

No. _____

9th Cir. No. 22-10023

D.C. No. 2:20-cr-00432-SRB-1

IN THE
Supreme Court of the United States

ESTEBAN PARRA-REYES,

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

Anders Rosenquist, Jr., Az Bar No. 002724
ROSENQUIST & ASSOCIATES
42104 N. Venture Drive, Suite A122
Anthem, AZ 85086
PHONE: 480-861-7115
rosenquistlegal@gmail.com
Attorney for Petitioner
Esteban Parra-Reyes

QUESTIONS PRESENTED

- I. Whether The Denial Of Esteban Para Reyes'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	7
REASONS FOR GRANTING THE WRIT.....	9
-CLAIM I: The Denial Of Mr. Parra-Reyes's Motion For Compassionate Release Was An Abuse Of Discretion.....	9
-CLAIM II: The Ninth Circuit's Summary Affirmance Was Improper.....	19
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. 22-10023, filed August 19, 2022.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DENYING MR. PARRA-REYES’S MOTION FOR COMPASSIONATE RELEASE PURSUANT TO 18 U.S.C. § 3582, CASE NO. CR-20-00432-001-PHX-SRB, filed January 24, 2022.

APPENDIX C – JUDGEMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CASE NO. CR-20-00432-001-PHX-SRB, filed July 14, 2021.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>In re Thomas</i> , 508 F.3d 1225, 1227 (9th Cir. 2007).....	20
<i>Page v. United States</i> , 356 F.2d 337, 339 (9th Cir. 1966).....	19, 20
<i>Pepper v. United States</i> , 562 U.S. 476, 491 (2011).....	16
<i>Thuillard v. United Customs & Border Sec.</i> , 214 F. App'x 651 (9th Cir. 2006).....	20
<i>United States v. Aruda</i> , 993 F.3d 797, 800 (9th Cir. 2021).....	9
<i>United States v. Davis</i> , 598 F.3d 10, 13-14 (2nd Cir. 2010).....	19, 23
<i>United States v. Dunn</i> , 728 F.3d 1151, 1155 (9 th Cir. 2013).....	9
<i>United States v. Hooton</i> , 693 F.2d 857 (9 th Cir. 1982).....	19, 20
<i>United States v. Keller</i> , 2 F.4th 1278, 1281 (9th Cir. 2021).....	9, 10
<i>United States v. Lightfoot</i> , 626 F.3d 1092, 1094 (9 th Cir. 2010).....	9
<i>United States v. Newton</i> , 996 F.3d 485, 489-90 (7th Cir. 2021).....	12, 13
<i>United States v. Ruvalcaba</i> , 26 F.4th 14, 23 (1 st Cir. 2022).....	10
<i>United States v. Schram</i> , 475 F. Supp. 3d 1168 (D. Or. 2020).....	22
<i>United States v. Smith</i> , 482 F. Supp. 3d 1218 (M.D. Fla. 2020).....	22
<u>STATUTES</u>	
8 U.S.C. §1326.....	7, 8
18 U.S.C. §3142(g).....	10
18 U.S.C. §3553(a).....	8, 9, 10, 16, 19, 20, 22

18 U.S.C. §3582(c)(1)(A).....	7, 8, 9, 10, 16
28 U.S.C. §1254(1).....	7
USSG § 1B1.13.....	10

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

Petitioner, Esteban Parra-Reyes ("Mr. Parra-Reyes"), 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. Parra-Reyes'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. Parra-Reyes'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. Parra-Reyes to 48-months incarceration for reentry of removed alien is annexed as Appendix C.

JURISDICTION

The United States Court of Appeals, Ninth Circuit, decided this case on August 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. §1326(a)
2. 8 U.S.C. §1326(b)(1)
3. 18 U.S.C. §3582(c)(1)(A)(i)

STATEMENT OF THE CASE

On September 2, 2020, Mr. Parra-Reyes pled guilty to Reentry of Removed Alien in violation of 8 U.S.C. §1326(a) and (b)(1). *See* Appendix "C". Mr. Parra-Reyes was sentenced on May 27, 2021 to 48-months incarceration followed by 3-years supervised release. *Id.*

Mr. Parra-Reyes submitted his request for a compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A) to the McRae Correctional Facility on August 15, 2021. (Inmate Grievance, ER-15). ¹ On August 16, 2021, the Warden denied the request. (Memorandum from Warden, ER-14).

On September 30, 2021, Mr. Parra-Reyes filed a pro se Emergency Motion for Compassionate Release Pursuant to 18 U.S.C. §3582(C)(1)(A) in the Arizona District Court. (Doc #72). Mr. Parra-Reyes argued that he qualifies for compassionate release due to extraordinary and compelling reasons that warrant a sentence reduction. Specifically, his multiple health conditions put him at risk for severe complications or death should he contract COVID-19. Also, Mr. Parra-Reyes's rehabilitation and the 18 U.S.C. §3553(a) factors weigh in favor of a sentence reduction. The Government opposed the Motion. (Doc. #73).

On October 12, 2021, the District Court appointed counsel for Mr. Parra-Reyes to file an amended motion for relief or a notice that no amended motion will be filed. (Doc. #75). Appointed counsel filed a Supplement to Emergency Motion for Compassionate Release on September 10, 2021 arguing additional extraordinary and compelling

¹ Citations are to the Excerpts of Record ("ER") filed in the Ninth Circuit Court of Appeals.

reasons and sentencing factors that warranted a sentence reduction. (Doc. #78). The Government filed a Supplemental Response. (Doc. #79).

After full briefing, the District Court entered an Order denying Mr. Parra-Reyes's Emergency Motion for Compassionate Release Pursuant to 18 U.S.C. §3582(C)(1)(A). *See* Appendix "B". The Court found Mr. Parra-Reyes "has not shown extraordinary and compelling reasons that would justify release" and the §3553(a) factors weigh against his release. *Id.*

Mr. Parra-Reyes timely appealed on January 26, 2022. (Notice of Appeal, ER-84). On August 19, 2022, the Ninth Circuit Court of Appeals summarily affirmed the District Court's order denying the motion for compassionate release. *See* Appendix "A".

REASONS FOR GRANTING THE WRIT

I. The Denial Of Mr. Parra-Reyes'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. Parra-Reyes'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. Parra-Reyes Failed To Demonstrate An Extraordinary & Compelling Circumstance Justifying A Sentence Reduction Was An Abuse Of Discretion

For a §3582(c)(1)(A)(i) motion filed by a defendant, courts currently consider (1) whether extraordinary and compelling reasons warrant such a reduction; and (2) the factors set forth in section 3553(a) to the extent that they are applicable. 18 U.S.C. § 3582(c)(1)(A)(i); *United States v. Keller*, 2 F.4th 1278, 1283-84 (9th Cir. 2021). When adjudicating prisoner-initiated motions for compassionate release district courts have discretion, unconstrained by any policy statement currently in effect, to consider whether a prisoner's particular reasons are sufficiently extraordinary and compelling to warrant compassionate release. *United States v. Ruvalcaba*, 26 F.4th 14, 23 (1st Cir. 2022).

Mr. Parra-Reyes argued his extraordinary and compelling reasons for compassionate release are the “multiple healthcare conditions that put him at a higher risk to die from COVID-19.” (Doc. #72, p. 17). Those conditions include: BPH (benign prostatic hyperplasia), constipation, DJD (degenerative joint disease), gastritis, hypertension, hyperlipidemia, and other issues which make it harder to fight COVID-19 medical complications. *Id.* Mr. Parra-Reyes provided medical records to the District Court demonstrating his health complications. (Inmate Condensed Chart Report, ER-39-55). Mr. Parra-Reyes also supplemented his list of health conditions with information that the medical records show his body mass index (“BMI”), which is over 26, falls within the CDC’s definition of “overweight”. (Doc. #78, p. 2); (Progress Note dated 10/8/2020, ER-54); (Chronic Care Clinic Visit Note dated 5/5/2021, ER-17). Mr. Parra-Reyes submitted medical records demonstrating he was being treated by the Chronic Care Clinic for his hypertension and other health complications. (Chronic Care Clinic Records, ER-17-38).

The District Court’s finding that Mr. Parra-Reyes “has not shown extraordinary and compelling reasons that would justify his release” is an abuse of discretion. The District Court based its decision on the erroneous conclusion that hyperlipidemia and hypertension are common ailments and are not listed by the CDC as placing individuals at higher risk of severe illness from COVID-19. The District Court also separately stated that Mr. Parra-Reyes is *only* overweight according to his BMI and not considered obese. (emphasis added).

The District Court abused its discretion by not taking into consideration the cumulative effect of Mr. Parra-Reyes's comorbidities. *See United States v. Newton*, 996 F.3d 485, 489–90 (7th Cir. 2021). The District Court attempts to discount each one of Mr. Parra-Reyes' health conditions as minor and common, and erroneously concludes that Mr. Parra-Reyes "does not suffer from medical conditions that have been recognized by the CDC as placing him at risk for severe illness were he to contract COVID-19." Both hypertension and overweight (defined as BMI of 25 to 30) are specifically listed by the CDC as conditions associated with a risk of severe illness from COVID-19.² Mr. Parra-Reyes gave evidence from the World Health Organization that almost all available evidence suggests hypertension increases the risk of severe COVID-19.³ Although not listed on the CDC's website, Mr. Parra-Reyes also included information that hyperlipidemia is associated with poorer outcomes for those infected with COVID-19, such as blood clots, heart attacks and stroke.⁴

The District Court first stated that hypertension was not listed by the CDC as placing individuals at higher risk of severe illness from COVID-19, but then added a footnote that the CDC advises hypertension may "possibly" place an individual at higher risk. In the case of COVID-19, assessing the effect of comorbidities necessarily involves an estimation of probabilities, not certainties. "The CDC necessarily must deal

² <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (Feb. 25, 2022)

³ https://www.who.int/publications/i/item/WHO-2019-nCoV-Sci_Brief-Hypertension-2021_1 (June 17, 2021)

⁴ <https://www.verywellhealth.com/high-cholesterol-and-covid-19-5118092> (April 27, 2021)

with the present state of scientific knowledge and the courts must apply the statutory criteria in light of that reality.” *Newton*, 996 F.3d at 489. The District Court never assessed the risk of Mr. Parra-Reyes’s chronic illnesses in the aggregate. The District Court should have assessed Mr. Parra-Reyes’s situation not only in light of each of his comorbidities individually, but also cumulatively. *Id.* The CDC guidance that the District Court relied on referred only to the risk posed by individual conditions, not combinations of conditions. The CDC itself specifically advises, “A person’s risk of severe illness from COVID-19 increases as the number of underlying medical conditions they have increases.”⁵ As the 7th Circuit found in *Newton*, here the District Court’s ruling gives no indication the court gave Mr. Parra-Reyes’s combination of conditions any focused consideration. This is clear by the District Court’s characterization of Mr. Parra-Reyes’s health conditions as “common ailments” and the erroneous statement that Mr. Parra-Reyes does not have any conditions “recognized by the CDC as placing him at risk for severe illness”. Therefore, the District Court’s ruling was an abuse of discretion.

The District Court also mentions that Mr. Parra-Reyes is “fully vaccinated” against COVID-19 as a factor in denying him compassionate release. But Mr. Parra-Reyes’s vaccination status does not eliminate the increased danger he faces from the COVID-19 pandemic. Severe ‘breakthrough’ cases among vaccinated people are still possible. Based on the CDC’s COVID-19 incidence and death rates across 25 U.S.

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (Feb. 25, 2022)

jurisdictions from April 4 – December 25, 2021, there were a total of 6,812,040 COVID-19 cases among unvaccinated persons with 94,640 deaths, and 2,866,517 cases among fully vaccinated persons with 22,567 deaths (as of December 4, 2021).⁶

An article published in March 2021 in the New England Journal of Medicine (NEJM), “Vaccination plus Decarceration - Stopping COVID-19 in Jails and Prisons,” highlighted the problem for inmates 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.”⁷

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 able to keep up with the reproduction of a COVID-19 viral spread. *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:

“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.”⁸

One example of the continuing risk posed to Mr. Parra-Reyes is demonstrated in a report published by the CDC, which showed the Delta variant ripped through a federal prison in Texas over the summer of 2021, infecting both the unvaccinated and

⁶ <https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e2.htm> (Jan. 28, 2022)

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

⁸ <https://www.nejm.org/doi/full/10.1056/NEJMp2100609>

fully vaccinated populations.⁹ The report demonstrates the potential for outbreaks in congregate settings, including correctional and detention facilities, even among places and populations with high vaccination coverage.

Mr. Parra-Reyes also argued, but the District Court failed to consider, that the CDC is recommending booster shots for all adults at least 6-months after completing the primary COVID-19 vaccination series.¹⁰ The availability of a COVID booster for inmates incarcerated at the McRae Correctional Facility, and for Mr. Parra-Reyes specifically, is still unknown. While the Federal Bureau of Prisons appears to now be offering booster shots, advocates have complained there is a lack of data on how many prisoners have actually been boosted.¹¹ A Department of Justice spokesperson stated to the media that 29,200 people in federal custody have had a booster dose, but that information is not publicly available on the DOJ's website. *Id.* Although the vaccine may have provided good protection to Mr. Parra-Reyes initially, its efficacy has been well documented to significantly wane over time. Without having received a booster dose, there is no evidence that at the time of the District Court's decision Mr. Parra-Reyes could be considered "fully vaccinated", and such characterization by the District Court was an abuse of discretion.

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

⁹ <https://www.cnbc.com/2021/09/21/cdc-delta-variant-infects-highly-vaccinated-prison-population-but-few-hospitalized.html> (Sept. 21, 2021)

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html> (Dec. 9, 2021)

¹¹ <https://www.statnews.com/2022/02/02/biden-promises-covid19-prisons/> (Feb. 2, 2022)

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. 18 U.S.C. §3582(c)(1)(A)(i). Evidence of post sentencing 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 post sentencing 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.* Post sentencing 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’s findings on the 18 U.S.C. § 3553(a) factors were an abuse of discretion. The Court cites to Mr. Parra-Reyes’s “20-year history of felony and misdemeanor convictions...and the seriousness of at least two of those prior convictions demonstrate the type of history and characteristics that do not favor early release.” Although the District Court was focused on the “seriousness” of Mr. Parra-Reyes’s two prior convictions, Mr. Parra-Reyes is currently incarcerated for a nonviolent

immigration offense. Given his projected release date of July 4, 2023, Mr. Parra-Reyes only has about 14-months left of his 48-month sentence. He poses no threat to the public and will be deported upon his release from prison. The offenses that were referenced by the District Court in its ruling occurred nearly 20-years ago (2000-2007) when Mr. Parra-Reyes was only in his thirties. He is now in his fifties.

The District Court's findings in its ruling directly contradict statements made by the same Court at Mr. Parra-Reyes's sentencing. At the time of sentencing, the Court noted Mr. Parra-Reyes had been living in the U.S. for several years *without having engaged in any other criminal conduct.* (Sentencing Transcript 5/27/2021, p. 9-10, ER-68-69). The Court was also concerned that Mr. Parra-Reyes's criminal history category and total offense level were a bit overstated. (Sentencing Transcript 5/27/2021, p. 10, ER-69). For example, the Court stated although the prior marijuana offense looked like it was only 5-years-old, it was actually 17-years-old. *Id.* The Court also stated it was not clear that Mr. Parra-Reyes still posed a threat to the public. *Id.* All of that directly contradicts the District Court's finding in its order denying compassionate release that Mr. Parra-Reyes has the "type of history and characteristics that do not favor early release."

Mr. Parra-Reyes is housed at the McRae Correctional Facility, which is a low-security facility. The Inmate Discipline Data submitted by Mr. Parra-Reyes shows he has not had any disciplinary infractions during his current term of imprisonment. (Inmate Discipline Data, ER-9). Mr. Parra-Reyes's criminal history does not include any

acts of violence. His entire criminal history consists almost solely of non-violent drug offenses and one prior re-entry of a removed alien. Although Mr. Parra-Reyes does have a prior conviction for misconduct involving weapons from 2007, the incident involved Mr. Parra-Reyes being pulled-over in his vehicle while he had a handgun in his waistband. There was no allegation that Mr. Parra-Reyes removed the handgun from his waistband at any point during the stop, Mr. Parra-Reyes was compliant during the stop, and was taken into custody without incident. None of the prior convictions in Mr. Parra-Reyes's Presentence Report mention or allege the use of violence.

The District Court also did not give sufficient weight to Mr. Parra-Reyes's current age: 52 years old. Studies have shown that older offenders are substantially less likely than younger offenders to recidivate following release.¹² For both federal offenders' prior arrest history and national 2016 arrests as reported by the FBI, older age groups had fewer arrests.¹³ It was found that both age and criminal history exerted a strong influence on recidivism. *Id.* For offenders in Criminal History Category IV (this was Mr. Parra-Reyes's criminal history category at the time of his sentencing), the re-arrest rate ranged from 86.3 percent for offenders younger than age 30 at the time of release (his age when he committed the priors the district court was so worried about), but that was reduced to 51.6 percent for offenders age 50 to 59 years (his current age).

Id., p. 25.

¹² <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders>

¹³ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf (Dec. 2017)

With full consideration of all the §3553(a) factors as the circumstances are now, including Mr. Parra-Reyes's post-incarceration conduct, Mr. Parra-Reyes's time served in prison constitutes a sentence sufficient but not greater than necessary to accomplish the goals of sentencing.

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

Mr. Parra-Reyes filed his Opening Brief with the Ninth Circuit on April 26, 2022. Instead of filing a response brief, the Government filed a Motion for Summary Affirmance. The Ninth Circuit granted the Motion and summarily affirmed the District Court's order on August 19, 2022.

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. Parra-Reyes’s issues raised in his appeal were far from such circumstances.

Summary affirmance should be denied where the arguments raised in the opening brief are sufficiently substantial to warrant further argument. *See, e.g., Thuillard v. United Customs & Border Sec.*, 214 F. App’x 651 (9th Cir. 2006). Mr. Parra-Reyes’s Opening Brief to the Ninth Circuit specific arguments that the District Court abused its discretion because its findings were not supported by the record. That alone prevented the summary affirmance and dismissal of Mr. Parra-Reyes’s appeal. Regarding the §3553(a) factors, Mr. Parra-Reyes’s argued that the District Court’s findings were an abuse of discretion. The District Court’s findings on the §3553(a) factors directly

contradicted its own statements made at the time of Mr. Parra-Reyes's sentencing. At the time of sentencing, the Court noted Mr. Parra-Reyes had been living in the U.S. for several years *without having engaged in any other criminal conduct.* (Sentencing Transcript 5/27/2021, p. 9-10, ER-68-69). The Court was also concerned that Mr. Parra-Reyes's criminal history category and total offense level were overstated. (Sentencing Transcript 5/27/2021, p. 10, ER-69). For example, the Court stated although the prior marijuana offense looked like it was only 5-years-old, it was actually 17-years-old. *Id.* The Court also stated it was not clear that Mr. Parra-Reyes still posed a threat to the public. *Id.* All of that directly contradicted the District Court's finding that Mr. Parra-Reyes has the "type of history and characteristics that do not favor early release" when it denied compassionate release.

Mr. Parra-Reyes is incarcerated for a nonviolent immigration offense. At sentencing, the District Court made statements indicating that Mr. Parra-Reyes's criminal history was not as serious as it appeared and that it wasn't clear if Mr. Parra-Reyes even posed a danger to the public anymore. Yet in denying Mr. Parra-Reyes's motion for compassionate release, the District Court cited the exact opposite – the seriousness and length of his criminal history. But the offenses referenced by the District Court occurred nearly 20-years ago (2000-2007) when Mr. Parra-Reyes was only in his 30's. Mr. Parra-Reyes is now in his 50's. This is the information the District Court was referring to when, at sentencing, the Court expressed its concern that Mr. Parra-Reyes's criminal history category and total offense level were overstated. When the

District Court denied Mr. Parra-Reyes's motion for compassionate release, this is the same information the court completely disregarded. Therefore, the District Court's findings on the §3553(a) factors are not supported by the Court's own record. Mr. Parra-Reyes's Opening Brief set forth erroneous factual findings made by the District Court in its analysis of the §3553(a) factors, and therefore the Ninth Circuit's summary affirmance was improper.

There are numerous examples of cases where, when the District Court correctly assessed the §3553(a) factors, compassionate release was granted even for those with long criminal histories. *See, e.g., 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).

Also, the Government noted in the District Court that Mr. Parra-Reyes has not, in fact, been vaccinated against COVID-19, but the parties and court were operating under Mr. Parra-Reyes's own assertion that he was. If Mr. Parra-Reyes is, in fact, not vaccinated against COVID-19, his risk for serious injury or death should he contract the virus is exponentially higher. The District Court did not consider this information and it goes directly to the issue of whether Mr. Parra-Reyes's health ailments and COVID-19 risk constitute extraordinary and compelling reasons for compassionate release. At a minimum, the Government's request for summary affirmance should have been denied and instead the case remanded by the Ninth Circuit back to the District Court for consideration of those new facts.

Mr. Parra-Reyes'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. Parra-Reyes'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. Parra-Reyes's appeal was improper and denied him of his right to appeal the District Court's final ruling.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 9th day of November 2022.

ROSENQUIST & ASSOCIATES

s/ Anders Rosenquist

Anders Rosenquist, Jr.
Az Bar No. 002724
42104 N. Venture Drive, Ste. A122
Anthem, AZ 85086
Attorney for Esteban Parra-Reyes