In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1981

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEONARD WILLIAMS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 3:18-cr-30006-SEM-TSH — **Sue E. Myerscough**, *Judge*.

SUBMITTED MARCH 9, 2023 — DECIDED MARCH 13, 2023

Before EASTERBROOK, BRENNAN, and ST. EVE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Leonard Williams is among the many federal prisoners who believe that a legal error in a sentence creates an "extraordinary and compelling" reason for compassionate release under 18 U.S.C. §3582(c)(1). We rejected that position in *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021), and have applied *Thacker* many times since. We also have concluded that *Thacker* is unaffected by *Concepcion v. United States*, 142 S. Ct. 2389 (2022), which concerns the

circumstances that a district court must consider when resentencing a defendant but does not define the sort of "extraordinary and compelling" circumstances that justify a lower sentence. See, e.g., *United States v. King*, 40 F.4th 594 (7th Cir. 2022); *United States v. Von Vader*, 58 F.4th 369 (7th Cir. 2023). Accord, *United States v. Jenkins*, 50 F.4th 1185 (D.C. Cir. 2022).

As Williams sees matters, his sentence is too long because a district court treated him as having a prior conviction for unlawful drug delivery, which increased his minimum sentence to 10 years. 21 U.S.C. §841(b)(1)(B). Williams insists that *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), which postdates his sentencing, shows that his conviction for delivery of cocaine in Illinois does not satisfy the criteria of a "serious drug felony" under §841(b)(1)(B). But *United States v. Brock*, 39 F.4th 462, 464–66 (7th Cir. 2022), holds that *Ruth* does not support compassionate release. As we put it in *Von Vader*, "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 [28 U.S.C.] §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." 58 F.4th at 371. There's nothing "extraordinary" about a legal error by a district court (or a court of appeals), and the law provides methods other than compassionate release for dealing with claims of legal error.

Williams filed in this court a brief making arguments other than the one based on *Ruth*. He contends that he has a spotless conduct record in prison and has completed educational

programs that will allow him to participate in society without committing additional crimes. He also contends that he is at greater risk of contracting COVID-19 and other diseases in prison than he would be if released. The district court did not address these contentions, and the United States provides an explanation: Williams did not present them to the Bureau of Prisons. The statute requires inmates to seek administrative relief first. Section 3582(c)(1)(A) provides that the court may provide relief "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". This means that an inmate must present to the Bureau the same reasons later presented to the court; permitting an inmate to argue new reasons in court amounts to bypassing a request for administrative relief. *United States v. Williams*, 987 F.3d 700, 703 (7th Cir. 2021). *Ruth* is the only reason that Williams presented to the Bureau and therefore, the United States contends, the only one the judiciary may consider.

Failure to exhaust is an affirmative defense, or perhaps a mandatory claims-processing rule. Under either characterization, it is the sort of entitlement that is lost if withheld in the district court or otherwise raised belatedly. See, e.g., *United States v. Sanford*, 986 F.3d 779, 782 (7th Cir. 2021). See also *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019) (discussing the charge-filing requirement in employment-discrimination law). The United States never contended in the district court that Williams had failed to exhaust administrative opportunities on subjects other than the effect of *Ruth*, and perhaps it is too late to raise this argument now.

There's a good reason, however, why the United States did not make this argument—or any other—in the district court. The judge summarily denied Williams's application the day after the court received it. Williams immediately appealed rather than seeking reconsideration. As a result, its brief on appeal was the United States' first opportunity to contend that *Ruth* is the only potential ground of relief that Williams has preserved. A litigant that presents an affirmative defense at its earliest opportunity cannot be blamed for undue delay.

One circuit has held otherwise. *United States v. Miller*, 2021 U.S. App. LEXIS 26630 (6th Cir. Sept. 2, 2021). But a different court of appeals has held that the United States may assert non-exhaustion in the court of appeals when it lacked an opportunity to do so in the district court. See *United States v. Purify*, 2021 U.S. App. LEXIS 35783 (10th Cir. Dec. 3, 2021). Both the Sixth Circuit and the Tenth Circuit thought the matter so straightforward that they resolved it in nonprecedential orders. It seems simple to us, too, and we side with the Tenth Circuit. As far as we can see, none of the courts of appeals has addressed this subject in a published, precedential opinion. None, that is, until today. We hold that a defense of failure to exhaust under §3582(c)(1)(A) is timely if raised by the United States at its first opportunity, even if that opportunity does not come until briefing on appeal. Cf. *Hamer v. Neighborhood Housing Services of Chicago*, 897 F.3d 835 (7th Cir. 2018). It follows that Williams has failed to exhaust his administrative remedies on grounds other than the effect of *Ruth*.

AFFIRMED