

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS EDUARDO WIRICHAGA-
LANDAVAZO,

Defendant - Appellant.

No. 23-4040
(D.C. No. 2:14-CR-00517-TS-1)
(D. Utah)

ORDER AND JUDGMENT*

Before **PHILLIPS, BALDOCK**, and **ROSSMAN**, Circuit Judges.

Jesus Eduardo Wirichaga-Landavazo, a federal prisoner proceeding pro se,¹ appeals the district court's denial of his request for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), commonly known as compassionate release. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

¹ Because Wirichaga-Landavazo is a pro se litigant, we liberally construe his filings, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), without acting as his advocate, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

BACKGROUND

In 2015, Wirichaga-Landavazo pleaded guilty to conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A) and illegal reentry in violation of 8 U.S.C. § 1326. The district court sentenced him to 180 months of imprisonment and five years of supervised release.

Wirichaga-Landavazo's projected release date is October 15, 2027. This is the second time that Wirichaga-Landavazo has sought compassionate release.

In March 2021, Wirichaga-Landavazo filed his first pro se motion for compassionate release. In that motion, he argued that extraordinary and compelling reasons warranted a sentence reduction because, during the COVID-19 pandemic, he was “particularly at risk due to his pre-existing latent tuberculosis.” App. vol. 1, at 40. In support, Wirichaga-Landavazo cited the CDC's general COVID-19 webpage with a parenthetical explaining that “people of all ages with pre-existing health condition[s] identified by C.D.C., have a higher risk of severe illness from affected (COVID-19) individuals.” *Id.* (citing COVID-19, CDC (Mar. 2021), www.cdc.gov/coronavirus/2019-ncov).

The district court entered a form order, checking the box for “DENIED after complete review of the motion on the merits.” App. vol. 1, at 108. In the “[o]ptional” section for “factors considered,” the district court's explanation echoed the government's response: “Defendant has failed to present ‘extraordinary and compelling reasons’ warranting his release. Defendant argues that his history of tuberculosis places him at a greater risk of severe

illness from COVID-19. However, the CDC does not identify tuberculosis as a condition that elevates COVID-19 risk.” *Id.* (cleaned up).

Wirichaga-Landavazo, then represented by counsel, timely appealed. In his opening brief, he asserted that because the CDC website had been updated to include tuberculosis as a COVID-19 risk factor, the district court committed clear error when it found (months earlier) that the CDC did not list tuberculosis as a risk factor. *See United States v. Wirichaga-Landavazo (Wirichaga-Landavazo I)*, No. 21-4070, 2022 WL 500651, at *2 (10th Cir. Feb. 18, 2022) (unpublished), *cert. denied*, 142 S. Ct. 2846 (2022). We disagreed, concluding that the district court accurately found “at the time of [its] order” that tuberculosis was not listed by the CDC as a “condition that elevates COVID-19 risk.” *Id.* at *3. Thus, we determined the district court’s order denying the motion for compassionate release was not based on a clearly erroneous factual finding. *Id.* But we also noted that because “the district court’s only stated basis” for denying Wirichaga-Landavazo’s motion “depend[ed] on a fact that is no longer true,” Wirichaga-Landavazo could “file a new compassionate release motion in the district court based on the CDC’s recent recognition that tuberculosis is one of the medical conditions increasing the risk of severe illness from COVID-19.” *Id.*

After unsuccessfully petitioning the Supreme Court for a grant of certiorari, Wirichaga-Landavazo filed a new pro se motion in the district court, styled as a “Motion to Reconsider,” requesting compassionate release “in light

of” the CDC’s addition of tuberculosis as a COVID-19 risk factor. App. vol. 1, at 120. In this motion, he first contended that he is “particularly at risk of becoming severe[ly] ill” from COVID-19 due to his “pre-existing health condition of tuberculosis.” *Id.* at 122. Second, he asserted that the 18 U.S.C. § 3553(a) factors weighed in favor of his release, stating (1) that he had served “almost nine years” of his sentence, (2) the especially “laborious nature” of having been incarcerated during the COVID-19 pandemic, and (3) his “significant strides toward rehabilitation.” *Id.* at 123.

The district court denied this motion, concluding that Wirichaga-Landavazo had “failed to present extraordinary and compelling reasons to support his release,” because he had declined a COVID-19 vaccine without any valid explanation or indication that it was contraindicated. *United States v. Wirichaga-Landavazo (Wirichaga-Landavazo II)*, No. 2:14-CR-517, 2023 WL 2391017, at *2 (D. Utah Mar. 7, 2023). The court acknowledged Wirichaga-Landavazo’s assertion that his “history of tuberculosis puts him at [a] higher risk should he become infected” with COVID-19 but pointed out that “he has refused to take basic measures to protect himself against that risk.” *Id.* Additionally, the court observed, “the most recent statistics from the [Bureau of Prisons] show that only a small number of inmates and staff at [Wirichaga-Landavazo’s] facility are currently testing positive for COVID-19,” indicating that his “risk of infection is low.” *Id.*

Alternatively, the district court explained, even if Wirichaga-Landavazo had presented extraordinary and compelling reasons for a sentence reduction, “[t]he [c]ourt’s consideration of the § 3553(a) factors leads to the conclusion that release is not appropriate.” *Id.* Specifically, the court emphasized the seriousness of Wirichaga-Landavazo’s offense, his criminal history, his disciplinary conduct while serving his sentence, the need to promote respect for the law, the need to deter Wirichaga-Landavazo and others, and the importance of protecting the public. *Id.*

Wirichaga-Landavazo timely appealed.

STANDARD OF REVIEW

We review a district court’s order denying a § 3582(c)(1)(A) motion for abuse of discretion. *United States v. Hemmelgarn*, 15 F.4th 1027, 1031 (10th Cir. 2021) (citation omitted). “A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact.” *Id.* (quoting *United States v. Battle*, 706 F.3d 1313, 1317 (10th Cir. 2013)).

DISCUSSION

Federal courts are generally forbidden from modifying a term of imprisonment after it has been imposed. *Freeman v. United States*, 564 U.S. 522, 526 (2011) (quoting 18 U.S.C. § 3582(c)). But this “rule of finality is subject to a few narrow exceptions,” including when a defendant moves for a sentence reduction under § 3582(c)(1). *United States v. Maumau*, 993 F.3d 821,

830 (10th Cir. 2021) (quoting *Freeman*, 564 U.S. at 526). We often refer to § 3582(c)(1) motions as compassionate-release motions. *See id.* at 826, 837.

District courts follow a three-step test in evaluating compassionate-release motions. *Id.* at 831 (citations omitted). First, the court “must find whether extraordinary and compelling reasons warrant a sentence reduction.” *Id.* (cleaned up). Second, the court “must find whether such reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* (cleaned up). And third, the court must “consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by steps one and two is warranted in whole or in part under the particular circumstances of the case.”² *Id.* (cleaned up). District courts may deny a compassionate-release motion on any of the three steps without addressing the others. *United States v. Hald*, 8 F.4th 932, 942–43 (10th Cir. 2021) (quoting *United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021)).

² The § 3553(a) factors are (1) “the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) the need for the sentence to “reflect the seriousness of the offense,” deter future crime, protect the public, and effectively provide the defendant with treatment; (3) “the kinds of sentences available”; (4) “the kinds of sentence and the sentencing range established” for the offense at the time of sentencing; (5) certain policy statements issued by the Sentencing Commission; (6) the need to avoid “unwarranted sentencing disparities” among similarly situated defendants; and (7) the need for victim restitution. 18 U.S.C. § 3553(a).

On appeal, Wirichaga-Landavazo asserts two reasons why, in his view, the district court abused its discretion in concluding that his motion failed to establish extraordinary and compelling reasons for his early release.

First, Wirichaga-Landavazo states, “since the denial of his compassionate release, [he] has received a (COVID-19) vaccination,” citing *United States v. Cavely*, No. 00-CR-157, 2021 WL 2843833 (N.D. Okla. July 7, 2021) (granting motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), based on extraordinary and compelling circumstances). Op. Br. at 3. But at the time of the district court’s factual finding, viewed in the context of the arguments and evidence before it, Wirichaga-Landavazo had refused a COVID-19 vaccine. Indeed, the relevant excerpts from Wirichaga-Landavazo’s Bureau of Prisons medical records (submitted with the government’s opposition to his first motion for compassionate release) showed that he had declined a COVID-19 vaccine in April 2021. And the factual record before the court never changed. Wirichaga-Landavazo said nothing about having received a COVID-19 vaccine during his first appeal. *See generally* Appellant’s Opening and Reply Brief, *Wirichaga-Landavazo I*, 2022 WL 500651 (No. 21-4070).³ Nor did he mention it to the district court when he filed his “Motion to Reconsider” late last year. In fact, in

³ We may take judicial notice of Wirichaga-Landavazo’s brief in the prior appeal. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (“[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand.”).

his most recent request for compassionate release, Wirichaga-Landavazo relied on the “B.O.P. medical records attached to [his] previous motion.” App. vol. 1, at 123. Thus, he never informed the district court about an updated vaccination status and never gave the court any opportunity to consider his new argument based on having now “received a (COVID-19) vaccination.” Op. Br. at 3.⁴ Thus, the district court’s fact finding that Wirichaga-Landavazo had refused the COVID-19 vaccine was not clearly erroneous.

Additionally, Wirichaga-Landavazo’s reliance on *Cavely* is misplaced because (1) *Cavely* predates the decisions from this court recognizing that receiving or refusing a COVID-19 vaccine weighs against a finding of extraordinary and compelling circumstances; (2) unlike Wirichaga-Landavazo, *Cavely* had presented extraordinary and compelling reasons for a sentence reduction that had little to do with his vaccination status, including his lack of any criminal history and his lengthy 440-month sentence, of which he had

⁴ Because the government was never ordered to respond to Wirichaga-Landavazo’s latest motion, the government did not submit any additional medical records for Wirichaga-Landavazo beyond those previously attached to the government’s response to his initial compassionate-release motion. On appeal, the government has filed a motion to supplement the record with additional pages from Wirichaga-Landavazo’s medical records, and a motion to file these medical records under seal. We deny the motion to supplement the record because this material was not available to or considered by the district court. *See Leatherwood v. Allbaugh*, 861 F.3d 1034, 1051 (10th Cir. 2017); *United States v. Farley*, 856 F. App’x 765, 768 (10th Cir. 2021) (unpublished) (“[W]e generally deny motions to supplement the record where the supplemental material was not available to or considered by the district court.”). We grant the motion to seal the medical records, however, because it will remain on the court’s docket as an attachment to the motion.

served 256 months; and (3) unlike Wirichaga-Landavazo, Cavely had put forth evidence showing multiple current comorbidity diagnoses including “morbid obesity, Congestive Heart Failure, and Chronic Obstructive Pulmonary Disease,” all of which placed him at an increased risk of severe illness from COVID-19. *See Cavely*, 2021 WL 2843833, at *4.

Second, Wirichaga-Landavazo contends, that the “rapidly-changing COVID-19 variants” should “preclude” a “blanket rule based on vaccination status.” Op. Br. at 3. But contrary to Wirichaga-Landavazo’s assertion, the district court did not adopt a “blanket rule based on vaccination status.” *Id.* Rather, the court considered Wirichaga-Landavazo’s individual circumstances, including his history of tuberculosis, vaccination status, and current risk of infection at his facility. *Wirichaga-Landavazo II*, 2023 WL 2391017, at *2. Based on these considerations, the district court properly concluded that Wirichaga-Landavazo had not presented an extraordinary and compelling reason for a sentence reduction. *Id.* A district court does not abuse its discretion by finding that a defendant who has either refused (or received and benefited from) the COVID-19 vaccine fails to establish extraordinary and compelling reasons warranting a sentence reduction. *United States v. Mendoza-Contreras*, No. 22-5057, 2023 WL 2706808, at *4 (10th Cir. Mar. 30, 2023) (unpublished) (“[W]e have recognized that access to vaccination may weigh against a finding of extraordinary and compelling reasons.” (cleaned up)); *Hald*, 8 F.4th at 936 n.2 (noting “a growing consensus that either receiving or

refusing COVID-19 vaccination weighs against a finding of extraordinary and compelling circumstances” (cleaned up)). Based on the evidence before the district court, Wirichaga-Landavazo had refused the COVID-19 vaccine.⁵ So the district court didn’t abuse its discretion by finding that Wirichaga-Landavazo failed to show an extraordinary and compelling need for a sentence reduction. *See Mendoza-Contreras*, 2023 WL 2706808, at *4; *Hald*, 8 F.4th at 936 n.5.

Nor did the district court abuse its discretion by holding, on alternative grounds, that the § 3553(a) factors didn’t support a sentence reduction. And Wirichaga-Landavazo does not argue otherwise.⁶ Accordingly, even if

⁵ This court cannot consider, for the first time on appeal, Wirichaga-Landavazo’s arguments based on his new vaccination status because that evidence was not first presented to the district court. *See Serna v. Webster*, No. 23-2091, 2023 WL 6382099, at *3 (10th Cir. Oct. 2, 2023) (unpublished) (declining to consider pro se litigant’s “allegations that [were] newly made on appeal,” based on “more factual details than appeared in the original amended complaint” (cleaned up)).

⁶ Rather than challenging the district court’s analysis of the § 3553(a) factors, Wirichaga-Landavazo’s appellate brief seems to raise a new argument that the district court “improperly imposed a leadership enhancement” under U.S.S.G. § 3B1.1(a) at his sentencing more than eight years ago. To the extent that Wirichaga-Landavazo’s brief raises a new and independent argument about a sentencing disparity, Wirichaga-Landavazo has waived this argument because he did not (1) raise it before the district court in his compassionate-release motion, (2) object to the Guidelines calculation that included the enhancement when he was sentenced in 2015, or (3) attack his sentence on this ground when he sought relief under 28 U.S.C. § 2255. Except in extraordinary circumstances, we won’t consider arguments raised for the first time on appeal. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002). Nor can we consider arguments attacking the validity of a sentence in the context of a

(footnote continued)

Wirichaga-Landavazo had presented extraordinary and compelling reasons for a sentence reduction, the district court did not abuse its discretion in denying Wirichaga-Landavazo's compassionate release motion based on the § 3553(a) factors.

CONCLUSION

For the reasons stated above, we affirm the district court's denial of Wirichaga-Landavazo's motion for compassionate release.⁷

Entered for the Court

Gregory A. Phillips
Circuit Judge

compassionate-release motion. *See United States v. Wesley*, 60 F.4th 1277, 1284, 1289 (10th Cir. 2023).

⁷ We grant Wirichaga-Landavazo's motion to proceed on appeal in forma pauperis.