

# APPENDIX - A

## APPENDIX A

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### Selected docket entries for case 22-16165

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Filed	Document Description	Page	Docket Text
09/13/2024	70		FILED MEMORANDUM DISPOSITION (CARLOS T. BEA, SALVADOR MENDOZA, JR. and MICHAEL W. FITZGERALD) AFFIRMED. FILED AND ENTERED JUDGMENT. [12906755] (MM)
	70 Memorandum	2	
	70 Post Judgment Form <b>DOCUMENT COULD NOT BE RETRIEVED!</b>		

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**FILED**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**SEP 13 2024**

**FOR THE NINTH CIRCUIT**

**MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS**

**UNITED STATES OF AMERICA,**

**Nos. 22-16165, 24-383**

**Plaintiff-Appellee,**

**D.C. Nos.  
3:12-cr-00111-EMC-1  
3:12-cr-00642-EMC-1**

**v.**

**WILLIAM J. WISE,**

**MEMORANDUM\***

**Defendant-Appellant.**

**Appeal from the United States District Court  
for the Northern District of California  
Edward M. Chen, District Judge, Presiding**

**Submitted September 9, 2024\*\*  
San Francisco, California**

**Before: BEA and MENDOZA, Circuit Judges, and M. FITZGERALD,\*\*\* District Judge.**

**Defendant-Appellant William J. Wise appeals the district court's orders:**

**(1) denying his motion to amend his motion to vacate or set aside his conviction**

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**\*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).***

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**\*\*\* The Honorable Michael W. Fitzgerald, United States District Judge for the Central District of California, sitting by designation.**

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under 28 U.S.C. § 2255, and (2) denying his motion for compassionate release. We review de novo whether the district court lacked jurisdiction to hear a § 2255 motion because it is an improper “second or successive” motion. *United States v. Jackson*, 21 F.4th 1205, 1212 (9th Cir. 2022). We review for abuse of discretion a district court’s denial of a motion for compassionate release. *United States v. Roper*, 72 F.4th 1097, 1100 (9th Cir. 2023). We affirm.

1. We construe Wise’s motion to amend as a § 2255 motion because it raises a “new ground for relief.” *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). 28 U.S.C. § 2255 permits a defendant in federal custody to challenge a sentence that was imposed “in violation of the Constitution or laws of the United States,” by filing a motion with “the court which imposed the sentence to vacate, set aside or correct the sentence.” The defendant “is generally limited to one motion under § 2255.” *United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). But a defendant may file a “second or successive” motion “only if the appropriate court of appeals certifies that the motion contains newly discovered, dispositive evidence or relies on a new constitutional rule made retroactive to collateral proceedings.” *Tong v. United States*, 81 F.4th 1022, 1024 (9th Cir. 2023) (citing 28 U.S.C. § 2255(h)).

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Wise's § 2255 motion is second or successive. In the habeas context, "second or successive" is a "term of art," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), and "[h]abeas petitions that are filed second-in-time are not necessarily second or successive," *Clayton v. Biter*, 868 F.3d 840, 843 (9th Cir. 2017). A second-in-time filing is not second or successive if the court dismissed the first-in-time motion on "technical procedural grounds without reaching the merits." *Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016). Similarly, a second-in-time habeas filing is not second or successive if "the factual predicate for [the second-in-time] claim accrued only after the time of the initial petition." *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018). But that is not the case here. The district court dismissed Wise's initial § 2255 motion on the merits. And the factual predicate for Wise's second-in-time motion accrued when Wise was prejudiced by his counsel's allegedly deficient performance—*i.e.*, when he pleaded guilty—which was well before he filed his initial § 2255 motion. *Brown v. Atchley*, 76 F.4th 862, 873 (9th Cir. 2023).

Because Wise's § 2255 motion is second or successive, he was "required to obtain permission from the court of appeals before filing [his] § 2255 motion in district court." *United States v. Lopez*, 577 F.3d 1053, 1056 (9th Cir. 2009). But he did not obtain this court's permission, so the district court lacked jurisdiction to hear his claim. *Id.* And even if we construe Wise's motion as a belated request for

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certification, we would deny it. Certification is appropriate where “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 “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h). Neither situation is present here.

2. The district court did not abuse its discretion in denying Wise’s motion for compassionate release. 18 U.S.C. § 3582(c)(1)(A)(i) permits a court to modify an imposed term of imprisonment where it considers the factors laid out in 18 U.S.C. § 3553(a) and finds that “extraordinary and compelling reasons warrant such a reduction.” The district court correctly concluded that Wise’s medical conditions and age do not amount to extraordinary and compelling reasons to reduce his sentence. Wise’s motion for compassionate release highlighted the various medical issues he is dealing with in prison. But the district court correctly noted that the record demonstrated that Bureau of Prisons (“BOP”) physicians were evaluating and treating Wise’s conditions. The district court also correctly determined that, even if BOP had failed to meet some or all of Wise’s medical needs, Wise had not met his burden of showing that he was at risk of “serious

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deterioration in health or death" or "serious deterioration in physical or mental health" as U.S.S.G. § 1B1.13(b) requires.

**AFFIRMED.**

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7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA  
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11 USA,  
12 Plaintiff,  
13 v.  
14 WILLIAM J. WISE,  
15 Defendant.  
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17 Case No. 12-cr-00111-EMC-1  
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20 **ORDER DENYING DEFENDANT'S  
21 MOTION FOR COMPASSIONATE  
22 RELEASE**

23 Docket No. 327  
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26 United States District Court  
27 Northern District of California

28 Currently pending before the Court is Mr. Wise's motion for compassionate release.  
Having considered the parties' briefs and accompanying submissions, the Court hereby **DENIES**  
the motion for relief.  
  
This is the fourth motion for compassionate release filed by Mr. Wise. Mr. Wise asks for  
compassionate release based on "extraordinary and compelling circumstances." 18 U.S.C. §  
3582(c)(1). Specifically, he argues that there are extraordinary and compelling circumstances  
based on (1) his medical circumstances, *see U.S.S.G. § 1B1.13(b)(1)(C)* (providing that there are  
extraordinary and compelling circumstances if "[t]he defendant is suffering from a medical  
condition that requires long-term or specialized medical care that is not being provided and  
without which the defendant is at risk of serious deterioration in health or death"), and (2) his age,  
*see id. § 1B1.13(b)(2)* (providing that there are extraordinary and compelling circumstances if  
"[t]he defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical  
or mental health because of the aging process; and (C) has served at least 10 years or 75% of his or  
term of imprisonment, whichever is less").  
Mr. Wise has demonstrated extraordinary and compelling circumstances based on either

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1 criteria in (1) or (2) above. With respect to Mr. Wise's medical circumstances, the record  
 2 indicates that BOP has generally responded to issues that have arisen with his medical conditions,  
 3 and, to the extent the quality of care may be problematic, Mr. Wise has not demonstrated that he is  
 4 at risk of serious deterioration in health or death. Indeed, Mr. Wise recently provided a medical  
 5 record reflecting a clinical encounter in December 2023 in which the treating physician evaluated,  
 6 *inter alia*, Mr. Wise's urinary tract problems, hip and knee osteoarthritis, and glaucoma and notes  
 7 that Mr. Wise was "alert, oriented and in no distress."<sup>1</sup> Docket No. 332 (ECF Page 5).

8 As for Mr. Wise's age, he is over 65 years and has served at least 10 years of his sentence.  
 9 Thus, the critical question is whether he "is experiencing a serious deterioration in physical or  
 10 mental health because of the aging process." U.S.S.G. § 1B1.13(b)(2). The Court acknowledges  
 11 that, since Mr. Wise's last motion for compassionate release, he has experienced some notable  
 12 medical issues, including urinary tract problems and glaucoma. But, consistent with the above,  
 13 the record does not establish that he is experiencing a "serious deterioration" in physical health  
 14 based on age. Although Mr. Wise points out that the treating physician stated in the same medical  
 15 record referenced above that, "[i]n terms of [Mr. Wise's] possible compassionate release – if he  
 16 has served over half his sentence and is over age 65, that should qualify him to apply for  
 17 compassionate release, and certainly Medical supports that request, given his multiple chronic  
 18 conditions, as outlined above," Docket No. 332 (ECF Page 10), the statement is not dispositive,  
 19 particularly as it is not clear that the doctor was aware of the appropriate legal standard (*i.e.*,  
 20 serious deterioration in physical or mental health because of the aging process). Nor did the  
 21 doctor specify in any meaningful detail the nature of the conditions which constitute a "serious  
 22 deterioration" in Mr. Wise's physical health based on age. *See* Docket No. 332 (ECF Page 6)  
 23 (merely noting, *inter alia*, Mr. Wise's enlarged prostate with lower urinary tract symptoms but  
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25 <sup>1</sup> In his papers, Mr. Wise suggests that he was recently transferred (in November 2023) to a new  
 26 prison (in Wisconsin) as retaliation for making complaints at his old prison (*e.g.*, about medical  
 27 conditions). Mr. Wise asserts that the new prison is a lower-level facility in terms of medical care.  
 28 Even assuming that there was a retaliatory transfer (based on the record, it is not clear that the new  
 prison cannot sufficiently provide for his care), Mr. Wise can bring a civil rights suit to challenge  
 the transfer. The appropriate remedy would be to undo or otherwise address the allegedly  
 improper transfer, not an outright release from prison.

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United States District Court  
Northern District of California

1 “improving per patient” and prescription stopped due to symptom improvement; essential  
2 hypertension being treated with medication; GERD; inguinal hernia with surgical referral;  
3 osteoarthritis of hip and knee; glaucoma); *see also United States v. Stafford*, No. 95-cr-00847-  
4 BLOOM, 2023 U.S. Dist. LEXIS 91092, at \*6-7 (S.D. Fla. May 23, 2023) (stating that “[a]”  
5 prisoner experiences serious age-related deterioration if evidence supports a ‘sudden or rapid  
6 decline in health and wellness’” and “may also demonstrate serious age-related deterioration by  
7 showing that he suffers from a disease that has an ‘end-of-life trajectory’ together with ‘a litany of  
8 [other age-related] ailments,’ or that he requires constant medical care[;] [¶] [b]y contrast, where a  
9 prisoner suffers from multiple ‘relatively minor or treatable conditions commonly caused by  
10 aging,’ those conditions do not support a finding of age-related serious deterioration in the  
11 prisoner’s health”). Moreover, even if there were extraordinary and compelling circumstances  
12 here based on age, the Court would still deny Mr. Wise’s motion based on the 18 U.S.C. § 3553(a)  
13 factors, *see* 18 U.S.C. § 3582(c)(1)(A) (requiring consideration of the § 3553(a) factors), which  
14 include “the nature and circumstances of the offense” and the need for the sentence imposed “to  
15 reflect the seriousness of the offense, to promote respect for the law, and to provide just  
16 punishment for the offense.” 18 U.S.C. § 3553(a). Consistent with its prior order denying  
17 compassionate release, *see* Docket No. 312 (order), the Court takes note that Mr. Wise’s release  
18 date is not until late 2030; he has served only slightly more than 50% of his sentence (about 140  
19 out of 262 months); and his Ponzi scheme had significant impact on a number of victims.

20 Finally, the Court takes note that, in one of his recent filings, *see* Docket No. 333  
21 (addendum), Mr. Wise cites a district court decision finding extraordinary and compelling  
22 circumstances where the government promised not to oppose a prison transfer to Canada but failed  
23 to comply with that promise by stating that it took no position on the defendant’s request for a  
24 transfer. *See United States v. Liu*, No. CR-19-0042 PDW (D.N.D.) (Docket No. 71) (Order at 6)  
25 (“On the unique and specific facts of this case, the Court agrees with Liu and finds that the  
26 inconsistent recommendation concerning the treaty transfer and subsequent denial of the transfer  
27 presents extraordinary and compelling reasons for a sentence reduction [under] §  
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1 3582(c)(1)(A)."').<sup>2</sup> That decision is not binding on this Court and involves materially different  
2 facts. *Compare* Docket No. 298 (Order at 2) (indicating that, in the case at bar, the obligation not  
3 to oppose transfer was, per the terms of the plea agreement, applicable only to the USAO for the  
4 Northern District of California and the USAO for the Eastern District of North Carolina only, and  
5 not for any other federal, state, or local agency).

6 **IT IS SO ORDERED.**

7  
8 Dated: January 16, 2024

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11 EDWARD M. CHEN  
12 United States District Judge

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26 <sup>2</sup> *See also* U.S.S.G. § 1B1.13(b)(5) (providing that there are extraordinary and compelling  
27 circumstances if "[t]he defendant presents any other circumstance or combination of  
28 circumstances that, when considered by themselves or together with any of the reasons described  
in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through  
(4)").

**Additional material  
from this filing is  
available in the  
Clerk's Office.**