No. 16-3820

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

COREY GRANT,

Appellant

Appeal from the Final Judgment in a Criminal Case of the United States District Court for the District of New Jersey (Crim. No. 90-328). Sat Below: Honorable Jose L. Linares, U.S.D.C.J.

SECOND SUPPLEMENTAL BRIEF FOR APPELLEE

CRAIG CARPENITO
UNITED STATES ATTORNEY
Attorney for Appellee
970 Broad Street
Newark, New Jersey 07102-2535
(973) 645-2700

On the Brief:

Bruce P. Keller
Assistant U.S. Attorney
Special Counsel to the U.S. Attorney
(973) 645-2930

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal Statutes

Sentencing Guidelines

Other Authority

The four questions this Court raised regarding the sentencing-package doctrine are answered below, along with a clarification regarding the compassionate release provision codified at 18 U.S.C. § 3582(c)(1)(A)(i).

1. The District Court Revisited the Entire Sentencing Package.

Grant argues the doctrine requires a *de novo* resentencing on his drug and gun convictions. According to Grant, Judge Linares committed error by not revisiting those 40-year (Counts 4-6) and consecutive 5-year (Count 11) sentences and by "limit[ing]" his resentencing to "Counts 1 and 2." DB47. That's not what happened. The entire factual premise of Grant's argument — that the District Court never considered modifying the original sentences for Grant's drug and gun convictions — is wrong.

Grant's resentencing was the final stage of the proceeding under 28 U.S.C. § 2255 this Court authorized in *In re Pendleton*, 732 F.3d 280 (3d Cir. 2013). After finding that Grant's life sentences for his two RICO counts of conviction violated the Eighth Amendment, the District Court concluded that Grant was "entitled to a new sentencing hearing." *Grant v. United States*, No. 12-cv-6844 (JLL), 2014 WL 5843847, at *7 (D.N.J. Nov. 12, 2014). It ordered a new PSR and directed the parties to address which version of the Guidelines "should be used for the resentencing hearing" and "what role, if any, acquitted conduct can and should play at the resentencing." DE24. That would not have been necessary had the Court intended to limit the resentencing to a "remand for resentencing under *Miller*" and not go "'beyond the original sentencing judge's consideration of relevant factors,'" as Grant demanded. PSR Addendum, p.65.

The resentencing hearing itself shows the District Court considered whether and how to modify the sentence for each count of conviction. A149–52. Acknowledging that "the reason" for "a resentencing of this case" was *Miller*, A149, 151, the Court nonetheless announced it also had taken the "time" to "look at" whether, as part of an entirely new sentence, the sentences on the drug and gun counts should be re-imposed. A151–52. It expressly considered the issue and did not ignore the sentences for "the drug conviction[s] and/or the minimum sentence" for "the gun conviction." A152. Instead, it affirmatively and explicitly decided not to alter them because of Grant's active role "in the distribution of" drugs. That went far beyond those "who were just selling" or "packaging," because Grant played the unique role as the armed enforcer for "this enterprise," which distributed a massive "quantity of drugs" during a "length[y] … conspiracy." *Id.*

Grant glosses over these aspects of the record when he portrays the sentences on the drug and gun counts as completely "undisturbed." DB47. Those terms of imprisonment were left largely intact because the District Court exercised its discretion to do so, not because they were ignored. In fact, Judge Linares *modified* a different component of those sentences, *increasing to life* the terms of supervised release on the drug counts, A21, 156, confirming he reviewed all of the counts, just as Grant belatedly had requested.

2. When the Sentencing-Package Doctrine Should Apply.

Under § 2255, if "the court finds" that "the sentence imposed was not authorized by law," the court "shall vacate and set the judgment aside and

shall discharge the prisoner or resentence him … or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). That "plain language" gives "the district court broad and flexible power in its actions following a successful § 2255 motion." *United States v. Davis*, 112 F.3d 118, 121 (3d Cir. 1997). It certainly allows broad leeway to determine what further proceedings are necessary to remedy a constitutional error affecting only some of the sentences a defendant received in a multi-count case.

In the direct appeal context, it is well settled that, after a court of appeals has reversed the judgment in a criminal case, it can remand either for *de novo* resentencing or for a limited resentencing. *See Pepper v. United States*, 562 U.S. 476, 505 n.17 (2011) (recognizing that courts of appeals may issue "limited remand orders" in "appropriate cases"); *United States v. Diaz*, 639 F.3d 616, 623 n.3 (3d Cir. 2011). In making that determination, appellate courts rely on the sentencing-package doctrine, whose *raison d'être* is to provide a sentencing court the freedom, unless ordered otherwise, to reconsider the overall architecture of all the sentences imposed upon multiple counts of conviction if a resentencing is necessary. *Davis*, 112 F.3d at 122. That is especially important in the "typical[]" case, where one or more counts of conviction have been vacated, *Greenlaw v. United States*, 554 U.S. 237, 253 (2008), because, as a result of the vacated count, the overall calculation of how all of the sentences interrelate is most likely to be affected.

That isn't this case. None of Grant's convictions was vacated; they were not challenged in his § 2255 motion; and the non-RICO sentences raised no

constitutional issue. But even where one or more counts have been vacated (which didn't occur here), *de novo* resentencing is required on the remaining counts *only* where the vacated count affected the "total offense level, Guideline range, or sentence." *United States v. Ciavarella*, 716 F.3d 705, 735 (3d Cir. 2013).

Grant portrays his original 40-year sentences as afterthoughts given the Guidelines-driven life sentences imposed on the murder-predicated RICO counts. But he faced still another life sentence on a drug count, Count 4, which also carried a statutory maximum sentence and Guidelines range of life. 21 U.S.C. §§ 841(b)(1)(A) and 846. Yet Judge Ackerman imposed only 40 years' imprisonment on that count.[1] Grant never argued that the resulting, 45-year aggregate term of imprisonment for those counts (adding the five-year consecutive sentence required for Grant's § 924(c) conviction) violates *Graham*, nor could he. If those were the only sentences, Grant would be scheduled for release more than two decades before his projected life expectancy, whether measured from current age or age at original sentencing. A46, 488.

Grant has not identified any case *requiring* resentencing on all counts simply because the sentence for one or two needs to be altered. Indeed, even in those Circuits that, unlike this one, have adopted default rules on whether a resentencing should be *de novo* or limited unless the mandate specifies otherwise, panels remain free to override the default rule in any given case. *See,*

[1] That Grant could have received life on one of the drug counts appears "inadvertent[ly]," DB16, to have led the District Court to include it within the sentences carrying a new, 60-year term. As a practical matter, this had no effect on his new total sentence.

e.g., *United States v. Blackson*, 709 F.3d 36, 40–42 (D.C. Cir. 2013); *United States v. Quintieri*, 306 F.3d 1217, 1225–28 (2d Cir. 2002).

Moreover, in *United States v. Miller*, 594 F.3d 172, 179–80 (3d Cir. 2010), this Court distinguished between packages involving a vacated conviction and ones involving only a sentencing error. When a conviction has been vacated, *de novo* resentencing makes more sense. Because the sentence on that conviction also has been vacated, *de novo* review of whether anything else needs adjustment can be appropriate. *E.g.*, *United States v. Baroni*, 909 F.3d 550, 588–89 (3d Cir. 2018) (remanding for resentencing after reversing two counts of conviction that significantly increased defendants' advisory Guidelines range), *pet. for cert. filed*, No. 18-2059 (S. Ct. Feb. 13, 2019).

When only sentencing error has occurred, however, resentencing should be limited to correcting the error itself, unless that error somehow affects the entire calculation or "the sentencing colloquy demonstrates that the sentences were interdependent." *Diaz*, 639 F.3d at 620. Put another way, the issue is not properly resolved simply by asking whether a conviction or a sentence has been vacated. Instead, the relevant inquiry is whether the reason requiring resentencing may also affect multiple sentences such that it no longer makes sense to assume the overall sentence still fits the crime and the criminal.

That can happen where the reason for the resentencing involves a change in the advisory Guidelines range, or if the vacated count or sentence was part of a package that also included mandatory minimum sentences. In the latter scenario, that may mean consideration of sentences longer than the minimum

to carry out the sentencing court's original intent or, even absent a minimum, a possible longer sentence. *United States v. Smith*, 725 F.3d 340, 349 n.6 (3d Cir. 2013) (vacating sentence on sole surviving count to allow the district court to "reconstruct the sentencing architecture").

By contrast, sometimes the reason for vacating one sentence will not affect the other. *E.g.*, *United States v. Kukafka*, 478 F.3d 531, 540 (3d Cir. 2007) (where two sentences ran concurrently for two years, but one exceeded the shorter, statutory maximum of six months, proper remedy was to correct the erroneous sentence by reducing it to the statutory maximum, not resentence on both). In other situations, however, all sentences need adjustment because the original aggregate sentence remains proper, even if a component of it was imposed in error. *E.g.*, *United States v. Cantrell*, 774 F.3d 666, 669 (10th Cir. 2014) (erroneous 54-month sentence for two aggravated identity theft counts exceeded statutory 48-month term, but on remand, district court was free to increase sentences for fraud and money laundering so that overall package totaled 132 months, the amount set forth in plea agreement).

In short, application of the doctrine in cases involving a sentencing error is a matter of discretion, best answered by the court that identified the error. The purpose of the doctrine is flexibility: It permits a sentencing court to "reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." *Greenlaw*, 554 U.S. at 253. Unless a higher court orders otherwise, sentencing courts should have discretion to reconsider interdependent sentences at any resentencing. But

absent an error that affects the counts or sentences that did not trigger the resentencing, resentencing on every count is not required.

That's this case. Although the Supreme Court's juvenile sentencing cases did not affect the non-life, term-of-years sentences on Grant's drug and gun counts, Judge Linares elected to review them. He did not apply "law-of-the-case," DB47, but rather exercised his discretion to ensure those portions of Grant's overall sentence remained appropriate in light of the rest of the package, A151–52. That implements *Greenlaw*'s admonition to ensure the new sentencing plan satisfies § 3553(a). Nothing more is required. Grant falls woefully short of showing that the District Court abused its discretion in leaving the terms of imprisonment on the non-homicide sentences intact.

3. The Issue Was Not Preserved.

Because there was no error, the standard of review takes on less importance. Still, Grant never invoked the doctrine below, let alone argued it required adjustment of the drug and gun sentences. A39. Instead, he contended, based on *Miller*, he should be resentenced to time-served. A98. When the District Court stated that at no point during the *Miller*-based § 2255 proceeding had Grant ever "challenged" the drug and gun count sentences, Grant did not disagree. A39. Instead, he responded "[be] that as it may," *id.*, nobody "looked upon this as somehow a breakdown" that "you got 40 on that and five on that"; supposedly, everybody thought about Grant's sentence as "a life sentence," A40. Responding to his failure to have raised any issues with respect to Counts 4–6 and 11, Grant stated "yeah, we never argued for it

because it was almost irrelevant looking at the life sentence." *Id.*; A42 ("of course we never broke this down"; "we were confronted with a juvenile being sentenced for the rest of his life"). Even when directly challenged to state the basis for revisiting the drug and gun sentences, Grant never mentioned the sentencing-package doctrine. Instead, focused like a laser beam on *Miller*, his position was that even 40 years was "tantamount to" LWOP. A40, 44.

For those reasons, Grant's sentencing package arguments are unpreserved and subject to plain error review. It is not enough to argue nobody "looked upon this as somehow a breakdown" but as a "life sentence." A40. Grant articulated a very specific reason for contending the "sentence as a whole was offensive to the *Miller* concept." A44. He was using *Miller* as the basis to support his request for a new sentence of time served. A98. In other words, Grant tried to smuggle into his *Miller* resentencing a new claim that his non-homicide, term-of-years sentences also violated the Eighth Amendment. That did not preserve his sentencing-package argument. "To preserve an argument for appeal, a party 'must have raised the same *argument* in the District Court — merely raising an issue that encompasses the appellate argument is not enough.'" *United States v. Ley*, 876 F.3d 103, 106 (3d Cir. 2017) (quoting *United States v. Joseph*, 730 F.3d 336, 337 (3d Cir. 2013), and applying *Joseph* to preservation of sentencing claim).

4. Only a Limited Remand Is Warranted.

Because there is no error, no relief (other than a remand to allow the District Court to determine whether to correct the term of imprisonment it

increased on the drug conspiracy count) is required. That "eminently practical" conclusion is underscored by the concurrent sentence doctrine. *Jones v. Zimmerman*, 805 F.2d 1125, 1128 (3d Cir. 1986). Because Grant's aggregate 65-year term of imprisonment does not violate the Eighth Amendment, he "remains sentenced in any event," and "reviewing the [shorter] concurrently sentenced counts" would be "of no utility." *Id*. It is absolutely clear that the District Court took a fresh "look" at the drug and gun sentences, A152, but even if it were not, a remand solely to confirm that point would be the only result consistent with the need to "conserve[] judicial resources for more pressing needs." 805 F.2d at 1128; *see United States v. Ross*, 801 F.3d 374, 381–82 (3d Cir. 2015) (applying concurrent sentence doctrine).

5. Compassionate Release.

An issue arose towards the end of oral argument regarding 18 U.S.C. § 3582(c)(1)(A), U.S.S.G. § 1B1.13 and geriatric release. The geriatric release provision to which the Government referred at argument is ***not*** the one in § 3582(c)(1)(A)(ii). That applies only to defendants sentenced under § 3559(c) and who are at least 70 years old. Instead, the geriatric release provision applicable to the question raised in this Court's February 15, 2019 letter has a different provenance: 18 U.S.C. § 3582(c)(1)(A)(i).

Under § 3582(c)(1)(A), as amended by the First Step Act, a defendant now may move for a reduction in sentence "consistent with applicable policy statements issued by the Sentencing Commission," which, in turn, has issued U.S.S.G. § 1B1.13. That Guideline includes among the "[e]xtraordinary and

[c]ompelling reasons" that *may* warrant consideration of a reduction of a term of imprisonment "[o]ther reasons" determined by the BOP. § 1B1.13, cmt. (n.(1)(D)). Those other reasons may be considered independently of, or in conjunction with, other provisions of the policy statement. *Id.*

That is the genesis of the BOP's pure geriatric release provision, set forth in BOP Program Statement § 5050.50(4)(c). "[I]nmates age 65 or older who have served the greater of 10 years or 75% of the[ir] term of imprisonment" may invoke § 3582(c)(1)(A)(i) — regardless of health or whether they were sentenced under 18 U.S.C. § 3559(c) — as a basis for a sentence reduction. In Grant's case, he will turn 65 in 2038, the same year he has served 75% of his 65-year sentence. Thus, whether or not Grant can seek a reduction under § 3582(c)(1)(A)(i) before then, BOP itself recognizes that he can when he is 65.

Respectfully submitted,

CRAIG CARPENITO
UNITED STATES ATTORNEY

Bruce P. Keller
Assistant U.S. Attorney
Special Counsel to the U.S. Attorney

Date: March 8, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify as an Assistant United States Attorney for the District of New Jersey that:

(1) this brief is less than 10 double spaced pages and thus does not exceed the page limit set by this Court;

(2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared using a Microsoft WORD 2016 word-processing system and it is in a proportionally spaced typeface, namely Calisto MT, that is at least 14 points; and

(3) The electronic PDF brief was prepared on a computer that is automatically protected by a virus detection program, namely a continuously updated version of McAfee Endpoint Security 10.5, and no virus was detected.

Bruce P. Keller
Assistant U.S. Attorney

Dated: March 8, 2019

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on March 8, 2019, I caused the Second Supplemental Brief for Appellee to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system.

I also certify that on March 8, 2019, I caused this Brief to be served by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system, on all counsel of record in this appeal for Defendant Corey Grant and the *amici curiae* who submitted briefs supporting him.

Bruce P. Keller
Assistant U.S. Attorney

Dated: March 8, 2019