
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOVANI JACOBO
Petitioner,

vs.

UNITED STATES OF AMERICA,
Appellant.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

JOVANI JACOBO, Petitioner

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Question Presented

The federal compassionate-release statute, 18 U.S.C. § 3582(c)(1)(A), permits sentencing courts to release federal prisoners for “extraordinary and compelling reasons.” Does § 3582(c)(1)(A)’s use of the term “extraordinary” allow these courts to employ personal observation and anecdotal data in deciding these motions.

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Petition For A Writ Of Certiorari

Jovani Jacobo respectfully petitions the Court for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Eighth Circuit on March 18, 2021 and its denial of Jacobo's petition for rehearing on April 16, 2021.

Opinions Below

The district court's Restricted Memorandum and Order is unpublished, but a copy of that Order is also in the Appendix. App. 1A. The unpublished decision of the United States Court of Appeals affirming the district court's decision is appended to this Petition. App. 5A. The court of appeals' unpublished denial of Jacobo's petition for rehearing is also appended. App. 6A.

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 18, 2021. App. 5A. That Court denied Jacobo's petition for rehearing on April 16, 2021. App. 6A. Jacobo invokes this Court's jurisdiction under 28 U.S.C. §1254(1), having timely filed this petition for a writ of certiorari within 150 days of the Court of Appeal's denial of a timely petition for rehearing. *See* Supreme Court's Order Rescinding Prior COVID Orders, 594 U.S. ___, July 19, 2021 (extending the 150-day deadline for petitions for writ of certiorari in cases in which the lower court denied a timely petition for rehearing prior to July 19, 2021).

Constitutional and Statutory Provisions Involved

Jovani Jacobo's Petition for a Writ of Certiorari involves the federal

compassionate-release statute, 18 U.S.C. § 3582(c)(1)(A), which states:

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or 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, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

Statement of the Case

On March 14, 2017, Jovani Jacobo pled guilty to conspiring to distribute methamphetamine in violation of 21 U.S.C. § 846. On July 21, 2017, the district court sentenced Mr. Jacobo to serve 121 months in prison – the low end of the guideline range and just one month above the mandatory minimum – to be followed by a five-year term of supervised release. Jacobo has been in continuous confinement since November 21, 2016. He is in a federal prison camp in Yankton, South Dakota and his projected release is July 24, 2025.

While Mr. Jacobo was in prison, the mother and guardian of his then-four-year-old son incurred a series of arrests and the child was placed in the custody of the Department of Health and Human Services. A deputy county attorney in Dawson County, Nebraska, filed a petition in juvenile court alleging, among other things, that Mr. Jacobo's son, J[]:

lack[ed] proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provided proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such juveniles; or who are in a situation or engage in an occupation dangerous to life or limb or injurious to the health or morals of such juveniles.

After a series of arrests and charges, the child's mother was convicted and sentenced to prison. As Mr. Jacobo watched helplessly from prison, the permanency goal for his son changed from reunification to adoption.

On June 4, 2020, Jovani Jacobo, citing the drug abuse of his son's mother and the imminent loss of his parental rights, moved for his compassionate release under 18 U.S.C. § 3582(c)(1)(A). On February 26, 2021, having received briefing, the district court denied Mr. Jacobo's motion. App. 1A.

The district court concluded that Mr. Jacobo's case was [REDACTED] and that the circumstances were [REDACTED] App. 1A, 3A. The district court found, however, that the circumstances were [REDACTED] [REDACTED] noting the frequency of drug use among parents. *Id.* The district court also commented that it [REDACTED] about Mr. Jacobo's underlying offense and denied the motion. *Id.* at 4A.

On March 18, 2021, the Eighth Circuit Court of Appeals summarily affirmed the district court's decision without permitting briefing on the matter. App. 5A. On April 16, 2021, the court of appeals denied Jacobo's petition for rehearing. App. 6A.

Reasons for Granting the Writ

Section 3582(c)(1)(A) of Title 18, U.S. Code, governs the modification of an imposed term of imprisonment based upon "extraordinary and compelling reasons" (§ 3582(c)(1)(A)(i)) or the defendant's age (§ 3582(c)(1)(A)(ii)). Before December 1, 2018, only the Director of the Bureau of Prisons could bring such motions and very few were filed. In 2010 and 2011, for example, federal prison wardens reviewed approximately 618 inmate requests for compassionate release and forwarded along just 64 to the Director of the Bureau of Prisons. U.S. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program, I-2013-006* (April 2013), <https://oig.justice.gov/reports/2013/e1306.pdf>, (hereinafter "OIG Report."))

"This drought of compassion concluded in 2020, when the forces of law and nature collided." *United States v. Jones*, 980 F.3d 1098, 1100 (6th Cir. 2020). With the December 1, 2018 First Step Act amendment to 18 U.S.C. § 3582, sentencing courts could suddenly consider *prisoner-filed* motions for compassionate release under certain circumstances. Within 16 months of the amendment's passage, the World Health Organization had declared the coronavirus (COVID-19) outbreak to be a global pandemic and President Trump had declared a national emergency. See

United States Sentencing Commission, *Compassionate Release Data Report, Calendar Year 2020*, July 2021 at 3

(<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210714-Compassionate-Release.pdf>)

(last accessed September 7, 2021) (hereinafter “Compassionate Release Data Report”).

In calendar year 2020, federal district courts received 12,885 motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Compassionate Release Data Report at Table 1.

The problem is: ‘Congress has not defined what constitutes ‘extraordinary and compelling reasons’ for a sentence reduction and similarly did not do so in the First Step Act.” *United States v. Cooper*, 996 F.3d 283, 287 (5th Cir. 2021). Congress instead delegated to the United States Sentencing Commission to “promulgat[e] general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A).” 28 U.S.C. § 994(t); *see also Cooper*, 996 F.3d at 287. The applicability of that policy statement – § 1B1.13 of the U.S. Sentencing Guidelines Manual – has generated a circuit split.

Section 1B1.13 states, in pertinent part, “Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment...if, after considering the factors set forth in 18 U.S.C. § 3553(a)...the court determines that...[e]xtraordinary and compelling reasons warrant the

reduction[.]” U.S.S.G. § 1B1.13(1)(A). The accompanying application note provides an inclusive list of “extraordinary and compelling reasons,” including the defendant’s medical condition, age, family circumstances, and “other reasons” “[a]s determined by the Director of Bureau of Prisons....” *Id.* at Application Note 1(A) – 1(D).

Neither § 1B1.13 nor its application notes have been amended since the First Step Act permitted prisoners to file compassionate-release motions directly. The Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have concluded that § 1B1.13 is not an “applicable policy statement” to prisoner-filed compassionate-release motions. *See United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388 392 (5th Cir. 2021); *Jones, supra*, at 1111 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021) (per curiam); and *United States v. McGee*, 992 F.3d 1035, 1050-51 (10th Cir. 2021).

The Eleventh Circuit, however, disagrees and binds prisoner-filed motions to the examples and grounds listed in § 1B1.13. *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021).

The absence of a binding “extraordinary and compelling” definition in 18 U.S.C. § 3582(c)(1)(A) prevents uniform handling of the explosion of these compassionate-release cases.

The Eighth Circuit has not weighed in on this Circuit split. To be sure, the district court in Jacobo's case chose to treat § 1B1.13 as non-binding. But the Eighth Circuit's summary affirmance of the district court's denial of compassionate release has further prevented the emergence of a proper definition of "extraordinary" for purposes of 18 U.S.C. § 3582(c)(1)(A). Mr. Jacobo specifically wanted the court of appeals to resolve whether a drug-induced spiral by the guardian of a prisoner's child could be considered "extraordinary" under the compassionate-release statute, *particularly* when the facts of the guardian's addiction were unknown to the district court at the time of sentencing and not foreseeable. *Cf. United States v. Powell*, No. 4:17CR7, Dkt. Entry #85, *5-*9, n.1 (M.D. Ga. Oct. 31, 2019) (taking into consideration the fact that the unavailability of the child's other parent was known at the time of sentencing and impacted the original sentence.) Moreover, Jacobo wanted the court of appeals to resolve whether the district court erred by defining "extraordinary" based primarily (if not solely) upon anecdotal evidence and observation. None of these questions have been answered and, under the present regime, will continue be subjected to the individual observations and beliefs of each federal district judge.

Whether the Eighth Circuit had joined the seven circuits rejecting § 1B1.13 in prisoner-filed cases or joined the Eleventh Circuit's adoption of it, a system where 677 different federal judges are individually defining "extraordinary and compelling" is untenable. Only this Court can prevent the disparate treatment such

a situation will inevitably bring to a criminal-justice system already full of inequities.

Conclusion

Jovani Jacobo is – like many prisoners whose compassionate-release motions have been denied – the victim of a rudderless standard for “extraordinary and compelling.” Seven circuits do not tie the definition to a Sentencing Commission policy statement. One circuit does. Jacobo’s circuit has declined to decide the matter, deferring to the district court’s anecdotal conclusion about what is and is not “extraordinary.”

With the First Step Act and COVID-19 colliding to create an explosion in this area of litigation, this Court should grant Jacobo’s writ of certiorari to decide what is and what is not “extraordinary” and what the district courts can and cannot consider in defining that term for the purposes of 18 U.S.C. § 3582(c)(1)(A).

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