

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**August 30, 2023**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTOINE DWAYNE ROBINSON,

Defendant - Appellant.

No. 21-7065  
(D.C. No. 6:04-CR-00018-RAW-KEW-1)  
(E.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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Before **MATHESON, BACHARACH, and McHUGH**, Circuit Judges.

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Antoine Dwayne Robinson, a federal prisoner proceeding pro se, seeks a certificate of appealability (COA) from the district court’s denial of a motion he brought ostensibly under 18 U.S.C. § 3582(c)(1)(A), commonly known as a compassionate release motion. The district court construed the motion as an unauthorized second or successive 28 U.S.C. § 2255 motion and dismissed it for lack of jurisdiction. We conclude that no reasonable jurist could disagree with the district court’s disposition, so we deny a COA and dismiss this matter.

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

## **I. BACKGROUND & PROCEDURAL HISTORY**

### **A. Robinson's Crime & Sentencing**

Robinson committed an armed robbery of a grocery store in Muskogee, Oklahoma, in January 2004. A federal grand jury handed down a three-count indictment arising from this event:

- Count 1: Hobbs Act robbery (18 U.S.C. § 1951);
- Count 2: possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)); and
- Count 3: possession of a firearm during a crime of violence, namely, the robbery charged in count 1 (18 U.S.C. § 924(c)(1)(A)).

Robinson pleaded guilty to all charges, without a plea agreement.

Not accounting for adjustments the sentencing judge might make, Robinson's sentencing exposure on counts 1 and 2 was 77–96 months, and a consecutive 60 months on count 3, for a total possible term of 137–156 months. However, at Robinson's sentencing hearing in June 2004, the district court made several findings that significantly increased Robinson's sentencing range.

First, the district court applied § 4B1.1 of the sentencing guidelines, often known as the career-offender guideline. That guideline contains three elements:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
- (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and

(3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

USSG § 4B1.1(a) (line breaks added for clarity).<sup>1</sup> There was no dispute about the first element. As to the second, the district court found that Hobbs Act robbery is a crime of violence. As to the third, the district court identified two relevant crime-of-violence felony convictions from California. Thus, the career-offender enhancement applied.

Next, concerning count 3 (possessing a firearm during a crime of violence), the district court applied the statutory enhancement for brandishing, thus increasing the mandatory minimum on that count to 84 months. *See* 18 U.S.C. § 924(c)(1)(A)(ii).

Given these adjustments, the overall sentencing range rose to 262–327 months. The district court—treating the guidelines as mandatory, as they were then understood—ultimately sentenced Robinson to 240 months on count 1 concurrent with 120 months on count 2, plus a consecutive 84 months on count 3, for an effective total of 324 months (*i.e.*, 27 years).

Robinson did not file a direct appeal, but he filed an unsuccessful § 2255 motion claiming ineffective assistance of counsel.

## **B. Later Developments**

Since Robinson’s sentencing, the Supreme Court has issued three decisions, which, in his view, undermine the sentence he received.

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<sup>1</sup> All guidelines citations in this order and judgment refer to the 2003 version, which was in effect at Robinson’s sentencing.

First, in *United States v. Booker*, 543 U.S. 220, 245 (2005), the Supreme Court held that the sentencing guidelines must be treated as advisory, not mandatory, or else they violate the defendant’s Sixth Amendment right to a jury trial. Robinson therefore believes that he had a chance at a below-guidelines sentence if the district court had treated his sentencing range as advisory.

Second, in *Alleyne v. United States*, 570 U.S. 99, 115–16 (2013), the Supreme Court held that the statutory enhancement for brandishing (in addition to possessing) a firearm while committing a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii), creates an additional element of the crime that must be proven beyond a reasonable doubt. Robinson appears to be saying that, because count 3 of his indictment did not allege brandishing, *Alleyne* means that the district court should not have accepted his guilty plea on that count, *see* 570 U.S. at 110 (discussing the need for “fact[s] that increase[] punishment [to] be charged in the indictment”), or at least should not have applied the brandishing enhancement through its own fact-finding at the sentencing hearing.

Third, in *Johnson v. United States*, 576 U.S. 591, 597 (2015), the Supreme Court held that the so-called “residual clause” of the Armed Career Criminal Act (ACCA) was unconstitutionally vague. Robinson was *not* sentenced under the ACCA, but he was sentenced under the career-offender guidelines and § 924(c), both of which contain a materially identical residual clause. This court previously granted Robinson authorization to file a new § 2255 motion on that basis, but the ensuing

motion was resolved against him. *United States v. Robinson*, 757 F. App'x 781, 783 (10th Cir. 2019).

### **C. Robinson's Compassionate Release Motion**

In May 2021, Robinson filed a compassionate release motion based on the effect that *Booker*, *Alleyne*, and *Johnson* would allegedly have if he were sentenced today, combined with evidence of rehabilitation and a post-release housing and employment plan. The district court dismissed the motion for lack of jurisdiction, reasoning that the motion, in its entirety, amounted to an unauthorized successive § 2255 motion.

Robinson timely filed a notice of appeal, and then filed the COA motion now at issue.

## **II. ANALYSIS**

To merit a COA, Robinson “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And he must make an extra showing in this circumstance because the district court resolved his motion on a procedural basis, namely, lack of jurisdiction. So he must also show that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

Our recent decision in *United States v. Wesley*, 60 F.4th 1277 (10th Cir. 2023), essentially disposes of this matter. There, a federal prisoner similarly brought a

compassionate release motion based on alleged errors in his sentence. We rejected that use of compassionate release, holding that

[w]hen 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.

Robinson insists that he was not challenging the validity of his sentence, but that he was only trying to show that he would be sentenced differently if his sentencing hearing were held today. Combined with other factors, we have approved such arguments for compassionate release when a prisoner would have been sentenced differently because Congress later made the relevant sentencing provisions more lenient. *See, e.g., United States v. Maumau*, 993 F.3d 821, 824 (10th Cir. 2021). But Robinson’s compassionate-release argument necessarily relies on showing that he would have been sentenced differently today because post-sentencing developments show that his sentence was erroneous. That type of “would have been sentenced differently” argument was not before the court in *Maumau*. *See Wesley*, 60 F.4th at 1283. And *Wesley* makes clear that if relief is available for that sort of claim, it can only come through § 2255. It is not a basis for compassionate release.

We note, however, one error in the district court's disposition. Robinson's compassionate release motion asserted three justifications: (1) the alleged errors already discussed, (2) rehabilitation, and (3) post-release plans. The district court correctly refused to consider the first of these, but the second and third were not beyond the court's jurisdiction. Moreover, although rehabilitation alone could not justify compassionate release, *see* 28 U.S.C. § 994(t), rehabilitation plus the post-release plan conceivably might be enough, depending on the circumstances, *see Maumau*, 993 F.3d at 832 (discussing the district court's discretion in the compassionate-release context). At a minimum, those latter two arguments are not controlled by § 2255. Thus, instead of dismissing the entire compassionate release motion for lack of jurisdiction, the district court should have dismissed the portion relying on alleged errors in Robinson's sentence, and then addressed the remainder of the motion on its merits. *See Wesley*, 60 F.4th at 1288–89 (discussing proper procedure for handling compassionate release motions based on alleged errors combined with other factors).

That said, Robinson does not raise this argument as a reason to allow the appeal to proceed. His arguments instead reaffirm that the alleged effects of *Booker*, *Alleyne*, and *Johnson* are the essential basis of his compassionate release claim. Thus, we note this error only for the district court's future reference.

**III. CONCLUSION**

We deny a COA and dismiss this matter.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk