Elliott timely filed a notice of appeal.

DISCUSSION

I. Elliott needs a COA to appeal the district court's dismissal ruling.

Elliott asserts that we have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)—the statutes providing jurisdiction over appeals from final orders and from final criminal sentences. But Elliott seeks to appeal the district court's decision to dismiss his § 924(c) argument as an unauthorized, successive § 2255 motion.[4] And we cannot review "the final order in a proceeding under section 2255" unless the prisoner first obtains a COA. § 2253(c)(1)(B). So we must determine whether the district court's dismissal is a final § 2255 order. *Wesley* compels the answer: it is, so Elliott needs a COA.

In *Wesley*, a prisoner filed a compassionate-release motion, claiming various extraordinary and compelling reasons warranted relief. 60 F.4th at 1279. Among those, the prisoner argued that prosecutorial misconduct infected his sentencing. *Id.* The district court dismissed that argument as an unauthorized § 2255 motion and rejected the remaining arguments on the merits. *Id.* On appeal, the prisoner challenged only the district court's dismissal of his prosecutorial-misconduct argument, but the prisoner didn't seek a COA. *Id.* This court determined that he needed one because, though arising from a compassionate-release motion, "[t]he district court's dismissal of an unauthorized § 2255 motion is a 'final order in a proceeding under section 2255.' " *Id.* at 1280 (quoting *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008)). We then considered whether the prisoner satisfied the COA standard. *Id.*

***3** As in *Wesley*, the district court construed Elliott's § 924(c) argument as a § 2255 claim and dismissed it for lack of jurisdiction. That means the district court's order is a "final order in a proceeding under section 2255" and that Elliott needs a COA. § 2253(c)(1)(B); *see also United States v. McKinney*, Nos. 22-3090, 22-3189, 2023 WL 5608463, at *2 (10th Cir. Aug. 30, 2023) (requiring a COA in the same circumstances). Because Elliott hasn't sought a COA from us, we treat his notice of appeal as a request for a COA.[5] *Frost v. Pryor*, 749 F.3d 1212, 1222 n.6 (10th Cir. 2014).

II. We deny Elliott a COA.

Elliott is entitled to a COA if "jurists of reason would find debatable the district court's decision to construe [Elliott's § 924(c) argument] as a motion to vacate, set aside, or correct his sentence pursuant to § 2255." *Harper*, 545 F.3d at 1233 (cleaned up). *Wesley* prevents reasonable jurists from debating the district court's ruling.

Wesley considered whether prisoners may include claims governed by § 2255 in their compassionate-release motions. 60 F.4th at 1284. Reviewing the text and structure of § 3582 as well as comparing it to § 2255, the court concluded that a compassionate-release motion "may not be based on claims specifically governed by 28 U.S.C. § 2255." *Id.* at 1289. The court defined "a claim governed by § 2255" as one "that, if true, would mean 'that the sentence was imposed in violation of the constitution or laws of the United States, ... or is otherwise subject to collateral attack.' " *Id.* at 1288 (quoting § 2255(a)). And when confronted with a compassionate-release motion that includes such a claim, the court instructed, district courts should "treat the part governed by § 2255 as if explicitly brought under § 2255 and handle it accordingly (including dismissal for lack of jurisdiction if appropriate)." *Id.*

Elliott's § 924(c) argument asserts a claim governed by § 2255. In substance, he argues that he was wrongfully convicted of § 924(c) because his arson conviction is not a qualifying predicate crime of violence. And he contends that the district court erred in submitting the § 924(c) charge to the jury. Thus, "if true," then Elliott is serving an unlawful sentence—the type of argument "governed by § 2255." *Wesley*, 60 F.4th at 1288. After all, Elliott advanced a similar version of this argument in his authorized, second § 2255

motion. *See United States v. Elliott*, No. 22-8046, 2023 WL 4196838, at *3 (10th Cir. 2023 June 27, 2023) (unpublished).

In his brief, Elliott concedes that the district court properly applied *Wesley*. And he doesn't dispute that his § 924(c) argument fits under § 2255. Instead, he contends that "*Wesley* was wrongly decided." Op. Br. at 5. But because this court is bound by *Wesley*, and because *Wesley* compels the result reached by the district court, reasonable jurists would not debate the district court's ruling. *See United States v. Garcia*, 936 F.3d 1128, 1139 (10th Cir. 2019) ("We are consequently bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." (cleaned up)).

CONCLUSION

***4** For these reasons, we deny Elliott a COA and dismiss this matter.

All Citations

Not Reported in Fed. Rptr., 2024 WL 4100574

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 Section 924(c) provides a substantive offense for anyone who uses a firearm "during and in relation to any crime of violence." The statute provides two definitions for "a crime of violence." The first, dubbed the elements clause, requires that the predicate felony "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). The second, dubbed the residual clause, covers felonies that "involve[ ] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3)(B). *Davis* struck down the residual clause but left the elements clause intact. *See* 588 U.S. at 470.

2 To grant a motion for compassionate release, the district court must find that "extraordinary and compelling reasons warrant a sentence reduction" and that a "reduction is consistent with applicable policy statements issued by the Sentencing Commission." *See United States v. Maumau*, 993 F.3d 821, 831 (10th Cir. 2021) (cleaned up). Then the court must "consider any applicable § 3553(a) factors and determine whether" a reduction is warranted. *Id.* (cleaned up).

3 Elliott has reshaped his argument over the years he has been litigating the § 924(c) issue. His finetuning has been aided by recent Supreme Court decisions like *Borden v. United States*, 593 U.S. 420 (2021). There, the Court ruled that "[o]ffenses with a *mens rea* of recklessness do not" fit under the elements clause of § 924(e)(2)(B)—a near copy of § 924(c)(3)(B). *Borden*, 593 U.S. at 445. Elliott contends that arson under § 844(f) requires a mens rea of recklessness, and so he asserts that his § 924(c) conviction cannot be sustained under the elements clause. We addressed this argument in *Elliott*, 2023 WL 4196838, at *4, *7. Because the authorization for Elliott's second § 2255 motion was limited to *Davis* and the residual clause, we ruled that we lacked jurisdiction to consider the merits of his arguments under *Borden* and the elements clause. *Id.* at *7.

4 Elliott doesn't challenge the district court's merits decision denying his compassionate-release motion.

5 The district court didn't consider whether to grant a COA. *See* 10th Cir. R. 22.1(C) ("[T]he district court shall in every applicable case issue or deny a certificate of appealability when it enters a final order adverse to

the applicant."). But because thirty days have passed since Elliott filed his notice of appeal, we consider the district court to have denied a COA. *See United States v. Card*, 534 F. App'x 765, 767 n.2 (10th Cir. 2013) (unpublished).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, VS. JOEL S. ELLIOTT, Defendant,	Case No. 15-CR-42

ORDER DENYING MOTION FOR COMPASSIONATE RELEASE

In 2014, Joel Elliott used a homemade bomb to set fire to a building owned by Sheridan County, Wyoming and used by the Sheridan County Attorney's Office. (ECF No. 140 at 4-5.) As a result of his conduct, Elliott was charged with and convicted of, *inter alia*, committing arson of a building owned by an entity receiving federal funds, in violation of 18 U.S.C. §§ 844(f)(1) and (f)(2), and using a destructive device (the homemade bomb) during and in relation to a crime of violence (i.e., arson of a building receiving federal funds), in violation of 18 U.S.C. §§ 924(c)(1)(A) and (B)(ii).[1] (ECF No. 133.) The bulk of his 444-month sentence is attributable to his § 924(c) conviction, which carries a mandatory minimum 360-months' imprisonment to be served consecutively to any other sentence(s) imposed. (*See* ECF No. 150 at 2); *see* 18 U.S.C. § 924(c)(1)(B)(ii) and (D)(ii).

[1] The jury convicted Elliott on two additional counts: possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d) and making a false declaration before a grand jury in violation of 18 U.S.C. § 1623(a). (ECF No. 133 at 2-3.)

Elliott's conviction was affirmed on direct appeal. *United States v. Elliott*, 684 Fed. App'x 685, 698 (10th Cir. 2017) (*Elliott I*). Subsequent challenges to his sentence under 28 U.S.C. § 2255 have proven unsuccessful. *United States v. Elliott*, 753 Fed. App'x 624 (10th Cir. 2018) (denying certificate of appealability to appeal district court's dismissal of first motion for relief under § 2255) (*Elliott II*); *United States v. Elliott*, No. 22-8046, 2023 WL 4196836 (10th Cir. Jun. 27, 2023) (remanding with instructions to dismiss second § 2255 motion for lack of jurisdiction for failure to satisfy § 2255(h)'s gatekeeping provisions) (*Elliott IV*). Elliott now tries an appeal to discretion.

Before the Court is Elliott's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), in which he argues extraordinary and compelling reasons justify a reduction of his sentence to time served. (ECF No. 222.) Chief among those reasons, Elliott argues he could not be convicted of his § 924(c) count if charged today because his arson conviction does not qualify as a predicate crime of violence under current law. (*Id.* at 7.) Because Elliott's claim necessarily implies the invalidity of his § 924(c) conviction, his only vehicle for relief is through a federal habeas petition, and the Court is without jurisdiction to consider his claim under the guise of a motion for compassionate release. The Court finds Elliott's remaining reasons fall far short of extraordinary and compelling, and a sentence reduction is not warranted here.

LEGAL STANDARD

"Federal courts are forbidden, as a general matter, to modify a term of imprisonment once it has been imposed, but th[at] rule of finality is subject to a few narrow exceptions." *Freeman v. United States*, 564 U.S. 522, 526 (2011) (internal quotation marks and citation

omitted). Come to be known as compassionate release, 18 U.S.C § 3582(c)(1)(A)(i) permits a district court to reduce a term of imprisonment where "extraordinary and compelling reasons warrant such a reduction."

An inmate seeking compassionate release under § 3582(c)(1)(A)(i) bears the burden of showing the statute authorizes a reduction of his or her sentence. See *United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016) (defendant bears burden of demonstrating entitlement to relief under § 3582(c)(2)); *United States v. Saldana*, 807 Fed. App'x 816, 820 (10th Cir. 2020) (movant required to show § 3582(c) authorizes relief); *United States v. Pullen*, No. 98-40080-01-JAR, 2020 WL 4049899, at *2 (D. Kan. Jul. 20, 2020) ("defendant requesting compassionate release bears the burden of establishing that compassionate release is warranted under the statute"). A district court may reduce a term of imprisonment upon motion of a defendant who has exhausted his administrative rights where three requirements are met: "(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." *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021).

DISCUSSION

Elliott argues extraordinary and compelling reasons justify a reduction of his sentence to time served—a reduction of nearly 27 years off his original sentence. As extraordinary and compelling reasons, Elliott asserts (1) he could not be convicted of §

924(c) if charged today because his arson conviction does not qualify as a predicate crime of violence under current law, (2) the severity of § 924(c)'s mandatory thirty-year minimum sentence "far outweighs the gravity of the offense," and (3) his rehabilitation while incarcerated. (ECF No. 222 at 5-7.)

1. Elliott cannot attack his conviction or sentence through a motion for compassionate release under § 3582(c)(1)(A)(i).

Elliott contends that if charged today, a court would have no choice but to dismiss the § 924(c) charge because his § 844(f) arson conviction could not serve as a predicate crime of violence under current law. For purposes of § 924(c), a felony offense qualifies as a crime of violence if it satisfies either of two definitions. *United States v. Taylor*, 596 U.S. 845, 848 (2022). The first, known as the "elements clause," covers offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A); *Taylor*, 596 U.S. at 848. The second, known as the "residual clause," includes an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3)(B); *Taylor*, 596 U.S. at 848. Elliott argues federal arson cannot qualify as a crime of violence under either clause based on the Supreme Court's holdings in *United States v. Davis*, 588 U.S. ---, 139 S. Ct. 2319 (2019) and *United States v. Borden*, 593 U.S. 420 (2021).

In *Davis*, the Supreme Court announced a new rule of constitutional law and made it retroactively applicable to cases on collateral review. *In re Mullins*, 942 F.3d 975, 977-79 (10th Cir. 2019). The court held § 924(c)'s residual clause is unconstitutionally vague.

Davis, 139 S. Ct. at 2336. The residual clause, the court explained, "provides no reliable way to determine which offenses qualify as crimes of violence." *Id.* at 2324. *Davis* also held a court must apply a categorical approach to determine whether an offense qualifies as a crime of violence under § 924(c)'s elements clause. *Id.* at 2330. Under a categorical approach, a court must examine a statute and determine whether it can be violated in a way that does not satisfy the elements clause. *See Taylor*, 596 U.S. at 850.

In *Borden*, the Supreme Court held a criminal offense requiring only a *mens rea* of recklessness cannot qualify as a violent felony under the elements clause of the Armed Career Criminal Act, § 924(e)(2)(B)(i). 593 U.S. at 423. The Tenth Circuit has recognized the similarity between ACCA's "violent felony" definition and § 924(c)'s elements clause definition for a "crime of violence," noting the only difference is "the former states 'against the person of another' while the latter states 'against the person or property of another.'" *United States v. Elliott*, No. 21-8016, 2021 WL 6102495, at *1 (10th Cir. Dec. 23, 2021) (*Elliott III*). Elliott argues *Borden* applies with equal force to § 924(c)—that is, an offense which can be committed recklessly categorically cannot qualify as a crime of violence for purposes of § 924(c).

Elliott asserts if he were charged today, he could not be convicted of § 924(c) because federal arson is not a crime of violence under the elements clause definition. Federal arson proscribes "malicious[]" conduct. *See* 18 U.S.C. § 844(f)(1). Maliciousness includes both reckless *and* intentional conduct. *United States v. Wiktor*, 146 F.3d 815, 818 (10th Cir. 1998) (term "maliciously" includes acts done intentionally or recklessly). Thus, because a defendant can be guilty of arson under § 844(f) for merely reckless conduct,

Elliott argues, the arson statute can be violated in a way that does not satisfy the elements clause definition of a crime of violence.[2] In essence, Elliott asserts his conviction and sentence is contrary to law.

Elliott's argument is more typical of the type of claim brought under a 28 U.S.C. § 2255 motion. *See Taylor*, 596 U.S. at 849 (reviewing defendant's § 2255 petition arguing conspiracy to commit robbery and robbery convictions do not qualify as a crime of violence under § 924(c)). In fact, Elliott raised these same arguments in a prior § 2255 motion. *Elliott IV*, 2023 WL 4196836 at *3, 6-7. Thus, the question presented by Elliott's motion is whether extraordinary and compelling reasons can include matters that, if true, would demonstrate the invalidity of his conviction or sentence. The Tenth Circuit answered this question in the negative in *United States v. Wesley*, 60 F.4th 1277 (10th Cir. 2023).

In *Wesley*, the Tenth Circuit rejected the use of a motion for compassionate release to raise claims governed by a habeas petition under § 2255.

> 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.

Id. at 1288 (citation omitted). The proper vehicle for Elliott to challenge potential defects in his conviction or sentence is through § 2255, not a motion for compassionate release.

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[2] The Court anticipated this issue and instructed the jury to find whether Elliott acted deliberately and intentionally or recklessly. (ECF No. 133 at 1-2.) The jury unanimously found beyond a reasonable doubt that Elliott committed the arson deliberately and intentionally. (*Id.*)

When a district court receives a motion for compassionate release containing claims governed by § 2255, the Tenth Circuit instructs the district court must "treat the part governed by § 2255 as if explicitly bought under § 2255 and handle it accordingly (including dismissal for lack of jurisdiction if appropriate[.]" *Id.* For Elliott, that means this Court is without jurisdiction to consider the merits of his § 2255 claim. Because Elliott already filed at least two § 2255 motions, any successive motion is subject to the gatekeeping provisions of § 2255(h), including the requirement he obtain authorization from the appropriate court of appeals to bring a successive § 2255 motion. *See* § 2255(h). In the absence of such authorization, the Court lacks jurisdiction to consider his claims governed by § 2255. *Elliott IV*, 2023 WL 4196838, at *4 ("Importantly, § 2255(h)'s gatekeeping requirements for second or successive habeas corpus motions are jurisdictional in nature." (citation omitted)).

After *Wesley*, the Sentencing Commission issued a new policy statement, U.S.S.G. § 1B1.13, applicable to compassionate release motions.[3] Nothing in the new policy statement permits a court to consider a defect in a defendant's conviction or sentence in determining whether extraordinary and compelling circumstances exist. *See* U.S.S.G. § 1B1.13. And as the *Wesley* court noted, it is unlikely Congress would grant an administrative agency the authority to circumvent § 2255.

> Congress required district courts considering compassionate release motions to ensure that any sentence reduction "is consistent with applicable policy

[3] To the extent Elliott argues *Wesley* is "subject to change" in the wake of U.S.S.G. § 1B1.13, the Court notes it is bound to apply the law as it is today. *United States v. McGoff-Lovelady*, No. 06-20060-03-JWL, 2013 WL 3820720, at *1 (D. Kan. Jul. 23, 2013) ("this court is bound to follow the law of the Tenth Circuit").

> 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, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (noting that Congress does not "hide elephants in mouseholes").

Wesley, 60 F.4th at 1284-85.

Moreover, the new policy statement is consistent with *Wesley*. Under § 1B1.13(c), a court generally cannot consider a change in the law when determining "whether an extraordinary and compelling reason exists under th[e] policy statement." A change in the law may be considered, "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." USSG § 1B1.13(b)(6). But where, as here, a defendant asserts a defect in his sentence or conviction, he is not arguing he would receive a lesser sentence if convicted today as a result of a change in the law. Instead, he is arguing no sentence could be imposed because he could not be convicted at all. In that case, the claim is governed not by a motion for compassionate release, but by § 2255.

Regardless of how he tries to frame it, Elliott's claims implicate the validity of his conviction and sentence and therefore are governed exclusively by § 2255. *Bradshaw v. Story*, 86 F.3d 164 (10th Cir. 1996) ("The exclusive remedy for testing the validity of a judgment and sentence … is that provided for in 28 U.S.C. § 2255."). To that extent, the

Court will dismiss his motion for lack of jurisdiction as an improper successive § 2255 motion.

2. Elliott's remaining reasons fall short of "extraordinary and compelling."

What remains of Elliott's proffered extraordinary and compelling circumstances are (1) his argument that the time does not fit the crime and (2) his rehabilitation while in prison. At the first step in considering a motion for compassionate release, the Court decides for itself whether extraordinary and compelling reasons warranting a sentence reduction exist. *United States v. Maumau*, 993 F.3d 821, 832 (10th Cir. 2021). The Court is unpersuaded.

As an extraordinary and compelling reason for a sentence reduction, Elliott argues "the severity of the sentence"—924(c)'s thirty-year mandatory minimum— "far outweighs the gravity of the offense." (ECF No. 222 at 6.) Had he opted for a lighter or a match, rather than a bomb, Elliott asserts, he would not be subject to a thirty-year mandatory minimum sentence. (*Id.*) The distinction between a match and a bomb was not lost on Congress. A cursory look at § 924(c) demonstrates a clear congressional intent to distinguish between various types of firearms used in the commission of an applicable crime of violence. For example, if a person commits an applicable crime of violence while possessing a short-barreled shotgun, he is subject to a mandatory minimum term of ten-years' imprisonment. § 924(c)(1)(B)(i). If that same offense is committed with a machinegun, however, the mandatory minimum increases to thirty-years' imprisonment. § 924(c)(1)(B)(ii). Elliott's thirty-year sentence for employing a bomb instead of a match is not a congressional fluke.

See Castillo v. United States, 530 U.S. 120, 126-27 (2000) ("[T]he difference between carrying, say, a pistol and carrying a machinegun (or, to mention another factor in the same statutory sentence, a 'destructive device,' *i.e.*, a bomb) is great, both in degree and kind.").

Nor does the "severity" of Elliott's sentence outweigh the gravity of his offense. Elliott claims the incendiary device was simply a "convenient means of initiating the fire." (ECF No. 222 at 6.) This characterization dramatically discounts the seriousness of his offense. Elliott used a bomb to set fire to the Sheridan County District Attorney's office in the middle of the night, the very office that was prosecuting him on charges of check forgery. (ECF No. 140 at 5-6.) Then, to avoid prosecution for the arson, Elliott framed his cellmate for the crime. (*Id.* at 6.) The sentence is commensurate with the crime.

Elliott's rehabilitation while in prison does not carry him across the line to extraordinary and compelling circumstances. As evidence of his rehabilitation, Elliott points to his legal advocacy on behalf of himself and other inmates, his food service and cleaning efforts around the prison, and his completion of every educational course available to him. (ECF No. 222 at 17-18.) The Court commends these efforts. But Elliott's rehabilitation, even coupled with his criticism of § 924(c)'s mandatory minimums, falls far short of extraordinary and compelling circumstances justifying a sentence reduction. Because the Court finds extraordinary and compelling circumstances lacking, it need not consider the Sentencing Commission's applicable policy statement and the § 3553(a) factors. *United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021).

CONCLUSION AND ORDER

Elliott's principal argument in support of compassionate release raises a claim that, if true, would mean his sentence was imposed in violation of law. Because such a claim is governed by 28 U.S.C. § 2255, the Court lacks jurisdiction to consider it under the guise of a motion for compassionate release. Elliott's general criticism of 18 U.S.C. § 924(c) and his rehabilitation while incarcerated do not constitute extraordinary and compelling reasons for a sentence reduction.

THEREFORE IT IS ORDERED that Defendant Joel Elliott's motion for compassionate release (ECF No. 222) is **DENIED.**

Dated this 11th day of March, 2024.

Scott W. Skavdahl
United States District Judge

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 (1554)

18 U.S.C.A. § 3582, 18 USCA § 3582
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

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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 (5866)

28 U.S.C.A. § 2255, 28 USCA § 2255
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

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