In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1798

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WOLFGANG VON VADER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:99CR00125-001 — **James D. Peterson**, *Chief Judge*.

ARGUED JANUARY 12, 2023 — DECIDED JANUARY 24, 2023

Before SYKES, *Chief Judge*, and EASTERBROOK and RIPPLE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. After pleading guilty in the Western District of Wisconsin to distributing methamphetamine, Wolfgang Von Vader was sentenced to 270 months' imprisonment. When sentencing him in 2000, the court ruled that his prior convictions make him a "career offender" for the purpose of U.S.S.G. §4B1.1. He did not appeal. In 2012 Von Vader pleaded guilty to possessing heroin in prison. That led

to an additional ten-year sentence, imposed by the District of Kansas.

Developments since 2000 call into question the length of the 270-month sentence. Von Vader contends, and we shall assume, that *Johnson v. United States*, 576 U.S. 591 (2015), and *Mathis v. United States*, 579 U.S. 500 (2016), show that one or more of his previous convictions should not have been counted toward the number required for classification as a career offender. In 2017 Von Vader sought collateral relief under 28 U.S.C. §2255. But the district court dismissed the petition as untimely, whether measured from *Johnson* or from *Mathis*, and added that Von Vader had not met the requirements for equitable tolling of the time limit set by §2255(f). 2018 U.S. Dist. LEXIS 205763 (W.D. Wis. Dec. 6, 2018). We denied Von Vader's request for a certificate of appealability.

Von Vader then recast his *Johnson* and *Mathis* arguments. He applied to the district courts in both Kansas and Wisconsin for compassionate release under 18 U.S.C. §3582(c)(1), contending that the (asserted) sentencing error in 2000 is an "extraordinary and compelling" reason for release. We held in *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020), that district courts may grant prisoner-initiated petitions under this statute, notwithstanding the absence of an applicable Guideline, but that release is possible only if the statutory threshold of "extraordinary and compelling" reasons has been satisfied. Both the District of Kansas and the Western District of Wisconsin denied Von Vader's applications. We have nothing more to say about the former, because appellate review is in the Tenth Circuit. The latter is within our jurisdiction.

According to the United States, however, the Western District of Wisconsin itself lacked jurisdiction to consider Von

Vader's application. That is because his 2000 sentence has expired and custody now depends on the 2012 sentence. The United States contends that §3582(c) does not authorize release from an expired sentence, which makes Von Vader's application in Wisconsin moot.

We may assume without deciding that a retroactive reduction is unauthorized by statute, but do not see how this moots Von Vader's request. If §3582(c) does not supply authority for the relief Von Vader wants, then he loses on the merits, not for lack of jurisdiction. See *Bell v. Hood*, 327 U.S. 678 (1946).

Relief is possible if Von Vader is right on the law. The judge in Wisconsin could order the Bureau of Prisons to treat the Wisconsin sentence as if it had expired earlier and to reduce the time remaining on the Kansas sentence accordingly. Or the court in Wisconsin could make an adjustment in the length of supervised release, on the Wisconsin sentence, that will follow the conclusion of the Kansas sentence. As long as relief is possible in principle, the fact that a given request may fail on statutory grounds does not defeat the existence of an Article III case or controversy. *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013); *Shahi v. Department of State*, 33 F.4th 927, 931 (7th Cir. 2022).

This brings us to the merits, and we can be brief. Von Vader contends that his original sentence is legally defective. We have held, however, that a legal contest to a sentence must be resolved by direct appeal or motion under §2255, not by seeking compassionate release under §3582. See, e.g., *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021); *United States v. Martin*, 21 F.4th 944 (7th Cir. 2021); *United States v. Brock*, 39 F.4th 462 (7th Cir. 2022); *United States v. King*, 40 F.4th 594 (7th

Cir. 2022). Accord, *United States v. Jenkins*, 50 F.4th 1185 (D.C. Cir. 2022). As we put it in *Brock*:

> Judicial decisions, whether characterized as announcing new law or otherwise, cannot alone amount to an extraordinary and compelling circumstance allowing for a sentence reduction. To permit otherwise would allow §3582(c)(1)(A) to serve as an alternative to a direct appeal or a properly filed post-conviction motion under 28 U.S.C. §2255. We rejected that view in *Thacker* and *Martin* and do so again here.

39 F.4th at 466. In other words, the sort of "extraordinary and compelling" circumstance that §3582(c)(1) addresses is some new fact about an inmate's health or family status, or an equivalent post-conviction development, not a purely legal contention for which statutes specify other avenues of relief—avenues with distinct requirements, such as the time limits in §2255(f) or the need for a declaration by the Sentencing Commission that a revision to a Guideline applies retroactively. See 18 U.S.C. §3582(c)(2); U.S.S.G. §1B1.10.

According to Von Vader, *Thacker* and its successors are beside the point because an institutional rather than a legal error affected him. He tells us that the Sentencing Commission's staff compiled a list of inmates potentially affected by *Johnson* and *Mathis*, distributing the information to federal defenders' offices for use in seeking relief under §2255. Von Vader maintains that either the Commission left him off its list or the federal defender in Western Wisconsin fell down on the job; one way or another, no one approached him with an offer to file a timely §2255 motion.

Yet prisoners do not have a right, either constitutional or statutory, to legal assistance in initiating a request for collateral relief. The Criminal Justice Act permits district judges to appoint counsel to assist prisoners seeking collateral relief, 18

U.S.C. §3006A(a)(2)(B), but does not require that step, either before or after a §2255 petition is on file. The norm in federal procedure is for a prisoner to file his own §2255 motion and seek appointment of counsel afterward. That norm was followed in Von Vader's situation, which therefore cannot be called "extraordinary and compelling". A norm is the opposite of anything extraordinary. And §3582(c) assuredly is not a means to obtain indirect review of a district court's ruling, in an action filed under §2255, that the prisoner is not entitled to equitable tolling of the statutory time limit.

AFFIRMED