

IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

OCTOBER TERM, 2022

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ENRIQUE INFANTE, JR.,

Petitioner,

- VS -

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## **QUESTIONS PRESENTED FOR REVIEW**

- (1) Whether inadequate medical care for a treatable illness is a categorically insufficient basis to qualify as an extraordinary and compelling reason for 18 U.S.C. § 3582(c)(1)(A) relief?
- (2) Whether, in conducting a 18 U.S.C. § 3553(a) analysis for a compassionate release motion, a district court abuses its discretion if it analyzes whether it would have imposed a shorter sentence under current law at the time of the original sentencing, rather than engaging in a current-time determination in light of the new extraordinary and compelling reasons presented at the time of the motion?

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No. \_\_\_\_\_

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 21, 2023.

## **JURISDICTION AND CITATION OF OPINION BELOW**

On April 21, 2023, the Ninth Circuit affirmed the district court's denial of Petitioner's compassionate release motion in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

## **FEDERAL STATUTORY PROVISION AT ISSUE**

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

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

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

18 U.S.C. § 3582 (c)(1)(A)(i).

## INTRODUCTION

Petitioner asks this Court to grant review of the instant case to address two important questions concerning the adjudication of 18 U.S.C. § 3582(c)(1)(A)(i) motions. Petitioner was serving a ten-year sentence for a drug importation offense when he began to display obvious signs that he was suffering a life-threatening medical crisis. Despite Petitioner's repeated requests to BOP officials to provide him reasonable medical care to diagnose and treat his condition, he did not receive diagnostic treatment for nearly eighteen months, at which time he was diagnosed with, and then subsequently treated for, stage-II colon cancer.

Based upon what occurred in connection with the BOP's failure to provide Petitioner with necessary medical care in response to his obvious and serious medical need, Petitioner filed a request for compassionate release. The district court denied the motion, finding that the BOP's failure to provide Petitioner with adequate medical care for a treatable illness did not present an extraordinary and compelling basis relief. In the alternative, the district court found that the 18 U.S.C. § 3553(a) factors did not support a grant of relief because Petitioner had served just over four years of the ten-year sentence, and the original sentence would not have been shorter based upon current law. The Ninth Circuit affirmed.

This case squarely presents two questions which have widespread application in the section 3582(c)(1)(A) context, and for which guidance from the Court is much needed. First, Petitioner asks the Court to address whether inadequate medical care for a treatable illness is a categorically insufficient basis to demonstrate an extraordinary and compelling basis for compassionate release, a question where district courts in the Ninth Circuit conflicts with district courts in other circuits. Second, Petitioner asks the Court to decide whether, in the context of applying 18 U.S.C. § 3553(a) to a section 3582(c)(1)(A) motion, a district court abuses its discretion if it fails to conduct a current-time analysis as to whether the new extraordinary and compelling reason or reasons cited at the time of the motion warrant the granting of relief, and instead focuses on whether the sentence would have been different at the time of the original sentencing.

### **STATEMENT OF FACTS AND CASE**

In February 2018, Petitioner was arrested after importing methamphetamine into the United States from Mexico. In June 2018, Petitioner pled guilty to an information alleging a violation of 21 U.S.C. §§ 952 and 960, which included a ten-year mandatory-minimum penalty due to the quantity of drugs alleged. Petitioner's advisory guideline range was 168-201 months, but the district court varied downward and imposed the mandatory-minimum sentence of 120 months

custody.

Petitioner was delivered to the Bureau of Prisons' Correctional Institution at Victorville, California for service of his sentence in mid-2019. At the end of 2019, Petitioner began noticing blood in his stool. In early 2020 after his bleeding began to worsen, he repeatedly made FCI-Victorville officials aware of his condition. FCI-Victorville officials initially told Petitioner that the bleeding was just from hemorrhoids and there was nothing they could do about it; however, Petitioner continued to notify FCI-Victorville officials that it was much more serious than that. For instance, on September 21, 2020, he directed an "Inmate Request to Staff" to the medical supervisor, a request which he stated was approximately his 20th request for medical care for his condition, in which he stated:

I am having very serious rectal bleeding. Really heavy blood (I'm peeing blood thru anal in other terms). I poop globs of blood. I have abdominal lower pains when I try to poop. This is a serious matter going on for months now and medical isn't doing anything about my bleeding condition.

[ER 43].<sup>1</sup>

On October 8, 2020, Petitioner sent another formal inmate request to staff, this time addressed to the warden. [ER 44]. In this request asking for

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<sup>1</sup> "ER" refers to the excerpts of record Petitioner filed in the Ninth Circuit Court of Appeals.

compassionate release due to his medical condition (which included a positive Covid test), Petitioner again discussed his bleeding condition, and reiterated that it was an ongoing problem. Id. Ten days later, on October 18, 2020, this time in a request to the medical department, Petitioner stated “I don’t know how to stress this enough but my condition is still the same. The bleeding in my stool continues and its causing a lot of stress, anxiety, depression and its really starting to scare me.” [ER 45]. “I need to be seen my bleeding can be something serious that the B.O.P. medical has been ignoring for too long already.” Id. In the “disposition” section of this request, an entry dated October 20, 2020 stated that “you have been approved for a colonoscopy.” Id.

The colonoscopy did not occur until nine months later – on July 21, 2021. In the period between October 2020 and July 2021, Petitioner sent repeated requests to FCI-Victorville officials begging for medical care. In a November 2020 request, he repeated his health concerns and requested to confirm that he had the off-site colonoscopy scheduled. He stated in his request that he had requested verification and had been told that nothing was scheduled. [ER 46]. In response, he was informed that he was still scheduled for the procedure. Id. In January 2021, Petitioner requested another update and stated that he was having non-stop severe bleeding when going to the bathroom. [ER 47]. In response, the BOP told him that

it was still waiting on a report from a doctor. *Id.* On May 18, 2021, Petitioner emailed a request to the associate warden informing him that his bleeding was continuing to worsen, that he was going to the bathroom 6 to 10 times per day and primarily discharging blood on each occasion, and that he was afraid he might have colon cancer. [ER 48]. On May 24, 2021, Petitioner again emailed the associate warden, again describing the out-of-control bleeding. [ER 49]. Petitioner sent another similar email on June 4, 2021, [ER 51], and another one on July 5, 2021. [ER 52].

Petitioner finally was given a colonoscopy on July 21, 2021. [ER 54-60]. The procedure revealed a large tumor in Petitioner's colon which was subsequently confirmed to be malignant. [ER 55]. Two weeks later, Petitioner underwent surgery to remove the tumor, as well as part of his colon. *Id.* In November 2021, Petitioner was transferred to the Federal Medical Center at Butner, North Carolina where he began a course of chemotherapy for treatment of his stage-II colon cancer. [ER 62-64].

In February 2022, Petitioner was appointed instant counsel to present a compassionate release request to the district court. Counsel filed a request for compassionate release, along with exhibits documenting what occurred with Petitioner between 2019 and 2021. [ER 16-66]. The district court held a hearing on

the matter in May 2022. [ER 67-83].

The district court began the hearing by providing a tentative ruling:

While we all certainly can and do sympathize with Mr. Infante's medical condition, the prevailing case law is within the Ninth Circuit runs contrary to his position here. Briefly stated, without going into any extensive detail, the weight of the case law is that chronic but treatable conditions such as those conditions being experienced by Mr. Infante do not constitute extraordinary and compelling reasons for his release.

I think that Counsel cited a couple of cases there, a couple of cases out of the Northern District, *U.S. v. Rodriguez* and *U.S. v. Miller*, that are generally on point there.

Moreover, he does have other remedies available to him for any alleged inadequate medical care, particularly including a § 1983 claim for violation of the Eighth Amendment, prohibition against cruel and unusual punishment.

Going further, even if the Court did find that Mr. Infante's cancer amounted to extraordinary and compelling circumstances, which the Court has not found – at least not yet – defendant would still, in addition, have to demonstrate that the § 3553(a) sentencing factors weigh in favor of compassionate release here, which in the Court's view has not been demonstrated on the record.

Among other things, even if he could have avoided the ten-year mandatory minimum, as defense counsel argues here, by being sentenced after Lopez and after the effective date of the First Step Act, it's still likely he would have received a sentence, as I look at the guidelines and calculations, close to ten years due to his extensive criminal history – he was, after all, in a criminal history category VI – and in

light of the other aggravating factors apparent in the record here.

While to his credit, on the other hand, he has certainly performed well while in custody as demonstrated among other things, among other ways, by Exhibit G here and the multiple certificates he's earned, all to his credit. Still, in the Court's view, that would not carry enough weight to change the result here. So for those reasons, among others cited in the Government's opposition, the Court's tentative ruling is to respectfully deny the motion.

[ER 4-6].

Counsel for Petitioner argued that, irrespective of the fact that he was being treated for his condition, the district court should grant relief to account for the harm and trauma caused to Petitioner from the BOP's mistreatment of him, including the fact that the BOP's misconduct exacerbated his condition, and also to account for the fact that the BOP demonstrated that it would not provide proper medical care to Petitioner in the future. [ER 7-12]. The district court confirmed its tentative ruling and denied the motion. [ER 15-17].

The Ninth Circuit affirmed. It did not decide whether "the district court erred in holding that inadequate medical care for a treatable illness is a categorically insufficient basis for early release," but held that the "district court permissibly concluded that the 18 U.S.C. § 3553(a) factors weigh against reducing Infante's sentence in any event." [Ex. "A" at 3].

## ARGUMENT

### **THE COURT SHOULD REVIEW THIS PETITION TO DECIDE WHETHER INADEQUATE TREATMENT FOR A TREATABLE ILLNESS IS A CATEGORICALLY INSUFFICIENT BASIS FOR 18 U.S.C. § 3582(c)(1)(A)(I) RELIEF, AND WHETHER A DISTRICT COURT ABUSES ITS DISCRETION IF IT FAILS TO CONDUCT A CURRENT-TIME 18 U.S.C. § 3553(a) ANALYSIS REGARDING WHETHER THE NEWLY PRESENTED EXTRAORDINARY AND COMPELLING BASES WARRANT RELIEF**

**A. Inadequate medical care for a treatable illness is not a categorically insufficient basis to demonstrate an extraordinary and compelling reason for 18 U.S.C. § 3582(c)(1)(A) relief**

The First Step Act expanded the grounds for compassionate release under 18 U.S.C. Section 3582(c) by granting to district courts the right to “reduce the term of imprisonment . . . after considering the factors set forth in [18 U.S.C. §] 3553(a), to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582. Most circuits have held that the current version of USSG § 1B1.13 is not an ‘applicable policy statement[]’ for [sentencing reduction] motions filed by a defendant.” United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021); see also, e.g., United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) (“Turning to the text of Guideline § 1B1.13, it is manifest that its language is clearly outdated and cannot be fully applicable.”); United States v. McCoy, 981 F.3d 271, 281 (4th Cir. 2020) (“What § 3582(c)(1)(A) requires

is that sentence reductions be consistent with ‘applicable policy statements.’ And here, that consistency requirement simply is not implicated, for the threshold reason that there currently exists no ‘applicable policy statement[ ].’); United States v. Jones, 980 F.3d 1098, 1108 (6th Cir. 2020) (“U.S.S.G. § 1B1.13 is not an ‘applicable’ policy statement when an imprisoned person files a motion for compassionate release . . . .”); United States v. Gunn, 980 F.3d 1178, 1181 (7th Cir. 2020) (“Until . . . § 1B1.13 is amended, however, the Guidelines Manual lacks an ‘applicable’ policy statement covering prisoner-initiated applications for compassionate release.”).

Because “[t]here is as of now no ‘applicable’ policy statement . . . district courts are empowered . . . to consider any extraordinary and compelling reason for release that a defendant might raise.” Aruda, 993 F.3d at 801 (quoting McCoy, 981 F.3d at 281). District courts can “consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release.” Brooker, 976 F.3d at 237 (cited with approval by Aruda). So while “[t]he Sentencing Commission’s statements in U.S.S.G. § 1B1.13 may inform a district court’s discretion . . . they are not binding.” Aruda, 993 F.3d at 802.<sup>2</sup>

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<sup>2</sup> The U.S. Sentencing Commission recently adopted an amendment to section 1B1.13, to become effective November 1, 2023.  
(<https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-ame>

The Ninth Circuit erred at the outset in declining to find that Petitioner presented an extraordinary and compelling basis for section 3582(c)(1)(A) relief. The concept that inadequate medical care for a treatable illness is categorically an insufficient basis for demonstrating an extraordinary and compelling ground for early release not only is in conflict with numerous district court decisions which have addressed similar claims, but it represents an irrational approach to adjudicating section 3582(c)(1)(A)(i) motions.

Numerous district courts have found that the BOP's failure to provide adequate medical care, even as to a treatable illness, can rise to the level of demonstrating an extraordinary and compelling ground for early release. See, e.g., United States v. Burr, 2022 WL 17357233, at \*8 (M.D.N.C. Dec. 1, 2022) (noting that “[m]any courts have explicitly found that lengthy and unexplained delays of needed medical care can be extraordinary and compelling circumstances,” and finding inadequate medical care for consistent epigastric pain constituted extraordinary and compelling circumstances); United States v. Beck, 425 F. Supp. 3d 573, 580–82 (M.D.N.C. 2019) (finding that the BOP’s delay in arranging a biopsy to diagnose the defendant’s breast cancer was an extraordinary and compelling reason for

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compassionate release); United States v. Derentz, 2022 WL 2192931, at \*1-5 (E.D. Penn. June 17, 2022) (finding that BOP’s “grossly inadequate treatment” of a defendant’s treatable medical condition, including delays in treatment, may qualify as an extraordinary and compelling reason); United States v. Kohler, 2022 WL 780951, at \*4 (M.D. Fla. Mar. 15, 2022) (finding that the defendants motion and supporting evidence describe inadequacies in his medical care that put his life at serious risk and support compassionate release), citing United States v. Vazquez-Torres, 2020 WL 4019038, at \*4 (S.D. Fla. July 14, 2020) (granting compassionate release “given the obstacles [defendant] faces in receiving adequate and complete treatment while incarcerated.”); United States v. Verasawmi, 2022 WL 2763518, at \*1-3, 8-9 (D. N.J. July 15, 2022) (granting compassionate release and finding that “BOP has either neglected to provide urgent treatment . . . or repeatedly delayed for months in providing scheduled care” and “had the Court not intervened, the ‘urgent’ care Verasawmi’s physician ordered would have continued to fall through the cracks.”); United States v. Rodriguez-Gonzales, 2021 WL 5769160, at \*1-3 (N.D. Ohio. Nov. 3, 2021) (“The defendant needs medical care for a serious condition that incontestably can be painful and can affect the quality of life . . It seems clear that the [prison’s] decisionmakers were not inclined to take even the simplest of steps to respond to this situation.”); Vazquez-Torres, 2020 WL 4019038, at \*4 (granting

compassionate release “given . . . the obstacles [defendant] faces in receiving adequate and complete treatment while incarcerated”).

Petitioner presented to the district court undisputed evidence that the BOP, when faced with unmistakable evidence that he was suffering from a life-threatening health crisis, waited nearly eighteen months before providing him the basic medical care to which he was entitled. See Brown v. Plata, 563 U.S. 493, 510-11 (2011) (“Prisoners are dependent on the State for food, clothing, and necessary medical care. . . . Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care.”); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (“[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”). While the district court relied on what it believed to be the law in the Ninth Circuit to find that even this level of maltreatment did not present an extraordinary and compelling reason for early release because Petitioner’s colon cancer was treatable, [ER 4-6], this position is in direct conflict with the aforementioned decisions which have declined to recognize such a callous distinction. The impropriety of the district court’s conclusion in this case is especially evident here because there is nothing in the record to indicate that the BOP’s failure to provide medical care to Petitioner was in any way due to “inadvertence or good faith errors.” See Anderson v. Kingsley, 877 F.3d 539, 543

(4th Cir. 2017) (factoring into Eighth Amendment determination reason for insufficient medical response).

In sum, as to this first issue, the Court should review this case to address this conflict and decide which approach is proper. Is it the one from this case where the question of whether BOP medical misconduct can qualify as extraordinary and compelling depends on whether the victim has a treatable illness, or is it the one from the decisions of the above district courts which have recognized that what is extraordinary and compelling does not necessarily depend on whether the BOP's insufficient medical care is related to a condition which is going to cost the prisoner his or her life.

**B. A district court abuses its discretion when adjudicating a compassionate release motion by failing to engage in a current-time determination in light of the new extraordinary and compelling reasons presented at the time of the motion**

The Ninth Circuit found that even if Petitioner showed an extraordinary and compelling reason for early release due to the BOP's failure to provide him with timely and necessary medical care for his life-threatening condition, the district court permissibly found that the section 3553(a) factors weighed against any sentence reduction. [Ex. "A" at 2]. The problem with the Ninth Circuit's conclusion is that instead of the district court engaging in an up to date analysis as to whether the

relevant section 3553(a) “factors weigh against sentence reduction in light of new extraordinary and compelling reasons,” see United States v. Malone, 57 F.4th 167, 176 (4th Cir. 2023) (noting that a district court’s task is to ““determine whether these relevant § 3553(a) factors weigh against sentence reduction in light of new extraordinary and compelling reasons.”” (citing United States v. Kibble, 992 F.3d 326, 334 (4th Cir. 2021) (Gregory, C.J. concurring)), it instead engaged in a backward-looking analysis as to the reasonableness of the original sentence. The district court found that no reduction was warranted because the original sentence would not have been shorter even under current law (as related to since-expanded safety-valve relief), and it noted that Petitioner had served less than half of the original ten-year term. [Ex. “A” at 2-3].

Neither of these points address whether, at the time of Petitioner’s hearing on his compassionate release motion, the section 3553(a) “factors weigh against sentence reduction in light of new extraordinary and compelling reasons.” Malone, 57 F.4th at 176. Recently, the Court held that in considering resentencing motions under section 404(b) of the First Step Act—addressing crack/powder sentencing disparities—the Court must view the present-day defendant and any changes that have occurred since the original sentencing. See Concepcion v. United States, 142 S. Ct. 2389, 2395-96 (2022). This recognizes the fundamental principle

that “the punishment should fit the offender and not merely the crime.” Pepper v. United States, 562 U.S. 476, 487–88 (2011) (citation omitted). Judges should use “the fullest information possible concerning the defendant’s life and characteristics.” Id. at 488.

The district court had a host of new facts and developments that were required to inform its section 3553(a) analysis when Petitioner’s case was back before it in May 2022. It had detailed and undisputed information that for the nearly eighteen months prior to his colonoscopy, Petitioner presented clear evidence to the BOP that he was seriously ill and the BOP failed to provide him with timely medical care. It knew that when BOP officials finally did take Petitioner to the hospital to diagnose his condition properly, the procedure revealed that a large cancerous tumor had grown in his colon which required surgery to remove both the tumor and a portion of his colon. It was aware that Petitioner was at that time undergoing chemotherapy to treat this now stage-II cancer at a prison medical center. And it knew that it is unknown whether Petitioner’s life-threatening cancer will reoccur in the future. Instead of the district court conducting a section 3553(a) analysis specifically in light of this extraordinary misconduct by the BOP and its multiple adverse impacts on Petitioner, including whether these developments changed what length of sentence was “sufficient, but not greater than necessary,” to “reflect the

seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,” to “afford adequate deterrence to criminal conduct,” and “to protect the public from further crimes,” 18 U.S.C. § 3553(a)(2)(A)-(C), it simply found that the factors weighed against relief because it would not have imposed less time under the current law at the time of the original sentencing, and because Petitioner had served less than half of the ten-year term it originally imposed. [Ex. “A” at 2-3]. While the Ninth Circuit found this analysis to be sufficient, this record fails to demonstrate that the district court specifically considered these new facts in connection with its section 3553(a) analysis. See United States v. Hargrove, 30 F.4th 189, 197 (4th Cir. 2022) (“[m]otions for relief under § 3582(c)(1)(A)(i) ask courts to balance the severity of the inmate’s personal circumstances, on the one hand, against the needs for incarceration, on the other.”); Malone, 57 F.4th at 176 (district court’s task is to “determine whether relevant section 3553(a) factors weigh against sentence reduction in light of new extraordinary and compelling reasons”). Review of this case by the Court therefore also is necessary to address whether the district court’s narrow and backward-focused section 3553(a) analysis conformed with the principles from Pepper and Concepcion.

## CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: May 10, 2023

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