# Appendix A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR No. 15-125 KG

ROMAN ENRIQUE DELGADO-MONTOYA,

Defendant.

MEMORANDUM OPINON AND ORDER

This matter comes before the Court on Defendant's Motion for Compassionate Release, filed May 26, 2020. (Doc. 125). On June 8, 2020, counsel was appointed for Defendant. (Doc. 126). On July 9, 2020, Defendant's counsel filed a brief in support of Defendant's Motion for Compassionate Release. (Doc. 127). Defendant's counsel explains that Defendant seeks compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) because the COVID-19 pandemic poses an unreasonable risk of harm in federal prison. Pursuant to the Court's Order, (Doc. 128), on August 7, 2020, the Government filed a response to the Motion, (Doc. 132). On August 13, 2020, Defendant's counsel filed a reply to the Motion. (Doc. 134). Additionally, on August 20, 2020, the Government filed a Motion for Leave to File Surreply, (Doc. 135), and Defendant filed a response in opposition, (Doc. 136). Having carefully reviewed the record and applicable law, the Court grants the Motion to File Surreply, (Doc. 135), and denies the Motion for Compassionate Release, (Doc. 126).

*I. Background*

On May 22, 2015, Defendant pled guilty to Reentry of a Removed Alien, in violation of 8 U.S.C. § 1326(a) and (b). (Doc. 80). On October 27, 2015, the Court sentenced Defendant to 120 months imprisonment, followed by three years of unsupervised release. (Doc. 91). Defendant received a 16-level enhancement to his offense level based of a prior arson conviction. (Doc. 90); (Doc. 127) at 16 (arson of Defendant's ex-wife's dry cleaning building). Defendant is incarcerated at Reeves County Detention Center (Reeves) and is eligible for release on December 6, 2022. *See* https://www.bop.gov/inmateloc/ (site last visited August 18, 2020).

Defendant now seeks a reduction in his sentence because he is almost 59 years old and suffers from high cholesterol, so he argues he is at high risk of contracting COVID-19. (Doc. 127) at 1-2. Defendant states he made two requests for compassionate release to his warden in June, but he has not received a response. (Doc. 127) at 3; (Docs. 127-4, 127-5).[1] In support of his Motion, Defendant states he is physiologically 10 to 15 years older than his chronological age. *Id.* at 13; (Doc. 127-1) at 6 (affidavit of Brie William, M.D., stating "[P]risoners' physiological age *averages 10 to 15years older* than their chronological age.") (citations omitted). Defendant also argues that Reeves "has a notorious history of providing seriously deficient medical care to inmates" and the living conditions there provide additional risk to his health. (Doc. 127) at 2, 13-16. In an attached declaration, Defendant states he is unable to socially distance in the pod where he is housed with 49 other people, the showers are dirty, and he and the other occupants of the pod received only a single bottle of hand sanitizer months ago.

[1] Defendant explains he is not eligible for release to home confinement because he will be removed to Mexico at the conclusion of his incarceration. (Doc. 134) at 3.

*Id.* at 15; (Doc. 127-6). He further states he has received only one mask, he receives a single small bar of soap every other week, there is no testing or checking for fever, and he has only limited access to fresh air. *Id.*

Defendant also argues the relevant Section 3553(a) sentencing factors warrant a reduction in sentence because he was convicted of a nonviolent offense, his previous arson offense has since been vacated, and he has served more than 75% of his sentence. (Doc. 127) at 16-17. Defendant has taken classes towards obtaining his G.E.D., improving his parenting skills, and Bible studies. *Id.* at 17; (Doc. 127-7) (certificates of completion). When released, Defendant will be deported to Mexico where he plans to live with his mother-in-law and 10-year-old daughter. Defendant's mother-in-law, Aurelia Guevara Zayago, provided a statement that her daughter (Defendant's wife and mother of their child), passed away in 2016, and that Ms. Zayago has high blood pressure and diabetes, and she worries who will care for her granddaughter if she passes away. (Doc. 127) at 17-18; (Doc. 127-9).

In response, the Government states that Reeves County Detention Center has no record of receiving a compassionate release request from Defendant, so the Government asks the Court to deny the motion without prejudice. (Doc. 132) at 6; 8-17. The Government notes that Defendant's medical records reflect that he has vision problems and hyperlipidemia (high cholesterol) and is classified as a Care Level 2 inmate meaning he is a stable outpatient requiring clinician evaluations every one to six months. *Id.* at 6; (Docs. 132-3, 132-4). The Government states Defendant has no history of disciplinary violations during his term of imprisonment. (Doc. 132) at 6. Nevertheless, the Government opposes his early release because he has not established "extraordinary and compelling reasons" for a sentence reduction and has not shown a

reduction is warranted in light of the danger he poses to the community and under the relevant Section 3553(a) factors. *Id.* at 17-22.

*II. Discussion*

Prior to the passage of the First Step Act, only the Director of the Bureau of Prisons (BOP) could seek compassionate release under 18 U.S.C. § 3582(c). The First Step Act modified 18 U.S.C. § 3582(c)(1)(A) with the intent of "increasing the use and transparency of compassionate release." Pub. L. No. 115-391, 132 Stat. 5194, at 5239. Section 603(b) of the First Step Act now provides that a sentencing court may modify a sentence either upon a motion of the Director of the BOP "or upon motion of the defendant after he has exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on his behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility … ." 18 U.S.C. § 3582(c)(1)(A).

Aside from allowing prisoners to bring a motion directly, the First Step Act did not change the standards for compassionate release. Relief is available where the sentence reduction is supported by: (1) "extraordinary and compelling reasons;" (2) "applicable policy statements issued by the Sentencing Commission[;]" and (3) "the factors set forth in [18 U.S.C. §] 3553(a)." 18 U.S.C. § 3582(c)(1)(A)(i)-(ii). As to the first requirement, Congress directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for a sentence reduction, including … a list of specific examples." 28 U.S.C. § 994(t). *See also United States v. Saldana,* 2020 WL 1486892, at *2 (10th Cir.) (looking to Sentencing Commission factors to define extraordinary and compelling reasons for release). The Sentencing Commission has listed four categories of extraordinary and compelling reasons: "(A) Medical

Condition of the Defendant," "(B) Age of the Defendant," "(C) Family Circumstances," and "(D) Other Reasons." U.S.S.G. § 1B1.13, cmt. n.1.

Some courts have found "extraordinary and compelling reasons" to justify compassionate release where the defendant's serious underlying health conditions place him at high risk of infection and death from COVID-19. *See United States v. McCarthy*, 2020 WL 1698732, at *5 (D. Conn.) (collecting cases involving asthma, diabetes, and compromised immune systems); *United States v. Jenkins*, 2020 WL 2466911, at *6 (D. Colo.) (releasing inmate based on age and stroke risk); *United States v. Lopez*, 2020 WL 2489746, at *3 (D.N.M.) (analyzing release based on age, blood pressure, and diabetes). However, "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020); *see also United States v. Nwankwo*, 2020 WL 2490044, at *1 (S.D.N.Y.) (collecting cases for the proposition "that the risks posed by the pandemic alone do not constitute extraordinary and compelling reasons for release, absent additional [risk] factors").

*A. Exhaustion of Administrative Remedies*

Pursuant to 18 U.S.C. § 3582(c)(1)(a), a defendant must first request that the BOP file a compassionate release motion on his or her behalf. A court may grant a defendant's motion for compassionate release only after the defendant has fully exhausted all administrative remedies from such a request, or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." *Id.* Here, Defendant's counsel submitted a copy of a request for compassionate release based on COVID-19 that Defendant sent to his warden, but the date is illegible. (Doc. 127-5). Counsel explains the request was made prior to counsel's appointment

in June 2020 and he obtained a copy of the request from the prison, demonstrating the warden received the request. (Doc. 127) at 6. Defendant's counsel made a second request for compassionate release via an email sent to the BOP and Reeves on June 18, 2020. (Doc. 127-4).

The Government argues in its Motion to File Surreply that Defendant's counsel's June 18, 2020, request was sent to the wrong email addresses. (Doc. 135). The Government states the email contained a typo for one of the BOP email addresses, and explains Reeves is a private facility, so the BOP division to which the email was sent "does not provide oversight for the Reeves County Facility." *Id.* at 2. Additionally, the Government states a third email address to which the email was sent was for a case manager at Reeves, and argues "[c]ase managers cannot handle compassionate release requests" so these requests should be directed to the warden's office. *Id.* Defendant's counsel opposes the Motion to File Surreply because the motion does not provide any new information, and because Defendant himself requested compassionate release from the warden before counsel sent the email on June 18, 2020, and Defendant's request has not been responded to in over 30 days. (Doc. 136); (Doc. 136-1).

First, the Court will grant the Government's Motion to File Surreply because it points out problems with Defendant's counsel's email requesting compassionate release that were not addressed in the Government's response brief. Second, the Court finds that Defendant has sufficiently demonstrated he exhausted his administrative remedies. Even if his counsel's email did not reach the proper BOP or Reeves email addresses, Defendant's *pro se* request was received by the warden more than 30 days ago, which is all that is required by § 3582(c)(1)(A). *See* § 3582(c)(1)(a) (explaining exhaustion under First Step Act occurs after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility"). Nevertheless,

Defendant may continue to pursue administrative relief through the warden and BOP, especially since it appears his earlier requests were not adequately addressed.

*B. Extraordinary and Compelling Circumstances*

Next, the Court considers whether Defendant has demonstrated sufficiently "extraordinary and compelling" circumstances to justify compassionate release. Defendant argues his medical condition justifies compassionate release because of his age and high cholesterol. (Doc. 127) at 1-2. However, to find "extraordinary and compelling reasons" 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." U.S.S.G. § 1B1.13, cmt. n.1, (A)(i)-(ii). Defendant does not allege or provide evidence of such serious health conditions or that he is at a significantly higher risk of infection and death from COVID-19. Indeed, as a Care Level 2 inmate, Defendant is considered able to manage his conditions through routine, regularly scheduled appointments with clinicians for monitoring. While Defendant alleges Reeves is failing to take appropriate safety measures, he does not allege that Reeves has a substantial outbreak of COVID-19. *See* (Doc. 134) at 4 (stating as of August 11, 2020, Reeves had 2 confirmed COVID-19 cases). Accordingly, the Court cannot find "extraordinary and compelling reasons" to justify release. *See Raia,* 954 F.3d at 597 ("[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release."); *Nwankwo,* 2020

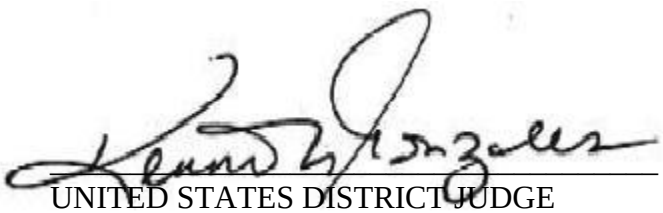
WL 2490044, at *1 (explaining "the risks posed by the pandemic alone do not constitute extraordinary and compelling reasons for release, absent additional [risk] factors").

The Court notes Defendant's progress towards his G.E.D., his completion of additional programs, and his exemplary prison record. The Court commends Defendant and encourages him to continue to take steps that will improve his chances of success upon his release. However, "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for purposes of compassionate release. 28 U.S.C. § 994(t); U.S.S.G. § 1B1.13, app. n. 3. In addition, Defendant's mother-in-law's request for support for her and Defendant's daughter does not qualify Defendant for release based on family circumstances. The Guidelines provide that a defendant may qualify for a reduction in sentence based on family circumstances in certain situations where the defendant is needed to care for a spouse, partner, or child. U.S.S.G. § 1B1.13, cmt. n.1, (C). The Guidelines also provide that a defendant may qualify for a reduction for "other reasons." U.S.S.G. § 1B1.13, cmt. n.1, (1)(D). Nevertheless, while the Sentencing Guidelines are advisory and this Court is sympathetic, Ms. Zayago does not state that she is unable to care for Defendant's daughter, and Defendant has failed to establish additional care is needed or that other reasonable options are unavailable to assist Ms. Zayago and his daughter. *See United States v. Crandle*, 2020 WL 2188865, at *3, n.27 (M.D. La.) (gathering cases finding caring for elderly parents not sufficient to show "extraordinary and compelling" circumstances for release).

For the foregoing reasons, the Court finds Defendant's Motion for Compassionate Release fails to allege extraordinary and compelling reasons justifying a release. The Court will,

therefore, deny the Motion without reaching the factors addressing community safety and Section 3553(a).

IT IS THEREFORE ORDERED that Defendant's Motion for Compassionate Release (Doc. 125) is denied.



UNITED STATES DISTRICT JUDGE

# Appendix B

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**November 9, 2021**

**Christopher M. Wolpert**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROMAN ENRIQUE DELGADO-MONTOYA,

Defendant - Appellant.

No. 20-2125
(D.C. No. 2:15-CR-00125-KG-CG-1)
(D. N.M.)

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**ORDER**

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Before **BACHARACH**, **EBEL**, and **EID**, Circuit Judges.

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Appellee's unopposed *Motion to Amend* is GRANTED. The Clerk's Office shall replace our October 25, 2021 order and judgment with the attached revised order and judgment effective *nunc pro tunc* to the date the original order and judgment was filed.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**October 25, 2021**

**Christopher M. Wolpert**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROMAN ENRIQUE DELGADO-MONTOYA,

Defendant - Appellant.

No. 20-2125
(D.C. No. 2:15-CR-00125-KG-CG-1)
(D. N.M.)

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**ORDER AND JUDGMENT***

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Before **BACHARACH**, **EBEL**, and **EID**, Circuit Judges.

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Amid the ongoing COVID-19 pandemic, appellant Roman Enrique Delgado-Montoya was serving a 120-month prison sentence for violating 8 U.S.C. § 1326(a), (b). He filed pro se, and supplemented through counsel, a motion for a sentence reduction with the district court.

Delgado-Montoya argued that his medical condition rendered him vulnerable to COVID-19 and thus qualified as an extraordinary and compelling reason, as defined by U.S.S.G. § 1B1.13(1)(A), permitting a sentence reduction through 18 U.S.C. § 3582(c)(1)(A).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The district court denied the motion. Delgado-Montoya now appeals, arguing that the district court impermissibly bound itself to U.S.S.G. § 1B1.13(1)(A) when it concluded that he failed to demonstrate extraordinary and compelling reasons to justify a sentence reduction.

Under 28 U.S.C. § 1291, we affirm the denial of the motion for sentence reduction because the district court did not limit itself to U.S.S.G. § 1B1.13(1)(A) in its decision and if any error did occur, it was harmless.

## I. FACTUAL BACKGROUND

In February 2014, the United States deported Delgado-Montoya to Mexico. In May 2014, Delgado-Montoya unlawfully reentered the United States and eventually pleaded guilty to one count of reentry by a removed alien in violation of 8 U.S.C. § 1326(a), (b).

In the presentence report, Delgado-Montoya's offense level received a two-level increase for obstruction of justice after he feigned mental health and cognitive issues and a sixteen-level increase from a prior conviction for a crime of violence. The district court sentenced Delgado-Montoya to 120 months' imprisonment. Delgado-Montoya appealed and we affirmed the sentence. *See United States v. Delgado-Montoya*, 663 F. App'x 719 (10th Cir. 2016).

Early in the COVID-19 pandemic, Delgado-Montoya submitted an undated pro se request to the Federal Bureau of Prisons for a sentence reduction. In May 2020, Delgado-Montoya filed a pro se motion with the district court for a sentence

reduction, which was then supplemented by appointed counsel. And in June 2020, Delgado-Montoya submitted through counsel a third request for a sentence reduction.

Delgado-Montoya argued that age, high cholesterol, and deteriorating eyesight rendered him vulnerable to the virus and qualified as extraordinary and compelling reasons under the commentary to the U.S. Sentencing Commission's policy statement, § 1B1.13(1)(A). And, as a result, Delgado-Montoya urged that a sentence reduction was authorized under 18 U.S.C. § 3582(c)(1)(A)(i). Delgado-Montoya also asserted that "[e]ven if this [c]ourt were to find that he does not fit within the precise contours of that scenario, this [c]ourt has the discretion and authority to find that he falls within the scope of the 'other reasons' scenario of the policy statement." Aplt. App'x Vol. I at 42. Delgado-Montoya further claimed that considering the § 3553(a) factors permitted a sentence reduction because the underlying conviction for a crime of violence, the basis for the sixteen-level enhancement, was dismissed and there was no presented risk of danger to the community.[1]

The district court denied the motion, concluding, as relevant, that Delgado-Montoya failed to allege any extraordinary and compelling reasons to justify compassionate release. After describing the effects of the First Step Act, the court stated that to find extraordinary and compelling reasons for a sentence reduction based on a defendant's medical condition, the defendant "must be" suffering from a

[1] Because Delgado-Montoya did not raise this issue on appeal, he has waived it and is not entitled to appellate relief. *See Dubbs v. Head Start, Inc.,* 336 F.3d 1194, 1202 n. 2 (10th Cir. 2003) (holding that where a party does not brief an issue on appeal, the argument is waived).

medical condition as described in the policy statement. *Id*. at 275. Later, stating that "the Sentencing Guidelines are advisory," the court found Delgado-Montoya: 1) did not allege or provide evidence of a serious health condition "or that he is at a significantly higher risk of infection and death from COVID-19"; 2) "is considered able to manage his conditions through routine, regularly scheduled appointments with clinicians for monitoring"; 3) did "not allege that [the correctional facility] has a substantial outbreak of COVID-19; 4) did not state the mother-in-law is unable to care for Delgado-Montoya's daughter; and 5) "failed to establish additional care is needed or that other reasonable options are unavailable to assist the mother-in-law and daughter." *Id.* at 275–77.

The court also noted Delgado-Montoya's progress towards his G.E.D., completion of programs, and model prison record. The district court then declined to reach the factors addressing community safety and § 3553(a). In all, after examining the facts before it, the court found Delgado-Montoya failed to allege any extraordinary and compelling reasons to justify a sentence reduction.

Delgado-Montoya timely appealed.

## II. ANALYSIS

We review de novo the question of whether the district court properly understood "the scope of . . . [its] authority" under § 3582(c)(1)(A). *United States v. Maumau*, 993 F.3d 821, 830 (10th Cir. 2021); *see also United States v. Ansberry*, 976 F.3d 1108, 1126 (10th Cir. 2020).

As amended by the First Step Act, 18 U.S.C. § 3582(c)(1) states, as relevant:

> (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; . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . .

18 U.S.C. § 3582(c)(1)(A)(i).

A district court may thus grant a motion for a sentence reduction if it finds that extraordinary and compelling reasons warrant a reduction, contemplates the factors in § 3553(a) as relevant, and the reduction is consistent with applicable policy statements issued by the U.S. Sentencing Commission. *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021).

The existing policy statement by the U.S. Sentencing Commission states that extraordinary and compelling reasons exist under the following circumstances:

> (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).

U.S.S.G. § 1B1.13 cmt. 1.

In our circuit, the "Sentencing Commission's existing policy statement is applicable only to motions filed by the Director of the [Bureau of Prisons], and not to motions filed directly by defendants." *Maumau*, 993 F.3d at 836–37 (10th Cir. 2021) (citing *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020)). Indeed, "if a compassionate release motion is not brought by the [Bureau of Prisons] Director, Guideline § 1B1.13" would "not, by its own terms [be considered to] apply to it." *Id.* at 837 (quoting *Brooker*, 976 F.3d at 236). Because "Guideline § 1B1.13 is not 'applicable' to compassionate release motions brought by defendants, Application Note 1(D) cannot constrain district courts' discretion to consider whether any reasons are extraordinary and compelling." *Id.*

In this case, Delgado-Montoya "directly filed" a motion for sentence reduction and therefore, under *Maumau*, the district court's discretion to grant a sentence reduction is not restrained by the commentary to U.S.S.G. § 1B1.13. Delgado-Montoya argues that the district court erred by restraining its discretion to the policy statement's commentary in finding that Delgado-Montoya did not demonstrate extraordinary and compelling reasons for a reduction. Specifically, Delgado-

Montoya points to the fact that, after describing the effects of the First Step Act, the court stated that "to find 'extraordinary and compelling reasons' for a sentence reduction based on a defendant's medical condition, the defendant *must be*" suffering from a medical condition as described in the policy statement. Aplt. App'x Vol. I at 275 (emphasis added).

The district court's statement, however, must be read in context. Delgado-Montoya focused on the commentary to the Sentencing Commission's policy statement when he argued that his medical condition and resulting vulnerability to COVID-19 amounted to an extraordinary and compelling reason under § 1B1.13. For example, Delgado-Montoya argued that his susceptibility to severe illness or death because of the "proliferation of COVID-19 in prisons, combined with . . . [his] age" caused him to "fall[] within the scope of . . . the policy statement." Aplt. App'x Vol. I at 42. It is thus entirely logical (and unsurprising) that the court would address Delgado-Montoya's argument with the commentary of § 1B1.13. Merely citing a guideline does not amount to an erroneous restraint of discretion.

Moreover, the court articulated that "the Sentencing Guidelines are advisory" only. Aplt. App'x Vol. I at 276. In this way, the court recognized that the language of § 1B1.13 did not restrict its evaluation. This is further evidence that the district court did not erroneously restrict its discretion to the policy statement's commentary.

Finally, the most important indication that the court did not erroneously constrain its discretion is the fact that it considered factors not listed in the commentary of the Sentencing Guidelines policy statement. For example, instead of

checking Delgado-Montoya's health conditions against § 1B1.13(1)(A)'s exhaustive list of qualifying conditions (terminal illness, a "serious" condition, or age-related deterioration), the court considered the totality of evidence regarding Delgado-Montoya's health conditions, risk factors, and living situation. Specifically, the court indicated it might consider compassionate release for someone whose "underlying health conditions place him at high risk of infection and death from COVID-19," a factor that is not mentioned in § 1B1.13(1)(A). Aplt. App'x Vol. I at 273. It ultimately concluded that Delgado-Montoya's health condition is manageable and under control, that he is not at a significantly high risk of infection and death from COVID-19, and that the correctional facility had no substantial COVID-19 outbreak.[2]

Notably, the court found that Delgado-Montoya did not provide evidence of a health condition rising to the level of seriousness required by § 1B1.13(1)(A) "*or* that he is at a significantly higher risk of infection and death from COVID-19." *Id.* at 275. This framing indicates that, although the court considered Delgado-Montoya's condition in light of § 1B1.13(1)(A), it did not rely exclusively on an inconsistency with the commentary to reach its conclusion. Rather, the court also based its ruling on its finding that Delgado-Montoya's COVID-19 risk, which he failed to show was unusually high, did not constitute an extraordinary and compelling reason for early release. The court's analysis thus demonstrates that it did not "constrain [its]

[2] Importantly, Delgado-Montoya does not contest any of these factual findings on appeal and has therefore waived any challenge to them. *See* supra n.1.

discretion to consider whether any reasons are extraordinary and compelling." *Maumau*, 993 F.3d at 837.

Further, Delgado-Montoya raised rehabilitation, family circumstances, and the loss of adequate care for his daughter and mother-in-law only in the context of his argument that he "is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." He argued that his efforts to enrich and educate himself and the fact that he has a release plan involving caring for his family are relevant to the court's consideration of whether a sentencing reduction is consistent with the Sentencing Commission's policies. But Delgado-Montoya did not argue that these factors constituted extraordinary and compelling reasons.

Nevertheless, the district court independently considered whether those circumstances called for a sentence reduction. For example, after commending Delgado-Montoya for his efforts at rehabilitation, the court observed, unprompted, that Congress does not consider rehabilitation alone to be an extraordinary and compelling reason for purposes of compassionate release. *Id*. (referring to 28 U.S.C. § 994(t)). Additionally, the court found no evidence that Delgado-Montoya's mother-in-law was unable to care for his daughter or that assistance was unavailable, again findings that Delgado-Montoya does not contest. Acknowledging that the commentary to the Sentencing Guidelines is "advisory," the court noted that, even so, Delgado-Montoya had not provided enough facts for his argument to succeed on a totality-of-the-circumstances analysis. Delgado-Montoya's mother-in-law never indicated "that she is unable to care for . . . [his] daughter, and . . . [Delgado-

Montoya] has failed to establish additional care is needed or that other reasonable options are unavailable" to assist his family members. Aplt. App'x Vol. I at 276. In sum, not only did the court not restrict its discretion to the confines of the Sentencing Guidelines, it considered potential arguments not raised by Delgado-Montoya in the context of extraordinary and compelling reasons.

True, the district court's decision came before this court's decisions in *McGee* and *Maumau*, both of which held that, as noted above, district courts are not bound by the examples of extraordinary and compelling reasons enumerated in the § 1B1.13 commentary, and may determine whether such reasons are present based on the totality of a defendant's circumstances. However, the district court's decision, as demonstrated above, is entirely consistent with those decisions. By not constraining its discretion to the policy statement's commentary in this case, the district court followed the correct analysis as set forth in *McGee* and *Maumau*.

In any event, if the court did commit an error, it was a harmless one.[3] Even if the court had improperly constrained its discretion, the error would not have affected its decision. In other words, assuming the court incorrectly treated the enumerated categories in the policy statement's commentary as a limitation, it still would have denied the motion for sentence reduction, concluding that none of the facts in the

[3] We address the issue of harmless error on our own initiative because it is clear from the record that any error would be harmless. *See United States v. Doe*, 572 F.3d 1162, 1175 (10th Cir. 2009).

record constituted extraordinary and compelling reasons to reduce Delgado-Montoya's sentence.

For example, the policy statement's commentary contains a list of categories under which a defendant's medical condition could fall. If the court had constrained itself to the listed conditions, it would not have included Delgado-Montoya's condition within them. One such category, as particularly relevant here, is any "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." U.S.S.G. § 1B1.13(1)(A).

As noted above, Delgado-Montoya provided no evidence that he is at a particularly high risk of infection and death from COVID-19 and, although he alleged that the correctional facility failed to take appropriate safety precautions, he did not argue that it had a substantial outbreak. The district court noted that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." Aplt. App'x Vol. I at 273 (citing *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020)).

Additionally, as noted above, the court took it upon itself to assess Delgado-Montoya's family circumstances among other factors, even though he did not raise that argument in the context of "extraordinary and compelling reasons." The district court found no evidence to indicate that Delgado-Montoya's daughter could not be cared for by his mother-in-law while he served time at the correctional facility.

In sum, we conclude that, even if the district court improperly constrained its discretion, it would have reached the same result. Reliance on the policy statement thus would not have had a "substantial influence" on the outcome or leave us in "grave doubt" as to whether it had such an effect. *United States v. Cristerna-Gonzalez*, 962 F.3d 1253,1267 (10th Cir. 2020) (citations omitted).

## III. CONCLUSION

By not confining its discretion to the policy statement to determine whether the presented facts amounted to extraordinary and compelling reasons to permit a sentence reduction, the district court properly understood its discretion. Furthermore, if any error did occur, it was harmless. We accordingly AFFIRM the district court's denial of the motion for a sentence reduction. We also deny Delgado-Montoya's motion to remand.

Entered for the Court

Allison H. Eid
Circuit Judge

# Appendix C

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter D. Imprisonment (Refs & Annos)

18 U.S.C.A. § 3582

# § 3582. Imposition of a sentence of imprisonment

Effective: December 21, 2018
Currentness

**(a) Factors to be considered in imposing a term of imprisonment.**--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

**(b) Effect of finality of judgment.**--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

**(1)** modified pursuant to the provisions of subsection (c);

**(2)** corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

**(3)** appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

**(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; and

**(B)** the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

**(2)** in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

**(d) Notification requirements.**--

**(1) Terminal illness defined.**--In this subsection, the term “terminal illness” means a disease or condition with an end-of-life trajectory.

**(2) Notification.**--The Bureau of Prisons shall, subject to any applicable confidentiality requirements--

**(A)** in the case of a defendant diagnosed with a terminal illness--

**(i)** not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

**(ii)** not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

  

**(iii)** upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

**(iv)** not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

**(B)** in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)--

**(i)** inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

**(ii)** accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

**(iii)** upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

**(C)** ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of--

**(i)** a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

**(ii)** the procedures and timelines for initiating and resolving requests described in clause (i); and

**(iii)** the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

**(3) Annual report.**--Not later than 1 year after December 21, 2018, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year--

**(A)** the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

  

**(B)** the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

**(C)** the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

**(D)** the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

**(E)** the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

**(F)** the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

**(G)** for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

**(H)** for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

**(I)** the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

**(J)** the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

**(K)** the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.

**(e) Inclusion of an order to limit criminal association of organized crime and drug offenders.**--The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

  

**CREDIT(S)**

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998; amended Pub.L. 100-690, Title VII, § 7107, Nov. 18, 1988, 102 Stat. 4418; Pub.L. 101-647, Title XXXV, § 3588, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title VII, § 70002, Sept. 13, 1994, 108 Stat. 1984; Pub.L. 104-294, Title VI, § 604(b)(3), Oct. 11, 1996, 110 Stat. 3506; Pub.L. 107-273, Div. B, Title III, § 3006, Nov. 2, 2002, 116 Stat. 1806; Pub.L. 115-391, Title VI, § 603(b), Dec. 21, 2018, 132 Stat. 5239.)

Notes of Decisions (1247)

18 U.S.C.A. § 3582, 18 USCA § 3582
Current through P.L. 117-80.

**End of Document**

# Appendix D

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter One. Introduction, Authority, and General Application Principles (Refs & Annos)
Part B. General Application Principles

USSG, § 1B1.13, 18 U.S.C.A.

# § 1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

Currentness

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.

## CREDIT(S)

(Effective November 1, 2006; amended effective November 1, 2007; November 1, 2010; November 1, 2016; November 1, 2018.)

## COMMENTARY

<**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).>

<**2. Foreseeability of Extraordinary and Compelling Reasons.--**For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.>

<**3. Rehabilitation of the Defendant.--**Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.>

<**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.>

<This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.>

  

<**5. Application of Subdivision (3).--**Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.>

<**Background:** The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(a)(2) and (t).>

Notes of Decisions (2)

Federal Sentencing Guidelines, § 1B1.13, 18 U.S.C.A., FSG § 1B1.13
As amended to 11-1-21.

**End of Document**