

No. _____

9th Cir. No. 21-10216

D.C. No. 2:11-cr-00739-SRB-1

IN THE
Supreme Court of the United States

MICHAEL RAY KAPP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Florence M. Bruemmer, Bar #019691
LAW OFFICE OF FLORENCE M. BRUEMMER, P.C.
42104 N. Venture Drive, Suite A122
Anthem, AZ 85086
PHONE: (623) 551-0380
FACSIMILE: (480) 619-5004
florence@bruemmerlaw.com
Attorney for Defendant-Appellant
Michael Kapp

QUESTIONS PRESENTED

- I. Whether The Denial Of Michael Kapp's Motion For Compassionate Release Was An Abuse Of Discretion?
- II. Whether the Ninth Circuit's Summary Affirmance Was Improper?

LIST OF PARTIES

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

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	1
LIST OF PARTIES.....	2
TABLE OF CONTENTS.....	3
INDEX TO APPENDICES.....	4
TABLE OF AUTHORITIES CITED.....	5
OPINIONS BELOW.....	7
JURISDICTION.....	7
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	7
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT.....	9
-CLAIM I: The Denial Of Mr. Kapp's Motion For Compassionate Release Was An Abuse Of Discretion.....	9
-CLAIM II: The Ninth Circuit's Summary Affirmance Was Improper.....	20
CONCLUSION.....	24

INDEX TO APPENDICES

APPENDIX A – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUMMARILY AFFIRMING THE DISTRICT COURT’S ORDER DENYING APPELLANT’S MOTION FOR COMPASSIONATE RELEASE, CASE NO. 21-10216, filed February 18, 2022.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DENYING MR. KAPP’S MOTION FOR COMPASSIONATE RELEASE PURSUANT TO 18 U.S.C. § 3582, CASE NO. CR-11-00739-001-PHX-SRB, filed August 4, 2021.

APPENDIX C – JUDGEMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CASE NO. CR-11-00739-001-PHX-FJM, filed November 29, 2012.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>In re Thomas</i> , 508 F.3d 1225, 1227 (9 th Cir. 2007).....	21
<i>Page v. United States</i> , 356 F.2d 857 (9 th Cir. 1966).....	20, 21
<i>Pepper v. United States</i> , 562 U.S. 476, 491 (2011).....	18
<i>United States v. Aruda</i> , 993 F.3d 797, 799 (9th Cir. 2021).....	9
<i>United States v. Davis</i> , 598 F.3d 10, 13-14 (2 nd Cir. 2010).....	20, 24
<i>United States v. Dunn</i> , 728 F.3d 1151, 1155 (9th Cir. 2013).....	9
<i>United States vs. Gabriel Lopez</i> , Case No. 1:09-cr-00166-BLW (D. Idaho, March 11, 2021).....	16
<i>United States v. John William Guess</i> , No. 18-11(1)(DWF/KMM) at *2 (D. Minn. Nov. 16, 2020).....	17
<i>United States v. Hasanoff</i> , No. 10-CR-162 (KMW), 2020 WL 6285308 (S.D.N.Y. Oct. 27, 2020).....	17
<i>United States v. Hooton</i> , 693 F.2d 857, 858 (9 th Cir. 1982).....	20, 21
<i>United States v. Hussain</i> , No. 13-cr-661-PWG, 2021 WL 3367822 (D. Md. Aug 3, 2021).....	14
<i>United States v. Keller</i> , 2 F.4th 1278, 1281 (9th Cir. 2021).....	9
<i>United States v. Lightfoot</i> , 626 F.3d 1092, 1094 (9th Cir. 2010).....	9
<i>United States v. Owens</i> , 996 F.3d 755, 764 (6th Cir. 2021).....	21
<i>United States v. Quigley</i> , No. 09-cr-182 (D.D.C. Aug. 26, 2021).....	14
<i>United States v. Schram</i> , 475 F. Supp. 3d 1168 (D. Or. 2020).....	23
<i>United States v. Smith</i> , 482 F. Supp. 3d 1218, 1220 (M.D. Fla. 2020)...	23

<i>United States v. Sweet</i> , No. 07-20369, 2021 WL 1430836, at *2 (E.D. Mich. Apr. 15, 2021).....	15
<u>STATUTES</u>	
18 U.S.C. §924(c)(1)(A)(i).....	7, 8
18 U.S.C. §3142(g).....	10
18 U.S.C. §3553(a).....	8, 9, 10, 15, 16, 18, 19, 21, 22, 23
18 U.S.C. §3582(c)(1)(A).....	7, 8, 9, 10, 16
21 U.S.C. §841(a)(1) & 841(b)(1)(A)(viii).....	7, 8
USSG § 1B1.13.....	10

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

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

OPINIONS BELOW

A copy of the final Order of the United States Court of Appeals for the Ninth Circuit summarily affirming the district court's order denying Mr. Kapp's motion for compassionate release under 18 U.S.C. §3582(c)(1)(A)(i) is annexed as Appendix A. A copy of the Order of the United States District Court for the District of Arizona denying Mr. Kapp's Motion for Compassionate Release Pursuant to 18 U.S.C. §3582 is annexed as Appendix B. A copy of the Judgment of the United States District Court for the District of Arizona sentencing Mr. Kapp to 210-months incarceration for possession with intent to distribute 50 grams or more of methamphetamine and possession of a firearm in furtherance of a drug trafficking crime, is annexed as Appendix C.

JURISDICTION

The United States Court of Appeals, Ninth Circuit, decided this case on February 18, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. §924(c)(1)(A)(i)
2. 18 U.S.C. §3582(c)(1)(A)(i)
3. 21 U.S.C. §841(a)(1)
4. 21 U.S.C. §841(b)(1)(A)(viii)

STATEMENT OF THE CASE

On March 27, 2012, Mr. Kapp pled guilty to Possession with Intent to Distribute 50 Grams or More of Methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii) and Possession of Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). *See* Appendix “C”. Mr. Kapp was sentenced to 210 months imprisonment (150 months on Count 1 and 60 months on Count 3, consecutive) followed by 5 years of supervised release. *Id.*

Mr. Kapp submitted his request for a compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A) to the FCI-Oakdale Warden on January 28, 2021. (Exhibit A to Motion for Compassionate Release, EOR 39).¹ On February 5, 2021, the Warden denied Mr. Kapp’s request for a compassionate release. *Id.*

On June 14, 2021, Mr. Kapp filed a Motion for Compassionate Release Pursuant to 18 U.S.C. §3582 in the Arizona District Court. (Motion for Compassionate Release, EOR 21). Mr. Kapp suffers from medical conditions that place him at severely high-risk of serious health complications or death should he contract COVID-19. Mr. Kapp argued that he qualifies for compassionate release because: 1) extraordinary and compelling reasons warrant a sentence reduction due to Mr. Kapp’s increased risk of severe illness or death from COVID-19; 2) the 18 U.S.C. § 3553(a) factors weigh in favor of a sentence reduction; and 3) Mr. Kapp poses no threat to the community.

¹ Citations are to the Excerpts of Record (“EOR”) filed in the Ninth Circuit Court of Appeals.

After full briefing, the District Court entered its Order denying Mr. Kapp's Motion for Compassionate Release. *See Appendix "B".* The Court found Mr. Kapp "failed to demonstrate an extraordinary and compelling circumstance that justifies a sentence reduction." *Id.* at p. 4. The Court also found the §3553(a) factors "do not weigh in favor of the Defendant's release or a sentence reduction." *Id.* at p. 7.

Mr. Kapp timely appealed on August 5, 2021. (Notice of Appeal filed 8/5/2021, EOR 100). On February 18, 2022, the Ninth Circuit Court of Appeals summarily affirmed the District Court's order denying Mr. Kapp's motion for compassionate release. *See Appendix "A".*

REASONS FOR GRANTING THE WRIT

I. The Denial Of Mr. Kapp's Motion For Compassionate Release Was An Abuse Of Discretion.

The District Court's decision to grant or deny a sentence reduction under § 3582(c)(1) is reviewed for abuse of discretion. *United States v. Keller*, 2 F.4th 1278, 1281 (9th Cir. 2021) (quoting *United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021) (per curiam). "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Id.* (quoting *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013)); *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010).

The District Court had discretion to reduce Mr. Kapp's term of imprisonment pursuant to 18 U.S.C. §3582(c)(1)(A), which states in relevant part that the Court "may reduce the term of imprisonment, after considering the factors set forth in 18 U.S.C.

§3553(a) to the extent they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]” USSG § 1B1.13 states the Court may reduce a term of imprisonment under 18 U.S.C. § 3582(c)(1)(A) after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that –

- “(1) (A) extraordinary and compelling reasons warrant the reduction...
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.”

A. The District Court’s Finding That Mr. Kapp Failed To Demonstrate An Extraordinary & Compelling Circumstance Justifying A Sentence Reduction Was An Abuse Of Discretion

At the time of filing his Motion for Compassionate Release, Mr. Kapp was a 53-year-old who suffered from chronic viral hepatitis C, peripheral vascular disease, and his height and weight put his BMI at 25.8. (Exhibit B to Motion for Compassionate Release, EOR 41). Mr. Kapp was taking the following medications: daily Aspirin, Cetirizine (allergies), Doxepin (antidepressant for sleep), and Oxcarbazepine (for seizures). *Id.* Mr. Kapp argued these underlying medical conditions put him at an increased risk for severe illness from the virus that causes COVID-19. The District Court found these medical risks failed to demonstrate an extraordinary and compelling circumstance justifying a sentence reduction. The District Court based its finding that

Mr. Kapp failed to demonstrate extraordinary and compelling reasons on “Defendant’s apparent mild case of COVID despite his medical risks...Defendant’s denial at medical appointments of loss of smell and taste and shortness of breath, of his vaccination status, and of the lack of scientific evidence that he remains at serious risk of severe illness in the unlikely event of reinfection...” Those findings are clearly erroneous.

Despite Mr. Kapp’s previous infection and vaccination status, he continues to meet the requirements of extraordinary and compelling reasons. Mr. Kapp is a 53-year-old who suffers from chronic viral hepatitis C, peripheral vascular disease, and his height (69 in.) and weight (175 lbs.) as of December 15, 2020 put his BMI at 25.8. According to the Centers for Disease Control (“CDC”), adults of any age with certain underlying medical conditions are at increased risk for severe illness from the virus that causes COVID-19.² This specifically includes being overweight (BMI greater than 25), and hepatitis C, which Mr. Kapp suffers from both. Mr. Kapp’s prior infection and vaccination does not eliminate those risks. The scientific evidence demonstrates that Mr. Kapp remains at serious risk of severe illness.

Regarding hepatitis C, according to the CDC “Adults of any age with certain underlying medical conditions, including people with liver disease (such as hepatitis B or hepatitis C), might be at increased risk for severe illness from the virus that causes

² <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (updated May 13, 2021).

COVID-19.”³ Regarding overweight/obese individuals, the CDC states, “Overweight (defined as a body mass index (BMI) $> 25 \text{ kg/m}^2$ but $< 30 \text{ kg/m}^2$), obesity (BMI $\geq 30 \text{ kg/m}^2$ but $< 40 \text{ kg/m}^2$), or severe obesity (BMI of $\geq 40 \text{ kg/m}^2$), can make you more likely to get severely ill from COVID-19. The risk of severe COVID-19 illness increases sharply with elevated BMI.”⁴ Also, older adults are more likely to get severely ill from COVID-19. More than 80% of COVID-19 deaths occur in people over age 65, and more than 95% of COVID-19 deaths occur in people older than 45. *Id.* Mr. Kapp is 53-years-old. The more underlying medical conditions someone has, the greater their risk is for severe illness from COVID-19. *Id.*

Regarding vaccination efforts within the prison systems, as of May 31, 2021 the numbers of vaccinations for inmates and staff hovers around 50%.⁵ An article published in March in the New England Journal of Medicine (NEJM), “Vaccination plus Decarceration - Stopping COVID-19 in Jails and Prisons,” highlighted a problem for those in prison, even if they are vaccinated:

“... even a vaccine with seemingly adequate efficacy, pace, and coverage may be insufficient to alter the fundamental population dynamics that produce high disease prevalence.”

Id. In environments like prisons, where there are so many un-vaccinated people, living in close concentrated areas, vaccines, even those with high efficacy rates, may not be

³ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/liverdisease.html#:~:text=Adults%20of%20any%20age%20with,by%20their%20healthcare%20provider>

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

able to keep up with the reproduction of a COVID-19 viral spread. *Id.* The paper stated, “... even a vaccine with seemingly adequate efficacy, pace, and coverage may be insufficient to alter the fundamental population dynamics that produce high disease prevalence.” *Id.* The authors of the NEJM article concluded the only real solution would be to continue with some plan that leads to a reduction of prison population:⁶

“Vaccination of incarcerated people is important for changing this dynamic, but it is not enough. We believe that it must be coupled with large-scale decarceration to increase the real-world effectiveness of vaccination, disrupt wide-ranging viral transmission chains, and turn off the epidemiologic pump that puts the health of all at risk from mass incarceration.”

The chances of getting seriously ill after being vaccinated are higher for those with certain health conditions that affect the immune system (such as Mr. Kapp’s hepatitis C).⁷ As of September 27, 2021, the CDC had documented 22,115 cases of fully vaccinated people who were hospitalized or died from COVID-19.⁸ The evidence also demonstrates that the efficacy of the Pfizer COVID vaccine is significantly waning (effectiveness in preventing infection dropped to 47% from 88% six months after the second dose).⁹ Mr. Kapp received his second Pfizer dose on May 3, 2021. The CDC

⁵ <https://www.forbes.com/sites/walterpavlo/2021/05/31/even-after-vaccine-federal-prisons-still-have-covid-19-concerns/?sh=7bc19a142bea>

⁶ <https://www.nejm.org/doi/full/10.1056/NEJMp2100609>

⁷ <https://www.npr.org/sections/health-shots/2021/07/21/1018872469/worried-about-breakthrough-covid-cases-heres-what-to-know> (July 21, 2021)

⁸ <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>

⁹ <https://www.reuters.com/business/healthcare-pharmaceuticals/pfizerbiontech-covid-19-vaccine-effectiveness-drops-after-6-months-study-2021-10-04/> (October 4, 2021)

recommends a booster shot six months after the second dose.¹⁰ There was no evidence Mr. Kapp had received a booster shot or that a booster shot was even available to Mr. Kapp.

Compassionate release can be granted despite vaccination. In *United States v. Quigley*, No. 09-cr-182 (D.D.C. Aug. 26, 2021), the Court granted compassionate release to a fully vaccinated individual with obesity, type 2 diabetes, and non-alcoholic fatty liver disease based in part on the dangers posed by the Delta variant. Also, in *United States v. Hussain*, No. 13-cr-661-PWG, 2021 WL 3367822 (D. Md. Aug 3, 2021), the Court stated,

“[W]hether Mr. Hussain has been vaccinated is not dispositive. We are still learning about the duration and level of protection that vaccinations provide for individuals with various medical conditions.”

Therefore, the Court granted compassionate release finding the defendant’s medical conditions could still present extraordinary and compelling circumstances, even with increasing vaccination rates.

Mr. Kapp’s prior COVID-19 infection occurred in December 2020 when the original coronavirus strain was still dominant. That strain is no longer the dominant strain. The District Court failed to consider the evidence presented regarding the risks posed to Mr. Kapp by the new variants and any waning (or at this point non-existent) immunity. Although the District Court stated the medical records show Mr. Kapp was asymptomatic when diagnosed with COVID in December 2020, it is unknown if Mr.

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html#:~:text=People%20aged%2065%20years%20and,age%20with%20underlying>

Kapp would have the same symptoms if infected with another variant. Although the vaccines provide protection, the efficacy of the vaccine received by Mr. Kapp has significantly waned. No additional precautions are available to Mr. Kapp in prison, such as universal masking and social distancing, nor are they being implemented by prison officials.

Therefore, even having received the Pfizer vaccine a year ago and recovering from a previous COVID-19 infection from the original strain back in December 2020, Mr. Kapp is still at significant risk for severe illness and qualifies for compassionate release. *See United States v. Sweet*, No. 07-20369, 2021 WL 1430836, at *2 (E.D. Mich. Apr. 15, 2021) (compassionate release granted to defendant that had COVID-19 and recovered and also had been fully vaccinated, but recent data reveals threat of severe illness or death from COVID-19, while diminished, is nevertheless real citing series of BOP press releases in which inmate tested positive for COVID-19 twice, in one instance the inmate died, and likelihood of reinfection for inmates may be even higher than for someone not incarcerated because of the congregate prison setting). The District Court's finding of a "lack of scientific evidence that [Mr. Kapp] remains at serious risk of severe illness in the unlikely event of reinfection" was clearly erroneous and an abuse of discretion.

B. The District Court's Finding's On The 18 U.S.C. § 3553(a) Factors Were Clearly Erroneous

Under the present statutory regime, the existence of extraordinary and compelling circumstances confers on the District Court the authority to consider the relevant 18 U.S.C. § 3553(a) factors and determine whether the circumstances warrant a sentence reduction. The District Court has discretion to reduce a term of imprisonment under 18 U.S.C. §3582(c)(1)(A)(i) as follows:

“after considering the factors set forth in 18 U.S.C. §3553(a) to the extent they are applicable, if it finds that...extraordinary and compelling reasons warrant such a reduction...and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]”

The District Court’s findings on the 18 U.S.C. § 3553(a) factors were clearly erroneous. The Court cites to Mr. Kapp’s “history of drug trafficking and weapons possession going back almost 20 years at the time of the crimes of conviction.” The time of conviction was nearly ten years ago now. If only looking at the Section 3553(a) factors that existed at the time of the crimes of conviction, of course the court would re-impose the same sentence. §3582(c)(1)(A)(i) does not require or even contemplate the Court denying compassionate release for every defendant with a significant criminal history. There are numerous examples of the District Court recently granting compassionate release under the First Step Act to defendants who were convicted of much more serious (and sometimes violent) crimes than Mr. Kapp based upon their good record and rehabilitation while incarcerated, for example: *United States vs. Gabriel Lopez*, No. 1:09-cr-00166-BLW (D. Idaho, March 11, 2021, Doc. #47) (sentenced to 120 months for possession with intent to distribute 50 grams or more of methamphetamine and 60 months on possession of a firearm in furtherance of a drug trafficking crime,

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

Although the District Court acknowledged Mr. Kapp’s participation in various rehabilitative programs while in prison and characterized his disciplinary history while incarcerated as “fairly minor” the Court nonetheless found that there was “no reason” to believe Mr. Kapp would not return to drug trafficking upon his release. It was an

abuse of discretion for the Court to dismiss the evidence that Mr. Kapp has spent the last 10-years of his life staying out of trouble, working on rehabilitation, and not receiving any new charges. Instead, the Court put more weight on the §3553(a) factors as they existed at the time of sentencing.

Evidence of postsentencing rehabilitation may be highly relevant to several of the §3553(a) factors. *Pepper v. United States*, 562 U.S. 476, 491 (2011). For example, evidence of postsentencing rehabilitation may plainly be relevant to “the history and characteristics of the defendant.” *Id.* Such evidence may also be pertinent to “the need for the sentence imposed” to serve the general purposes of sentencing set forth in § 3553(a)(2)—in particular, to “afford adequate deterrence to criminal conduct,” “protect the public from further crimes of the defendant,” and “provide the defendant with needed educational or vocational training...or other correctional treatment in the most effective manner.” *Id.* Postsentencing rehabilitation may also critically inform a sentencing judge's overarching duty under § 3553(a) to “impose a sentence sufficient, but not greater than necessary,” to comply with the sentencing purposes set forth in § 3553(a)(2). *Id.* The District Court should have given the proper weight to the programming and rehabilitation completed by Mr. Kapp during his incarceration as part of the “history and characteristics of the defendant”, which were not and could not have been considered by the Court at the time of his sentencing. During Mr. Kapp’s incarceration, he has taken advantage of many opportunities presented to him and has

actively sought out and completed numerous programs. (Exhibit D to Motion for Compassionate Release).

The District Court also points out Mr. Kapp's "long-term history of weapons' possession." However, there was no allegation the firearms were used or brandished in any manner, that anyone was threatened, or that Mr. Kapp otherwise used the firearms against any persons or the community during the commission of the offense. The Government did not dispute those facts. The firearms were simply found inside Mr. Kapp's home during the execution of a search warrant.

Finally, Mr. Kapp's criminal history and prior convictions underlying the Court's decision to deny compassionate release must be weighed against the fact that Mr. Kapp is now 53-years old. Nearly all of the prior convictions cited by the Court occurred when Mr. Kapp was much younger. Studies have shown that older offenders are substantially less likely than younger offenders to recidivate following release.¹¹ Mr. Kapp's criminal history at the time of sentencing was a Category VI due to his career offender status. However, at this point Mr. Kapp's prior felony drug convictions which qualified him for "career offender" status are from April 1, 1998 – over 24 years ago.

With full consideration of all of the §3553(a) factors based upon current circumstances, including Mr. Kapp's post-incarceration conduct, Mr. Kapp's time served in prison constitutes a sentence sufficient but not greater than necessary to accomplish the goals of sentencing. Therefore, the District Court's Order denying Mr.

¹¹ <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders>

Kapp compassionate release constitutes an abuse of discretion and incorrectly applies the law as set forth in the cases cited herein.

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

Mr. Kapp filed his Opening Brief with the Ninth Circuit on October 20, 2021. Instead of filing a response brief, the Government filed a Motion for Summary Affirmance on January 5, 2022. The Ninth Circuit granted the Motion and summarily affirmed the District Court's order.

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

Summary affirmance of a district court's decision in place of full merits briefing is, and should be treated as, a rare exception to the completion of the appeal process. *United States v. Davis*, 598 F.3d 10, 13-14 (2nd Cir. 2010). It is a short-cut and, considering the liberty and property rights involved, one that is available only if an appeal is truly "frivolous." *Id.* An appeal is frivolous when it lacks an arguable basis either in law or in fact advancing inarguable legal conclusions or fanciful factual allegations. *Id.* It requires more than a finding that the correct resolution of an appeal seems obvious. *Id.* Easy cases are to be distinguished from inarguable or fanciful ones. *Id.* The Court should

exercise great care in labeling a certain action or argument as frivolous, for doing so often carries grave consequences. *Id.*

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

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

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

The situation regarding the COVID-19 pandemic is ever changing. The increased risk to Mr. Kapp posed by his waning immunity and the additional variants was raised in Mr. Kapp's Opening Brief, but the Ninth Circuit failed to address it. Given the rapidly changing dynamics of this unprecedented and deadly pandemic, it is not unforeseeable that circumstances would change during the time from the District Court proceedings through an appeal. The answer to that is not to summarily dismiss every appeal and require defendants to re-file a new motion for compassionate release with every change in circumstance from new variants to changes in CDC recommendations. Especially in this circumstance where Mr. Kapp did raise the issue of the emergence of the new Delta variant in the District Court. It was well within the Ninth Circuit's discretion to remand Mr. Kapp's case to the District Court to reconsider its findings in light of the information regarding the vaccine's waning efficacy and the CDC's recommendation for booster shots. Instead, the Ninth Circuit summarily affirmed.

Mr. Kapp's Opening Brief cited to specific evidence and studies that he remained at a heightened risk of getting seriously ill with COVID even after being vaccinated.¹² The District Court's finding of a "lack of scientific evidence that [Mr. Kapp] remains at

¹² <https://www.nejm.org/doi/full/10.1056/NEJMp2100609> (continued risks to those in prison even if they are vaccinated); <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html> (rates of fully vaccinated who were hospitalized or died from COVID); <https://www.reuters.com/business/healthcare-pharmaceuticals/pfizerbiontech-covid-19-vaccine-effectiveness-drops-after-6-months-study-2021-10-04/> (waning efficacy of Pfizer vaccine).

serious risk of severe illness in the unlikely event of reinfection" was clearly erroneous. Mr. Kapp also identified erroneous factual findings regarding the District Court's analysis of the §3553(a) factors. In the District Court's analysis, it cites to Mr. Kapp's "history of drug trafficking and weapons possession going back almost 20 years at the time of the crimes of conviction." This finding suggests the District Court incorrectly analyzed the §3553(a) factors as they existed at the time of Mr. Kapp's sentencing, instead of as they existed at the time of his request for compassionate release, which was nearly 10-years later. There are numerous examples of cases where, when the District Court correctly assessed the §3553(a) factors as they existed at the time of the compassionate release proceedings, compassionate release was granted even for those with long criminal histories. *See United States v. Smith*, 482 F. Supp. 3d 1218, 1220 (M.D. Fla. 2020) (supporting his motion for compassionate release during COVID-19 pandemic because: inmate did not have a propensity for violence and was not likely to reoffend, inmate's offenses of conviction were nonviolent drug crimes, there was no indication inmate used or carried a firearm in connection with offenses of conviction, inmate's previous violent offenses occurred 47-50 years ago, inmate's prison disciplinary record showed he generally conducted himself well in prison, and inmate would know that if he reoffended while on supervised release he would be subject to the revocation of his supervised release and reimprisonment); *United States v. Schram*, 475 F. Supp. 3d 1168 (D. Or. 2020) (compassionate release, based on extraordinary and compelling reasons, would not present a danger to the community, with respect to 68-

year-old federal prisoner, with 36 months remaining on 130-month sentence for bank robbery, who had heightened risk of severe illness from COVID-19 because of his history of liver disease and weakened immune system from chronic hepatitis C; despite prisoner's lengthy criminal history, which included bank robberies and other robberies, he had attempted to better himself while serving his current sentence, gaining employable work skills, and prisoner would be supervised by probation officer and would reside in a reentry center).

Mr. Kapp's appeal did not lack an arguable basis either in law or in fact advancing inarguable legal conclusions or fanciful factual allegations. The Ninth Circuit did not make any findings that Mr. Kapp's appeal was inarguable or fanciful. *See* Appendix "A". An appeal is not appropriate for summary affirmance simply because it appears to be an "easy case". *See Davis*, 598 F.3d at 14 (2nd Cir. 2010). The Ninth Circuit's summary affirmance in Mr. Kapp's appeal was improper and denied him of his right to appeal the District Court's final ruling.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 17th day of May 2022.

LAW OFFICE OF FLORENCE M. BRUEMMER, P.C.

s/ Florence M. Bruemmer

Florence M. Bruemmer #019691
42104 N. Venture Drive, Ste. A122
Anthem, AZ 85086
Attorney for Michael Kapp