Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROMAN ENRIQUE DELGADO-MONTOYA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Tenth Circuit

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January 2022

QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A)(i), a district court may reduce a term of imprisonment "after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent they are applicable" but only "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."

As initially codified, only the Bureau of Prisons could move to modify a federal prisoner's sentence, but it rarely did so. In response, in December 2018, Congress amended the statute to allow federal prisoners to file their own motions directly in the district court. This amendment has resulted in significant litigation, but the lower courts have split on the proper interpretation of the statute. This Court has yet to speak on the issue.

The question presented is whether, under 18 U.S.C. § 3582(c)(1)(A)(i), the district court is limited to the "extraordinary and compelling reasons" given in application note 1 of the commentary to U.S.S.G. § 1B1.13.

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RELATED PROCEEDINGS

There are two prior related appeals, *United States v. Delgado-Montoya*, Tenth Circuit Docket No. 15-2192, and *United States v. Delgado-Montoya*, Tenth Circuit Docket No. 19-2178.

The underlying district court case is *United States v. Delgado-Montoya*, CR. NO. 15-00125-KG-CG-1 (D. New Mexico).

OPINIONS BELOW

The district court's decision is attached as Appendix A.

The Tenth Circuit's decision is attached as Appendix B.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

The district court denied Mr. Delgado-Montoya's Motion in a Memorandum Opinion and Order on August 24, 2020. The unpublished Opinion and Order is attached as Appendix A. The Tenth Circuit's decision affirming the district court was originally filed on October 25, 2021. On motion by the government, the Tenth Circuit amended the order and judgment on October 26, 2021. The revised order was filed on November 9, 2021, and is attached as Appendix B.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

18 U.S.C. § 3582 (full text included as Appendix C).

U.S.S.G. § 1B1.13 (full text included as Appendix D).

STATEMENT OF THE CASE AND THE FACTS

Statement of the Case: Mr. Delgado-Montoya was sentenced to 120 months for violating 8 U.S.C. § 1326(b)(2), illegal reentry after deportation, on October 27, 2015. On May 26, 2020, Mr. Delgado-Montoya pro se filed a Motion for Reduction of Sentence. Through counsel, on July 9, 2020, Mr. Delgado-Montoya filed a Supplement to his Motion for Compassionate Release. The Court denied the Motion in a Memorandum Opinion and Order filed on August 24, 2020.

Statement of the Facts: Sometime prior to filing a motion in the district court, Mr. Delgado-Montoya filed a request for compassionate release with the warden of his facility. He then moved in the district court for a reduction in his sentence based primarily on the fact that his prior crime of violence had been vacated, and accordingly the basis for his sentencing enhancement no longer existed. The Supplement to the Motion, filed through counsel, asserted that a reduction in Mr. Delgado-Montoya's sentence was warranted pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) because of "extraordinary and compelling reasons." Specifically, the motion pointed to Mr. Delgado-Montoya's age of 59 years and the fact that, under prison conditions, his physiological age is probably 10-15 years greater, in light of his physiological age, his incarceration, and his health conditions, he was at serious risk of complications and even death if he contracted COVID-19; he was incarcerated in a facility that was known to provide

substandard health care; and his young daughter was in the care of her elderly grandmother, who was also at serious risk in the pandemic. As part of his argument, he pointed out that the district court was not bound by the Sentencing Guidelines and that numerous courts had held they had the discretion and authority to determine for themselves which "extraordinary and compelling reasons" fell within the scope of the "other reasons" scenario.

The government asserted in its response that the BOP had a comprehensive plan for the safety of inmates, and the private prison housing Mr. Delgado-Montoya was contractually obligated to comply with CDC recommendations. The government also asserted that the Motion should be denied because Mr. Delgado-Montoya had not exhausted his administrative remedies. On the merits, the government asserted that Mr. Delgado-Montoya had failed to show "extraordinary and compelling reasons" for a reduction in sentence and he was a danger to the public, pointing to the now-dismissed arson conviction.

Mr. Delgado-Montoya replied, pointing out that his Motion was timely because he had exhausted administrative remedies. Moreover, he asserted that he had demonstrated extraordinary and compelling reasons to support his release because: 1) the California court had vacated his state arson conviction, and had that occurred before his sentencing, his sentence would have been much less; 2) the measures implemented by BOP to limit the spread of COVID-19 in its prison

facilities were irrelevant to what was actually occurring at the private facility, CI Reeves I and II, which has a history of providing substandard medical care; 3) Mr. Delgado-Montoya provided evidence that he lived in crowded conditions, had inadequate personal protective equipment and hygiene supplies, and could not maintain adequate social distance; 4) the situation was becoming even more serious with the pandemic; and 5) his elderly mother-in-law and young daughter needed his support and assistance.

The district court denied Mr. Delgado-Montoya's Motion in a Memorandum Opinion and Order on August 24, 2020. *See* Appendix A. The Court found that Mr. Delgado-Montoya had exhausted his administrative remedies because he had filed a request that was received by the warden more than 30 days prior. Appendix A at 6.

The Court, however, found that Mr. Delgado-Montoya had not presented extraordinary or compelling circumstances justifying a reduction in his sentence.

The Court first found that:

> to find "extraordinary and compelling" circumstances for a sentence reduction based on a defendant's medical condition, the defendant must be "suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory)," or a serious physical or medical condition "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."

Appendix A at 7 (quoting U.S.S.G. § 1B1.13, cmt. n. 1, (A)(i)-(ii)). Because Mr. Delgado-Montoya did not provide evidence of such serious health conditions or that he was at "significantly higher risk of infection and death from COVID-19," could manage his conditions in prison, and did not allege that Reeves had a Asubstantial outbreak of COVID-19," he was not entitled to a sentence reduction based on a medical condition. Appendix A at 7. Again pointing to the guidelines commentary, the Court concluded that Mr. Delgado-Montoya's family circumstances did not qualify him for a reduction in sentence. Appendix A at 8 (citing U.S.S.G. § 1B1.13, cmt. n. 1, (1)(D)). The Court also stated that the circumstances of Mr. Delgado-Montoya's family did not meet the requirements for a sentence reduction under the "other reasons" option of U.S.S.G. § 1B1.13, cmt. n. 1, (1)(D). Appendix A at 8.

The district court did not consider whether Mr. Delgado-Montoya had demonstrated extraordinary and compelling reasons that were not delineated in the commentary to U.S.S.G. § 1B1.13.

The Tenth Circuit affirmed the district court's decision on October 25, 2021, amended on November 9, 2021. *See* Appendix B. It reasoned that the district court had in fact considered other factors and, regardless, any error was harmless. *Id.* at 13.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition to resolve a conflict in the Circuits over whether courts should still consider the policy statements to U.S.S.G. § 1B1.13 when considering whether a motion pursuant to § 3582(c)(1)(A) should be granted. Review is essential because of the question's importance. Aside from the need to resolve an entrenched conflict, the question involves the interpretation of a new remedial statute that is widely available to all federal prisoners. It is imperative that the statute be interpreted uniformly and in a manner that provides meaningful guidance to the lower courts. Accordingly, this Court should grant this petition.

I. Review is necessary to resolve a conflict in the Circuits.

There is a conflict in the circuits concerning the applicability of the policy statements to U.S.S.G. § 1B1.13 to motions brought by prisoners seeking compassionate release. Several circuits have held that § 1B1.13 applies only to motions filed by the Bureau of Prisons, and not to motions filed by defendants. *See United States v. McCoy*, 981 F.3d 271, 280–84 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1108–11 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 230(2d Cir. 2020).

However, in some circuits, including the Tenth Circuit:

> district courts, in applying the first part of § 3582(c)(1)(A)'s statutory test, have the authority to

> determine for themselves what constitutes "extraordinary and compelling reasons," but that this authority is effectively circumscribed by the second part of the statutory test, i.e., the requirement that a district court find that a reduction is consistent with applicable policy statements issued by the Sentencing Commission pursuant to § 994(a)(2)(C) and (t). In other words, we conclude that Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase "extraordinary and compelling reasons," but rather for the Sentencing Commission to describe those characteristic or significant qualities or features that typically constitute "extraordinary and compelling reasons," and for those guideposts to serve as part of the general policy statements to be considered by district courts under the second part of the statutory test in § 3582(c)(1)(A).

United States v. McGee, 992 F.3d 1035, 1045 (10th Cir. 2021).

Similarly, in the Fifth Circuit:

> Courts should still look to the policy statement for guidance in determining what constitute "extraordinary and compelling reasons" for a sentence reduction when a prisoner files a compassionate-release motion. See United States v. Thompson, 984 F.3d 431, 433 (5th Cir. 2021) ("Although not dispositive, the commentary to the United States Sentencing Guidelines ('U.S.S.G.') § 1B1.13 informs our analysis as to what reasons may be sufficiently 'extraordinary and compelling' to merit compassionate release."); see also, e.g., United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020) ("The substantive aspects of the Sentencing Commission's analysis in § 1B1.13 and its Application Notes provide a working definition of 'extraordinary and compelling reasons'; a judge who strikes off on a different path risks an appellate holding that judicial discretion has been abused.").

United States v. Williamson, 4:19-CR-087-SDJ, 2021 WL 5390964, at *2 (E.D. Tex. Nov. 18, 2021) (unpublished). Accordingly, in the Fifth Circuit,

> the "extraordinary and compelling reasons" applicable to defendant-filed motions are those that are similar in kind and scope to those listed in U.S.S.G. § 1B1.13's application notes. Therefore, any proffered "extraordinary and compelling reason" that is not contained in the Sentencing Commission's policy statement should nonetheless be similar to those reasons in order to warrant release under the statute. In this sense, the Court's analysis of whether Williamson has presented "extraordinary and compelling reasons" warranting the sentence reduction he seeks will be significantly guided, though not strictly bound, by the Sentencing Commission's description in U.S.S.G. § 1B1.13 and the accompanying application notes.

Id., at *4. However, in the Sixth and Second Circuits, "the passage of the First Step Act rendered § 1B1.13 'inapplicable' to cases where an imprisoned person files a motion for compassionate release. Until the Sentencing Commission updates § 1B1.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an 'extraordinary and compelling' reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion." *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020) (citation and footnote omitted). *See also Brooker*, 976 F.3d at 237.

In contrast, the Eighth and Eleventh Circuits have held that § 1B1.13 is applicable to prisoner-filed motions, not just to BOP-initiated motions. *See United*

States v. Vangh, 990 F.3d 1138, 1141 (8th Cir. 2021); *United States v. Bryant*, 996 F.3d 1243, 1264-65 (11th Cir. 2021).

Plainly, the standards for considering prisoner-filed motions vary dramatically depending on which circuit the motion is filed in. This Court should grant certiorari to provide clarity and guidance to the lower courts.

II. This is an important issue of national significance.

Review is also necessary because of the importance of the question presented. Congress just recently amended § 3582(c)(1)(A) to permit defendants to file their own motions for relief. First Step Act, § 603, 132 Stat. 5194, 5238. This new remedy is available to every federal prisoner, and there are currently over 150,000 federal prisoners. Over 20,000 federal prisoners have already sought relief under this newly available remedial statute (and over 3,600 prisoners have obtained relief). A statute that is so widely available and so widely used must have a uniform interpretation. As it stands now, it does not. *See, e.g.*, Sup. Ct. R. 10(a) (authorizing review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *Dawson v. Steager*, 139 S.Ct. 698, 703 (2019) ("Because cases in this field have yielded inconsistent results, much as this one has, we granted certiorari to afford additional guidance.").

Moreover, § 3582(c)(1)(A)(i)'s meaning is currently unsettled. This Court has not yet interpreted the meaning of the statute. Thus, the question presented is not "that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. Houston*, 137 S.Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). Rather, the law is applied in various ways in different circuits and is thus needs to be resolved. *See, e.g., Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 346 (1944) (granting certiorari to review "unsettled" questions "important to the administration of" a statutory scheme). Because the law is being so variably interpreted, the conflict will continue until this Court provides guidance. *See, e.g., Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959) ("Since the question is important and recurring we granted certiorari.").

Critically, § 3582(c)(1)(A)(i) has a different meaning based solely on geography. Prisoners sentenced in one jurisdiction must play by different rules than prisoners sentenced in other jurisdictions. And district courts in one jurisdiction are subject to different rules than district courts in other jurisdictions. Such "geographical happenstance" has no place in the proper interpretation of a statute. *See, e.g., Rogers Cty. Bd. of Tax Roll Corr. v. Video Gaming Techs.*, 141 S.Ct. 24, 25 (2020) (Thomas, J., dissenting from the denial of cert.). The confusion is especially critical because federal prisoners are potentially sent

anywhere within the United States without regard to the jurisdiction of conviction. *See* 18 U.S.C. § 3621(b). Prisoners housed in the same prison (but with convictions from different jurisdictions) should not be subject to differing interpretations of § 3582(c)(1)(A)(i) simply because they happened to be convicted in different places.

III. The Petition should be granted because the decision below was erroneous.

The Tenth Circuit erred because the District Court did not consider whether there were "extraordinary and compelling" reasons warranting compassionate release but instead relied on the inapplicable guideline application note. The district court failed to exercise the power which Congress conferred on it to determine whether to grant Mr. Delgado-Montoya's motion for compassionate release. Congress enacted the First Step Act of 2018, Pub. L. No. 115 391, 132 Stat. 5194 (FSA), in part, to empower district court judges to determine whether to grant compassionate release. By passing the FSA, Congress amended 18 U.S.C. § 3582 and gave defendants the ability to petition courts to reduce their sentences through a request for compassionate release. District courts now have the power to reduce a defendant's sentence after "considering the factors set forth in [18 U.S.C.] § 3553(a) to the extent 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). The relevant Sentencing Commission policy statement, which predates the FSA, sets forth several "extraordinary and compelling reasons[,]" *see* 18 U.S.C. § 3582(c)(1)(A), including (A) the medical condition of the defendant, (B) the age of the defendant, (C) family circumstances, and (D) a "catchall" provision, meaning an "extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." U.S.S.G. § 1B1.13(1)(A) & cmt. 1. The Commission also requires that the defendant not pose a danger to the community. U.S.S.G. § 1B1.13(2).

Prior to the FSA, district courts could act only if the Bureau of Prisons (ABOP") made a motion under 18 U.S.C. § 3582(c). Such motions were rarely made. The Office of the Inspector General for the Department of Justice concluded in 2013 that "[t]he BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." Dep't of Justice, Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program (April 2013), at 11, available at https://oig.justice.gov/reports/federal-bureau-prisons-compassionate-release-program (visited January 13, 2022); *see also* Dep't of Justice, Office of the Inspector General, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons (May 2015), at 51, available at https://oig.justice.gov/reports/2015/e1505.pdf (visited January 13, 2022)

("Although the BOP has revised its compassionate release policy to expand consideration for early release to aging inmates, which could help mitigate the effects of a growing aging inmate population, few aging inmates have been released under it."); U.S.S.G. § 1B1.13, cmt. n.4 (encouraging the director of the BOP to file such motions).

The FSA, *inter alia*, amended 18 U.S.C. § 3582(c)(1)(A). Through the FSA, Congress resuscitated compassionate release by, among other things, allowing defendants to file a motion directly with the sentencing court after either waiting 30 days after filing a request with the BOP or exhausting administrative remedies, rather than leaving that power solely in the hands of the BOP.

Section 3582(c) now provides, in relevant part:

> 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 [the court] finds thatB
>
> (i) extraordinary and compelling reasons warrant such a reduction....
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

Id. (emphasis added).

Congress did not define what constituted "extraordinary and compelling" reasons warranting compassionate release under 18 U.S.C. § 3582(c). What is clear is that Congress intended this amendment to expand the use of compassionate release sentence reductions. *See Shon Hopwood, Second Looks & Second Chances*, 41 Cardozo L. Rev. 83, 101, 121 (2019). *See also* First Step Act, Pub. L. 115 391, 132 Stat 5194, 5239 (titling the subsection amending § 3582, "Increasing the Transparency and Use of Compassionate Release"); 164 Cong. Rec. S7314 02, 2018 WL 6350790 (Dec. 5, 2018) (statement by Senator Cardin, cosponsor of the First Step Act, noting that its purpose was to "expand[s] compassionate release" and "expedite[ ] compassionate release applications").

Of course, following *United States v. Booker*, 543 U.S. 220 (2005), most of the United States Sentencing Guidelines, including policy statements, are no longer binding on district courts. While sentencing judges must properly compute and consider the guidelines, *id*. at 264, the lower courts generally are not bound to

follow them. The Sentencing Commission has not issued any applicable policy statements since the enactment of the FSA and is currently unable to do so because, since the passage of the Act, the Sentencing Commission has had only two voting commissioners. *See, e.g., United States v. Haynes*, 456 F.Supp.3d 496, 510 n.20 (E.D.N.Y. 2020). The guidelines cannot be amended until two more voting commissioners are appointed to constitute a quorum. *Id*.

Following enactment of the FSA, on January 17, 2019, the Bureau of Prisons issued Program Statement 5050.50 entitled "Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)." However, Program Statement 5050.50 did not define other extraordinary and compelling reasons beyond those listed in the catch all clause. Under the circumstances, reliance on the BOP is inconsistent with the FSA's purpose to expand and expedite the use of compassionate release by freeing the judiciary from the BOP's control.

In the instant case, the district court ignored Mr. Delgado-Montoya's argument that the FSA removed the constraints of U.S.S.G. § 1B1.13. Mr. Delgado-Montoya's argument was consistent with the statute and Congress's intent. While the district court recognized that it could consider bases other than poor health, old age and loss of caregivers for finding extraordinary and compelling reasons, the Court did not acknowledge that it had the discretion to

determine additional bases. When considering whether Mr. Delgado-Montoya had demonstrated extraordinary and compelling reasons for a reduction in sentence, the district court looked only to the definition in the application note to U.S.S.G. § 1B1.13 and did not exercise its independent discretion and authority. The district court's interpretation, affirmed by the Tenth Circuit, would effectually emasculate the Congress' purpose in enacting this provision of the FSA. Congress clearly intended to expand the use of compassionate release beyond the BOP program to allow district judges to determine circumstances that may constitute "extraordinary and compelling" and, not be bound by the BOP definition. *See Brooker, supra.*

CONCLUSION

For all of the foregoing reasons, Defendant-Appellant requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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