

Westlaw

26 Fed.Appx. 394

Page 1

26 Fed.Appx. 394, 2001 WL 1356205 (C.A.6 (Ky.))  
(Cite as: 26 Fed.Appx. 394)

**H**

Engle v. U.S.  
C.A.6 (Ky.),2001.

This case was not selected for publication in the Federal Reporter. NOT RECOMMENDED FOR FULL-TEXT PUBLICATIONS. Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals, Sixth Circuit.  
Thurman ENGLE, Petitioner-Appellant,

v.

UNITED STATES of America,  
Respondent-Appellee.  
No. 00-6659.

Oct. 25, 2001.

Federal prisoner who was serving term of 121 months' imprisonment imposed following his federal drug conviction filed hybrid motion to vacate sentence, and for habeas corpus relief, seeking reduction in sentence in light of his terminal lymphoma. The United States District Court for the Eastern District of Kentucky, Joseph M. Hood, J., denied relief. Prisoner appealed. The Court of Appeals held that: (1) prisoner's claims were procedurally defaulted; (2) denial of sentence reduction in any event did not violate Eighth Amendment; and (3) district court lacked jurisdiction to grant compassionate release in absence of motion from Director of Bureau of Prisons.

Affirmed.

West Headnotes

**[1] Criminal Law 110** ⇨ 1576

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)1 In General

110k1574 Petition or Motion

110k1576 k. Characterization. Most

Cited Cases

**Habeas Corpus 197** ⇨ 666

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)1 In General

197k665 Petition or Application

197k666 k. Characterization;

Treatment as Habeas Corpus Petition. Most Cited Cases

Action in which federal prisoner challenged both the original imposition of his sentence, and its continued execution, was properly construed as both a motion to vacate his federal conviction, and a petition for writ of habeas corpus. 28 U.S.C.A. §§ 2241, 2255.

**[2] Habeas Corpus 197** ⇨ 272

197 Habeas Corpus

197I In General

197I(C) Existence and Exhaustion of Other Remedies

197k272 k. Administrative Remedies, and Review Thereof. Most Cited Cases

Federal prisoners are required to exhaust administrative remedies before filing a petition for a writ of habeas corpus. 28 U.S.C.A. § 2241.

**[3] Habeas Corpus 197** ⇨ 277

197 Habeas Corpus

197I In General

197I(C) Existence and Exhaustion of Other Remedies

197k275 Particular Issues and Problems

197k277 k. Prisons; Conditions, Discipline, Transfer, Etc. Most Cited Cases

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

26 Fed.Appx. 394, 2001 WL 1356205 (C.A.6 (Ky.))  
(Cite as: 26 Fed.Appx. 394)

Federal prisoner who sought compassionate release from warden, but did not appeal the decision and did not raise an Eighth Amendment claim, had procedurally defaulted his claims, for purposes of federal habeas corpus review, and was required to show cause and prejudice for the failure to exhaust in order to assert claims. 28 U.S.C.A. § 2241.

#### [4] Habeas Corpus 197 ⇨273

197 Habeas Corpus

197I In General

197I(C) Existence and Exhaustion of Other Remedies

197k273 k. Exhaustion and Procedural Default, in General. Most Cited Cases

Although a federal prisoner's intentional decision not to exhaust procedural remedies generally does not constitute cause sufficient to excuse a procedural default, for purposes of federal habeas corpus review, official interference making compliance impracticable will. 28 U.S.C.A. § 2241.

#### [5] Habeas Corpus 197 ⇨278

197 Habeas Corpus

197I In General

197I(C) Existence and Exhaustion of Other Remedies

197k275 Particular Issues and Problems

197k278 k. Length of Sentence. Most Cited Cases

Federal prisoner's short life expectancy resulting from recurrence of his cancer, which allegedly created an interest in immediate judicial review that outweighed government's interest in judicial economy, was insufficient to establish cause for his procedural default, for purposes of federal habeas corpus review, of his claim that Eighth Amendment required reduction in sentence. U.S.C.A. Const.Amend. 8; 28 U.S.C.A. § 2241.

#### [6] Sentencing and Punishment 350H ⇨1527

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(G) Confinement

350Hk1527 k. In General. Most Cited

Cases

While the incarceration of a terminally ill prisoner may be "cruel," it is not "unusual," and thus does not violate Eighth Amendment. U.S.C.A. Const.Amend. 8.

#### [7] Sentencing and Punishment 350H ⇨1466

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(D) Prosecutions

350Hk1466 k. Sentencing Proceedings. Most Cited Cases

#### Sentencing and Punishment 350H ⇨1480

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and

Proportionality of Sentence

350Hk1480 k. In General. Most Cited Cases

Eighth Amendment does not require consideration of mitigating factors at sentencing in non-capital cases, nor at mid-sentence. U.S.C.A. Const.Amend. 8.

#### [8] Sentencing and Punishment 350H ⇨1546

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1546 k. Medical Care and Treatment. Most Cited Cases

Eighth Amendment's prohibition on cruel and unusual punishment does not mandate that a terminally ill prisoner be housed without discomfort. U.S.C.A. Const.Amend. 8.

#### [9] Sentencing and Punishment 350H ⇨1570

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(J) Alternatives to Incarceration

350Hk1570 k. In General. Most Cited

26 Fed.Appx. 394, 2001 WL 1356205 (C.A.6 (Ky.))  
(Cite as: 26 Fed.Appx. 394)

#### Cases

The early release of terminally ill prisoners is not mandated under Eighth Amendment's prohibition on cruel and unusual punishment, and is a matter more properly weighed by the legislature and prison administration than the courts. U.S.C.A. Const.Amend. 8.

### [10] Sentencing and Punishment 350H ⇌ 1570

#### 350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(J) Alternatives to Incarceration

350Hk1570 k. In General. Most Cited

#### Cases

Refusal to grant early release to prisoner who had been sentenced to term 121 months' imprisonment following his drug conviction, on basis that prisoner suffered from terminal lymphoma, did not result in cruel and unusual punishment in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8.

### [11] Prisons 310 ⇌ 15(7)

#### 310 Prisons

310k15 Reduction of Term of Imprisonment and Discharge for Good Conduct

310k15(7) k. Procedure and Review. Most Cited Cases

District court lacked jurisdiction to sua sponte grant compassionate release to federal prisoner, who suffered from terminal lymphoma, where no motion requesting a modification of sentence had been filed by Director of Bureau of Prisons. 18 U.S.C.A. § 3582.

Before MARTIN, Chief Judge; CLAY, and GARWOOD,<sup>FN\*</sup> Circuit Judges.

FN\* The Honorable Will L. Garwood,  
United States Circuit Judge for the Fifth  
Circuit, sitting by designation.

#### ORDER

\*\*1 Thurman Engle, a federal prisoner proceeding

through counsel, appeals a district court order denying his hybrid motion filed pursuant to 28 U.S.C. §§ 2241 and 2255. The parties have expressly waived oral argument in this case, and upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

A jury convicted Engle of conspiracy to possess with intent to distribute marijuana and cocaine in violation of 21 U.S.C. § 846. He was sentenced to 121 months in prison, 5 years of supervised release, a \$50 special assessment, and a \$17,500 fine. This court affirmed his conviction and sentence on direct appeal in \*396*United States v. Wilson*, Nos. 96-6709/6710, 1999 WL 71499 (6th Cir. Jan.14, 1999) (unpublished).

In his pro se motion, Engle essentially asserted that: 1) his trial counsel rendered ineffective assistance by failing to seek a downward departure pursuant to USSG § 5H1.4 due to Engle's terminal lymphoma; and 2) a federal warden erred by denying Engle's request for compassionate release. The district court appointed counsel and then denied the motion as untimely under § 2255. Engle's counsel moved for reconsideration, additionally arguing that Engle's incarceration was in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. In its order denying the motion, the district court reasoned that even if the motion were timely, it could not have departed below the statutory minimum of 120 months, that Engle's incarceration was not in violation of the Eighth Amendment, and that the court lacked authority to grant compassionate release without a motion from the Bureau of Prisons. The district court thereafter granted a certificate of appealability as to whether Engle's incarceration offends the Eighth Amendment and whether the district court lacks authority to grant compassionate release.

[1] Initially, we construe the action as arising under § 2241 as well as § 2255 because Engle initially challenged both the original imposition of his sentence and its continued execution. *See United States v. Jalili*, 925 F.2d 889, 893-94 (6th Cir.1991). However, his appeal is solely based upon the return of his cancer, an event occurring after

26 Fed.Appx. 394, 2001 WL 1356205 (C.A.6 (Ky.))  
(Cite as: 26 Fed.Appx. 394)

sentencing, and thus we will apply the law governing § 2241 actions. *See Cohen v. United States*, 593 F.2d 766, 770-71 (6th Cir.1979). This court reviews the dismissal of a § 2241 petition de novo on appeal. *See Fowler v. United States Parole Comm'n*, 94 F.3d 835, 837 (3d Cir.1996); *Robbins v. Christianson*, 904 F.2d 492, 494 (9th Cir.1990).

[2][3][4] Upon review, we conclude that the district court's judgment must be affirmed for reasons other than those stated by the district court. *See City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir.1994). Federal prisoners are required to exhaust administrative remedies before filing a petition under 28 U.S.C. § 2241. *Little v. Hopkins*, 638 F.2d 953, 954 (6th Cir.1981). Although Engle sought compassionate release from the warden, he did not appeal the decision and he did not raise an Eighth Amendment claim. Thus, he has procedurally defaulted his claims and must show cause and prejudice for the failure to exhaust. *See Moscato v. Fed. Bureau of Prisons*, 98 F.3d 757, 760 (3d Cir.1996); *Sanchez v. Miller*, 792 F.2d 694, 697 (7th Cir.1986). Although an intentional decision not to exhaust procedural remedies generally does not constitute cause, official interference making compliance impracticable will. *Amadeo v. Zant*, 486 U.S. 214, 221-22, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

\*\*2 [5] Relying on *McCarthy v. Madigan*, 503 U.S. 140, 146, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), Engle argued below that his short life expectancy creates an interest in immediate judicial review that outweighs the government's interests in the efficiency of administrative autonomy that the exhaustion doctrine is designed to further. Engle's argument is insufficient to show cause. *McCarthy* concerned administrative exhaustion in a *Bivens* action, rather than a § 2241 action, and it has since been superseded by an amendment to 42 U.S.C. § 1997e. Furthermore, Engle has not shown that the Bureau of Prisons has made compliance with the exhaustion requirement impracticable.

\*397 [6][7][8][9][10] Nonetheless, even if Engle had not procedurally defaulted his claims, his claims would not merit relief. First, Engle's

incarceration does not violate the Eighth Amendment. Although the incarceration of a terminally ill prisoner may be "cruel," it is not "unusual." *See Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (severe, mandatory penalties are cruel, but not unusual). The Eighth Amendment does not require consideration of mitigating factors at sentencing in non-capital cases, *id.* at 995, 111 S.Ct. 2680, and thus we do not deem it to require consideration of mitigating factors mid-sentence. Individualized sentencing is not mandated by the Eighth Amendment in non-capital cases even where a term sentence effectively becomes a life sentence due to the personal characteristics of a defendant. *Id.* at 996, 111 S.Ct. 2680 (individual sentencing would not be required for a 65-year-old man). Additionally, Engle has explicitly disclaimed that prison officials have been deliberately indifferent to his medical needs. While Engle's remaining days would likely be more pleasant outside of prison, the Eighth Amendment does not mandate that he be housed without discomfort. *See Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). As the Eighth Amendment provides no relief, the early release of terminally ill prisoners is a matter more properly weighed by the legislature and prison administration than the courts. *See id.*

[11] Second, the district court lacked jurisdiction to sua sponte grant compassionate release. A district court may not modify a defendant's federal sentence based on the defendant's ill health, except upon a motion from the Director of the Bureau of Prisons. *See* 18 U.S.C. § 3582. No such motion was filed in the instant case.

Accordingly, the district court's judgment is affirmed.

C.A.6 (Ky.),2001.  
Engle v. U.S.  
26 Fed.Appx. 394, 2001 WL 1356205 (C.A.6 (Ky.))

END OF DOCUMENT