APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 10, 2025
Lyle W. Cayce
Clerk

No. 25-20035
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

HARRY WHITMAN,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:96-CR-83-1

Before SMITH, WILLETT, and WILSON, *Circuit Judges*.

PER CURIAM:[*]

Harry Whitman, federal prisoner # 23111-037, was convicted of numerous bank robbery and firearm offenses, and he received an aggregate sentence of 624 months in prison. This sentence included consecutive sentences of 120 months and 240 months for two convictions for using and

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

carrying a firearm during and in relation to a crime of violence pursuant to 18 U.S.C. § 924(c)(1).

Whitman filed a motion under 18 U.S.C. § 3582(c)(1)(A)(i), arguing that he had shown extraordinary and compelling reasons warranting compassionate release because under the First Step Act, his sentence would be significantly shorter as he would have received only a consecutive 120-month sentence for his second § 924(c) conviction. The district court denied the motion. Whitman now appeals but concedes that his argument is foreclosed by *United States v. Austin*, 125 F.4th 688, 692–93 (5th Cir. 2025). The Government has filed an unopposed motion for summary affirmance or, alternatively, an extension of time to file a brief.

A district court may modify a prisoner's sentence if it finds that extraordinary and compelling reasons warrant such relief. 18 U.S.C. § 3582(c)(1)(A)(i). If the prisoner has served at least 10 years of an "unusually long sentence," the district court may consider whether a change in the law constitutes an extraordinary and compelling reason warranting a reduction in sentence, "but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed." U.S.S.G. § 1B1.13(b)(6), p.s. We have ruled that a non-retroactive change in the law, such as the First Step Act amendments to § 924(c), are "neither an 'extraordinarily severe exigency' nor 'unique to the life of the prisoner,'" and therefore "a non-retroactive change in the law is not an extraordinary or compelling reason to reduce a prisoner's sentence." *Austin*, 125 F.4th at 692 (citation omitted).

Summary affirmance is proper because Whitman's sole issue is foreclosed by circuit precedent. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Accordingly, the Government's motion for summary affirmance is GRANTED, the alternative motion for an extension

of time is DENIED as unnecessary, and the district court's order is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CRIMINAL ACTION NO. H-96-83-1
	§	
HARRY WHITMAN.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is defendant's counseled motion for a sentence reduction under the compassionate release provisions of 18 U.S.C. § 3582(c)(1)(A)(i) (Docket Entry No. 207).[1] The Court twice ordered the Government to file a response, but no response has been filed.

Having considered the motion, the record, and the applicable law, the Court **DENIES** the motion.

I. BACKGROUND

A jury found defendant guilty of nine criminal charges: two counts of bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d); two counts of unlawful use or carrying of a firearm during the commission of a crime in violation of 18 U.S.C. § 924(c)(1); two counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(e)(1); two counts of possession of an unregistered gun in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871; and one count of conspiracy to commit a bank robbery in violation of 18 U.S.C.

[1]This case was transferred to the undersigned district judge on February 13, 2024. All proceedings prior to that date, including trial, sentencing, post-conviction motions, and other proceedings, were before a now-retired district judge of this Court.

§§ 2113 and 371. He was found to be a career offender and sentenced to a 624-month (52-year) sentence in 1999. The Court further ordered a five-year term of supervised release, restitution in the amount of $13,513, and a $450 special assessment. Defendant has currently served approximately 27 years of his sentence. The Bureau of Prisons reports his anticipated date of release as June 30, 2040.

In affirming defendant's convictions and sentences, the United States Court of Appeals for the Fifth Circuit set forth the following statement of facts:

> Over a period of ten days in early 1996, Whitman and his accomplice, Yolanda Vick ("Vick"), robbed two Houston banks at gunpoint. The couple first walked into Cypress National Bank carrying large black bags and two "sawed-off" shotguns. Pointing one of the shotguns, Whitman and Vick ordered a teller to close off the drive-thru area. They then took $78,820 from the teller drawers and the vault before leaving the bank.
>
> Later that evening, federal law enforcement officers located Whitman at his residence, but he fled in a red Toyota car. The officers searched his residence and discovered two "sawed-off" shotguns. Later, they discovered an abandoned red Toyota car in a hospital parking lot. The officers then received information that Whitman had entered a movie theater. Inside, they found a black bag filled with money, but Whitman was nowhere to be found.
>
> Whitman and Vick carried out another bank heist about a week later. This time, they entered Compass Bank carrying black bags and "sawed off" shotguns. After taking $35,807, they locked the bank employees and customers inside a vault. They fled from the bank, again eluding law enforcement officials. Two days later, federal law enforcement officers spotted Whitman and Vick in a car on I-10 north of New Orleans. The couple tried to escape and engaged in a high-speed chase. Vick lost control of the car, and crashed it into an embankment. Officers arrested both of them. They found over $27,000, two loaded "sawed-off" shotguns and a black bag inside the car.

United States v. Whitman, 2001 WL 360789, *1 (5th Cir. Mar. 20, 2001).

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The Court denied defendant's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, and the Fifth Circuit Court of Appeals denied a certificate of appealability as to that ruling in 2003. His 2019 petition for habeas relief filed under 28 U.S.C. § 2241 in the Eastern District of Washington, was dismissed in August 2024 for lack of jurisdiction.

In the pending motion, defendant seeks a sentence reduction to time served under the "unusually long sentence" compassionate release provisions of United States Sentencing Guideline ("U.S.S.G.") § 1B1.13(b)(6).

II. ANALYSIS

The Court has the authority under the compassionate release provisions of 18 U.S.C. § 3582(c)(1)(A)(i) to reduce a defendant's sentence of confinement if (i) extraordinary and compelling reasons warrant the reduction, (ii) such reduction fulfills the sentencing factors set forth in 18 U.S.C. § 3553(a), (iii) the reduction is consistent with the United States Sentencing Commission's applicable policy statements, and (iv) the defendant's claims are exhausted, in that his motion was filed with the Court following a lapse of 30 days after he submitted his request to the warden of his facility and there was no response.[2]

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[2] *See United States v. Clark*, No. 24-10020, 2024 WL 4930383, at *1 (5th Cir. Dec. 2, 2024) (explaining the court must find that (1) extraordinary and compelling reasons justify a sentence reduction; (2) such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) early release would be consistent with the sentencing factors in § 3553(a)). Exhaustion is required by 18 U.S.C. § 3582(c)(1)(A).

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Under the amended provisions of U.S.S.G. § 1B1.13(b), district courts may consider the following extraordinary and compelling circumstances in their analysis: (1) medical circumstances of the defendant; (2) age of the defendant; (3) family circumstances of the defendant; (4) whether the defendant, while in custody, was a victim of abuse; (5) other reasons similar in gravity to those previously described; and (6) an unusually long sentence meeting certain requirements. *Id.* § 1B1.13(b)(1)–(6). Defendant bases his pending motion on § 1B1.13(b)(6).

A. 1999 Sentencing

The Court's judgment of conviction reflects the following sentence of confinement:

> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 624 month(s). The term consists of SIXTY (60) MONTHS as to Count 1S; TWO HUNDRED SIXTY FOUR (264) MONTHS as to Counts 2S, 4S, 6S, and 8S; ONE HUNDRED TWENTY (120) MONTHS as to Counts 5S and 9S, all to be served concurrently: As to Count 3S, the defendant is sentenced to ONE HUNDRED twenty (120) MONTHS, to run consecutively to Counts 1S, 2S, and 4S-9S. The defendant is sentenced to TWO HUNDRED FORTY (240) MONTHS as to Count 7S, to run consecutively to Counts 3S, and Counts 1S-6S, 8S and 9S, for a total of SIX HUNDRED TWENTY FOUR (624) MONTHS.

(Docket Entry No. 158.) Thus, defendant was sentenced to an effective concurrent term of 264 months (22 years), followed by a total consecutive term of 360 months (30 years), for a total 624-month (52-year) term of confinement.

Defendant sets forth his analysis of his sentence as follows:

> As to the first § 924(c) count, the Court imposed a mandatory 10-year sentence. Because the law at the time required imposition of an enhanced, consecutive sentence for a second § 924(c) conviction even if imposed in the

> same proceeding as an initial § 924(c) conviction, the Court imposed a mandatory, consecutive 20-year sentence as to the second § 924(c) conviction.
>
> The Court ordered that the sentences on the remaining 7 sentences would be served concurrently to each other. The imposition of a 264-month sentence as to those counts with the greatest statutory maxima was driven by the Court's conclusion that Mr. Whitman was a career offender for purposes of USSG § 4B1.1. Because of the career offender determination, the district court treated Mr. Whitman as having 34 offense levels which, at Criminal History Category V, yielded a mandatory Guidelines range from 235 to 293 months.

(Docket Entry No. 207, pp. 8–9, citations to record omitted.)

B. Exhaustion

Defendant states that he exhausted his administrative remedies, and the Government has not disagreed. The Court finds that defendant's claims are exhausted for purposes of proceeding under § 3582(c)(1)(A).

C. Unusually Long Sentence

Defendant argues that he is entitled to relief under U.S.S.G. § 1B1.13(b)(6), which provides conditions under which a district court may reduce a previously imposed "unusually long sentence" as an extraordinary and compelling reason for relief. Section 1B1.13(b)(6) provides as follows:

> If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

U.S.S.G. § 1B1.13(b)(6). The guideline does not otherwise define "an unusually long sentence."

Thus, defendant must establish that he has served at least ten years of an unusually long sentence and that a change in law has produced a "gross disparity" between the sentence being served and the sentence likely to be imposed as of the time he filed his motion. Defendant argues that his is an unusually long sentence that should be reduced to time served due to three changes in the law: The First Step Act of 2018 ("FSA"), Amendment 709 to the sentencing guidelines enacted in 2007, and Amendment 599 to the sentencing guidelines enacted in 2000. However, even assuming defendant's sentence were found to be an unusually long sentence, defendant warrants no relief under § 1B1.13(b)(6), as shown below.

D. First Step Act of 2018

At the time defendant was sentenced in 1999, 18 U.S.C. § 924(c)(1) included a "stacking" provision which required courts to impose consecutive sentences for "second or subsequent" § 924(c) convictions, even when they were incurred in the same criminal proceeding as a first § 924(c) conviction. *See United States v. Gomez*, 960 F.3d 173, 176 (5th Cir. 2020). As a result, the Court imposed a ten-year sentence against defendant for his first conviction for using a short-barrel shotgun in relation to a crime of violence, and an additional twenty-year consecutive sentence for his second such conviction, even though the two convictions arose from the same criminal episode. *See Deal v. United States*, 508 U.S. 129 (1993).

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The law changed with enactment of section 403(a) of the First Step Act of 2018 ("FSA") to amend section 924(c) stacking. Following the FSA, only a defendant who has a prior final conviction under § 924(c) is subject to the escalating mandatory minimum and/or consecutive sentences for a subsequent § 924(c) conviction. *See Gomez*, 960 F.3d at 176–77. Thus, under the FSA of 2018, a second mandatory consecutive enhancement is triggered only by a section 924(c) conviction occurring *after* the initial second 924(c) conviction has become final.

According to defendant, this change in the law is an extraordinary and compelling reason for a sentence reduction under § 1B1.13(b)(6) due to the 120-month gross disparity between his 1999 sentence and the non-stacked sentence he would have received under the FSA. (Docket Entry No. 207, p. 19: "If the current reading of § 924(c) had controlled at the time of Mr. Whitman's sentencing, the district court would have likely imposed a sentence 120 months shorter than the 621-month sentence Mr. Whitman received.")

Defendant's arguments miss the mark for two significant reasons: Congress elected not to make the FSA "anti-stacking" amendments to § 924(c) retroactive, and the United States Court of Appeals for the Fifth Circuit holds that non-retroactive changes in the law provide no basis for a sentence reduction under the compassionate release statute.

Section 403(b) of the FSA provides as follows:

> This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5221–22 (2018). The FSA was enacted December 21, 2018. Defendant was sentenced in 1999. Thus, the FSA amendments as to non-stacking under 924(c) would not apply to defendant for purposes of § 1B1.13(b)(6), as he was sentenced prior to enactment of the FSA.

Additionally, as made clear by the Fifth Circuit Court of Appeals, "A non-retroactive change in the law cannot constitute an extraordinary and compelling reason justifying sentence reduction under § 3582(c)(1)." *United States v. Austin*, ___ F.4th ____, 2025 WL 78706, *3 (5th Cir. Jan. 13, 2025).[3] Consequently, defendant cannot successfully argue that the FSA amendment to the stacking provisions of § 924(c) provides him a basis for a sentence reduction under § 1B1.13(b)(6). Because the FSA of 2018 cannot constitute an extraordinary and compelling reason justifying a sentence reduction, consideration of any gross disparity between defendant's 1999 sentence and a likely 2024 sentence is pretermitted.

The Fifth Circuit's reasoning in *Austin* is straightforward:

> A prisoner may not leverage non-retroactive changes in criminal law to support a compassionate release motion, because such changes are neither extraordinary nor compelling. If we were to hold otherwise, we would usurp the legislative prerogative and use 18 U.S.C. § 3582(c)(1) to create retroactivity that Congress did not.

* * *

[3]The defendant in *Austin* sought a sentence reduction predicated on amendments to mandatory minimum sentencing provisions enacted in the FSA of 2018. He argued that the non-retroactive change in the law was an extraordinary and compelling reason to reduce his sentence under the compassionate release provisions of § 3582(c)(1).

> True, § 1B1.13(b)(6) of the Sentencing Guidelines says that a nonretroactive change in the law may be considered in determining whether the defendant presents an extraordinary and compelling reason. But that changes nothing. Just like any agency action, the Guidelines must bow to the specific directives of Congress. *Thus, the Sentencing Commission cannot make retroactive what Congress made non-retroactive*. And it certainly cannot do so through an interpretation of "extraordinary and compelling" that conflicts with the plain meaning of those terms.
>
> * * *
>
> A non-retroactive change in the law cannot constitute an extraordinary and compelling reason justifying sentence reduction under § 3582(c)(1).

Austin, *2–3 (cleaned up; emphasis added).

In short, Congress elected not to make the FSA of 2018 retroactive to defendants sentenced prior to its enactment on December 18, 2018. The sentencing guidelines cannot defeat that election by allowing its retroactive application to reduce defendant's sentence under the guise of § 1B1.13(b)(6).

Defendant demonstrates no extraordinary and compelling reason for a sentence reduction under the compassionate release provisions of § 3582(c)(1).

E. Career Offender

Defendant states that he was sentenced as a career offender due to "related cases" arising from the same offense. He contends that the Sentencing Commission changed the definition of "related cases" when it adopted Amendment 709 in 2007. After the adoption of this amendment, prior sentences are treated as a single sentence when they are not separated by an intervening arrest and when the sentences were imposed on the same day.

U.S.S.G. § 4A1.2(a)(2). Defendant further states that the Sentencing Commission emphasized that "no more than one prior sentence in a given single sentence may be used as a predicate offense," citing U.S.S.G. § 4A1.2, comment. n.3(A).

According to defendant, under the current sentencing guidelines, his two earlier sentences for armed robbery which were imposed in 1981 would now constitute a single sentence. He contends that, as a result of this change in the law, he would no longer be subject to the career offender enhancement, which the district court applied to increase his guidelines range in 1999.

However, absent in defendant's argument is any statement or legal authority showing that the 2007 amendment was given retroactive application. Indeed, the Fifth Circuit Court of Appeals recognizes that the amendment was not given retroactive application. *See*, *e.g.*, *United States v. Bogard*, 2011 WL 3476646, *1 (5th Cir. Aug. 9, 2011) ("Amendment 709 does not apply retroactively."). Without a showing of retroactive application, defendant's argument falls for the same reasons as did his arguments under § 924(c): "A non-retroactive change in the law cannot constitute an extraordinary and compelling reason justifying sentence reduction under § 3582(c)(1)." *Austin*, 2025 WL 78706, *3.

Accordingly, defendant cannot rely on Amendment 709 as an extraordinary and compelling reason for a sentence reduction under the compassionate release provisions of § 1B1.13(b)(6).

F. Four-Level Enhancement

Defendant additionally argues that Amendment 599 to the sentencing guidelines, enacted in 2000, was a change in the law that limited application of a sentencing enhancement for use of a firearm in connection with another felony offense involving use of a firearm. Amendment 599 appears to have been given retroactive application. *See United States v. McDaniel*, 2010 WL 8498854, *1 (5th Cir. Dec. 3, 2010) ("The Government concedes Amendment 599 applies retroactively."). However, defendant does not establish a gross disparity between his original sentence and the likely sentence he would receive today in light of Amendment 599. To the contrary, defendant acknowledges that, as a career offender, the amendment would have no effect on his sentencing guideline range. (Docket Entry No. 207, p. 25, n.2.)

Defendant does not show that Amendment 599, as applicable to his case, constitutes an extraordinary and compelling reason for a sentence reduction under § 1B1.13(b)(6).

G. Individualized Circumstances and Sentencing Factors

Defendant has not shown an extraordinary and compelling reason for a sentence reduction under the compassionate release provision of § 1B1.13(b)(6), and the Court need not address defendant's individual circumstances. Although it cannot be used as a basis for a sentence reduction, the Court acknowledges the great strides defendant has made in rehabilitation over the course of his incarceration. The Court encourages defendant to continue his efforts toward rehabilitation.

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Because a sentence reduction is being denied, the Court need not address any applicable sentencing factors. *See United States v. Jackson*, 27 F.4th 1088, 1093 (5th Cir. 2022).

III. CONCLUSION

For the above reasons, defendant's motion (Docket Entry No. 207) is **DENIED**.

Signed at Houston, Texas, on this the 23rd day of January, 2025.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX C

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

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1. Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221-22, provides:

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking ''second or subsequent conviction under this subsection'' and inserting ''violation of this subsection that occurs after a prior conviction under this subsection has become final''.

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

2. 18 U.S.C. § 3582(c)(1)(A) provides:

(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

* * *

3. 28 U.S.C. § 994(t) provides:

> (t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

4. USSG § 1B1.13(b)(6) provides:

> (b) Extraordinary and Compelling Reasons.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof
>
> * * *
>
> (6) UNUSUALLY LONG SENTENCE.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.