No. _____

9th Cir. No. 21-10057

D.C. No. CR-12-01419-DGC-1

IN THE

Supreme Court of the United States

MICHAEL ROCKY LANE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
From The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Denial Of Michael Lane's Motion For Compassionate Release Was An Abuse Of Discretion?

II. Whether the Ninth Circuit's Summary Affirmance Was Improper?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Rocky Lane ("Lane"), prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Lane's Motion for Reconsideration is annexed as Appendix A. A copy of the Order of the United States Court of Appeals for the Ninth Circuit summarily affirming the district court's order denying Mr. Lane's motion for compassionate release under 18 U.S.C. §3582(c)(1)(A)(i) is annexed as Appendix B. A copy of the Order of the United States District Court for the District of Arizona denying Mr. Lane's motion for compassionate release under 18 U.S.C. §3582(c)(1)(A)(i) is annexed as Appendix C.

JURISDICTION

The United States Court of Appeals, Ninth Circuit decided this case on July 23, 2021. The Motion for Reconsideration was denied on October 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. §3582(c)(1)(A)(i)
2. 21 U.S.C. §846
3. 21 U.S.C. §841(a)(1)
4. 21 U.S.C. §841(b)(1)(c)

STATEMENT OF THE CASE

On July 19, 2013, Mr. Lane was convicted by a jury of two counts of conspiracy to manufacture and distribute controlled substance analogues and one count of possession with the intent to distribute a controlled substance analogue in violation of 21 U.S.C. §§846, 841(a)(1) and 841(b)(1)(c). (Doc. #465)[1]. Mr. Lane was sentenced to 180-months imprisonment followed by 5-years of supervised release. (Doc. #566). Mr. Lane is housed at FCI Safford and the Bureau of Prisons lists his current projected release date as May 6, 2024.

Mr. Lane submitted his request for a compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A) to the FCI-Safford Warden on September 26, 2020. On October 23, 2020, the Warden denied Mr. Lane's request for a compassionate release. Mr. Lane then filed an emergency petition for compassionate release in the Arizona District Court on December 1, 2020. (Doc. #785).

Mr. Lane suffers from medical conditions that place him at severely high-risk of serious health complications or death should he contract COVID-19. Mr. Lane qualifies for compassionate release because: 1) he is at an increased risk of severe illness or death from COVID-19 based upon his age and underlying medical conditions; 2) he has been a model prisoner and is currently categorized by the BOP at minimum risk; 3) he poses no threat to the community; and 4) he has an appropriate release/home detention plan.

[1] Citations to document numbers (Doc. #) are to the document's location on the Arizona District Court docket.

After full briefing, the District Court entered its Order denying Mr. Lane's Emergency Motion for Compassionate Release. *See* Appendix "C". The Court found (and the Government agreed) that Mr. Lane suffers from medical conditions that could present serious risks from COVID-19. *Id.* at p. 4, 5. Therefore, the Court found that Mr. Lane had shown extraordinary and compelling reasons for compassionate release. *Id.* at p. 4. Nonetheless, the Court denied Mr. Lane compassionate release finding: 1) a sentence reduction would not serve the purposes of §3553(a); and 2) Defendant failed to show that he no longer is a danger to the community. *Id.*

Mr. Lane timely appealed on February 24. 2021. Notice of Appeal filed 2/24/2021, EOR 199.[2] On July 23, 2021 the Ninth Circuit Court of Appeals summarily affirmed the District Court's order denying Mr. Lane's motion for compassionate release. *See* Appendix "B". On October 21, 2021, the Ninth Circuit denied Mr. Lane's motion for reconsideration. *See* Appendix "A".

REASONS FOR GRANTING THE WRIT

I. The Denial Of Michael Lane's Motion For Compassionate Release Was An Abuse Of Discretion.

The District Court has discretion to reduce Mr. Lane's term of imprisonment pursuant to 18 U.S.C. §3582(c)(1)(A), which states in relevant part that the Court "may reduce the term of imprisonment, after considering the factors set forth in 18 U.S.C. §3553(a) to the extent they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent

[2] Citations to the EOR are to the Excerpts of Record filed in the Ninth Circuit Court.

with applicable policy statements issued by the Sentencing Commission[.]" USSG § 1B1.13 states the Court may reduce a term of imprisonment under 18 U.S.C. § 3582(c)(1)(A) 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...

(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."

a. The §3553(a) Factors Do Not Outweigh The Extraordinary & Compelling Reasons For Compassionate Release

The District Court found, and the Government agreed, that Mr. Lane had an extraordinary and compelling reason warranting a reduction in Mr. Lane's term of imprisonment. Pursuant to 18 U.S.C. §3582(c)(1)(A)(i), the existence of extraordinary and compelling circumstances confers on the District Court the authority to consider the relevant 18 U.S.C. § 3553(a) factors and determine whether the circumstances warrant a sentence reduction. In that regard, the District Court found a sentence reduction would not serve the purposes of §3553(a). (Appendix "C" at p. 7-8). Specifically, the District Court found that Mr. Lane's good behavior, substance abuse treatment, and rehabilitative efforts while in prison were commendable, but that releasing him at this time would not reflect the seriousness of his offenses, promote respect for the law, provide just punishment, or afford adequate deterrence to criminal conduct. *Id.* at p. 8. The District Court's ruling was an abuse of discretion because the

court did not consider all of the §3553(a) factors as they existed at the time of Mr. Lane's request for compassionate release, and some of the court's findings were clearly erroneous.

The §3553(a) factors include the nature and circumstances of the offense and the history and characteristics of the defendant; the purposes of sentencing; the kinds of sentences available; the sentences and ranges established by the Sentencing Guidelines; relevant policy statements issued by the Sentencing Commission; the need to avoid unwarranted sentencing disparities among similarly situated defendants; and the need to provide restitution to victims. Evidence of postsentencing rehabilitation may be highly relevant to several of the §3553(a) factors. *Pepper v. United States*, 562 U.S. 476, 491 (2011). For example, evidence of postsentencing rehabilitation may plainly be relevant to "the history and characteristics of the defendant." *Id.* Such evidence may also be pertinent to "the need for the sentence imposed" to serve the general purposes of sentencing set forth in § 3553(a)(2)—in particular, to "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training...or other correctional treatment in the most effective manner." *Id.* Postsentencing rehabilitation may also critically inform a sentencing judge's overarching duty under § 3553(a) to "impose a sentence sufficient, but not greater than necessary," to comply with the sentencing purposes set forth in § 3553(a)(2). *Id.*

The District Court found that Mr. Lane "has served about half of his 180-month sentence." According to the Presentence Investigation Report, Mr. Lane was arrested on

July 25, 2012 and therefore was entitled to over 500 days of presentence incarceration credit at the time of his sentencing on December 17, 2013. At the time of the District Court's Order on February 19, 2021, Mr. Lane had served approximately 8 years and 7 months of his sentence. Currently, the Bureau of Prisons lists Mr. Lane's projected release date as May 6, 2024 (it was previously 2025 but had been updated to reflect the application of Mr. Lane's earned release credits). Mr. Lane provided documentation to the District Court of the earned credits he was entitled to under the First Step Act for approved classes applied to home confinement, his employment with Unicor, and his enrollment in the Residential Drug Treatment Program (RDAP). (*See* Exhibit H: Individualized Reentry Plan – Program Review, EOR 128-129). With Mr. Lane's approved classes that were applied toward home confinement, combined with his employment with Unicor (where he had been working for the duration of the time he had been incarcerated except 6 months), Mr. Lane demonstrated to the District Court that he had accrued at least 330 days of earned credit towards home confinement since the implementation of the First Step Act (22 months of employment at Unicor and the already completed programs that qualify). Unicor is an approved First Step Act evidence-based recidivism reduction program, which entitles Mr. Lane to 15-days of earned credit for each month in the program. The RDAP program, which is 9-months, is also an approved First Step Act program entitling Mr. Lane to 15-days earned credit for each month in that program. Mr. Lane informed the District Court that his projected release date was scheduled to be reduced from May 2025 to May 2024 as soon as his earned credits for those programs were applied. (With additional home confinement

and half-way house credits that Mr. Lane believes he is entitled to, Mr. Lane projected that he would be eligible for release to a halfway house or home confinement as soon as 2022).

Therefore as Mr. Lane argued in the District Court, he had at most 3 years left to serve on his sentence (and likely even less time of actual incarceration before he is eligible for release to a halfway house or home confinement). That means Mr. Lane had served nearly two-thirds of his actual sentence of incarceration at the time of the District Court's findings.

The District Court also cited to the seriousness of Mr. Lane's offense of "conspiring to manufacture and distribute a controlled substance analogue." (Order at p. 7-8, EOR 195-196). However, it does not appear that the District Court considered the evidence from Mr. Lane's most recent §2255 proceeding in weighing the seriousness of Mr. Lane's offense. Although the District Court found this information could not be considered as an extraordinary and compelling reason to grant compassionate release (Order at p. 6, FN 6, EOR 194), it should have been considered by the District Court under the §3553(a) factors of seriousness of the offense and just punishment for the offense. In Mr. Lane's §2255 proceeding, the magistrate judge found the Government committed a *Brady* violation by failing to disclose DEA emails and dissenting opinions within the DEA regarding the chemical substance MDPV (one of the chemicals Mr. Lane was convicted of possessing). (Report & Recommendation in CV19-05028 at p. 18-23, Doc. #48). The District Court ultimately denied Mr. Lane's §2255 Motion for failure to prove prejudice (but only because the Government was successful in suppressing the

Brady material through Mr. Lane's trial, direct appeal, and his first §2255 proceeding). Because this was Mr. Lane's second §2255 proceeding, the District Court found the *Brady* material had to meet the higher bar required for relief that the material "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense." *See* 28 U.S.C. §2244(b)(2)(B)(ii); *See* Order filed 4/12/2021, Doc. #798. (Mr. Lane is in the process of appealing from that ruling and the Ninth Circuit recently granted him a certificate of appealability on the *Brady* issue).

Mr. Lane argued to the District Court that he had provided documents in his §2255 proceeding showing the Government withheld exculpatory evidence of a known dispute that existed within the DEA at the time of Mr. Lane's trial over determinations of substantial similarity in chemical structure under the Controlled Substance Analogue Act. This dispute within the DEA included a disagreement over which substances actually met the substantial similarity element to qualify as controlled substance analogues. The seriousness of Mr. Lane's crime should have been diminished by the proof submitted in his §2255 proceeding that the Government withheld and suppressed evidence of a widespread disagreement among DEA scientists over what actually constitutes a controlled substance analogue (including at least one dissenting opinion on a chemical Mr. Lane was convicted of). At sentencing, the court even acknowledged this area of the law was a "gray area" because "the fact is that people hadn't been prosecuted much for analogues, there hadn't been a court that determined some of these substances were analogues, and I think there is a reasonable view that would say

that kind of a crime of dealing in those gray area drugs is not as culpable as dealing in known controlled prohibited substances." (Sentencing Transcript at p. 43, EOR 65)

The District Court also cited to Mr. Lane's sentencing guidelines that existed at the time of his sentencing in 2013, and the fact that he was sentenced below the range and maximum sentence. Mr. Lane's criminal history score at the time of his original sentencing placed him in a Category III. However, in looking back at Mr. Lane's criminal history as it stands now, Mr. Lane's last conviction (which was a bank robbery in 1999) is now over 20-years old. Mr. Lane received a sentence of 67 months in that case, which means he has already served more than 3-years longer for his current conviction than he did for his last conviction 20+ years ago. All other convictions are even older than that, with some as old as 35-40 years. If Mr. Lane were sentenced today, those priors would not be reflected in his criminal history points. Taking into account the additional factors that currently exist as set forth below of Mr. Lane's age (60 years old), his programming and rehabilitation, and his low risk of recidivism as reflected by his PATTERN score, these factors more accurately reflect Mr. Lane's current situation better than his now outdated criminal history. *See Pepper v. United States*, 562 U.S. 476, 490 (2011) (when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range).

Regarding the purposes of sentencing, Mr. Lane demonstrated that he is rehabilitated. The programming and rehabilitation completed by Mr. Lane during his

incarceration could not have been considered at the time of his sentencing. Mr. Lane has taken full advantage of the opportunities presented to him and has actively sought out and completed numerous rehabilitative programs, including drug treatment, he has maintained his sobriety and has not had a dirty UA since being incarcerated, he has not had any disciplinary actions, and he has been employed with Unicor the entire time (except for 6 months). Mr. Lane has exhibited good institutional conduct in a low-security facility, enthusiastic participation in work and rehabilitative programs, a readiness for release, and a low-risk for recidivism at this stage in his life.

In reaching its decision, the District Court failed to consider the need to avoid unwarranted sentencing disparities among similarly situated defendants. Every co-defendant in Mr. Lane's case was released long ago, the last of which was Mr. Zizzo who was released from incarceration three years ago. The sentences of the co-defendant in Mr. Lane's case were as follows: David Titus – 42 months incarceration (Doc. #580); Clinton Strunk – probation (Doc. #581); Benjamin Lowenstein – 18 months incarceration (Doc. #593); Vincent Collura – probation (Doc. #616); Andrew Freeman – 36 months incarceration (Doc. #645); and Nicholas Zizzo – 54 months incarceration (Doc. #652).

It is undisputed that all co-defendants in Mr. Lane's case served significantly less time than Mr. Lane has, including the other leader/organizer of the sales operation who was most similarly situated to Mr. Lane, Nicholas Zizzo. Mr. Zizzo was sentenced to only 54-months and ended up serving less than 4 years. In contrast, Mr. Lane was sentenced to 15 years and has now served over 8 ½ years. At this point, Mr. Lane has served more than twice the amount of time that Mr. Zizzo did (who received the 2nd

longest sentence) for the exact same role and exact same conduct. The District Court abused its discretion by failing to consider this sentencing factor under §3553(a).

Regarding the history and characteristics of the defendant, the District Court failed to take into consideration Mr. Lane's advanced age at this point. Mr. Lane is now 60 years old. Studies have shown that older offenders are substantially less likely than younger offenders to recidivate following release. https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders For example, over an eight-year follow-up period, 13.4 percent of offenders age 65 or older at the time of release were rearrested compared to 67.6 percent of offenders younger than age 21 at the time of release. *Id.* This pattern was consistent across age groupings, and recidivism measured by rearrest, reconviction, and reincarceration declined as age increased. *Id.* It was found that both age and criminal history exerted a strong influence on recidivism. *Id.* For offenders in Criminal History Category I, the rearrest rate ranged from 53.0 percent for offenders younger than age 30 at the time of release to 11.3 percent for offenders age 60 or older. For offenders in Criminal History Category VI, the rearrest rate ranged from 89.7 percent for offenders younger than age 30 at the time of release to 37.7 percent for offenders age 60 or older. *Id.*

There are numerous examples of the District Court recently granting compassionate release under the First Step Act to defendants who were convicted of much more serious (and sometimes violent) crimes than Mr. Lane based upon their good record and rehabilitation while incarcerated, for example: *United States vs. Gabriel*

Lopez, No. 1:09-cr-00166-BLW (D. Idaho, March 11, 2021, Doc. #47) (sentenced to 120 months for possession with intent to distribute 50 grams or more of methamphetamine and 60 months on possession of a firearm in furtherance of a drug trafficking crime, consecutive, granted compassionate release even though crime was "serious" because he has "performed admirably while incarcerated"); *United States v. Hasanoff*, No. 10-CR-162 (KMW), 2020 WL 6285308 (S.D.N.Y. Oct. 27, 2020) (sentenced in 2013 to 18 years for providing and attempting to provide material support and resources to al-Qaeda and conspiring to provide material support and resources to al-Qaeda, granted compassionate release even though court characterized crimes as "extremely serious" because of extraordinary rehabilitation, remorse, BOP places him at "minimum risk" of recidivism, and unwarranted sentence disparity with co-defendant). An inmate previously incarcerated at FCI Safford with Mr. Lane was granted compassionate release in *United States v. John William Guess*, No. 18-11(1)(DWF/KMM) at *2 (D. Minn. Nov. 16, 2020). In that case, the Court found that "[d]espite the seriousness of Guess's crime and age, he had no prior convictions for crimes of violence at the time of sentencing. Guess has had no disciplinary incidents during his imprisonment, he has completed rehabilitative programming, and his recidivism risk is rated as minimum by the BOP." Accordingly, the District Court concluded a reduction in Guess's sentence to time served (which was only about one-third of his original sentence) was warranted under the First Step Act despite the seriousness of the crime, which was conspiracy to distribute 500 grams or more of methamphetamine (arguably a more serious crime than

Mr. Lane's analogue convictions as acknowledged by the sentencing court). Guess's sentence was originally 120 months.

b. Mr. Lane Demonstrated He Is No Longer A Danger To The Community

The District Court also denied the Emergency Motion for Compassionate Release on the basis "Defendant has failed to show that he no longer is a danger to the community". (Order at p. 4, EOR 92). USSG §1B1.13 states the Court may reduce a term of imprisonment under 18 U.S.C. §3582(c)(1)(A) after considering the factors set forth in 18 U.S.C. §3553(a), if the court determines that—

> "(1) (A) extraordinary and compelling reasons warrant the reduction…
> (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."

18 U.S.C. §3142(g) lays out the following factors that shall be taken into account by the judicial officer in determining whether a defendant is a danger to the safety of any other person or the community:

> "(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including—
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release."

First, Mr. Lane would argue the District Court should not have based its decision on the requirements of USSG §1B1.13, including that Mr. Lane is required to prove he no longer poses a danger to the community. *See United States v. Shkambi*, No. 20-40543, 2021 WL 1291609, at *4 (5th Cir. Apr. 7, 2021) (neither the policy statement nor the commentary to USSG §1B1.13 binds a district court in addressing a motion under §3582 – the district court is bound only by §3582(c)(1)(A)(i) and the sentencing factors in § 3553(a)).

Regardless, even taking into account the guidelines of USSG §1B1.13 as advisory, Mr. Lane has made the required showing. Mr. Lane was not convicted of: a crime of violence, a Federal crime of terrorism, a crime involving a minor, firearm, or explosive device. Mr. Lane was not on probation, parole, or other release pending trial, sentencing, or appeal when he committed the current offense. Further, Mr. Lane's history and characteristics demonstrate he no longer poses a threat or danger to the community. During Mr. Lane's incarceration, he has taken full advantage of the opportunities presented to him and has actively sought out and completed numerous rehabilitative programs, including drug treatment. (Exhibit H, Individualized Reentry Plan – Program Review, EOR 128-129). Mr. Lane has also maintained his sobriety and has not had a dirty UA while on supervised release or since being incarcerated. Mr. Lane has not had any disciplinary actions during his lengthy period of incarceration.

Mr. Lane has also been employed with Unicor during his entire period of incarceration except for 6 months.

Mr. Lane is currently housed at FCI-Safford, which is a low security facility. Based upon his in-custody classification, he was categorized at "camp" points. (Exhibit I, Male Custody Classification Form, EOR 139). On October 28, 2020, Mr. Lane's Unit Team Case Manager, Mrs. Alverez, informed him by email via the Electronic Staff Messaging System that his PATTERN score is General 10/Violence 6 - Minimum. (Exhibit D, Declaration, EOR 102; Exhibit J, Email from Unit Management to Mr. Lane dated 10/28/2020, EOR 141).

Mr. Lane's offenses are non-violent and do not include any crimes of violence, no sexual offenses, and are not terrorism-related. Also, Mr. Lane has no current motivation or reason to flee, and has no history of doing so. Mr. Lane has already served a significant portion of his sentence and has demonstrated his commitment to continue assisting the prosecution of his §2255 proceeding. Mr. Lane has exhibited good institutional conduct in a low-security facility, enthusiastic participation in work and rehabilitative programs, a readiness for release, a low-risk for recidivism, and no danger to the community.

The District Court solely points to Mr. Lane's crime for which he is currently incarcerated and his "history of criminal conduct" in finding "the Court cannot conclude on the present record that Defendant no longer poses a danger to the community." (Order at p. 9, EOR 197). The issue with the District Court's findings is that every person requesting compassionate release is doing so because they are

currently incarcerated for having committed a serious crime (although Mr. Lane's offenses do not include any crimes of violence, no sexual offenses, and are not terrorism-related). The difference being Mr. Lane has demonstrated that despite his past conviction and criminal history, he does not presently pose a danger to the community. It was an abuse of discretion for the District Court to deny Mr. Lane compassionate release based upon his history as it was at the time of his original sentencing, as opposed to his present circumstances over 8 years later.

The strongest evidence that Mr. Lane is no longer a danger to the community is the Department of Justice's own PATTERN scoring system, which "is designed to measure risk of recidivism of inmates." Mr. Lane's PATTERN score is "minimum." This means that despite Mr. Lane's current conviction and criminal history, the BOP considers Mr. Lane's current risk of recidivism to be the very lowest possible. The Department of Justice boasts the PATTERN scoring system has a "high level of predictability." The PATTERN scoring system takes into consideration everything the District Court cited in its decision such as the characteristics of the offense and criminal history, but also many other dynamic factors including age, history of escapes, history of violence, education, drug program status, incident reports, programs completed, work programs, etc. Rather than focus most of the weight on a few factors, such as the District Court did, the goal of the PATTERN risk assessment is to create a fair and accurate prediction of risk that an inmate will commit a crime. According to that assessment, Mr. Lane does not currently pose a risk to the community should he be granted compassionate release.

The District Court's determination that although Mr. Lane has completed several rehabilitative programs, has maintained his sobriety, has not been disciplined, and has been employed, his current circumstances cannot outweigh his past criminal conduct, is an abuse of discretion and incorrectly applies the law as set forth in the cases cited herein.

II. The Ninth Circuit's Summary Affirmance Was Improper.

Mr. Lane filed his Opening Brief with the Ninth Circuit on April 26, 2021. Instead of filing a response brief, the Government filed a Motion for Summary Affirmance on June 17, 2021. The Ninth Circuit granted the Motion and summarily affirmed the District Court's order.

A motion to affirm a final judgment should be filed only where "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." *U.S. v. Hooton*, 693 F.2d 857 (9th Cir. 1982); *See Page v. United States*, 356 F.2d 337, 339 (9th Cir. 1966). Summary affirmance should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the case of appellant's brief. *See Hooton*, 693 F.2d at 858.

Summary affirmance of a district court's decision in place of full merits briefing and, at the discretion of the court, argument is, and should be treated as, a rare exception to the completion of the appeal process. *United States v. Davis*, 598 F.3d 10, 13-14 (2nd Cir. 2010). It is a short-cut and, considering the liberty and property rights involved, one that is available only if an appeal is truly "frivolous." *Id.* An appeal is frivolous when it lacks an arguable basis either in law or in fact advancing inarguable

legal conclusions or fanciful factual allegations. *Id.* It requires more than a finding that the correct resolution of an appeal seems obvious. *Id.* Easy cases are to be distinguished from inarguable or fanciful ones. *Id.* The Court should exercise great care in labeling a certain action or argument as frivolous, for doing so often carries grave consequences. *Id.*

Examples of instances in which this Court has granted summary affirmance have involved a "frequent and vexatious litigant" who filed a frivolous action against four district court judges to challenge their prior rulings (*In re Thomas*, 508 F.3d 1225, 1227 (9th Cir. 2007)), an opening brief that was "a one-page document" in which the defendant requested this Court to reduce his sentence (*U.S. v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982)), and an appeal in which the errors were so harmless they were considered insubstantial because even if granted they still left intact all of the sentences imposed on the defendant (*Page v. United States*, 356 F.2d 857 (9th Cir. 1966)). Mr. Lane's issues raised in his appeal were far from such circumstances.

Mr. Lane's Opening Brief raised specific arguments that the District Court abused its discretion because its findings were not supported by the record. That alone prevented the summary affirmance and dismissal of Mr. Lane's appeal. Mr. Lane's Opening Brief in his appeal laid out that the District Court abused its discretion by failing to consider all the §3553(a) factors as they existed at the time of Mr. Lane's request for compassionate release, and some of the court's findings were clearly erroneous. *See United States v. Owens*, 996 F.3d 755, 764 (6th Cir. 2021) (case remanded because district court's order denying motion for compassionate release did not

acknowledge all the factors the defendant raised as extraordinary and compelling reasons together warranting compassionate release, nor did it consider the § 3553(a) factors).

Specifically, the District Court's finding that Mr. Lane has only served about half of his sentence was a clear abuse of discretion. In fact, Mr. Lane presented record evidence that his release date of May 2024 was without halfway house or any First Step Act earned release credits. Completion of the RAP program and the amount of time Mr. Lane had already served entitled him to one-year of halfway house (which shortens his release date to 2023). In addition, Mr. Lane's First Step Act earned release credits entitled Mr. Lane to an additional year in early release credits (which again shortens his release date to 2022). Therefore, the record demonstrated that Mr. Lane actually had less than a year left to serve before he was scheduled to be released.

Also, the evidence presented of the disparity in Mr. Lane's sentence to his co-defendants was indisputable and was not properly considered by the District Court. A sentence reduction for Mr. Lane would still have amounted to twice the amount of time as his next closest co-defendant received. *See United States v. Maumau*, 993 F.3d 821, 829 (10th Cir. 2021) (defendant granted reduction of sentence under First Step Act where district court noted that in terms of sentencing disparities, reducing defendant's sentence would mean that defendant would still be subjected to longer sentence than his co-defendants, many of whom engaged in relatively similar misconduct but received shorter sentences because of their respective plea agreements).

The District Court also failed to consider the issues raised in Mr. Lane's 28 U.S.C. §2255 proceeding under the §3553(a) factors of seriousness of the offense and just punishment for the offense. The Court's finding that Mr. Lane poses a danger to the community was also an abuse of discretion. The reasons the District Court set forth for its finding failed to adequately consider what Mr. Lane has accomplished since his sentencing or take into consideration the low PATTERN score and his age of 60 years old (along with the record demonstrating his reduced likelihood of dangerousness and recidivism). Congress specifically established the PATTERN score to more accurately provide a tool in which the risk of recidivism could be measured. It shouldn't have been so easily disregarded by the District Court.

The District Court's abuse of discretion in Mr. Lane's case is supported by other compassionate release cases in which the District Court granted compassionate release to defendants under similar circumstances. *See United States v. Smith*, 482 F. Supp. 3d 1218, 1220 (M.D. Fla. 2020) (supporting his motion for compassionate release during COVID-19 pandemic because: inmate did not have a propensity for violence and was not likely to reoffend, inmate's offenses of conviction were nonviolent drug crimes, there was no indication inmate used or carried a firearm in connection with offenses of conviction, inmate's previous violent offenses occurred 47-50 years ago, inmate's prison disciplinary record showed he generally conducted himself well in prison, and inmate would know that if he reoffended while on supervised release he would be subject to the revocation of his supervised release and reimprisonment); *See also United States v. Schram*, 475 F. Supp. 3d 1168 (D. Or. 2020) (compassionate release, based on

extraordinary and compelling reasons, would not present a danger to the community, with respect to 68-year-old federal prisoner, with 36 months remaining on 130-month sentence for bank robbery, who had heightened risk of severe illness from COVID-19 because of his history of liver disease and weakened immune system from chronic hepatitis C; despite prisoner's lengthy criminal history, which included bank robberies and other robberies, he had attempted to better himself while serving his current sentence, gaining employable work skills, and prisoner would be supervised by probation officer and would reside in a reentry center); *Compare with United States v. Woody*, 463 F. Supp. 3d 406, 407 (S.D.N.Y. 2020) (defendant failed to demonstrate the type of extraordinary and compelling circumstances that would mandate his compassionate release due to COVID-19 pandemic; although defendant was to be commended for earing his GED certificate while incarcerated, he was 31 years old, did not report any health issues that would make him particularly vulnerable to COVID-19, and posed a danger to the community, as he was convicted of conspiracy to commit Hobbs Act robbery, pistol-whipped a female store clerk during commission of the robbery, and while on pre-trial release, assaulted someone he thought had cooperated against him).

Mr. Lane's appeal did not lack an arguable basis either in law or in fact advancing inarguable legal conclusions or fanciful factual allegations. The Ninth Circuit did not make any findings that Mr. Lane's appeal was inarguable or fanciful. *See* Appendix "B". An appeal is not appropriate for summary affirmance simply because it appears to be an "easy case". *See Davis*, 598 F.3d at 14 (2nd Cir. 2010). The Ninth

Circuit's summary affirmance in Mr. Lane's appeal was improper and denied him of his right to appeal the District Court's final ruling.

CONCLUSION

For the foregoing reasons, Mr. Lane respectfully requests this Court grant certiorari on the issues presented herein.

RESPECTFULLY SUBMITTED this 19th day of January 2022.

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