

APPENDIX

A

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus RAMON LOPEZ, Defendant - Appellant.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2021 U.S. App. LEXIS 24654

No. 20-10389 Non-Argument Calendar

August 18, 2021, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

(2021 U.S. App. LEXIS 1)Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:91-cr-00317-UU-1. United States v. Lopez, 53 F.3d 1285, 1995 U.S. App. LEXIS 10051 (11th Cir. Fla., Apr. 24, 1995)

Disposition:

AFFIRMED.

Counsel

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Jason Wu, Assistant U.S. Attorney, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, MIAMI, FL; Scott Dion, Emily M. Smachetti, U.S. Attorney's Office, MIAMI, FL.

For RAMON LOPEZ, Defendant - Appellant: Michael Caruso, Federal Public Defender, Federal Public Defender's Office, MIAMI, FL; Bernardo Lopez, Federal Public Defender's Office, FORT LAUDERDALE, FL.

Judges: Before WILSON, ROSENBAUM, and ANDERSON, Circuit Judges.

CASE SUMMARYDistrict court was within discretion in denying compassionate release motion as defendant did not present extraordinary and compelling reasons, did not challenge that he presented a danger to the community due to his criminal history and violent drug-related conduct, nor did he rebut government's consideration of 18 U.S.C.S. § 3553(a) factors.

OVERVIEW: HOLDINGS: [1]-The district court was within its discretion in denying defendant's compassionate release motion after its valid determination that he presented a danger to the safety of another or the community and its consideration of applicable 18 U.S.C.S. § 3553(a) factors and even if the district court erred in determining that he did not present any extraordinary and compelling reasons, he did not challenge the alternative holding that he presented a danger to the community, nor did he rebut the government's argument that district court appropriately considered the applicable § 3553(a) factors, which include the defendant's history and characteristics, violent and drug-related conduct and a history of disciplinary infractions while imprisoned.

OUTCOME: Judgment affirmed.

CIRHOT

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LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Appellate courts review a district court's denial of a 18 U.S.C.S. § 3582(c)(1)(A) motion for abuse of discretion. A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous. Appellate courts may affirm on any ground supported by the record.

Governments > Courts > Authority to Adjudicate

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Court's Authority

18 U.S.C.S. § 3582(c)(1)(A) permits district courts to modify a term of imprisonment when they otherwise lack the inherent authority to do so. 18 U.S.C.S. § 3582(c).

Criminal Law & Procedure > Sentencing > Imposition > Factors

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Court's Authority

Prior to the enactment of the First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 in December 2018, § 3582(c)(1)(A) allowed a district court to reduce a prisoner's term of imprisonment only upon motion of the Bureau of Prisons (BOP) Director. 18 U.S.C.S. § 3582(c)(1)(A) (2018). 18 U.S.C.S. § 3582(c) now provides that in addition to a motion by a BOP Director, upon motion of the defendant after the defendant has fully exhausted all administrative rights, a district court may reduce the term of imprisonment, after considering the factors set forth in § 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. 18 U.S.C.S. § 3582(c)(1)(A); Pub. L. No. 115-391, § 603(b), 132 Stat. at 5239.

Criminal Law & Procedure > Sentencing > Imposition > Factors

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Court's Authority

U.S. Sentencing Guidelines Manual § 1B1.13 permits a sentence reduction, if, after considering the factors set forth in 18 U.S.C.S. § 3553(a), to the extent that they are applicable, the district court determines that extraordinary and compelling reasons warrant the reduction, the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C.S. § 3142(g), and the reduction is consistent with the statement. U.S. Sentencing Guidelines Manual § 1B1.13(1)(A), (2), (3). The commentary to the policy statement defines four factors that qualify as extraordinary and compelling reasons: medical condition, age, family circumstances, and other reasons as determined by the Director of the Bureau of Prisons. U.S. Sentencing Guidelines Manual § 1B1.13, cmt., application n. 1.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

U.S. Sentencing Guidelines Manual § 1B1.13 is an applicable, binding policy statement for all 18 U.S.C.S. § 3582(c)(1)(A) motions, regardless of whether the motions are brought by inmates or Bureau of Prisons (BOP) directors. With regard to the second question, the Bryant court made clear that §

1B1.13's catch-all other reasons provision provides discretion only to the BOP to develop other reasons (outside of age, medical condition, and family circumstances) warranting compassionate release, not district courts. Thus, district courts may not reduce a sentence by granting a motion filed by a prisoner that asserts as the basis for a finding of extraordinary and compelling reasons other reasons.

Criminal Law & Procedure > Sentencing > Imposition > Factors

For compassionate release motions made pursuant to 18 U.S.C.S. § 3582(c)(1)(A), a district court must explain its sentencing decisions adequately enough to allow for meaningful appellate review, and we must be able to understand from the record how the district court arrived at its conclusion, including what factors it relied upon.

Criminal Law & Procedure > Appeals > Reviewability > Waiver > Waiver Triggers Generally

When a party makes no arguments on the merits as to an issue, the issue is deemed waived.

Opinion

PER CURIAM:

Ramon Lopez, a federal prisoner represented by counsel on appeal,¹ challenges the district court's order denying his motion for "compassionate release" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), as modified by § 603 of the First Step Act.² Lopez argues that the district court abused its discretion when it denied his motion for compassionate release because it erred in determining the scope of its authority by interpreting the policy statement in U.S. Sentencing Guidelines Manual § 1B1.13 as limiting the court's discretion and because it did not consider certain of his arguments as "other factors" warranting compassionate release under{2021 U.S. App. LEXIS 2} this policy statement.

We review a district court's denial of a § 3582(c)(1)(A) motion for abuse of discretion. United States v. Harris, 989 F.3d 908, 911 (11th Cir. 2021). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Id.* (internal quotation marks omitted). We may affirm on any ground supported by the record. United States v. Muho, 978 F.3d 1212, 1219 (11th Cir. 2020).

Section 3582(c)(1)(A) permits district courts to modify a term of imprisonment when they otherwise lack the inherent authority to do so. 18 U.S.C. § 3582(c); United States v. Jones, 962 F.3d 1290, 1297 (11th Cir. 2020). Prior to the enactment of the First Step Act in December 2018, § 3582(c)(1)(A) allowed a district court to reduce a prisoner's term of imprisonment only upon motion of the Bureau of Prisons ("BOP") Director. 18 U.S.C. § 3582(c)(1)(A) (2018). Section 3582(c) now provides that in addition to a motion by a BOP Director, "upon motion of the defendant after the defendant has fully exhausted all administrative rights," a district court "may reduce the term of imprisonment . . . , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the{2021 U.S. App. LEXIS 3} Sentencing Commission." § 3582(c)(1)(A); Pub. L. No. 115-391, § 603(b), 132 Stat. at 5239.

The district court determined that U.S. Sentencing Guidelines Manual § 1B1.13 was the applicable policy statement that defined the court's authority and limited its discretion. Section 1B1.13 permits a

sentence reduction, "if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable," the district court determines that "[e]xtraordinary and compelling reasons warrant the reduction," "[t]he 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 the reduction is consistent with the statement. U.S.S.G. § 1B1.13(1)(A), (2), (3). The commentary to the policy statement defines four factors that qualify as extraordinary and compelling reasons: medical condition, age, family circumstances, and "other reasons . . . [a]s determined by the Director of the Bureau of Prisons." § 1B1.13, cmt. n.1.

Lopez argues that district court committed legal error by concluding that this policy statement limited the court's discretion because the Sentencing Commission has not issued a new policy statement since the First Step Act became effective and thus no policy statement addresses motions for compassionate release filed by federal inmates, as opposed to by BOP directors. He thus urges that § 1B1.13 is mere guidance{2021 U.S. App. LEXIS 4} and, at the same time, that under the First Step Act, district courts have as much discretion as the BOP held prior to the Act under the "other reasons" provision of § 1B1.13. In particular, he argues the court erred by not considering any factor not expressly listed in the commentary and not addressing as "other reasons" for release his argument about the effect Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), would have had on his sentence had he been sentenced after those decisions were issued.

Lopez's arguments in this regard, however, are foreclosed by our Court's recent decision in United States v. Bryant, 996 F.3d 1243, 1262 (11th Cir. 2021). In Bryant, our Court addressed two questions related to 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, and U.S.S.G. § 1B1.13: "[f]irst . . . whether district courts reviewing defendant-filed motions under Section 3582(c)(1)(A) are bound by the Sentencing Commission's policy statement," and "[s]econd, . . . how [should] district courts . . . apply that statement to motions filed under Section 3582(c)(1)(A)." 996 F.3d at 1247. As to the first question, the Bryant court held that § 1B1.13 is an applicable, binding policy statement for all Section 3582(c)(1)(A) motions, "regardless of whether the motions are brought by inmates or BOP directors." 996 F.3d at 1262. With regard to the second question, the Bryant court made clear that § 1B1.13's catch-all "other reasons" provision provides{2021 U.S. App. LEXIS 5} discretion only to the BOP to develop other reasons (outside of age, medical condition, and family circumstances) warranting compassionate release, not district courts. Id. Thus, district courts may not reduce a sentence by granting a motion filed by a prisoner that asserts as the basis for a finding of extraordinary and compelling reasons "other reasons."

Therefore, in this case, the district court did not err as Lopez urges. The district court did not err in not considering any of Lopez's other arguments outside the framework required by § 3582(c)(1)(A) and § 1B1.13 and its commentary. And the district court did not err in not thoroughly addressing the merits of Lopez's Apprendi-Alleyne argument because that argument does not fit within any of the three express factors in § 1B1.13, and the district court did not have discretion to consider it under the "other reasons" category.³ The district court had no discretion to consider any of Lopez's arguments as "other reasons" warranting his compassionate release. The district court properly determined that the policy statement in § 1B1.13 constrained the court's discretion and was not just guidance, as Bryant makes clear.

Not foreclosed completely by Bryant{2021 U.S. App. LEXIS 6} are Lopez's arguments that the district's analyses of his age, medical conditions, and family circumstances were erroneous under the proper framework. However, and as the government argues,⁴ even if the district court erred in determining that Lopez did not present any extraordinary and compelling reasons, Lopez does not challenge the district court's alternative holding that he presents a danger to the community, nor does he rebut the government's argument that the district court appropriately considered the

applicable § 3553(a) factors, which include the defendant's history and characteristics. See 18 U.S.C. § 3553(a)(1); see also *Cook*, 998 F.3d at 1184 (holding a district court must consider the applicable § 3553(a) factors and explain its decision in a way that allows for meaningful appellate review). Indeed, the district court explained in its order that it was "inclined to touch upon Defendant's criminal background and history of disrespect for the law"—despite its holding that Lopez failed to demonstrate extraordinary and compelling reasons—and proceeded to describe Lopez's extensive criminal history that started in 1981 and included violent and drug-related conduct and a history of disciplinary infractions while imprisoned. Lopez presents **{2021 U.S. App. LEXIS 7}** no argument that the district court should have considered other applicable § 3553(a) factors or that it was not within its discretion to conclude as it did regarding Lopez's being a danger to others and the community. Lopez has thus waived any arguments on these issues. See *Kelliher v. Veneman*, 313 F.3d 1270, 1274 n.3 (11th Cir. 2002) (holding that when a party makes "no arguments on the merits as to [an] issue, the issue is deemed waived"). Therefore, we conclude that the district court was within its discretion to deny Lopez's compassionate release motion after its valid determination that Lopez presented a danger to the safety of another or the community and its consideration of applicable § 3553(a) factors.

Accordingly, we affirm the order of the district court denying Lopez's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).

AFFIRMED.

Footnotes

1

Lopez filed the motion underlying this appeal pro se, but counsel subsequently filed a memorandum in support of the motion in the district court.

2

First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

3

Lopez argues that his case should be remanded because, in violation of *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (en banc), the district court completely failed to address his argument regarding Apprendi. But the district court did, in fact, address such argument: the district court explained in a footnote that it had considered Lopez's argument regarding Apprendi and the "other reasons" category and concluded that it was not properly before the Court on a motion for compassionate release. And *Clisby*, by its terms, only requires "district courts to resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254." 960 F.2d at 936. Instead, for compassionate release motions made pursuant to 18 U.S.C. § 3582(c)(1)(A), "a district court 'must explain its sentencing decisions adequately enough to allow for meaningful appellate review,'" and "we must be able to understand from the record how the district court arrived at its conclusion, including what factors it relied upon." United States v. Cook, 998 F.3d 1180, 1184-85 (11th Cir. 2021) (citations omitted). The district court's footnote explaining why it was rejecting this argument by Lopez was enough to satisfy the applicable standard. The district court was not required to explain further its valid legal conclusion.

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The government conceded in a letter filed after briefing that Lopez demonstrated extraordinary and compelling reasons, establishing eligibility for compassionate release, in that his hypertension may increase the likelihood of severe COVID-19. But the government maintains that the district court,

nonetheless, did not abuse its discretion in denying Lopez's motion because it properly considered the applicable § 3553(a) factors.

APPENDIX

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:91-cr-00317-UU-1

UNITED STATES OF AMERICA,

v.

RAMON LOPEZ,

Defendant.

ORDER DENYING COMPASSIONATE RELEASE

THIS CAUSE is before the Court on Defendant's *pro se* motion for compassionate release (D.E. 472) (the "Motion").

The Court has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

I. Background

On October 29, 1993, Defendant was sentenced to life imprisonment, five years of supervised release, and a \$25,000 fine for conspiring to possess cocaine with intent to distribute, and possession of cocaine with intent to distribute. D.E. 476 at 2-4. Evidence from the trial established that Defendant provided \$50,000 to rent an aircraft and hire a crew to transport 300 kilograms of cocaine from Colombia to the Southern District of Florida. *Id.* at 3. Defendant was "the most culpable" of his co-defendants and "was the source of the cocaine in the United States." PSI ¶ 16. In imposing sentence, the Court considered Defendant's substantial criminal history and the fact that he committed the offense while on release for other federal charges. *Id.* Defendant is now 67 years old and has served approximately 28 years in prison. D.E. 472 at 2.

Defendant initially submitted a request for compassionate release to FCI Coleman in April 9, 2019, in which he argued he should be released due to family circumstances and because his sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000). D.E. 472 at 8; D.E. 472-1. On June 25, 2019, his request was denied because he did not explain sufficient extraordinary and compelling reasons to justify his release. D.E. 472-1 at 73.

On October 23, 2019, Defendant filed the instant *pro se* motion for compassionate release. D.E. 472. Defendant's medical records provide that his documented health issues include:

- Eye/ vision problems, including cataracts and stenosis of lacrimal punctum. D.E. 476-2 at 1-2, 9, 25.
- "Benign hypertrophy of prostate" and "inflammatory disease of prostate." *Id.* at 11, 25, 40.
- Hypertension, "benign essential." *Id.* at 3, 11, 25, 40.
- Hyperlipidemia. *Id.* at 10, 12, 40.
- Aortic sclerosis without stenosis. *Id.* at 10, 25. On May 23, 2019, Defendant "request[d] an update on his Cardiology referral . . . he received paperwork . . . that his Cardiology evaluation had been approved several months ago but has not heard any information since." *Id.* at 19.
- Gastritis. *Id.* at 10.
- Hiatal hernia. *Id.* at 10.
- A history of osteoarthritis. *Id.* at 11.
- "Gastro-esophageal reflux disease without esophagitis." *Id.* at 12.
- Dental issues, including pulpitis and cracked teeth. *Id.* at 25.

In addition, Defendant avers that his family circumstances justify release. He states that since becoming incarcerated, he lost his son, who was "an army veteran with a beautiful wife and two beautiful daughters." D.E. 472 at 7. In a letter dated February 20, 2019, Defendant's daughter-in-law, Elizabeth Lopez, wrote that she "would like [her] daughters' grandfather to be a paternal figure, someone they need since [her] husband passed away." D.E. 472-1 at 44. Defendant is "more than glad to take that roll, [especially because he] was out of [his] own children's live[s] [during] their childhood." D.E. 472 at 7.

Defendant, through counsel, filed a memorandum in support of his Motion, in which he stated that his age, deteriorating health, family circumstances, and other reasons justify his release.

D.E. 475.¹ In its opposition, the Government argues that Defendant should not be granted compassionate release due to his criminal history, six prison disciplinary infractions, and “unremarkable” medical history. D.E. 476.

II. Legal Standard

The First Step Act of 2018 (the “Act”) went into effect on December 21, 2018. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Prior to the passage of the Act, prisoners could file motions for compassionate release with the BOP, and only the Director of the BOP could file motions for compassionate release with the court. Section 603(b) of the Act modified 18 U.S.C. § 3582(c)(1)(A) to “increase[e] the use and transparency of compassionate release.” Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239. Section 3582(c)(1)(A) now permits a prisoner to file a motion for compassionate release directly with the court:

the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction . . .

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

18 U.S.C. § 3582(c)(1)(A).

¹ The “other reasons” include that Defendant’s sentence is contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), of which he is not able to receive the benefit, and that if Defendant “had been charged with the exact same offenses today, alleging only a detectable amount of cocaine, the statutory maximum would be 20 years,” not life in prison. D.E. 475 at 4–5; D.E. 477 at 4. This argument is not properly before the Court on a motion for compassionate release.

A sentence reduction under Section 3582(c)(1)(A) is consistent with the Sentencing Commission's applicable policy statement where "extraordinary and compelling" reasons merit the reduction and the defendant is not a danger to any person or to the community. U.S.S.G. § 1B1.13(2) & cmt. n.1. Extraordinary and compelling reasons include:

(A) Medical Condition of the Defendant.

- (i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
- (ii) The defendant is—
 - (I) suffering from a serious physical or medical condition,
 - (II) suffering from a serious functional or cognitive impairment, or
 - (III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

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

(C) Family Circumstances

- (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
- (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) As determined by the Director of the [BOP], there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)

U.S.S.G. § 1B1.13, cmt. n.1. Thus, before reducing a sentence under Section 3582(c)(1)(A)(i), a sentencing court must do three things: (1) find that extraordinary and compelling reasons warrant such a reduction; (2) find that the defendant is not a danger to any person or to the community; and (3) consider the statutory sentencing factors set forth in Section 3553(a).

III. Analysis

A. Defendant Has Not Presented Extraordinary and Compelling Reasons

Defendant argues that he meets the requirements for extraordinary and compelling reasons under U.S.S.G. § 1B1.13, cmt. n.1(B) – Age of the Defendant (“subsection (B)”). Subsection B requires that the defendant be at least 65 years of age and have served at least 10 years of his sentence. Defendant meets those requirements. However, subsection (B) also requires that the defendant be “**experiencing a serious deterioration** in physical or mental health because of the aging process.” As listed above, Defendant’s health issues include aortic sclerosis, cataracts, inflammatory disease of the prostate, gastrointestinal issues, hypertension, hyperlipidemia, and a hiatal hernia. D.E. 476-2. Court have, for example, granted compassionate release to prisoners who have suffered from serious conditions such as terminal brain cancer;² congestive heart failure;³ breast cancer coupled with inadequate medical treatment;⁴ numerous age-related conditions, including congestive heart failure, atherosclerosis, diabetes, and chronic diabetic kidney disease;⁵ and numerous age-related conditions, including dementia, coronary artery disease, leg amputation, and gout.⁶ The Court finds that Defendant’s health issues are not extraordinary and compelling under subsection (B). The fact is he was sentenced to life in prison, so he obviously will suffer the effects of aging while incarcerated. The problems he describes are not abnormal aged-related illnesses.

The Court also rejects Defendant’s argument that his family circumstances—his son’s death, leaving a widow and young children—justify compassionate release under subsection (C).

² *United States v. Brittner*, No. 9:16-cr-00015, 2019 LEXIS 73653, at *1 (D. Mont. May 1, 2019).

³ *United States v. York*, No. 3:11-cr-00076, 2019 LEXIS 119768, at *18 (E.D. Tenn. July 18, 2019).

⁴ *United States v. Beck*, No. 13-cr-186, 2019 WL 2716505, at *1 (M.D.N.C. June 28, 2019).

⁵ *United States v. Bellamy*, No. 15-cr-00165-8, 2019 LEXIS 124219, at *1 (D. Minn. July 25, 2019).

⁶ *United States v. Peterson*, No. 7:12-cr-00015, 2019 LEXIS 93480, at *2 (E.D.N.C. June 4, 2019).

While at least one court has granted compassionate release based on family circumstances not expressly prescribed in subsection (C), this Court does not deem it appropriate to grant relief on this basis in this case. *See United States v. Bucci*, No. 04-cr-10194-WGY, 2019 LEXIS 178308, at *4 (D. Mass. Sept. 16, 2019) (granting compassionate release because the defendant was the only available caregiver to his ailing mother, and noting that “this Court sees no reason to discount this unique role simply because the incapacitated family member is a parent and not a spouse”). Moreover, Defendant indicates that if released, he would reside in Miami with his son, Raymond Lopez, not in Jacksonville with his daughter-in-law, Elizabeth Lopez. D.E. 479.

B. Danger to the Community

Section 1B1.13 of the Guidelines provides that compassionate release is only appropriate where 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). U.S.S.G. § 1B1.13(2). Although the Court need not consider Defendant’s dangerousness because he has not demonstrated that extraordinary and compelling reasons merit his release, the Court is inclined to touch upon Defendant’s criminal background and history of disrespect for the law.

Defendant immigrated to the United States from Cuba in 1979, when he was 27 years old. D.E. 476 at 1. His criminal activity began soon after he arrived in this country and spanned from approximately 1981 through 1991. *Id.* at 1–3. In 1982, he pleaded guilty to kidnapping with a machine gun and was sentenced to five years in prison. PSI ¶ 33. Defendant and his co-defendants kidnapped the victim at gunpoint, drove him to a farm, physically assaulted him, and threatened to kill him and his family unless he paid a \$10,000 ransom. *Id.* Defendant was convicted of at least two other offenses involving firearms, *id.* ¶¶ 34, 44, and one other offense involving drugs, ¶ 36. He also has two convictions for driving under the influence of alcohol. *Id.* ¶¶ 35, 40.

In imposing two concurrent life sentences, the Court considered Defendant's criminal history and the fact that he committed the offense while on release for other federal charges. Judgment at 2; PSI ¶ 36. In 1991, when Defendant was arrested for the instant offense, he was on release in a separate federal criminal case in this District involving nearly identical charges in case 1:90-cr-00389-CMA-2, in which he was also "viewed as the most culpable defendant." PSI ¶ 36. He was released on bond and placed on electronic monitoring in that case. *Id.*; D.E. 476 at 2. In addition, while he was being held pretrial in the instant case, he went to great lengths to attempt escape from custody, an offense to which he pleaded guilty. PSI ¶ 43.

The Government argues that Defendant's BOP disciplinary infraction history precludes the relief he seeks. D.E. 476 at 5. Between 1996 and 2008, Defendant received six infractions: (1) "interfering with taking count" in 2008; (2) "refusing to obey an order" in 2003; (3) "being insolent to staff member" in 2003; (4) "being insolent to staff member" in 1999; (5) "possession of a dangerous weapon – razor blade detached from issued razor" in 1998; and (6) "engaging in group demonstration" in 1996. D.E. 476-1. The Court notes that it has been over 10 years since Defendant last received an infraction, and over 20 years since he possessed a dangerous weapon.

IV. Conclusion

Accordingly, for the reasons stated herein, it is hereby ORDERED AND ADJUDGED that Defendant's Motion, D.E. 472, is DENIED.

DONE AND ORDERED in Chambers, Miami, Florida, this 23d day of January, 2020.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

APPENDIX

C

Ch. 1 Pt. A

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

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
- (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

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

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of

Ch. 1 Pt. A

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.

§1B1.13

(ii) The defendant is—

- (I) suffering from a serious physical or medical condition,
- (II) suffering from a serious functional or cognitive impairment, or
- (III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

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

(C) **Family Circumstances.**—

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- (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
- (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

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

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

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

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

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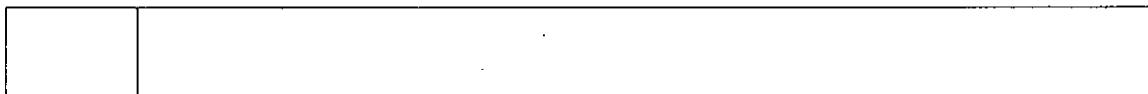
the defendant is a danger to the safety of any other person or to the community.

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

§1B1.13

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

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



Statement

PROGRAM STATEMENT

OPI OGC/LCI

NUMBER 5050.50

DATE January 17, 2019

Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)

/s/

Approved: Hugh J. Hurwitz

Acting Director, Federal Bureau of Prisons

1. PURPOSE AND SCOPE

§571.60 Purpose and scope.

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Under 18 U.S.C. 4205(g), a sentencing court, on motion of the Bureau of Prisons, may make an inmate with a minimum term sentence immediately eligible for parole by reducing the minimum term of the sentence to time served. Under 18 U.S.C. 3582(c)(1)(A), a sentencing court, on motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment of an inmate sentenced under the Comprehensive Crime Control Act of 1984.

The Bureau uses 18 U.S.C. 4205(g) and 18 U.S.C. 3582(c)(1)(A) in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.

18 U.S.C. 3582 was amended by the First Step Act of 2018, revisions noted below in Summary of Changes.

For the purposes of this Program Statement, the terms “compassionate release” and “reduction in sentence” are used interchangeably.

Federal Regulations from 28 CFR are in this type. Implementing information is in this type.

In deciding whether to file a motion under either 18 U.S.C. 4205(g) or 18 U.S.C. 3582, the Bureau of Prisons (BOP) should consider whether the inmate’s release would pose a danger to the safety of any other person or the community.

Under 18 USC 3582 (d)(2)(3), the Bureau ensures that all facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

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- (i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);
- (ii) the procedures and timelines for initiating and resolving requests described in clause (i); and
- (iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

§572.40 Compassionate release under 18 U.S.C. 4205(g).

18 U.S.C. 4205(g) was repealed effective November 1, 1987, but remains the controlling law for inmates whose offenses occurred prior to that date. For inmates whose offenses occurred on or after November 1, 1987, the applicable statute is 18 U.S.C. 3582(c)(1)(A). Procedures for compassionate release of an inmate under either provision are contained in 28 CFR part 571, subpart G.

a. Program Objectives. The expected results of this program are:

A motion for a modification of a sentence will be made to the sentencing court only in particularly extraordinary or compelling circumstances that could not reasonably have been foreseen by the court at the time of sentencing.

The public will be protected from undue risk by careful review of each compassionate release request.

Compassionate release motions will be filed with the sentencing judge in accordance with the statutory requirements of 18 U.S.C. 3582 or 4205(g).

b. Summary of Changes

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Policy Rescinded

P 5050.49 CN-1 Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)

The following have been added to this version of the Program Statement:

Requirements of section 603(b) of the First Step Act, codified at 18 USC § 3582:

- Ø Requiring inmates be informed of reduction in sentence availability and process;
- Ø Modifying definition of “terminally ill;”
- Ø Requiring notice and assistance for terminally ill offenders;
- Ø Requiring requests from terminally ill offenders to be processed within 14 days;
- Ø Requiring notice and assistance for debilitated offenders; and
- Ø Specifying inmates may file directly to court after exhaustion of administrative remedies, or 30 days from receipt of a request by the Warden’s Office.

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2. INITIATION OF REQUEST – EXTRAORDINARY OR COMPELLING CIRCUMSTANCES

§ 571.61 Initiation of request – extraordinary or compelling circumstances.

a. A request for a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) shall be submitted to the Warden. Ordinarily, the request shall be in writing, and submitted by the inmate. An inmate may initiate a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only when there are particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing. The inmate's request shall at a minimum contain the following information:

(1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.

(2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.

b. The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate's request. Staff shall refer a request received at the Central Office to the Warden of the institution where the inmate is confined.

A request for a RIS is considered "submitted" for the purposes of 18 USC §3582 (c)(1), when received by the Warden in accordance with this section.

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APPENDIX

D

KER:lg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
91-0317 CR-ROETTGER

21 U.S.C. §846
21 U.S.C. §841(a)(1)
18 U.S.C. §2

UNITED STATES OF AMERICA,

v.

RAMON LOPEZ,
GERARDO MACHADO,
REDELIO GARCIA,
NANCY GARCIA,
MARIA ALVAREZ,
a/k/a Luz Mary Alvarez Del Pino,
and
JAVIER OROSCO-ZAPATA,

INDICTMENT

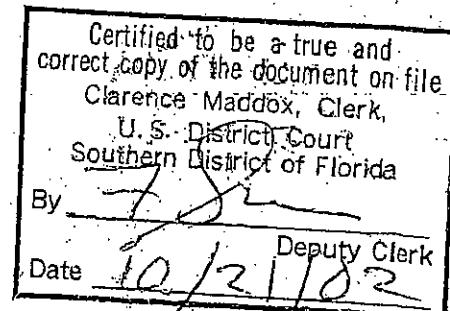
The Grand Jury charges that:

COUNT I

From on or about April 1, 1991, to on or about April 16, 1991,
at Miami, Dade County, in the Southern District of Florida, and
elsewhere, the defendants

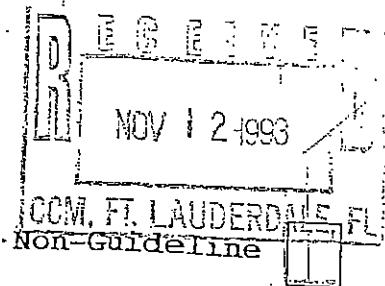
RAMON LOPEZ,
GERARDO MACHADO,
REDELIO GARCIA,
NANCY GARCIA,
MARIA ALVAREZ,
a/k/a Luz Mary Alvarez Del Pino,
and
JAVIER OROSCO-ZAPATA,

did knowingly and intentionally combine, conspire, confederate and
agree with each other and with persons unknown to the Grand Jury
to possess with intent to distribute a Schedule II narcotic
controlled substance, that is, a mixture and substance containing
a detectable amount of cocaine, in violation of Title 21, United



APPENDIX

E



UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

REVISED

UNITED STATES OF AMERICA

vs.) PRESENTENCE INVESTIGATION REPORT
Ramon Lopez) Docket No. 91-0317-CR-UNGARO-
) BENAGES
) Defendant No. One
) Guideline Manual: 1990
)

Prepared for: The Honorable Ursula Ungaro-Benages
U. S. District Judge

Prepared by: Janice S. Smith/lah
U. S. Probation Officer
300 N.E. 1st Avenue
Miami, Florida 33132-2126
(305) 536-6759

Assistant U. S. Attorney
Karen Rochlin
99 N.E. 4th Street
7th Floor
Miami, Florida 33132
(305) 536-5457

Defense Counsel
William M. Norris
Grove Forest Plaza
2937 S.W. 27th Ave.
Suite 206
Miami, Florida 33133
(305) 443-4466

Sentence Date: September 27, 1993 @ 1:00 p.m.

Offense: Count 1: Conspiracy to Possess with Intent to Distribute
Cocaine, 21 U.S.C. § 846, a Class A felony.

Count 2: Possession with Intent to Distribute Cocaine, 21
U.S.C. § 841(a)(1) and 18 U.S.C. § 2, a Class A felony.

Penalty: 10 years to life imprisonment, five years
supervised release and \$4,000,000 fine. Pursuant
to Sentencing Enhancement, 18 U.S.C. § 3147(1), a
sentence of not more than 10 years imprisonment
consecutive to any other sentence of imprisonment.

Arrest Date: May 14, 1991.