NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

ANTHONY JEROME BELL,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In denying a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling reasons" after considering the factors in 18 U.S.C. § 3553(a), must a district court specifically address the defendant's non-frivolous § 3553(a) arguments based on intervening factual and legal developments, or does the district court satisfy its duty to explain a denial of compassionate release by stating that it has reviewed the defendant's motion, and unchanged § 3553(a) factors like the nature and severity of the offense support the denial?

INTERESTED PARTIES

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

TABLE OF CONTENTS

The circuits are in conflict on whether, in denying a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling reasons" after considering the factors in 18 U.S.C. § 3553(a), a district court must specifically address the defendant's non-frivolous § 3553(a) arguments based on intervening factual and legal developments, or whether the district court satisfies its duty to explain a denial of compassionate release by stating that it has reviewed the

TABLE OF AUTHORITIES

Statutory and Other Authority:

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Anthony Bell ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's denial of Petitioner's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, *United States v. Bell*, 2021 WL 4786732 (11th Cir. Oct. 14, 2021) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court. The decision of the court of appeals affirming the district court's denial of Petitioner's motion to reduce sentence was entered on Oct. 14, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1, and this Court's December 16, 2021 order extending the due date for the petition.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582, as amended by Section 603(b) of the First Step Act of 2018, states in relevant part:

> (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...

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

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission . . . ;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

U.S.S.G. § 1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) Policy Statement), states in pertinent part:

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without 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 . . .

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

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

Commentary

Application Notes:

1. **Extraordinary and Compelling Reasons**.—Provided the defendant meets the requirements of subsection (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, ...

(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. . . .

STATEMENT OF THE CASE

The Charges, Convictions, and Original Sentence

On January 18, 2005, a federal grand jury sitting in the Southern District of Florida charged Petitioner with knowingly and intentionally possessing and conspiring to possess with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A).

On April 11, 2005, Petitioner was convicted by a jury of both counts.

According to the Presentence Investigation Report, the applicable statutory mandatory minimum under § 841(b)(1)(A) was ten years' imprisonment and the statutory maximum was life imprisonment. Petitioner qualified as a Career Offender under the law in effect at that time, based upon convictions for carrying a concealed firearm, and aggravated fleeing and eluding/high speed fleeing. As a result of that classification, Petitioner's Criminal History category was increased from V to VI. However, his total offense level was not ultimately dictated by the Career Offender guideline (a level 37). Rather, because his Chapter 2 offense level was a 42 based upon the quantity of crack in his case, a two level increase because of possession of a dangerous weapon, and another two levels for obstruction of justice, that offense level of 42 trumped the Career Offender offense level of 37. At an offense level of 42 and Criminal History Category VI, Petitioner's advisory Guideline range was 360-life.

On July 15, 2005, the district court imposed a low end sentence of 360 months imprisonment, concurrent as to both counts. Petitioner had sought a downward departure based upon his age (23); the crack:power ratio, a huge disparity with respect

to the sentencing of a co-defendant; and overrepresentation of his criminal history. The court found a downward departure warranted "under the facts of this particular case." The court also stated expressly that it had considered the factors set forth in 18 U.S.C. § 3553(a)(1) through (7). After noting Petitioner's "extensive criminal history and the seriousness of the instant offense," the court nonetheless sentenced him to the bottom of the then-applicable Guideline range.

Petitioner challenged his Career Offender classification on appeal, but the Eleventh Circuit affirmed his sentence. *See United States v. Bell*, No. 05-14043, 218 Fed. App'x 885 (11th Cir. Feb. 23, 2007).

He filed a motion to vacate but it was denied.

The Motion for Reduction of Sentence Pursuant to Amendment 782

On September 18, 2015, Petitioner, through counsel, filed a Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582 and Amendment 782, noting that he no longer qualified as a Career Offender since the Eleventh Circuit had declared in *United States v. Archer,* 531 F. 3d 1347 (11th Cir. 2008) that carrying a concealed firearm was no longer a crime of violence. The district court denied the motion, holding that it lacked the authority to reduce Petitioner's sentence under § 3582(c)(2) because he was sentenced as a Career Offender, and could not relitigate that determination through a § 3582(c)(2) motion.

Petitioner appealed that determination, but the Eleventh Circuit again affirmed. *United States v. Bell,* No. 15-15165, 652 Fed. App'x. 741 (11th Cir. June 7, 2016).

The First Step Act of 2018

In December of 2018, Congress enacted the First Step Act of 2018. In Section 404 of the Act, Congress made sections 2 and 3 the Fair Sentencing Act (the FSA) retroactive to offenders like Petitioner who were sentenced before its enactment. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841). Under Section 404, eligibility for retroactive application of the FSA turns on whether the defendant was previously sentenced for a "covered offense." Congress defined a "covered offense" in Section 404(a) as a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 [] that was committed before August 3, 2010." In Section 404(b), Congress authorized any court that "imposed a sentence for a covered offense" to now "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 [] were in effect."

In Section 603(b) of the First Step Act, entitled "Increasing the Use and Transparency of Compassionate Release," *see* Pub. L. 115-391, 132 Stat. 5194, 5239, § 603(b) (Dec. 21, 2018), Congress changed the procedure for seeking a sentence reduction for "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A) by removing the Director of the Bureau of Prisons as the "gatekeeper" to such motions. Specifically, prior to that amendment, § 3582(c)(1)(A) only allowed the BOP Director to move the district court to reduce a sentence if (in the BOP's view) there were "extraordinary and compelling reasons" to do so. Without a BOP-filed motion, sentencing courts were powerless to reduce a prisoner's sentence under § 3582(c)(1)(A).

Section 603 of the Act transformed that exclusive BOP-initiated remedy, by amending § 3582(c)(1)(A) to allow defendants to seek relief for "extraordinary and compelling reasons" *directly* from the district court (after first applying to the BOP, and the passage of 30 days).

The Motion to Reduce Sentence
Pursuant to Section 404 of the First Step Act

On February 26, 2019, Petitioner sought a sentence reduction pursuant to Section 404 of the First Step Act. He argued that based upon the quantity of crack charged in his indictment, after the FSA he faced a reduced statutory range of 5-40 years under 21 U.S.C. § 841(b)(1)(B). Taking into account the amendments to the drug quantity table since his sentencing (including those made in response to the FSA), he now faced a reduced Guideline range of 324-405 months as a Career Offender (total offense level of 36 rather than 42 for 1.5 kilos of crack, Criminal History Category VI), but 292-365 months without the Career Offender enhancement (total offense level of 36, but Criminal History Category of V). He urged the court to sentence him to 292 months imprisonment, the bottom of the non-Career Offender range since he was no longer a Career Offender under current law, or at least, to 324 months, the bottom of the reduced Career Offender range.

The district court granted Petitioner's motion in part and denied it in part. Specifically, the court agreed that Petitioner had a "covered offense." And it also agreed that he faced a reduced guideline range as a Career Offender of 324-405 months imprisonment. While the court did not dispute that Petitioner was no longer a Career Offender under current law, it held that since the First Step Act did "not provide for

plenary resentencing . . . the determination made at sentencing that [he] qualifies as a Career Offender must remain unchanged."

As to the discretionary step of the required analysis under Section 404(b), the court stated that it had reviewed Petitioner's "record, the factors set forth in 18 U.S.C. § 3553(a), [his] post-sentencing conduct, and the nature and seriousness of the danger to any person or community that may be posed by a reduction in [his] sentence," and determined that a reduction was warranted to the bottom of the current Career Offender guideline range: 324 months imprisonment.

The government appealed the order reducing Petitioner's sentence, but then voluntarily dismissed its appeal.

The Motion to Reduce Sentence
Pursuant to 18 U.S.C. § 3582(c)(1)(A))

On July 16, 2020, after the onset of the COVID-19 pandemic, Petitioner filed a *pro se* motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) for extraordinary and compelling reasons. Thereafter, counsel filed a more detailed motion on Petitioner's behalf explaining – with the support of BOP medical records – that in 2007 (after he was sentenced, while he was incarcerated), Petitioner was diagnosed with Myasthenia Gravis, an auto-immune neuromuscular disease, which made him susceptible to severe illness and potentially death from COVID-19. The counseled motion requested that the district court reduce Petitioner's term of imprisonment to time served and to impose home confinement/house arrest/electronic monitoring/GPS monitoring as a condition of his previously imposed five year term of supervised release.

In response, the government urged the court to reject Petitioner's request on three grounds. First, the government argued, Petitioner had not shown extraordinary and compelling reasons for release within U.S.S.G. § 1B1.13, cmt. n.1(A). Second it argued, "under the applicable policy statement," specifically § 1B1.13(2), the court "*must*" deny a sentence reduction unless it determines that the defendant is "not a danger to the safety of any other person or to the community" – a condition that Petitioner could not satisfy due to his prior record and the facts of the underlying offense which involved kidnapping the informant, driving him to a secluded location, and shooting him in the chest (the informant survived). Finally, the government argued, the court must also "consider the Section 3553(a) factors, as applicable, as part of this analysis," and the § 3553(a) factors weighed against release because Petitioner had failed to demonstrate that he was not a danger to the community. Specifically, the government argued, Petitioner could not show that the § 3553(a) factors weighed in favor of release because of the underlying facts of his case, his prior record and his disciplinary record in prison.

In reply, Petitioner first rebutted the government's assertion that he had not shown extraordinary and compelling reasons for release due to his auto-immune disorder, with a report by Dr. Meredith Bock, a board certified neurologist. Dr. Bock reviewed his medical records and opined – with specific reference to CDC guidelines – that Petitioner was highly likely to suffer serious complication *or death* were he to contract COVID-19 for several reasons: first, due to his age; second due to his long-term use of corticosteroids; and finally, because myasthenia gravis causes fluctuating

diffuse muscle weakness, including weakness of the respiratory muscles. The most serious complication of myasthenia gravis, Dr. Bock noted, is myasthenic crisis, a life-threatening condition of respiratory failure, which can be triggered by any viral infection. Myasthenic crisis, she noted, can often lead to the need for longer term ventilation, multiorgan failure and death. In her estimation, Petitioner was therefore at "extremely high risk of serious illness or even death if he were to contract COVID-19." In fact, she worried that he might not be able to survive his prison sentence if he contracted COVID.

Replying to the government's danger to the community argument, Petitioner noted that the government had mischaracterized his prior record in multiple regards. First, contrary to the government's mistaken suggestion, the PSI confirmed that he did *not* have convictions for burglary of an occupied dwelling, aggravated battery or armed robbery. The single aggravated assault in his record occurred when he was 14 years old, and he was given a period of juvenile community control which was successfully terminated. Moreover, the aggravated assault on a police officer charge mentioned by the government was *nolle prossed*. Finally, Petitioner asked the court to consider that his felony convictions for carrying a concealed firearm and aggravated fleeing *and* eluding were no longer "crimes of violence" under current law. Indeed, he noted, he would *not* qualify as a Career Offender based upon these convictions today. Accordingly, he argued, in no sense did his prior record weigh against release.

While he acknowledged that the offense in this case did involve violent conduct, he underscored that he committed this offense over 16 years ago – in 2004 when he

was 23. And, he argued, as shown by his personal development over the last 16 years, he was no longer the same person, and did not presently present any danger to the community. In this regard, he noted with significance that even in the incredibly dangerous environment of USP Florence he had undertaken a path of self-improvement by enrolling in educational and vocational training and engaged in an industrious, determined and long-term effort to prepare for and complete his GED. He pointed out that he had worked as an orderly, in food service, as a cook, in dining room detail, recreation detail, hobby detail, and in admission and orientation. He attached his BOP work history and educational transcript to show his rehabilitation.

While acknowledging that he had some disciplinary reports during his lengthy period of incarceration, he urged the court to view them through the lens of the harsh conditions in which he was housed. He cited the district court's own decision in *United States v. Walker,* Case No. 07-60238-COHN, ECF 58:6 (S.D. Fla. Feb. 24, 2020), where it had acknowledged that prison disciplinary records should be viewed with caution because prisoners are afforded minimal due process rights in disciplinary proceedings.

Moreover, Petitioner noted that the BOP medical records he had attached to his motion confirmed that he had been diagnosed with depression, which made his acclimation to harsh prison conditions difficult. Importantly, and as expressed in his *pro se c*ompassionate release motion, Petitioner expressed great anguish for his past conduct with the prison psychologist during counseling sessions. Further, he was remorseful and expressed tremendous regret for what he had done and stated a future desire to become a Nutrition Specialist for people with underlying health conditions.

Based upon all of the above, Petitioner urged the court to conclude that he was not the man he was in 2004, and the facts of the case 16 years ago did not demonstrate that he was presently a danger to the community. In light of his demonstrated rehabilitation, he argued, reducing the remainder of his sentence to time served with a condition of electronic monitoring/house arrest for his supervised release, was consistent with the factors in § 3553(a).

The District Court's Denial of the § 3582(c)(1)(A) Motion

On February 9, 2021, the district court issued an order recognizing that Petitioner had indeed shown "extraordinary and compelling" medical reasons within U.S.S.G. § 1B1.13, comment. N. 1(A) for compassionate release. However, the court found, Petitioner could not establish that he "is not a danger to the safety of any other person or to the community" as required by U.S.S.G. § 1B1.13(2), or that the sentencing factors set forth in 18 U.S.C.§ 3553(a) supported a reduction. Accordingly, the court denied him compassionate release.

In finding initially that Petitioner had established "extraordinary and compelling reasons" for a reduction, the court explained:

> The Court is very mindful of the serious and unique threat that the COVID-19 pandemic poses to persons currently incarcerated, who are unable to practice the social distancing measures advised by the Centers for Disease Control. Under 18 U.S.C. §3582(c), as amended by the First Step Act of 2018, courts may grant compassionate release upon finding "extraordinary and compelling reasons" that are "consistent with applicable policy statements issued by the [United States] Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The relevant policy statement issued by the Sentencing Commission is found in U.S.S.G. § 1B1.13. It explains in its commentary that extraordinary and compelling reasons can exist based on the defendant's medical condition, age, or family circumstances. *Id.* § 1B1.13 Application Note 1(A)-(C). With respect to the

> medical condition of the defendant, eligibility for a reduction is conferred on defendants "suffering from a terminal illness" 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." *Id.* § 1B1.13 Application Note 1(A)(i)-(ii). . . .
>
> [I]f a defendant has a chronic medical condition that has been identified by the Centers for Disease Control and Prevention ("CDC") as increasing his or her risk of becoming seriously ill from COVID-19, that condition may qualify as 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," even if that condition would not have satisfied this standard absent the risk of COVID-19. Defendant suffers from Myasthenia Gravis (MG), an autoimmune neuromuscular disease. The medication he takes for this condition suppresses his immune system and the condition itself can cause weakness of the respiratory muscles. Viral infection can trigger a serious complication of MG. Defense counsel retained Dr. Meredith Bock, a neurologist, to review Defendant's medical records and she opines that he "is at extremely high risk of adverse outcomes, including death, if he contracts COVID-19."
>
> Accordingly, the Court finds that Defendant's MG qualifies as a "serious physical or medical condition" as defined in the Sentencing Commission's policy statement found in U.S.S.G. § 1B1.13.

However, the court continued:

> [T]hat is not the end of the inquiry. In order to reduce Defendant's term of imprisonment, the Court must find that he "is not a danger to the safety of any other person or to the community" and that the sentencing factors set forth in 18 U.S.C. § 3553(a) support a reduction. *See* U.S.S.G. § 1B1.13. Because of Defendant's violent conduct committed in connection with the narcotics trafficking conspiracy that led to his conviction in this case, the Court is unable to make either of these findings. Defendant and his co-defendant kidnapped an individual they accused of being a government informant, drove him to a secluded area, shot him in the chest and left him for dead (although he survived). PSI ¶ 5. Considering, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), the Court finds that a reduction of Defendant's sentence by seven years would not promote the interests of justice but would minimize the severity of Defendant's conduct.

For those reasons – notwithstanding his demonstration of "extraordinary and compelling reasons" for release due to a health condition which could prove fatal if he contracted COVID – the court denied Petitioner relief from his sentence.

The Appeal and Affirmance of the District Court

On appeal to the Eleventh Circuit, Petitioner argued that after rightly finding that he had established "extraordinary and compelling" medical reasons for release under § 3582(c)(1)(A), the district court had reversibly erred in denying him relief based upon the "danger to the community" provision in U.S.S.G. § 1B1.13(2), or alternatively, under § 3553(a) based solely on the facts of the instant offense. As to the non-dangerousness requirement in § 1B1.13(2), he argued *inter alia* that that provision was inapplicable, and could not constrain the court from granting relief to an otherwise eligible defendant, since that particular subsection of the policy statement was unconstitutionally included in the policy statement by the Commission without any statutory authority from Congress in 28 U.S.C. § 994(t). And, to the extent that the district court had alternatively denied relief under § 3553(a) based solely on the facts of the instant offense, Petitioner argued, that was error as well.

On the latter point, Petitioner challenged the court's failure to consider either his entire "history and characteristics" or other applicable § 3553(a) factors "as they existed today." He argued, *inter alia*, that the court had erroneously failed to consider his immunocompromised health and risk of death in this pandemic in its § 3553(a) analysis as part of his current "history and characteristics," and wrongly bifucated the "extraordinary and compelling" medical reasons for release inquiry from the § 3553(a)

inquiry when the finding of an extraordinary new medical reason for release should have been a foremost consideration under § 3553(a). It was an abuse of discretion, he argued, for the court to deny relief based entirely on unchanged factors under § 3553(a) like the nature and severity of the offense, without any record indication that the court had considered the changed factors.

The Eleventh Circuit's Decision

On October 14, 2021, without the benefit of oral argument, the Eleventh Circuit affirmed the district court's denial of Petitioner's motion. *United States v. Bell*, 2021 WL 4786732 (11th Cir. Oct. 14, 2021). In doing so, it failed to address any of the above arguments.

As a threshold matter it found, citing the court's prior decision in *United States v. Tinker*, 14 F.4th 1234, 1238 (11th Cir. 2021), "'there are three separate conditions for granting a sentence reductions: (1) there must be "extraordinary and compelling reasons" for doing so; (2) the reduction must be supported by the § 3553(a) factors; and (3) granting a reduction "wouldn't endanger any person or the community within the meaning of § 1B1.13's policy statement.' Each condition is necessary, so the failure to satisfy one condition warrants denial of the motion." *Bell*, 2021 WL 4796732 at *1. Here, the Eleventh Circuit court found, the district court properly considered the § 3553(a) factors and did not abuse its discretion in denying compassionate release under § 3553(a). *Id.* at *2. And for that reason, it held, it "need not evaluate the district court's findings as to the danger releasing Bell would pose. *See* U.S.S.G. § 1B1.13(2)." *Id.* at *2, n. 2.

In explaining why it found no abuse of discretion in the § 3553(a) denial, the court first articulated the Eleventh Circuit standard for reviewing § 3582(c)(1)(A) denials, as established in prior decisions:

> An order granting or denying compassionate release under 3582(c)(1)(A) generally must indicate that the district court has considered "all applicable 3553(a) factors." *United States v. Cook*, 998 F.3d 1180, 1184-84 (11th Cir. 2021). "[A] district court need not exhaustively analyze each § 3553(a) factor or articulate its finding in great detail," and an acknowledgment by the court that it has considered the § 3553(a) factors and the parties' arguments is ordinarily sufficient. *Tinker*, [4 F.3d at 1241] (quotation marks omitted). Nevertheless, the court "must provide enough analysis that meaningful appellate review of the factors' application can take place." *Id.* (quotation marks omitted).
>
> Moreover, the weight to give any particular § 3553(a) factor, whether great or slight, is committed to the district court's sound discretion. *Id.* "Even so, [a] district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Id.* (quotation marks omitted).

Bell, 2021 WL 4786732 at *2. Applying the *Tinker* standard here, it found, "the district court did not abuse its discretion in concluding that a reduction was not supported by the § 3553(a) factors. *Id.* It reasoned:

> Even assuming the court was *required* to consider his post-offense rehabilitation, as Bell argues, the court need not explicitly reference or discuss his evidence of rehabilitation in its order. *See id.* at [1240-41]. And the record shows that the court considered several factors beyond the nature and circumstances of the offense and the history and characteristics of the defendant. *See* 18 U.S.C. § 3553(a). The court weighed the need for the sentence to reflect the severity of the offense conduct. *See* 18 U.S.C. § 3553(a)(2). It also stated that it had considered the parties' filings which discussed at length the factors that Bell contends the district court ignored. *See Tinker*, [14 F.4th at 1241] (concluding that the court adequately considered the § 3553 factors in part because it "acknowledged the parties' filings, which discussed at length the factors that Tinker contends the district court ignored").

REASON FOR GRANTING THE WRIT

The circuits are in conflict on whether, in denying a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling reasons" after considering the factors in 18 U.S.C. § 3553(a), a district court must specifically address the defendant's non-frivolous § 3553(a) arguments based on intervening factual and legal developments, or whether the district court satisfies its duty to explain a denial of compassionate release by stating that it has reviewed the defendant's motion, and unchanged § 3553(a) factors like the nature and severity of the offense support the denial.

A. Legal background

In *Concepcion v. United States*, No. 20-1650, the Court will resolve a circuit conflict on whether, when deciding if it should "impose a reduced sentence" on a defendant under Section 404(b) of the First Step Act of 2018, a district court "must or may" consider intervening factual or legal developments since the original sentencing. But *unlike* Section 404(b), in 18 U.S.C. § 3582(c)(1)(A) Congress *expressly* mandated that if a district court finds "extraordinary and compelling reasons warrant relief," it must "consider[] the factors set forth in section 3553(a) to the extent they are applicable" before granting or denying relief. Accordingly, there is no dispute in this case that a court must consider intervening legal and factual circumstances in conducting the mandatory § 3553(a) weighing under § 3582(c)(1)(A). Indeed, *Pepper v. United States*, 562 U.S. 476 (2011) confirms that a sentencing court must use "the fullest information possible concerning the defendant's life and characteristics," and at a resentencing, consider personal circumstances that have changed. *See id.* at 488, 491 (underscoring that the focus of any § 3553(a) analysis must be upon the defendant "as he stands before the court on the day of sentencing"). Moreover, as the Ninth Circuit

has rightly recognized in the § 3582(c)(2) context, which likewise requires a § 3553(a) balancing of applicable factors at the discretionary stage of the inquiry, it follows from *Pepper* that a court must also consider intervening changes in law under § 3553(a) as well, including changes in the applicable sentencing guidelines. *United States v. Lizarraras-Chacon*, 14 F.4th 961, 967- (9th Cir. 2021).

While there is plainly no dispute among the circuits that relief under § 3582(c)(1)(A) is discretionary, and that a district court may deny relief under § 3553(a) even if the defendant has shown extraordinary and compelling medical reasons for release, the courts sharply disagree as to how much explanation is required for a denial under § 3553(a). Specifically, to assure a reviewing court that the district court adequately considered the applicable § 3553(a) factors as mandated by § 3582(c)(1)(A) and that it did not abuse its discretion, must the district court address the defendant's non-frivolous arguments based upon intervening factual and legal developments? Or, is it sufficient for the court to simply reference having reviewed the defendant's motion where these arguments were made, and support its § 3553(a) ruling with unchanged factors such as the nature and severity of the offense?

Although this Court has never construed any provision in § 3582(c)(1)(A), this Court's precedents in *Rita v. United States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), and *Chavez Meza v. United States*, 138 S.Ct. 1959 (2018) are instructive as to what kind of explanation should accompany a denial of relief under the § 3553(a) component of that provision.

In *Rita*, this Court specified for the first time what type of explanation the district court must provide in imposing a sentence after considering the § 3553(a) factors. Although "brevity or length" will "depend upon [the specific] circumstances" of the case, including the simplicity or complexity of the issues, the Court held that a district court "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." 551 U.S. at 358. Particularly where a defendant presents "nonfrivolous reasons for imposing a different sentence [below the advisory Guideline range], the Court noted, a judge will "normally" "explain why he has rejected those arguments." *Id.* at 357. In Rita's case, the Court found that the sentencing judge's statement of reasons for denying a variance, and imposing sentence at the bottom of the Guideline range, to be "brief but legally sufficient" for three reasons: first, the record made clear that the sentencing judge had listened to each argument in support of the variance and considered the defendant's supporting evidence; second, the judge took the defendant's evidence about his physical ailments into account by imposing a bottom of the Guidelines sentence; and finally, the issues before the court were "conceptually simple." *Id.* at 2469-70.

In *Gall*, the Court applied *Rita* in clarifying that a sentence is not "procedurally reasonable" unless a district court "adequately explain[s] the chosen sentence," 552 U.S. at 51, as indeed, it is the explanation that "allow[s] for meaningful appellate review. *Id.* at 50.

In *Chavez-Meza*, the Court applied *Rita* and *Gall* in considering whether a district court adequately explained granting a defendant the benefit of a retroactive Guideline amendment pursuant to 18 U.S.C. §3582(c)(2), although *not* the extent of reduction requested, by entering the chosen sentence on a form order from the Administrative Office of the U.S. Courts. On that form, the judge was required to certify (and did) that he had "considered" the petitioner's motion and "tak[en] into account the § 3553(a) factors and the relevant Guidelines policy statement." *Id.* at 1965. In resolving the case, the Court considered not just that form order, but the "record as a whole" (which included the record from the original sentencing and the judge's statement of reasons for the petitioner's sentence at that time). It also took into account "the simplicity of this case," stating that its task was only "to decide the case before us." *Id.* at 1967. And, in the very simple case before it, the Court found, the judge's certifications on the AO form satisfied the *Rita* standard – "assuming" purely for argument's sake that *Rita* "applies to sentence modifications," and "district courts have equivalent duties." *Id.* at 1965-66.

The Court was clear, however, that "[i]t could be that, under different facts and a different record, the district court's use of a barebones form order in response to a motion like petitioner's would be inadequate." *Id.* at 1967. It plainly did *not* consider in *Chavez-Meza* the type of explanation required in every § 3582(c)(2) ruling, particularly one involving denial of any relief to an eligible defendant. And, the Court clearly has not considered whether the same or more explanation is required for a § 3553(a) denial under § 3582(c)(1)(A) – a provision that accords the district court

discretion to make a substantial modification to the defendant's sentence well beyond the "limited adjustment" allowed under § 3582(c)(2). *Dillon v. United States*, 560 U.S. 817, 82 (2010). The circuits, currently, are all over the board on what an "adequate explanation" requires in the § 3582(c)(1)(A) context. That issue is squarely presented here.

B. The circuits are intractably divided on the question presented

1. At one extreme on the spectrum of approaches on this issue lies the Eighth Circuit. The Eighth Circuit is the only court to require no explanation at all from the district court in denying a compassionate release motion under § 3553(a). According to *United States v. Rodd*, 966 F.3d 740 (8th Cir. 2020), it is sufficient for the district court to simply recite that it has considered the § 3553(a) factors – without discussing [all of] them individually. And, and if the defendant "'advanced his mitigating factors' in his compassionate release motion, exhibits, and reply memorandum," the court simply "presume[s] that the district court considered them." *Id.* at 748.

2. Close to the Eighth Circuit in this regard lies the Sixth. The Sixth Circuit has found *Chavez-Meza* directly applicable in the § 3582(c)(1)(A) context. While the Sixth Circuit, initially, in *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020), cast doubt on the insufficiency of "barebones orders" in the compassionate release context, *see id.* at 1113-14, 1116 (barebones orders "are reserved for the simplest of cases;" "a record that is all bones and no meat starves criminal defendants of meaningful appellate review;"), it later clarified in *United States v. Navarro*, 986 F.3d 668 (2021) that this discussion in *Jones* was dicta and not binding on a later panel. *United States*

v. Navarro, 986 F.3d 668, 671 (6th Cir. 2021) (finding that discussion in *Jones* to be "in tension" with *Chavez-Meza*). Conducting a "whole record" review in *Navarro*, and giving great weight to the judge's remarks at the original sentencing, the Sixth Circuit found that a request for compassionate release based exclusively on the COVID pandemic was indeed a "conceptually simple matter" "suitable to resolution via a form order" which does not specify the particular § 3553(a) factors considered, "and that the district court does not abuse its discretion in resolving a petition in that manner." *Id.*

Notably, though, the defendant in *Navarro* – unlike Petitioner here – did not argue that any of his personal circumstances had changed since sentencing. *Id.* at 672. And, the Sixth Circuit did at least hold the door open for a different case in which "a more detailed order fleshing out the district court's weighing of the § 3553(a) factors may be desirable." *Id.* Moreover, *Navarro* was a split decision that drew a sharp dissent from Judge Moore, who refused to "condone the district court's issuing a single-sentence order to deny [the defendant's] request for compassionate release when a barren record leaves us with nothing to examine on appeal." She described the majority's reasoning as "bob[ing] alone in a sea of contrary Supreme Court and Sixth Circuit precedent," i*d.* at 673 (Moore, J., dissenting). In her view, the majority's embracing of barebones orders in this different context conflicted directly with *Gall*, *Rita*, and *Chavez-Meza*. Id. at 673-76.

But that dissent did not dissuade subsequent Sixth Circuit panels from continuing to affirm compassionate release denials on form orders, even on different records from *Navarro*. *See, e.g, United States v. Kimball*, 988 F.3d 945 (6th Cir. 2021);

United States v. Harvey, 996 F.3d 310 (6th Cir. 2021). In *Harvey*, Judge Stranch concurred in the judgment but wrote separately to "express [her] concerns regarding [the court's] compassionate release jurisprudence." Id. at 315-17 ("in light of Supreme Court and Sixth Circuit precedent, it seems to me that the parties and the public deserve an actual explanation from the courts")(Stranch, J., concurring).

3. Similar to these circuits, the Eleventh Circuit likewise credits rote recitals by the district court and requires no discussion of the defense arguments for release under § 3553(a). And that is so, even if the defendant's § 3553(a) arguments are not merely "non-frivolous," but in fact, extraordinarily compelling. Indeed, disregarding both *Rita* and *Chavez Meza* in § 3582(c)(1)(A) cases, the Eleventh Circuit has adopted a categorical rule that the district court need not address *any* defendant's arguments under § 3553(a) based upon intervening legal or factual developments (including his risk of death because of a new medical condition, and the pandemic), so long as an unchanged § 3553(a) factor is mentioned.

In *United States v. Tinker*, 14 F.4th 1234 (11th Cir. 2021), the Eleventh Circuit held as a matter of first impression that a district court may deny a § 3582(c)(1)(A) motion solely under § 3553(a), without making a finding on whether the defendant had established "extraordinary and compelling reasons" for release during the COVID-19 pandemic. *Id.* at 1240.[1] And indeed, *Tinker* held, in basing its denial of a compassionate release motion solely on § 3553(a),

[1] As pointed out in *Hald et al. v. United States*, No. 21-6594 (petition filed Dec. 10, 2021), there is a circuit conflict on this issue. Although the government waived a response to the *Hald* petition, on January 13, 2022, the Court requested a response.

> In situations where consideration of the § 3553(a) factors is mandatory, district courts needn't address "each of the 3553(a) factors or all of the mitigating evidence." *United States v. Taylor*, 997 F.3d 1348, 1354 (11th Cir. 2021). Instead, an acknowledgment by the district court that it considered the § 3553(a) factors and the parties' arguments is sufficient. *Id.* at 1354-55. A sentence may be affirmed so long as the record indicates that the district court considered "a number of" the factors such as the "nature and circumstances of the offense," the defendant's history of recidivism, and the types of sentences available. *See United States v. Dorman*, 488 F.3d 936, 944-45 (11th Cir. 2007) (affirming defendant's sentence because although the district court didn't discuss each of the sentencing factors, the record showed that it considered several of them).

Id. at 1241.

Applying that rule to the decision before it for review in *Tinker*, the Eleventh Circuit held that in denying relief under § 3553(a), the district court had no need to "expressly discuss" every § 3553(a) factor or every argument in mitigation – in particular, his evidence and arguments as to his increased risk for a dangerous outcome if he contracted COVID-19 due to his medical conditions, or his evidence of post-offense rehabilitation, or even the types of sentences available. *Id.* at 1240-41. That was so, the court held, because "the district court provided a thorough discussion of *several* § 3553(a) factors and emphasized Tinker's extensive criminal history and the need to protect the public, which was within its discretion to do." *Id.* at 1241 (emphasis added). And, the Eleventh Circuit found significant, the district court "also acknowledged the parties' filings, which discussed at length the factors that Tinker contends the district court ignored." *Id.* Given the two findings on criminal history and the need to protect the public, as well as the court's acknowledgement of having

reviewed the pleadings, the Eleventh Circuit held, the district court did not abuse its discretion in weighing the § 3553(a) factors." *Id.*

In Petitioner's case, the Eleventh Circuit reflexively applied *Tinker*, even though the district court here expressly recognized that Petitioner had met the very high standard under U.S.S.G. § 1B1.13, by showing "extraordinary and compelling" medical reasons for release due to his Myasthenia Gravis. From the wording and structure of the order (in particular, the line "That is not the end of the inquiry"), the district court appeared to have *excluded* its finding of an extraordinary and compelling medical risk of death from its final discussion of § 3553(a). There is certainly no indication from the order that the district court considered Petitioner's newly-developed, extraordinary and compelling medical condition as part of his "history and characteristics" under § 3553(a)(1), or weighed that – and Petitioner's risk of death if he continued to be incarcerated during the pandemic – against the other § 3553(a) factors.

At the very least, the record is ambiguous as to whether the court re-considered the already-found extraordinary and compelling medical condition as part of Petitioner's "history and circumstances" under § 3553(a)(1). And even with that ambiguity, the court did not remand for further explanation or clarification. Rather, the Eleventh Circuit affirmed based on its decision in *Tinker*, finding it sufficient that the court had not merely considered the nature of the offense as Petitioner had alleged, but also its "severity," and had "stated that it had considered the parties' filings, which discussed at length the factors [including post-sentencing rehabilitation] that Bell

contends the district court ignored." *United States v. Bell*, 2021 WL 4786732, at *2 (11th Cir. Oct. 14, 2021) (citing *Tinker* as support for that proposition).

Petitioner relied expressly on *Rita* in his briefing to the Eleventh Circuit. *See* Pet. Reply Br. at 21-23. But there was no acknowledgment of *Rita* in the court's opinion.

4. The First, Second, and Seventh Circuits have similarly ignored the dictates of *Rita* in refusing to require the district court to explicitly address the defendant's non-frivolous arguments under § 3553(a). In these circuits, it is sufficient that the district court states at least one reason under § 3553(a) for denial.

Like the Eighth and Eleventh Circuits, the First Circuit "presume[]s – absent some contrary indication – that a sentencing court considered all the mitigating factors and that those not specifically mentioned were simply unpersuasive." *United States v. Saccocccia*, 10 F.4th 1, 10 (1st Cir. 2021). The First Circuit in *Saccoccia* noted with significance that the district court "explicitly" adopted the reasons in the government's brief.

The Second Circuit likewise has reiterated in the § 3582(c)(1)(A) context, that just as in an original sentencing, "We have never required a district court to 'address every argument the defendant has made or discuss every § 3553(a) factor individually." *United States v. Keitt*, 21 F.4th 67, 72-73 (2nd Cir. 2021) (citing defendant's serious criminal conduct in denying compassionate release under § 3553(a)(citations omitted). And notably, the Second Circuit has expressly rejected the argument that the district court – "which previously balanced the § 3553(a) factors when it sentenced [a

defendant] – should have rebalanced the factors in light of the pandemic." *United States v. Jones*, 17 F.4th 371, 375 (2d Cir. 2021).

And the Seventh Circuit has been explicit that a district court actually need only consider one § 3553(a) factor because "[c]onsideration of even one § 3553(a) factor [such as the seriousness of the offense] may show that the others do not matter." *United States v. Ugbah*, 4 F.3d 595 (7th Cir. 2021) (Easterbrook, J.) (holding that where the judge wrote that releasing the defendant now would "deprecate the seriousness of his offense and its impact on the victims," that was well within his discretion, and made it "unnecessary to give *other* reasons" for denying the motion; stating: "Federal law does not contain a mandatory-dictum policy, under which a judge must consider very possible issue. It is enough to state one reason adequate to support the judgment.")

5. A more nuanced, intermediate position is taken by the Fourth Circuit, which treats a § 3582(c)(1)(A) motion just like a § 3582(c)(2)motion, and applies *Chavez-Meza* to evaluate the sufficiency of a district court's denial of compassionate release under § 3553(a). Indeed, the Fourth Circuit has invoked *Chavez-Meza* in rejecting a "categorical requirement" in § 3582(c)(1)(A) cases that a court acknowledge and address each of the defendant's non-frivolous arguments. *See United States v. Jenkins*, 22 F.4th 162, 170 (4th Cir. 2021); *United States v. High*, 997 F.3d 181, 187 (4th Cir. 2021). While the Fourth Circuit, notably, has adopted a "presumption that the district court sufficiently considered relevant factors" in denying relief under both § 3582(c)(2) and § 3582(c)(1)(A), *Jenkins*, *id.* at 167; *High*, *id.* at 190, it has left the door open to a claim of inadequate explanation regarding intervening developments, by reiterating – based

upon *Chavez Meza* – that "just how much of an explanation is required" for a denial of a § 3582(c)(1)(A) motion under § 3553(a) "depends upon the narrow circumstances of the particular case." *Jenkins*, *id.* at 170; *High*, *id.* at 190. Citing *Chavez-Meza*, the Fourth Circuit reiterates that the district court must "set forth enough" to show that it considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority to allow for meaningful appellate review." *Jenkins*, *id.* at 171. In *Jenkins*, the Fourth Circuit found evidence that "the district court did weigh Jenkins' nonfrivolous arguments, either explicitly or implicitly, and thereby did not abuse its discretion," because it not only acknowledged his particular vulnerability to COVID-19 and increased risk by being incarcerated," but expressly concluded that "his current health status [did] not, however, persuade the court that it[was] appropriate to release [him.]" *Id.* at 172.

Similarly in *United States v. Kibble*, 992 F.3d 326 (4th Cir. 2021), the Fourth Circuit found significant that the record demonstrated that "the district court reconsidered the § 3553(a) factors in light of the extraordinary and compelling [health] circumstances present in Mr. Kibble's case." *Id.* at 332. And notably, although Chief Judge Gregory concurred in that determination for Mr. Kibble, he emphasized for future cases that the court's task under § 3553(a), after finding extraordinary and compelling medical reasons for release, is "not to assess the correctness of the original sentence it imposed," but rather "to determine whether the § 3553(a) factors counseled against a reduction in light of the new, extraordinary circumstances identified." *Id.* at at 334. Accordingly, Chief Judge Gregory expressly disagreed "with the Government's

suggestion that a district court may fulfill its duty to reconsider the § 3553(a) factors by merely recounting the considerations that supported the original sentence." *Id.* at 335 ("There is good reason to believe that, in some cases, a sentence that was 'sufficient but not greater than necessary' before the coronavirus pandemic may no longer meet that criteria.")

Clearly, therefore, in the Fourth Circuit, a district court may not – as in the Eleventh – exclude the very facts resulting in a finding of "extraordinary and compelling" medical reasons for release from its § 3553(a) balancing, and affirm solely on the basis of the nature and severity of the offense. After a finding of extraordinary and compelling medical reasons for release, more than a minimal explanation is necessary in the Fourth Circuit (under *Chavez Meza*).

5. The Tenth Circuit, like the Fourth, applies *Chavez-Meza* in the § 3582(c)(1)(A) context. And, along the lines of Chief Judge Gregory's concurrence in *Kibble*, goes further in mandating that the district court specifically consider and address "the facts allegedly establishing extraordinary and compelling reasons for release under § 3553(a). *United States v. Hald, et al.*, 8 F.4th 932 (10th Cir. 2021), *pet. for cert. filed* Dec. 10, 2021 (No. 21-6594). The Tenth Circuit noted with significance in *Hald* that the district court specifically addressed two defendants' arguments in this regard, and as a result these defendants had not alleged the type of error at issue here on appeal. *Id.* at 947. However, other than arguments based on the intervening factual developments that are alleged to constitute "extraordinary and compelling" reasons for release, the Tenth Circuit hews closely to *Chavez-Meza* in *not* requiring that the district

court address all of the defense points in mitigation under § 3553(a). *See id.* at 948. In its view, only "substantial contentions" by a defendant "demand a written explanation by the court." *Id.*

7. The Fifth Circuit goes further than both the Fourth and Tenth in requiring "a thorough factual record for our review" in every case, and mandating that the district "provide specific factual reasons, including but not limited to due consideration of the § 3553(a) factors, for its decision." *United States v. Chambliss*, 948 F.3d 691, 693 (3rd Cir. 2020). In *Chambliss*, the Fifth Circuit found that the district court "sufficiently articulated" its reasons for denying compassionate release because – after finding that the defendant's terminal illness was indeed an "extraordinary and compelling reason" for a sentence reduction, the court weighed that finding against other § 3553(a) factors (which it detailed), and expressly rejected the defendant's arguments that the time he had served was sufficient because the drug quantity used for sentencing was too high, and his need for medical care should not have the effect of extending his prison term. On the latter point, the Fifth Circuit found significant that the district court specifically found that the defendant was getting adequate medical are at FMC Rochester. *Id.* at 693-94.

8. The Third Circuit has been clear that in the § 3582(c)(1)(A) context, it is appropriate for a district court – in conducting its § 3553(a) inquiry – to specifically address both parties' arguments as to the significance of intervening factual developments. Indeed, in *United States v. Pawlowski*, 967 F.3d 327 (3rd Cir. 2020), the Third Circuit cited *Chambliss* with approval to the extent that the Fifth Circuit

weighed the amount of time a defendant had served under § 3553(a). *Id.* at 331. And indeed, the Third Circuit explained, "[b]ecause a defendant's sentence reflects the sentencing judge's view of the § 3553(a) factors at the time of sentencing, the time remaining in that sentence may – along with the circumstances underlying the motion for compassionate release and the need to avoid unwarranted disparities among similarly situated inmates – inform whether immediate release would be consistent with those factors. *Id.* In that case, the defendant argued "that his medical condition was more serious, and his offense less serious than those for whom other courts have rejected compassionate release." *Id.* at 331. The district court specifically addressed that argument and explained why it disagreed with his assessment of the seriousness of his offense, and why a reduction would itself result in an unwarranted disparity. *See id.* With that type of detailed explanation, the court found, there was no abuse of discretion in denying release under § 3553(a).

The Third Circuit has not yet determined what type of explanations will fall short under § 3582(c)(1)(A). However, from *Pawlowski* and *United States v. Easter*, 975 F.3d 318, 326 (3rd Cir. 2020) (holding even under Section 404(b) a district court must address a defendant's arguments based upon intervening factual developments such as health conditions and rehabilitation arguments in exercising its discretion), it should be clear that this type of explanation – if not more – is required from a district court in the Third Circuit when denying compassionate release.

9. Neither the D.C. or Ninth Circuits have yet issued published decisions clarifying what type of explanation must accompany a compassionate release denial

under § 3553(a). But both circuits have issued decisions strongly suggesting they will likewise fall at the opposite end of the spectrum from the Sixth, Eighth, and Eleventh Circuits.

In *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021), the D.C. Circuit held that "Section 3553(a) requires a discretionary balancing of multiple factors, not just dangerousness." *Id.* at 360. And since the record was silent as to what the court might have done had it considered the correct factors, *id.* the court reversed and remanded finding plain error. *Id.* at 361.

In *United States v. Keller*, 2 F.4th 1278 (9th Cir. 2021), the Ninth Circuit cited with approval the Sixth Circuit's decision in *Jones*, which is no longer followed by the Sixth Circuit. And, notably, in the § 3582(c)(2) context, the Ninth Circuit has applied *Rita* and *Gall* strictly. It has been adamant for years that "a mere statement that the judge had read the papers" was not a sufficient by itself for the judge's treatment of the § 3553(a) factors, and that "a sentencing judge presented with nonfrivolous arguments on § 3553(A) factors should ordinarily explain why he rejects them." *United States v. Trujillo*, 713 F.3d 1003 (9th Cir. 2013). Indeed, to this day, it consistently cites *Trujillo* in remanding for failure of the court to address nonfrivolous defense § 3553(a) arguments both at original sentencings and in § 3582(c)(2) proceedings. *See, e.g., United States v. Zitlalpopoca-Hernandez*, 709 F. App'x 428(9th Cir. Sept. 26, 2017); *United States v. Mitchell*, 2017 WL 3611524 (9th Cir. May 18, 2017).

Most recently, the Ninth Circuit remanded in a § 3582(c)(2) case where it was simply unclear whether the court actually considered the defendants' § 3553(a)

arguments. Specifically, in *Lizarraras-Chacon*, the Ninth Circuit remanded because the district court's order was "at best, ambiguous" as to whether the court "recognized that it had the discretion to consider relevant developments in the law in a § 3553(a) factor analysis." 14 F.4th at 968. That rationale would apply equally to the § 3553(a) balancing under § 3582(c)(1)(A).

C. The decision below is incorrect

The Court's intervention is necessary because the Eleventh Circuit's ruling is wrong for multiple reasons. In the decision below, the Eleventh Circuit followed its previous decision in *Tinker* as it was required to do under its "prior panel precedent" rule – which admits of no exception.[2] But *Tinker* mistakenly relied upon the *Taylor* and *Dorman* decisions that involved original sentencings – where the record included the transcript of the sentencing *hearing* where counsel made the relevant § 3553(a) arguments orally to the court before it imposed sentence. As in *Rita*, there could be no question in *Taylor* and *Dorman* that the court heard those arguments and considered them, even if the court did not address them specifically in refusing to impose the sentence requested by the defendant, and referenced other § 3553(a) factors instead. In a § 3582(c)(1)(A) case decided on the papers, there is no way a reviewing court can know whether the district court read or meaningfully considered the defendant's

[2] All post-*Tinker* Eleventh Circuit panels – like the one below – will be required to follow the dictates of *Tinker* even if convinced it was wrongly decided. *United States v. Steele*, 147 F.3d 1316, 117-18 (11th Cir. 1998)(en banc). *See Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) ("[w]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning").

written § 3553(a) arguments, unless the judge at least acknowledges these arguments. The district court did not do so here.

Applying the logic of *Rita*, *Gall*, and *Chavez-Meza*, and for the reasons stated by the Third, Fourth, Fifth, Ninth and Tenth Circuits above, rote recitals about considering pleadings are insufficient to assure a reviewing court that the district court considered all of the applicable factors, and the defendant's nonfrivolous arguments as to those factors. As these circuits – even those applying *Chavez Meza* strictly – have recognized, an extraordinary and compelling medical reason for relief in a § 3582(c)(1)(A) case is an extremely *significant* consideration under § 3553(a). It rightly deserves more explanation under § 3553(a) than other defense arguments; it may not simply be ignored. As a crucial part of the defendant's changed "history and circumstances," Petitioner's risk of death by remaining incarcerated during the pandemic should have been balanced against the severity of the offense and concerns about recidivism. By failing to engage in that balancing explicitly, the district court erred.

Even if it could be argued that that the district court *might* have reconsidered Petitioner's medical circumstances under § 3553(a), since it *did* find those circumstances were extraordinary in the first part of the opinion, whether it *actually* reconsidered and balanced his medical circumstances and risk of death under § 3553(a) is unclear on this record. In the Ninth Circuit an ambiguous record warrants a remand, and one should have been granted for like reasons here.

Notably, the Ninth Circuit would also have vacated the decision below and remanded for further explanation because there is no record indication that the district court considered under § 3553(a) the intervening change in law that resulted in Petitioner no longer being a Career Offender. In fact, even on a "whole record" review here, there is no such indication. To the contrary, a "whole record review" here confirms that the district court twice denied Petitioner a reduction down to the non-Career Offender guideline range because it believed it was without statutory authority (that it had no discretion) to do so. In the Section 404 proceeding, the court made comments indicating that it believed changes in the law simply could not be considered even at the discretionary phase of the proceeding for a defendant with a "covered offense."

Admittedly, the Court may make clear in *Concepcion* that such an understanding was erroneous under the law. But that does not impact the issue for this compassionate release case. What is crucial here is that nothing in the entire record here suggests that the court properly understood that in conducting the § 3553(a) analysis *under § 3582(c)(1)(A)*, it must correctly calculate the current guidelines and consider disparities with similarly-situated defendants. And indeed, if the district court here disregarded in its § 3553(a) balancing that Petitioner was no longer a Career Offender (as he argued in his pleadings), then the court erred for that reason as well. Again, for the reasons stated in *Lizarraras-Chacon*, an intervening change in the law that affects the Guideline calculation is a required consideration under § 3553(a).

D. The question presented is important, and this case is an ideal vehicle to resolve it.

Questions involving the duty to explain in the context of a denial of relief under 18 U.S.C. § 3582(c)(1)(A) have been important and recurring throughout the country since 2018 when Congress – in Section 603(b) of the First Step Act – removed the Bureau of Prisons as the "gatekeeper" to such motions, and allowed defendant-filed motions for the first time. The opening up of the compassionate release remedy was fortuitous for many incarcerated defendants, since soon thereafter the coronavirus pandemic swept the country and spread rapidly through the BOP. Thousands of motions for release under § 3582(c)(1)(A) were filed, and many at-risk defendants were released to allow them to protect themselves from COVID-19 outside the prison walls. But at the same time, requests for relief were denied under § 3553(a). And it was with those denials that the circuits' non-uniform treatment of the duty to explain in this context began to emerge. This Court's precedents in *Rita*, *Gall*, and *Chavez-Meza* were either not heeded, or misunderstood by many lower courts.

In *Chavez-Meza*, the Court did not resolve whether the dictates of *Rita* requiring a district court to address a defendant's nonfrivolous § 3553(a) arguments, apply in a sentence modification proceeding. It left that question for another day. That day has come, and this is the ideal case to resolve that question for several reasons.

First, the Court in *Chavez-Meza* restricted its holding to the "simple" case before it. But as several circuits have recognized, the § 3553(a) balancing question where a defendant has shown extraordinary and compelling medical reasons for release under § 3582(c)(1)(A) is *not* "simple." It is extremely complex. And there are therefore far

greater reasons here, than in the narrowly-circumscribed § 3582(c)(2) context, to require a more fulsome discussion by the district court under § 3553(a), explaining how it balanced other factors against the defendant's risk of death in denying compassionate release.

Second, the district court found explicitly here that Petitioner's medical condition and risk of death if he contracted COVID was indeed an "extraordinary and compelling reason" for release, within the strict confines of § 1B1.13, comment. N. 1(A). And that application note sets a very high bar. While district judges outside the Eleventh Circuit are no longer bound by § 1B1.13 and may determine what is "extraordinary and compelling" on their own because their appellate courts have found that § 1B1.13 and its application notes are "inapplicable" after the First Step Act,[3] the Eleventh Circuit has refused to allow judges that same discretion. *See United States v. Bryant*, 996 F.3d 1243 (11th Cir.), *cert. denied*, 142 S.Ct. 583 (2021). As such, if as here Eleventh Circuit defendants can meet the Commission's heightened standard in § 1B1.13, note 1(A) for a showing of "extraordinary and compelling reasons for release, they deserve, at the very least, a reasoned explanation from the district court as to why

[3] In the uniform view of the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits, there is *no* "*applicable* policy statement" constraining the court's discretion at this time for *defendant-filed* motions after the First Step Act because § 1B1.13 contains "clearly outdated" language requiring judicial deference to the Director of the BOP. *See United States v. Brooker*, 9796 F.3d 228, 235-36 (2d Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109-11 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 275-77, 280-84 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1048-51 (10th Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 832-37 (10th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 799-802 (9th Cir. 2021); *United States v. Shkambi*, 994 F.3d 338, 392-93 (5th Cir. 2021); *United States v. Long*, 997 F.3d 342, 354-59 (D.C. Cir. May 18, 2021); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021).

a new, extraordinary and compelling medical condition that puts them at risk of death does not outweigh unchanged factors under § 3553(a).

Third, given the exceedingly rigid way in which the Eleventh Circuit applies its prior panel precedent rule, no defendant in the Eleventh Circuit will have an opportunity for a sentence reduction under § 3582(c)(1)(A) on the grounds on which defendants in other circuits have already secured release. Nor will they receive an adequate explanation from the court as to why compassionate release was denied. Only this Court can assure that the right to a sentence reduction under § 3582(c)(1)(A) is not a function of this unfortunate geography.

Fourth, the issue raised here was squarely pressed below and passed on by the Eleventh Circuit in both *Tinker* and the instant case (following *Tinker*).

Finally, this case presents a clean vehicle to decide the question presented. There are no extraneous issues. Notably, the Eleventh Circuit did not articulate any alternative basis for upholding the district court. Indeed, although the district court also found that the petition should be denied under the non-dangerousness provision in §1B1.13(2), the Eleventh Circuit did not even attempt to defend that alternative ruling under the non-delegation doctrine.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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