APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RAFAEL FERNANDEZ GARCIA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 12-60614-CIV-DIMITROULEAS
(09-60245-CR-DIMITROULEAS)

FINAL JUDGMENT AND ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on Movant's (Garcia) undated Motion to Vacate [DE-1], filed on April 5, 2012 and his unsworn[1] April 2, 2012 Memorandum [DE-3]. The Court has considered the Government's April 30, 2012 Response [DE-6] and Garcia's May 29, 2012 Reply [DE-9], and having reviewed the Court file and Pre-Sentence Investigation Report (PSIR) and having presided over the trial of this cause and having conducted an evidentiary hearing on July 13, 2012 at which credibility of witnesses (Movant and Joaquin Mendez) was determined, and exhibits received, finds as follows:

1. On September 10, 2009, Garcia was arrested based upon a Criminal Complaint [CR-DE-1]. He was arrested after the completion of a reverse sting operation.

2. An indictment was returned on September 22, 2009 charging Garcia with Hobbs Act Robbery, Conspiracy to Possess with Intent to Distribute Five Kilograms or More of Cocaine, Attempted Possession with Intent to Distribute Five Kilograms or More of Cocaine, Conspiracy to

[1]It did contain Garcia's affidavit [DE-3, pp. 40-41]

Use a Firearm During a Crime of Violence or Drug Trafficking Crime, and Use of a Firearm During the Commission of a Crime of Violence or Drug Trafficking Crime, and Use of a Firearm During the Commission of a Crime of Violence or Drug Trafficking Crime. [CR-DE-49].

3. On October 28, 2009, this Court granted a defense continuance and reset the trial to January 25, 2010. [CR-DE-104, 105].

4. A Superceding Indictment was returned on January 5, 2010 [CR-DE-117].

5. On January 22, 2012, this Court granted another defense continuance and reset the trial to February 22, 2010. [CR-DE-171]. On February 2, 2010, this Court granted another defense continuance and reset the trial to March 1, 2010. [CR-DE-181]. At the calendar call held on February 26, 2010, Garcia announced that he was ready for trial. [CR-DE-368, p. 5]. The Court severed Garcia's trial from that of his brother's case. [CR-DE-368, p. 28].

6. The trial commenced on March 1, 2010 [CR-DE-198]. On March 12, 2010, Garcia was found guilty of the first four counts, but acquitted of Use of a Firearm During a Crime of Violence or Drug Trafficking Crime. [CR-DE-224].

7. On May 21, 2010, Garcia was sentenced to 292 months in prison. [CR-DE-301].

8. On October 27, 2011, the Eleventh Circuit Court of Appeals affirmed. [CR-DE-408]. U.S. v. Garcia, 445 Fed. Appx. 281 (11th Cir. 2011). The appellate court held that the court's denial of a dismissal of Juror Castellanos because of a special relationship with Detective Gandarillas was not an abuse of discretion.

9. In this timely Motion to Vacate, Garcia complains about

A. Ineffective assistance of counsel regarding a plea offer and a likely sentence after trial.

B. Ineffective assistance of counsel regarding inadequate preparation, accepting money from his family and a failure to obtain GPS and phone records.

C. An objectionable juror, Michele Castellanos, served on the case.

D. Prosecutorial misconduct in bolstering the testimony of Amaury Hernandez; misstating that Garcia had been convicted of similar crimes; misstating fingerprint evidence, and referencing Garcia's being in jail.

E. Ineffective Assistance of Counsel in failing to object to misstatement of facts and vouching (prints on stolen kilos, details of prior conviction, called from jail).

10. First, Garcia complains that trial counsel rendered faulty advice about a plea offer. Specifically, Garcia complains that he wanted to view a video tape of a collateral crime before deciding whether to accept an offer of 84 months in jail. He contends that trial counsel misadvised him about the penalty he would be facing after trial. Garcia contends that but for trial counsel's faulty advice he would have pled guilty. Finally, Garcia contends that trial counsel failed to accept his phone calls and charged his friend, Rosa Maria Duarte, $100.00 for marked up copies of documents. Garcia's main contention seems to be that had he seen the videotape of the collateral crime, he would probably have pled guilty, particularly if he knew that he faced over twenty (20) years in prison after a trial. The record indicates that trial counsel for Garcia filed a Motion in Limine to preclude evidence of an August 13, 2009 attempted kidnapping. [CR-DE-112]. The Government had noticed Garcia on October 6, 13, 20, and 26. 2009 and on December 10 and 16, 2009 that it intended to introduce evidence of an attempted kidnapping that occurred on August 13, 2009. [CR-DE–74, 75, 96, 99, 106 and 107]. On January 5, 2010, the prosecutor offered a plea to Counts One and Five; the plea was open until January 8, 2010. [DE-6-1, p. 1]. On January 13, 2010,

defense counsel communicated that his client had rejected the plea offer. He indicated that a ruling on the 404(b) motions might make a difference to his client, so he asked for the plea offer to remain open a little longer. [DE-6-1, p. 3]. Later that same day, the prosecutor indicated that Garcia was the one on the 8/13 Hialeah attempted kidnapping disc, seen picking up something. Defense counsel responded that he wished it were clearer because it might convince him. [DE-6-1, p. 5]. On February 4, 2010, Garcia wrote his attorney indicating that he wanted to see the video disc to decide whether he might have to take a deal. [DE-3, pp. 43-45]. Later on February 17, 2010, trial counsel, in response to the prosecutor's inquiring about Garcia's facing a 15 year mandatory minimum, indicated that he was going to see Garcia with all the audios and videos [DE-6-1, p. 9]. The Court determined credibility of witnesses at the evidentiary hearing. The Court finds the testimony of Mr. Mendez to be credible. Garcia was told that he was facing up to thirty (30) years in prison if he went to trial. He was told that the plea offer would result in a guideline range starting at 87 months. Garcia rejected the plea because he said he was innocent. Garcia still maintains his innocence. There has been no showing of ineffectiveness. In fact, the record shows that Mr. Mendez, an experienced criminal defense attorney, performed capably for Mr. Garcia. Garcia never wanted to accept a plea.[2] No ineffectiveness has been shown. Mr. Mendez explained the consequences of going to trial or pleading guilty. Garcia knowingly and intelligently rejected the plea offer; he maintained his innocence. Garcis does not explain why Mr. Mendez had to accept his phone calls or how he was prejudiced when Mendez met with him thirteen times, not including when he saw him in court. Finally, Garcia fails to explain what relevance there is to Mendez's charging copying fees to a

[2]It is doubtful that Garcia could have survived a plea colloquy with this Court. The Court would have explained that he was facing 25 years in prison on an open plea. The Court would have rejected a guilty plea where Garcia would have been professing his innocence.

non-party. In conclusion, Mendez was an experienced attorney who performed capably for Garcia. Garciua wanted a trial; when that did not work out he wants this court to believe that he really wanted to plead guilty. When the results were unfavorable to Garcia, he turned on Mendez to blame him for his woes.

11. Second, Garcia makes mostly conclusory allegations regarding trial counsel's lack of preparation.[3] Such conclusions are insufficient to warrant an evidentiary hearing. Chavez v. Sec'y, D.O.C., 647 F.3d 1057, 1061 (11th Cir. 2011) cert. denied, 132 S. Ct. 1018 (2012). He complains, in a conclusory fashion, about the failure of a private investigator's meeting with him. Specifically, Garcia does contend that GPS records would have impeached Amaury Hernandez's testimony that Garcia was present at the house of Lazaro Rivera's mother on September 10, 2009 when the robbery was planned. Additionally, Garcia contends that phone records would have shown an absence of communication between him and his co-defendants. In general, Garcia's conclusory allegations do not merit any relief. Garcia attaches no GPS records to support his position. On the contrary, the Government attaches records that seem to show an absence of GPS reports from 3:35.19 PM on September 10, 2009 (DE-6-3, p. 17) to 5:55:24 PM on that date [DE-6-3, p. 18]. Similarly, Garcia's conclusory contention about a lack of phone calls between certain numbers would not have been probative as other phones could have been used. Apparently, the government has records that Garcia called (texted) or received calls (texts) on nineteen (19) occasions from his co-defendant brother and on fifteen (15) occasions from co-defendant Lazaro Riveras [DE-6-2]. Finally, Garcia does not explain how his lawyer charging $100 to a non-party for copying expenses warrants a conclusion that counsel was ineffective. Mr. Mendez is an experienced criminal defense attorney, a former federal

[3]Mendez testified that he met with Garcia thirteen (13) times before trial.

law clerk, and a former federal public defender. No relief is appropriate on this claim.

12. Third, counsel can not be faulted for Juror Castellanos' serving on the jury, as he did object. The Eleventh Circuit Court of Appeal held that this Court did not abuse its discretion in keeping the juror on the jury. Matters which have been resolved on appeal should not be revisited on a Motion to Vacate. See U.S. v. Nyhuis, 211 F. 3d 1340, 1343 (11th Cir. 2000). During jury selection the prosecutor read a list of possible witnesses who might testify, included on that list was Broward County Sheriff's Office Detective Gonzo Gandarellas. [CR-DE-359, p. 9]. No juror indicated that any of the names sounded familiar. [CR-DE-359, p. 10]. Then the Court explained that merely knowing a witness would not automatically disqualify a prospective juror. [CR-DE-359, pp. 10-11]. Juror Castellanos denied having any close friends or relatives who were policemen. [CR-DE-359, p. 45]. The jury was selected and after a luncheon recess, the prosecutor informed the Court that Detective Gandarellas had recognized Juror Castellanos. [CR-DE-360, p. 50]. Defense counsel moved to strike the juror for cause, and the Government did initially not object. [CR-DE-360, p. 51]. However, the juror was then questioned, acknowledged that Gandarellas was Lourdes' brother, but stated that she would not be uncomfortable sitting on the case. [CR-DE-360, p. 52]. The prosecutor then withdrew his lack of objection to a cause challenge because there appeared to be no instant connection between the juror and the detective. [CR-DE-360, p. 53]. The Court found that there was no indication that the juror had been deceptive or dishonest. [CR-DE-360, p. 54]. The Court denied the challenge for cause. [CR-DE-360, p. 55]. No error was shown on appeal or appears on this record.

13. Fourth, Garcia complains about trial counsel's failure to object to the prosecutor's opening and closing arguments. Garcia complains that the prosecutor bolstered Amaury

Hernandez's testimony and misstated Garcia's criminal history. Garcia does not specify how the prosecutor bolstered Amaury Hernandez's testimony. Just arguing that Hernandez was believable based both on what he did and did not say is not impermissible bolstering. [CR-DE-366, pp. 85-86]. The context of the remarks establishes that the prosecutor was arguing the credibility of the witness not vouching for his credibility. Bass v. U.S., 655 F. 3d 758, 761 (8th Cir. 2011). Any objection to the prosecutor's confusing comments about Garcia's criminal history would have been overruled, and otherwise would have resulted in no harmful error. The jury would have been told what they were later told and that was that what the lawyers say is not evidence. [CR-DE-366, p. 132]. There was significant evidence of Garcia's guilt. Kennedy v. Kemna, 666 F. 3d 472, 483 (8th Cir. 2012). The prosecutor's confusing argument about prior acts of misconduct being probative of Garcia's intent did not clearly misstate Garcia's criminal history. The prosecutor jumbled up the 2008 convictions and the August, 2009 crimes, as both being indicative of Garcia's intent. From the context of the trial, it was clear that Garcia had 2008 convictions for crimes that had occurred in 2006 and for which he was on probation (wearing a GPS device) and that he had also committed crimes a month before the instant offense. The prosecutor's inartful argument did not prejudice Garcia,

14. Fifth, Garcia complains that trial counsel was ineffective in failing to object to vouching, prints on kilos, details of prior convictions and a collect call from the jail. Any additional objections would have been overruled. There was no improper vouching. There could have been no prints on kilos as this was a reverse sting, and the kilos were never in existence. The prosecutor properly published Exhibit 43, which detailed the information and judgement regarding the convictions in 2008. In his closing argument the prosecutor said:

> Remember one other thing, ladies and gentlemen. The defendant has been convicted before for very similar crimes. He was convicted on February 13, 2009, in the Circuit Court for Miami-Dade County of robbery carjacking, kidnapping, falsely impersonating an officer, another count of kidnapping, false imprisonment and attempted armed robbery.
>
> Ladies and gentlemen, the defendant on September 10, 2009 was doing then what he had done before when he was convicted on August the 13, 2009, and August 25, 2009. [DE-366, p. 95].

The only convictions that were introduced into evidence were those contained in Exhibit 43. There was no evidence of any convictions on August 13 or 25, 2009. The prosecutor's use of the plural word "crimes" referred to convictions on February 12, 2009 (the prosecutor also misspoke on the year, as the convictions were actually on February 12, 2008). The prosecutor's reference to August 13 and 25, 2009 as being convictions was obviously a misstatement. Garcia could not have been convicted on the same date that the incidents had occurred. It is obvious that the word conviction in reference to the August dates was a misstatement. Garcia should not receive a windfall because of a mispoken word that, in context, makes no sense, particularly given the overwhelming evidence in the case. Moreover, trial counsel did object to the reference to calls from the jail. He made a motion for a mistrial [CR-DE-366, p. 51]. The objection was sustained, and a curative instruction was given. [CR-DE-366, pp. 53-54]. See, U.S. v. Thomas, 664 F. 3d 217, 224 (8th Cir. 2011). No error has been shown, particularly where the jurors were instructed that the prosecutor's comment was improper. [CR-DE-366, p. 54]. They had previously been told that the lawyer's arguments were not evidence. [CR-DE-360, p. 47]. This court presumes that the jury followed both instructions. U.S. v.

Lopez, 590 F. 3d 1238, 1256 (11th Cir. 2009) cert. denied, 131 S. Ct. 413 (2010). No error has been shown.

Wherefore, the Motion to Vacate [DE-1] is Denied.

The Clerk shall close this case and deny any pending motions as Moot

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 13th day of July, 2012.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

CASE NO. 09-60245-CR-DIMITROULEAS

Plaintiff,

vs.

RAFAEL GARCIA,

Defendant.
_____/

ORDER DENYING MOTION FOR REDUCTION

THIS CAUSE is before the Court on Andre's pro se November 1, 2014[1] Motion for Reduction of Sentence Pursuant to Amendment 782, Under 18 U.S.C. § 3582(c)(2), [DE-420]. The Court has reviewed the court file and Pre-Sentence Investigation Report (PSIR) and having presided over this cause, finds as follows:

1. On September 22, 2009, Garcia was indicted and charged with: I, Hobbs Act Robbery; II, Conspiracy to Possess with Intent to Distribute 5 Kilograms or more of Cocaine; III, Attempted Possession with Intent to Distribute 5 Kilograms or more of Cocaine; IV, Conspiracy to Use a Firearm; and V, Use of a Firearm during a Crime of Violence. [DE-49]. The indictment charged that the crimes occurred in the Southern District of Florida on September 10, 2009.

2. On March 12, 2010, Garcia was found guilty on the first four counts, but acquitted on Count V. [DE-224]. On May 16, 2010, the Government filed a motion for an upward departure, alleging that Garcia's criminal history was under-represented by a Criminal History Category III. Moreover, it was alleged that Garcia had prior felony convictions that were too stale to be assessed points. [DE-297].

3. On May 21, 2010, Garcia was sentenced to 292 months in prison. [DE-301]. During the hearing, the Court indicated that Garcia had a disturbing past criminal history of violence.

[1] Received by the Clerk on November 5, 2014.

[DE-369, p. 20]. The Court indicated that the prosecutor had made a compelling argument for an upward departure, [DE-369, p. 32], but the Court did not grant the request. [DE-369, p. 29].

4. On October 27, 2011, the Eleventh Circuit Court of Appeals affirmed. [DE-408]. U.S. v. Garcia, 445 Fed. Appx. 281 (11th Cir. 2011). The appellate court rejected all of Garcia's complaints. When Garcia failed to file a petition for certiorari in the United States Supreme Court, his conviction became final on January 25, 2012.

5. On April 6, 2012, Garcia filed a motion to vacate; Garcia complained about ineffective assistance of counsel, a biased juror, and prosecutorial misconduct. The Court denied relief on July 13, 2012. [DE-416]. On February 5, 2013, the Eleventh Circuit Court of Appeal denied a certificate of appealability. [DE-27 in 12-60614 CV]. Reconsideration was denied on May 17, 2013. [DE-28 in 12-60614CV]. On September 6, 2013, Garcia filed another motion to vacate. [DE-1 in 13-61959]. Garcia made an Alleyne v. U.S., 133 S. Ct. 2151 (2013) complaint. On September 10, 2013, this Court dismissed the habeas petition. [DE-418]. On September 26, 2014, the Eleventh Circuit Court of Appeals affirmed. Garcia v. U.S., 2014 WL 4783717 (11th Cir. 2014).

6. Garcia now seeks a two level reduction based upon Amendment 782. The Court has discretion in deciding whether to award that reduction. U.S. v. Vautier, 144 F. 3d 756, 760 (11th Cir. 1998). However, having conducted a two –step process: recalculating the advisory guideline range (235-293 months) and considering the factors in 18 U.S.C. § 3553(a), the Court concludes that a reduction is not warranted. At sentencing, the Court found Garcia's past conviction for robbery and impersonating a police officer during the course of a robbery to be an extremely aggravating circumstance, given the similar facts of the instant convictions. [DE-369, p. 33]. The Court refused to impose a downward variance, as it would not promote respect for the law.

[DE-369, p. 33]. The Court did sentence at the low end of the guideline range. Here, the sentence of 292 months was a fair and just sentence in 2010, and it remains a fair and just sentence, even with a reduced guideline range of 235-293 months[2]. A reduction to 235 months would not promote respect for the law; it would not afford adequate deterrence; it would not protect the public. The Court denies the request for an Amendment 782 reduction. U.S.S.G. § 1B1.10 (note 1(B)(i)). Garcia's post-conviction efforts at rehabilitation (music lessons, physical exercise classes, and religious activities), although considered by the Court, do not alter the Court's decision. They do not merit a reduction in what was a lenient sentence in 2010.

Wherefore, Garcia's Motion for Reduction of Sentence [DE-420] is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of November, 2014.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Rafael Fernandez Garcia, #91169-004
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PO Box 1034
Coleman, FL. 33521

Anne Schultz, AUSA
Don Chase, AUSA

[2] The sentence of 292 months, although now almost at the high end of the amended guideline range, would still be in the amended range. U.S. v. Lynn, 503 Fed. Appx. 878, 880-81 (11th Cir. 2013).

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAFAEL FERNANDEZ GARCIA,

Defendant.
_____/

CASE NO. 09-60245-CR-DIMITROULEAS

ORDER

THIS CAUSE is before the Court on Defendant's *pro se* July 6, 2020 Motion for Reduction of Sentence [DE-503]. The Court has reviewed said motion, the Court file and Pre Sentence Investigation Report (PSIR), and having presided over the trial of this cause, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the motion [DE-503] is **Denied.**

Pursuant to 18 U.S.C. § 3582(c)(1)(A), the Court has considered the applicable factors in 18 U.S.C. § 3553(a) and the applicable Sentencing Guidelines Policy Statements. Defendant has alleged that the Warden has denied his request.

Even if the Court has jurisdiction, the Court would not find that extraordinary and compelling reasons have been shown to warrant the Court's granting the requested relief. The Defendant is 55 years old and has served less than a half of a 292 month sentence. He alleges that he suffers[1] from kidney stones, high blood pressure, high cholesterol, prior heart attacks, and a prior pulmonary embolism. The Court is not prepared to say that because of COVID 19 that

[1] It appears that he currently is prescribed medication for high blood pressure and high cholesterol [DE-503, p. 17].

everyone with medical problems should be released. The First Step Act did not transform this court into a *de facto* parole board. The Court finds no constitutional violation. The requested relief would not promote respect for the law or act as a deterrent[2]. The Court does not find that COVID 19 conditions at the prison warrant any relief. *U.S. v. Raia,* 954 F. 3d 594, 596-97 (3rd Cir. 2020).

The Clerk shall mail a copy of this order to the Defendant.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 14th day of July, 2020.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

Rafael Fernandez Garcia # 91169-004

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[2] At sentencing, the Court considered an upward departure [DE-369, pp. 29-32].

APPENDIX 3

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12868
Non-Argument Calendar

D.C. Docket No. 0:09-cr-60245-WPD-6

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAFAEL FERNANDEZ GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 19, 2021)

Before MARTIN, BRANCH, and ED CARNES, Circuit Judges.

PER CURIAM:

Rafael Garcia, acting pro se, appeals the district court's denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A).

Garcia contends his medical conditions of a pulmonary embolism in 2000, "multiple" heart attacks over "the next few years," kidney stones in 2003, hypertension, atherosclerotic heart disease, and high cholesterol "put him at a tremendous risk" of contracting coronavirus, which he asserts "will enter" his prison and "cannot be stopped." He argues coronavirus "would be fatal" to him, so his increased risk of contracting it is an extraordinary and compelling reason warranting compassionate release. He also argues the district court failed to analyze his listed extraordinary circumstances "thoroughly" and failed to address his argument regarding sentencing disparities.

"We review de novo . . . determinations about a defendant's eligibility for a Section 3582(c) sentence reduction," and "we review for abuse of discretion a district court's grant or denial of an eligible defendant's reduction request." United States v. Bryant, 996 F.3d 1243, 1251 (11th Cir. 2021). A defendant isn't eligible for a § 3582(c)(1)(A) sentence reduction unless "extraordinary and compelling reasons warrant" it, § 3582(c)(1)(A), and the first application note to U.S.S.G. § 1B1.13 defines what reasons qualify as extraordinary and compelling, § 1B1.13 cmt. n.1. The reasons listed in that application note, which we have held are exhaustive, see Bryant, 996 F.3d at 1263–65, include terminal illness and serious,

permanent physical or medical conditions that substantially diminish a defendant's ability to care for himself, § 1B1.13 cmt. n.1(A). The application note also contains a catchall category for any "other reasons" the BOP director determines are extraordinary and compelling. Id. at cmt. n.1(D). "[D]istrict courts may not reduce a sentence under Section 3582(c)(1)(A) unless a reduction would be consistent with [§] 1B1.13." Bryant, 996 F.3d at 1262.

When Garcia moved the BOP for compassionate release in March 2020, he used a form that included a checklist of empty boxes next to reasons corresponding with the ones listed in § 1B1.13 cmt. n.1. Garcia checked the box next to "other:- Extraordinary and Compelling Circumstance," the entry intended to correspond to the application note's catchall category. And Garcia's accompanying written explanation gave his history of pulmonary embolism as the only reason in support of his motion. As a result, the government contends Garcia failed to exhaust his administrative remedies on any ground other than that one. But we will assume Garcia comprehensively exhausted his administrative remedies because it doesn't matter given that the court didn't err in ruling that he had not shown extraordinary and compelling reasons to warrant compassionate release.

First, Garcia made clear on his motion form that he was applying for compassionate release under the catchall provision of § 1B1.13 cmt. n.1, which is subpart (D). But that provision specifically requires the director of the BOP — not

the district court — to determine "what reasons not expressly listed in [§] 1B1.13 can be extraordinary and compelling." Bryant, 996 F.3d at 1263; see also § 1B1.13 cmt. n.1(D). And despite the COVID-19 pandemic, the director of the BOP has not determined that medical conditions that increase an inmate's risk of contracting coronavirus are extraordinary and compelling reasons for compassionate release.[1] See BOP Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g), https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

Second, to the extent Garcia intended to apply for compassionate release under the medical conditions provision of § 1B1.13 cmt. n.1, which is subpart (A), that provision is limited to conditions that are terminal or have permanently debilitated a defendant. See § 1B1.13 cmt. n.1(A). Garcia hasn't argued any of his ailments are terminal or have made him unable to care for himself, so they wouldn't make him eligible for compassionate release under subpart (A) even if he had checked that box on the BOP form.

Finally, in denying the motion the district court explicitly considered both the ailments Garcia argued were extraordinary and compelling reasons to grant

[1] Nor has the BOP director determined that sentencing disparities are extraordinary and compelling reasons for compassionate release. See BOP Program Statement 5050.50. That makes sense because § 3582(c)(1) does not authorize direct challenges to a defendant's sentence on such grounds; those should be raised on direct appeal or in collateral proceedings under 28 U.S.C. § 2255.

compassionate release and the applicable 18 U.S.C. § 3553(a) factors. This not only refutes Garcia's assertion that the court failed to adequately analyze his motion, it also supports our conclusion that the court did not abuse its discretion. See United States v. Harris, 989 F.3d 908, 912 (11th Cir. 2021) ("The district court additionally considered the § 3553(a) factors and § 1B1.13 n.1, which further contributes to our holding that it did not abuse its discretion."); see also United States v. Cook, 998 F.3d 1180, 1184 (11th Cir. 2021) (noting that courts evaluating motions for compassionate release under § 3582(c)(1)(A) must "consider all applicable § 3553(a) factors").

Because Garcia's "motion does not fall within any of the reasons that [§] 1B1.13 identifies as 'extraordinary and compelling,' the district court correctly denied his motion for a reduction of his sentence." Bryant, 996 F.3d at 1265; see also Harris, 989 F.3d at 912 (affirming the conclusion that hypertension and other medical conditions were not "extraordinary and compelling" reasons to grant a prisoner compassionate release).

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.