NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

ALFRED DAKING,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
***Margaret Y. Foldes**
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

When Congress enacted the Sentencing Reform Act of 1984 (Pub. L. No. 98-473, Tit. II, ch. II, 98 Sta. 1987; 18 U.S.C. §3551, et seq.), it provided a few exceptions to the general rule that final judgments are unassailable. One of the exceptions was relief from a judgment through compassionate release, provided for in 18 U.S.C. §3582(c)(1)(A). This exception was recently expanded by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, §603(b) (2018) ("FSA 2018"), which for the first time allowed defendants to file their own compassionate release motions with the courts.

The question presented for review in this case is whether the expanded compassionate release statute, 18 U.S.C. §3582(c)(1)(A) (2018), triggers any sentencing guideline policy statements when defendants file their own motions, specifically whether U.S.S.G. § 1B1.13 is applicable to defendant-filed motions, or whether U.S.S.G. § 1B1.13 is inapplicable to such defendant-filed motions.

This question is the subject of a circuit split with eight circuits agreeing that U.S.S.G. §1B1.13 does not bind defendant-filed motions, while the Eleventh Circuit alone, finds that §1B1.13 is binding and limits defendant-filed compassionate release motions.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Alfred Daking, No. 12-14069-Cr-Graham (August 10, 2020)

United States Court of Appeals (11th Cir.):

United States v. Alfred Daking, No. 20-13042-GG (July 7, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

No:

ALFRED DAKING,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Alfred Daking respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 20-13042 in that court on July 7, 2021, which affirmed the district court's order denying petitioner's motion for compassionate release in the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's order denying petitioner's motion for compassionate release in the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on July 7, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1 and COVID-19 Announcement dated July 19, 2021. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory and guideline provisions:

18 U.S.C. §3582(c)(1)(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 * * *, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that * * * extraordinary and compelling reasons warrant such a reduction * * * and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

U.S.S.G. §1B1.13

> 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 (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that--
>
> **(1)(A)** Extraordinary and compelling reasons warrant the reduction; or
>
> **(B)** The defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
>
> **(2)** The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) The reduction is consistent with this policy statement.

Commentary to U.S.S.G. §1B1.13

Application Notes:

1. Extraordinary and Compelling Reasons.-- Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) Medical Condition of the Defendant.--

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is--

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.--The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.--

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.--As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

* * *

4. Motion by the Director of the Bureau of Prisons. -- A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

STATEMENT OF THE CASE

This case involves an individual who is 77 years old as of the date of this petition. Previously, he was convicted on one count of transporting and possessing child pornography. He received a sentence of 15 years with a supervised release term of life. He challenged his sentence through direct appeal to the Eleventh Circuit Court of Appeals and to this Court. The Eleventh Circuit affirmed his sentence, and this Court denied his petition for writ of certiorari.

In 2019, after having served more than 50% of his sentence, the petitioner requested compassionate release pursuant to the expanded version of 18 U.S.C. §3582(c)(1)(A). Mr. Daking explained that "extraordinary and compelling reasons" existed because COVID-19 was spreading rapidly throughout federal prisons, and specifically through his facility, FCI Seagoville, which had a COVID-19 outbreak during the pendency of his motion (the COVID-positive inmates went from four on June 26, 2020, to 1039 on July 16, 2020). He also argued that according to the Centers for Disease Control ("CDC"), he was at high risk due to his advanced age of 77 and his several health conditions which consisted of hyperinflated lungs, hypertension, bilateral legs edema, gastrointestinal disorders, squamous cell carcinoma, and a prosthetic eye. He added that the §3553(a) factors supported his request because the COVID pandemic increased the severity of the sentence from what was anticipated at the initial sentencing; he had spent approximately 8 years in prison (from September 5, 2012 – June 2020) and was now at a more advanced age

with more complicated health issues which reduced his risk of recidivism; he participated in extensive Bureau of Prison ("BOP") programming to rehabilitate himself; and in light of the above, he did not pose a danger to society. (DE 135:5-9). He further explained that in the FCI Seagoville facility, proper measures could not be met to keep the inmate population safe because it was not possible to practice social distancing, and because the bathrooms and living space for each floor were shared by approximately 85 inmates. The government opposed the compassionate release motion.

The district court denied Mr. Daking's motion, finding that Daking's medical conditions did not qualify as compelling and extraordinary reasons, and he still posed a danger to society. The district court cited to U.S.S.G. §1B1.13 (policy statement) application note 1, as limiting "extraordinary and compelling reasons" to scenarios such as when a defendant's health condition was terminal or diminished the defendant's ability to "provide self-care," or when the Director of the Bureau of Prisons determined an extraordinary and compelling reason existed. The Court found that Daking failed to meet 1B1.13's requirements. Thus, the district court found that Daking failed to show that he suffered from a serious medical or physical condition that qualified as an extraordinary and compelling reason in confluence with COVID-19 warranting release. The court also found that Mr. Daking was a danger. Petitioner appealed. The Eleventh Circuit Court of Appeals affirmed the denial of compassionate release. *United States v. Daking*, 2021 WL 2822291 (11th Cir. July

7, 2021). It found that Mr. Daking had not shown extraordinary and compelling reasons justifying compassionate release because his request did not match the standards set out in U.S.S.G. §1B1.13 or its commentary. The court found that this policy statement was binding on Mr. Daking's "defendant-filed" compassionate release motion pursuant to *United States v. Bryant*, 996 F.3d 1243, 1251 (11th Cir. 2021), *cert filed* S.Ct. No. 20-1732 (June 15, 2021). The Court concluded:

> Daking does not argue that he meets any of the four circumstances outlined in §1B1.13, rather, he reiterates his argument that his age, medical conditions, and the COVID-19 pandemic together constitute an extraordinary and compelling reason justifying his release. In other words, he asks us to create an additional "extraordinary and compelling reason" based on his particular circumstances in combination with the pandemic. This we cannot do. *Bryant*, 996 F.3d at 1248 ("Application Note 1(D) [to §1B1.13] does not grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence."). Because Daking's "circumstances do not match any of the four categories [of extraordinary and compelling reasons]" listed in §1B1.13, "he is ineligible for a reduction." *Id.* at 1254; 18 U.S.C. §3582(c)(1)(A) (giving a district court discretion to grant a reduction only if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."). Thus, the district court did not err by denying Daking's motion for a sentence reduction.

Daking, 2021 WL 2822291, at *2-*3 & n.3.

Because the court ruled that Mr. Daking was ineligible, it did not address any other arguments that Mr. Daking raised in his appeal. *Daking*, 2021 WL 2822291, at *3 n.5.

Mr. Daking, seeks further review, and requests that this Court grant his petition for writ of certiorari.

REASON FOR GRANTING THE WRIT

This Court should grant the petition to resolve an important circuit conflict of whether the expanded compassionate release statute, 18 U.S.C. §3582(c)(1)(A) (2018), triggers any sentencing guideline policy statements when defendants file their own motions, specifically whether U.S.S.G. § 1B1.13 is applicable to defendant-filed motions as held by the Eleventh Circuit, or whether U.S.S.G. § 1B1.13 is inapplicable to such defendant-filed motions as held by eight other circuit courts of appeal based on §1B1.13's express textual language.

In the courts below, Mr. Daking sought relief from his incarceration through the recently amended compassionate release statute, 18 U.S.C. §3582(c)(1)(A) (2018). He noted that he was 77 years old, he had several serious medical conditions, and COVID-19 was raging through the federal prisons, including the facility where he was living.

The compassionate release provision was originally a part of Congress' Sentencing Reform Act of 1984 (18 U.S.C. §3551, et seq.), which was enacted to make the federal sentencing process more fair and uniform. As part of that effort, Congress also created the Sentencing Commission and authorized it to promulgate sentencing guidelines and policy statements. See 28 U.S.C. §§991, 994(a). The system recognized that final judgments in criminal cases were generally unassailable, but Congress also provided for a few exceptions that allowed post-judgment modifications of criminal sentences. 18 U.S.C. §3582(c). One of those exceptions was if a defendant could establish "extraordinary and compelling reasons," warranting "compassionate release." 18 U.S.C. §3582(c)(1)(A). The compassionate

release provision was a safety valve for sentences that may have been reasonable when they were first imposed, but later became unreasonable due to new circumstances.

As first enacted, the Director of the Bureau of Prisons ("BOP") was the only party that could file a motion for compassionate release on behalf of a defendant. See 18 U.S.C. §3582(c)(1)(A) (1998). Years later, the Sentencing Commission promulgated U.S.S.G. §1B1.13 (policy statement) & commentary n.1, which gave guidance to the Director of BOP by defining extraordinary and compelling reasons through four categories that were: (1) the defendant's medical condition was terminal or interfered with the defendant's self-care in the prison setting; (2) the defendant was aged 65 or older with serious deterioration related to aging and completed at least 10 years or 75% of his term of imprisonment; (3) the defendant had family circumstances where the defendant's child or spouse was in need of a caregiver and the defendant was the only available caregiver; or (4) there was "an extraordinary and compelling reason other than, or in combination with," the reasons already described above "as determined by the Director of the Bureau of Prisons." Sentencing Guidelines App. C, Amend. 683 (2006); Amend 698 (2007). The same commentary, n.4, stated that, "A reduction under this policy statement [§1B1.13] may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. §3582(c)(1)(A)." U.S.S.G. §1B1.13, commentary, app. n.4.

However, BOP did not administer the compassionate release program well. See Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* i-iii (Apr. 2013) (OIG Report) at 11. To correct the situation, Congress amended §3582(c)(1)(A) in the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, §603(b) (2018). Under those amendments, Congress expanded and expedited federal compassionate release, and allowed courts to grant relief even when BOP found release inappropriate. The amendments provided that a district court could grant compassionate relief upon motion of the BOP or the defendant. 18 U.S.C. §3582(c)(1)(A) (2018). As amended, Section 3582(c)(1)(A) states:

> 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 * * *, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that * * * extraordinary and compelling reasons warrant such a reduction * * * and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. §3582(c)(1)(A).

Thus, once a defendant has properly filed a motion, a court may resentence the defendant if the court finds the reduction is warranted by "extraordinary and compelling reasons" and is "consistent with applicable policy statements issued by the Sentencing commission." The statutory question that has arisen in post-FSA

2018 compassionate release motions is whether §1B1.13 (policy statement), note 1, is an "applicable policy statement," in the case of defendant-filed motions, or whether it is non-applicable since it only contemplated and only expressly applied to BOP-filed motions.

The Eleventh Circuit in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), held that U.S.S.G. §1B1.13 policy statement and n.1 were applicable and binding on defendant-filed compassionate release motions. The *Bryant* court recognized that several other circuit courts had held otherwise. However, it veered from these other circuits through its interpretation of §3582(c)(1)(A)'s word "applicable." *Bryant*, 996 F.3d at 1252-53. It looked to a dictionary definition of the word "applicable," and found that §1B1.13 was capable of being applied. *Id.* Although the Court acknowledged that the plain terms of §1B1.13 were expressly directed only at BOP-filed motions, and that the policy statement was promulgated at a time when only BOP-filed motions existed, the *Bryant* majority reasoned that those portions of the policy statement referencing the BOP were "mere prefatory" clauses that had no operative effect. *Id.* at 1259-60. Thus, the majority concluded that §1B1.13 applied to defendant-filed motions created by the First Step Act and constrained the grounds on which a district court could grant relief. *Id.* The decision drew a dissent, which objected to striking or ignoring the express language of §1B1.13 referencing BOP which made it inapplicable to 18 U.S.C. §3582(c)(1)(A). *Id.* at 1269-70. The dissent also stated that making the §1B1.13 policy statement binding on defendant-filed

motions defeated the purpose of the FSA 2018 amendments to the compassionate release provision because it put such motions back in the hands of the BOP director who had proven to be derelict in properly requesting such relief on behalf of defendants. *Id*. at. 1273.

The *Bryant* court is in conflict with every other circuit to decide the issue. The Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits all decided that the U.S.S.G. §1B1.13 policy statement was not applicable or binding in defendant-filed compassionate release motions. *United States v. Brooker*, 976 F.3d 228, 235 (2d Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392-93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109-1111 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180-81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021). These courts reasoned both that §1B1.13 & n.1 applied only to motions filed by the BOP Director and that the Sentencing Commission was not contemplating defendant-filed motions when it promulgated 1B1.13.

The D.C. Circuit issued its opinion after the Eleventh Circuit's *Bryant* case, and discussed the conflict head-on. It stated:

Recently, a divided decision of the Eleventh Circuit ruled that U.S.S.G. §1B1.13 is applicable to defendant motions for compassionate release. The court reasoned that the pre-First Step Act policy statement is "capable of being applied" to those motions, and so it must be "applicable" within the meaning of 18 U.S.C. §3582(c)(1)(A).

But that opinion's reliance on dictionary definitions of "applicable" misses the forest for a tree. The decision ignores all of the other words in Section 1B1.13 that already state in plain and clear terms when the policy statement applies: "Upon motion of the Director of the Bureau of Prisons[.]" U.S.S.G. §1B1.13. As [dissenting] Judge Martin explained, the opinion's "dictionary-based theory about when a policy statement may be 'applicable' flies in the face of the statement's plain text that tells us when it is actually 'applicable.' In other words, this policy statement "is capable of being applied" to Long's motion, only if we take an eraser to the words that say the opposite.

The Eleventh Circuit backhanded the policy statement's express text as "prefatory" language that just "orients the reader by paraphrasing the statute as it existed at the time the policy statement was enacted." No so. The opening language is not mere prologue. Quite the opposite, the policy statement's first words – "Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. §3582(c)(1)(A)" – set out a rigid and indispensable condition of release: that the Bureau of Prisons itself agrees that relief is warranted. In that way, the beginning of the policy statement puts into effect Congress's (now superseded) command that motions for compassionate release may be filed only by the Bureau of Prisons. . . . To dismiss these words as inert preface is to ignore a direct textual instruction and central statutory feature of the compassionate release scheme prior to the First Step Act.

That essential function of Section 1B1.13's opening words makes stark the policy statement's inapplicability to the post-First Step Act world where Congress took compassionate release motions out of the Bureau of Prisons' exclusive control. Those words likewise highlight that Section 1B1.13 does not reflect any policy statement or policy judgment by the Sentencing Commission about how compassionate release decisions should be made under the First Step Act, in which a Congress dissatisfied the stinginess of compassionate release grants, deliberately broadened its availability.

> At bottom, for a policy statement to be "applicable," it must, at a minimum, take account of the relevant legislation and the congressional policy that it embodies. Section 1B1.13 does not do that.

Long, 997 F.3d at 358-59. (citations omitted).

The compassionate release provision is a safety valve for sentences that may be reasonable when imposed, but may become less so due to changing circumstances. Overall, its purpose is to make our court system more just. Congress recognized that this safety valve was not operating properly, and so, it took measures to fix it. The lion's share of the circuits have implemented these changes through proper statutory interpretation of 18 U.S.C. §3582(c)(1)(A)'s directive to apply the relief "consistent with applicable policy statements issued by the Sentencing Commission." However, the Eleventh Circuit through its misreading of the term "applicable," has added obstacles to the amended compassionate release provisions that neither Congress nor the Sentencing Commission authored. Thus, there will be unjust disparities in the application of compassionate release requests for defendants in Florida, Georgia, and Alabama as compared to other similarly situated defendants across the nation. The Court should grant review to resolve the conflict over this issue, which is important to both defendants and to the quality and nature of our federal justice system.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Margaret Foldes*
Margaret Foldes
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
December 3, 2021