17-3997

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ALEXANDER SALVAGNO,
a/k/a Alex Salvagno,

Petitioner-Appellant,

-against-

DIRECTOR, BUREAU OF PRISONS,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF AND APPENDIX FOR THE APPELLANT

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PRELIMINARY STATEMENT

Alexander Salvagno, a federal prisoner, appeals from a final judgment of the United States District Court for the District of Connecticut (Shea, J.), dismissing his *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. By order dated September 14, 2018, this Court appointed present counsel pursuant to the Criminal Justice Act to assist Mr. Salvagno with his appeal by filing a supplemental brief addressing, among other issues, "whether the federal courts may review a refusal of the Bureau of Prisons to move for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i)" (*see* Appendix ("A.") hereto, at A.159-60), a statute authorizing a reduced sentence and a defendant's compassionate release from prison when a district court finds that "extraordinary and compelling reasons warrant such a reduction".

The statute also requires the Bureau of Prisons ("BOP") to initiate the compassionate release process with a motion confirming that a particular inmate is eligible for consideration on medical or other grounds. Mr. Salvagno's warden recommended that the BOP make this initiating motion after the sudden and untimely death of Mr. Salvagno's wife, a tragedy that left the couple's three minor children without any other family member to care for them as a family unit, in part because the eldest child is afflicted with severe medical and developmental conditions that call for daily treatment and therapies. This family circumstance is expressly recognized in the Sentencing Guidelines and the BOP's own internal policies as one that crosses an eligibility threshold that should always allow for judicial consideration of an inmate's compassionate release. Yet the BOP refused to make an initiating motion in Mr. Salvagno's case.

Mr. Salvagno therefore challenged the BOP's refusal to initiate compassionate release consideration on his behalf, both under the broad habeas corpus statute, 28 U.S.C. § 2241, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, *et seq.*, but the district court dismissed his application, finding that it did not have the power to review the refusal of the Bureau of Prisons under either provision. In this, the court followed the flawed line of reasoning adopted by too many other courts that have wrongly assessed the jurisdictional issue by analogy to repealed statutory provisions governing parole, and without regard either to legislative intent or the Sentencing Commission's more recent articulation of factors that expressly encourage a BOP motion in

any case where a prisoner's changed circumstances meet the threshold qualifications for compassionate release.

Upon careful consideration of all of the traditional principles that call for an exercise of judicial review here, this Court should now correct this sad judicial history of mistakenly placed deference to the BOP's detrimental misinterpretation of the limited role Congress intended it to serve in compassionate release matters: as a neutral gatekeeper that does not thwart or delay, but conscientiously identifies those in its custody whose extraordinary and compelling circumstances should be considered by a sentencing court as a potential basis for a reduction in sentence. As his warden agreed, this petitioner's tragically changed family circumstances plainly passed that threshold. Because the BOP erred when nevertheless refusing to notify the sentencing court of petitioner's eligibility for compassionate release with an initiating motion, this Court should now reverse the district court's dismissal and direct that petitioner's qualifying application be considered on the merits by his sentencing court, along with all other factors in 18 U.S.C. § 3553(a).

JURISDICTIONAL STATEMENT

Under 28 U.S.C. § 2241, the district court possessed subject matter jurisdiction to entertain an application for a writ of habeas corpus by any person held in custody in violation of the Constitution or laws or treaties of the United States. Mr. Salvagno remains in federal custody at FCI Danbury, having thus far served more than 164 months of an unprecedented 300-month sentence imposed

for convictions of a racketeering conspiracy premised on his operation of an asbestos abatement company, and related conspiracy and substantive violations of the Clean Air and Toxic Substances Control Acts.

This Court's appellate jurisdiction is invoked pursuant to 28 U.S.C. § 1291, 28 U.S.C. §§ 2106, 2253(a), and Rule 4(a), Federal Rules of Appellate Procedure. Petitioner filed a timely notice of appeal on December 8, 2017, less than 60 days from the date the district court filed its decision (November 7, 2017) and judgment (November 9, 2017) dismissing petitioner's § 2241 motion (A.3, A.145-58). No certificate of appealability is required for habeas proceedings considered pursuant to 28 U.S.C. § 2241. Drax v. Reno, 338 F.3d 98, 106 n.12 (2d Cir. 2003)("the § 2253(c) requirement does not apply to federal habeas proceedings . . . brought pursuant to 28 U.S.C. § 2241").

STATEMENT OF FACTS

In 2004, petitioner Alexander Salvagno and his father were convicted after a trial of charges relating to their operation of an asbestos abatement company. As recounted in his presentence report (PSR ¶¶ 1-44),[1] the charges alleged that the defendants engaged in a racketeering conspiracy with predicate acts of obstruction of justice, money laundering and mail fraud from 1992 through 1998, and that, from 1990 to 2003, they conspired to

[1] A copy of the petitioner's presentence report will be submitted to the Court for filing under seal during the pendency of this appeal.

violate and, from 1990 to 1999, substantively violated the Clean Air and Toxic Substances Control Acts by undertaking asbestos removal projects in a manner that did not comply with lawful requirements meant to minimize environmental and health risks.

Prior to sentencing, the government identified a number of companies and individuals who suffered financial losses attributable to the asbestos removal practices of which the defendants were convicted (PSR ¶¶ 45-61). While a few individuals also voiced concerns over the risks of exposure and the potential for resulting adverse health consequences created by improper asbestos removal procedures (PSR ¶¶ 49, 55-57), the probation office advised the sentencing court that "damage to individuals directly and indirectly exposed to asbestos debris in this instance cannot be identified or quantified", in part because, according to the government's expert, "asbestos-related diseases do not become clinically evident until fifteen to twenty years have elapsed since exposure" (PSR ¶ 58).

Only one former employee of the defendants' asbestos abatement company was found to have developed pleural asbestosis as of 2003; however, given the 15-20 year latency period specified by the government's expert, his exposure would have occurred between 1983 and 1988, prior to the earliest of the asbestos removal violations (1990) alleged against the defendants (PSR ¶¶ 66, 108), and also before the time he worked for the defendants. No evidence showed that any of petitioner's employees could trace any relevant condition to the improper asbestos treatment practices of which

petitioner has been convicted. Nevertheless, the probation office surmised that it was "quite possible that other persons exposed will develop medical complications in the upcoming years" (PSR ¶¶ 66, 89).[2]

Accordingly, among the many upward adjustments added to the relatively modest base offense levels assigned to the offenses of conviction (PSR ¶¶ 79-97), the probation office added 9 levels to the guideline calculation for the Clean Air Act violations based on an earlier prosecution involving "a very similar fact pattern", in which this Court held that the conduct of another asbestos abatement contractor should be so graded based on a "substantial likelihood that at least one of his former employees would develop asbestos-related diseases", whether or not there was any evidence of such harm at the time of sentencing (PSR ¶ 89, citing United States v. Thorn, 317 F.3d 107, 118-19 (2d Cir. 2003)).

This earlier case involved a defendant with some criminal history, unlike petitioner, who had none at all (PSR ¶¶ 108-111). And while the cases reportedly involved "a very similar fact pattern", the defendant in the earlier case ultimately received a sentence of 144 months. United States v. Thorn, 659 F.3d 227, 230 (2d Cir. 2011).

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[2] That possibility has reportedly not come to pass, according to Workers' Compensation records submitted below (indexed as Doc. No. 12-12 in the record on appeal). Those records show that no worker has developed an asbestos-related disease in the fourteen years since petitioner's sentencing for their work undertaken between 1990 and 1998. This circumstance is one the sentencing court should consider when evaluating petitioner's application for compassionate release, since it bears on the nature and seriousness of the offenses for which petitioner has been sentenced.

At petitioner's sentencing, however, the court imposed a far harsher sentence of 300 months (A.30, A.45, A.146), an unprecedented punishment for the types of offense conduct of which petitioner stands convicted. This Court later summarily upheld petitioner's convictions and sentence on direct appeal. United States v. Salvagno, No. 06-4202, 343 Fed. Appx. 702 (2d Cir. Aug. 28, 2009).

A. Petitioner's Application for Compassionate Release

At the time of his sentencing in 2004, petitioner had been married to his wife, Rebecca, for close to five years (PSR ¶ 118). The couple had two young children (a 4-year old son and 3-year old daughter) at the time his presentence report was prepared (PSR ¶ 119), and welcomed a third child (another son) in 2005 (A.30), some months after petitioner surrendered to serve his sentence in April 2005 (A.34).

As detailed in his presentence report, petitioner's eldest child has "suffered from severe medical problems since birth" and was "initially given a life expectancy of just three weeks" (PSR ¶ 119). After undergoing several surgeries, the infant's life expectancy was extended to two to three months, and he spent those months in hospice care (PSR ¶ 119). Nine months later, in 2001, he first came home to his parents, but still required daily home nursing, special education, occupational therapy, and daily medications (PSR ¶¶ 119-20). The child also required a kidney transplant, and petitioner expected to be the donor (PSR ¶ 119).

After petitioner surrendered to begin serving his sentence in 2005, his wife Rebecca alone continued to care for their three

children, including their eldest child who has confronted and endured severe disabilities calling for daily medical and therapeutic interventions throughout his life. When petitioner's wife unexpectedly and tragically passed away on November 2, 2014, the couple's three minor children (then 14, 13 and 9) were left without either parent or any other family caregiver who could look after the children as a family unit and who possessed the medical training their eldest child's care still requires (A.15, A.17-18).

To best address the needs of his surviving children, petitioner applied for compassionate release in a thorough and well-documented application submitted to his warden on March 30, 2015 (A.15-44). In that compelling application, petitioner described the trauma, grief and needs of all three of his young children, the absence of any other family caregiver to stand in for their late mother, the special and serious medical and therapeutic needs of his eldest child that petitioner himself is trained to provide, and the positive relationship petitioner retains with all of his children, even since his incarceration (A.15-23, A.38-44). Petitioner's application also contained numerous letters of support, a release plan that included a friend's offer of immediate gainful employment, information about the offenses underlying petitioner's conviction, and details about petitioner's exceptionally positive institutional adjustment and achievements (A.24-30). Finally, petitioner outlined a persuasive collection of reasons why a reduction in his present sentence would not undermine any of the recognized goals of sentencing, and why his application

for a reduced sentence is supported by extraordinary and compelling circumstances (A.31-36).[3]

The warden of petitioner's correctional facility soon agreed that the information petitioner provided "presents compelling circumstances that warrant a recommendation for a Reduction in Sentence/Compassionate Release" under the BOP's Program Statement 5050.49 (A.45-46).[4] In a letter dated April 29, 2015, to the Office of General Counsel, the warden thus described the unexpected passing of petitioner's wife and the need for petitioner to stand in as the only available family member capable of providing for the care of the couple's three minor children (A.45). The warden also advised that petitioner has earned a Low Security Level during his years in custody (A.45). Forwarding all of the documentation petitioner previously provided in support of his application, the warden concluded by recommending that petitioner's request for a reduction in his sentence be approved based on his extraordinary and compelling circumstances (A.45).

A month later, on May 28, 2015, petitioner supplemented his application with additional information about the inability of the

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[3] Petitioner's present release date, assuming his continued accrual of all good time credits and release to a halfway house, is July 20, 2026 (as shown on a BOP Sentence Monitoring Computation indexed as Doc. No. 5-3 in the record on appeal). His compassionate release to care for his children would reduce his present 25-year sentence by about 7 actual years, and the 18 remaining years will still hold its place as the most severe sentence ever imposed for asbestos-related offenses.

[4] Among other grounds, this program statement specifically recognizes that an application for compassionate release may be based on the "death or incapacitation of the family member caregiver" (A.101). A copy of the entire program statement is reproduced in the accompanying appendix (A.97-111).

temporary caregivers of his children to cope with his eldest son's extraordinary needs (A.47-50). After more months passed without any word from the Office of General Counsel, petitioner again supplemented his application on October 2, 2015 (A.51-69), this time to inform the BOP that the temporary, non-family member guardians of his three children could no longer serve in that capacity, and that his children had been separated: his two younger children had been sent to live with his wife's brother in Tennessee, and his eldest son had been temporarily taken in by a family friend who was looking for a group home that could address his son's extraordinary needs (A.51-57).

Because these developments and their separation caused all of his children to suffer, petitioner urged the BOP's expeditious consideration of his pending application. A few weeks later, on October 22, 2015, petitioner updated the BOP with additional information that the Albany Family Court had placed his eldest son in temporary foster care because no family member was available to care for him (A.70-72).

Petitioner's application languished in the Office of General Counsel for many more months. On May 2, 2016, petitioner forwarded another letter of support to advise the BOP that his eldest son, who had received a kidney transplant in 2009 (at age 9) from a deceased donor, would require a new transplant within ten years (by 2019) and that, if he received the next kidney from a living family member, it could serve him for 20 or more years (A.73-74). The letter further advised that petitioner is a match and can donate a

kidney to his son (A.74). Also, this letter advised that petitioner's youngest child, who had experienced substantial difficulties adjusting to his mother's loss and living apart from his immediate family, was again expected to be displaced at the end of the school year and moved, either into foster care or to the home of some other temporary guardian, this time apart from his sister as well as any other family members (A.74).

Around this same time, in June 2016, the Albany Family Court held a hearing to assess the best interests and safety of petitioner's eldest child, who had remained in a foster home with medical assistance since October 2015 (A.70, A.75). The court continued this placement until December 2016, but directed that the child should be "[r]eturn[ed] to [his] parent" if petitioner's application for compassionate release is granted (A.77). In letters dated August 15 and December 23, 2016, petitioner's *pro bono* counsel advised the BOP of these developments, forwarding a copy of a transcript showing that the participants in the family court proceedings had taken all necessary steps to "facilitate the prompt return of the boy to his father's custody upon the granting of compassionate release", and urging the BOP to promptly file a motion with the sentencing court so that petitioner's application for a reduction in his sentence could be evaluated and decided (A.79-86).

Ultimately, on December 29, 2016, the BOP's Office of General Counsel issued its decision summarily advising that petitioner's application had been denied (A.87-88). The decision acknowledged

that, under the BOP's own program statement, the death or incapacitation of a family member caregiver that leaves an inmate's children without a family member to care for them may be grounds for a reduction in sentence if the inmate shows that the deceased family member was the only family member capable of caring for the inmate's children, that the inmate can obtain the immediate custody of any child in foster care, and that the inmate's children are under the age of 18 (A.87), factors addressed and established in petitioner's submissions. The decision also recognized that petitioner's wife had passed away suddenly on November 2, 2014, and that she "reportedly served as caregiver of their three minor children" (A.87).

Then, pivoting from its appropriate assessment of petitioner's thus established eligibility under the BOP's own policies authorizing a motion to allow a sentencing court to consider reducing a prisoner's sentence after the death of a family member caregiver, the BOP denied petitioner's application "because of his criminal conduct" (A.88) – a factor meant to be assessed, not by the BOP, but under § 3553(a), after the matter was referred to the sentencing court. Further, the BOP's denial rested on entirely unsupported and mistaken facts, pronouncing (from no source we can locate anywhere in the records) that petitioner's offense conduct supposedly "increased the likelihood of death of or serious bodily injury to at least 468 victims, a number of whom were present in contaminated elementary schools, churches and offices"; that two of petitioner's children were being cared for by their maternal uncle,

even though petitioner's youngest child had by then been removed elsewhere and separated from his sister and any family caregiver; and that the family court had "directed that [petitioner's] third child remain in foster care", again overlooking submitted documents that confirmed that the family court had actually ordered petitioner's eldest child to be returned to his father as soon as petitioner's pending application for compassionate release was granted (A.88).[5]

In a prompt request for reconsideration filed on January 23, 2017, petitioner notified the Office of General Counsel that its decision rested on "inaccurate and unreliable" information that should be corrected, and that the BOP had otherwise exceeded the scope of its role in the compassionate release process by applying "more stringent eligibility criteria than that established by the [Sentencing] Commission" when evaluating whether "extraordinary and compelling reasons" supported the filing of a motion for compassionate release (A.89-94). When the BOP did not reconsider its decision, petitioner sought relief from the district court with a § 2241 motion (A.5-14), in which he also sought relief under the Administrative Procedures Act, 5 U.S.C. §§ 701, 706(2)(a) (indexed as Doc. No. 1-1 at 1-2).

B. <u>The District Court Proceedings</u>

In his § 2241 motion, petitioner again assembled a persuasive, accurate and thorough *pro se* application for habeas relief,

[5] Under BOP regulations, 28 C.F.R. § 571.63(b), (d), this decision by the Office of General Counsel constituted a final administrative decision that may not be appealed.

detailing all of the foregoing information and providing the district court with a complete record of his efforts to obtain an initiating motion from the BOP for compassionate release, for which he qualified under all applicable standards. Petitioner specifically challenged the BOP's application of more restrictive criteria than Congress intended it to apply to a prisoner's initial application for compassionate release; the BOP's abuse of its discretion both when failing to make a motion despite petitioner's eligibility, and when basing its denial on factors Congress did not intend the BOP to consider; the BOP's reliance on unsupported and inaccurate facts that petitioner was never afforded an opportunity to correct; the BOP's misapplication of its own policies when soliciting the opinion of the office that prosecuted petitioner before deciding whether his application should be granted; and the resulting constitutional infringements, both to petitioner's due process rights and to the separation of powers principles that the BOP's policies failed to respect, that had been produced by these combined errors.[6]

Petitioner's motion also supplied the district court with unusual evidence of the BOP's long history of misinterpreting its statutory role and responsibility to initiate compassionate release consideration. First, in a detailed report issued in April 2013, the Office of the Inspector General of the U.S. Department

[6] Consistent with Rule 30(a)(2), Fed. R. App. P., we have not reproduced any memorandum of law in the accompanying appendix, but copies of petitioner's arguments are available in the electronic docket (indexed as Doc. Nos. 1-1 and 12-1), as is the government's response (indexed as Doc. No. 5).

of Justice ("OIG") concluded that the "BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered" (A.95-96).[7] The OIG faulted the BOP's failure to provide its staff with guidance on relevant criteria, its lack of timeliness in reviewing requests, its lack of procedures to inform inmates about the program, and the absence of any tracking mechanism to assure consistent decisions and timeliness (A.96).

As a result of "these multiple failures", the BOP engaged in inconsistent and *ad hoc* decisions that not only defeated cost savings and efforts to manage a growing federal prison population, but delayed decisions to the point that some 13 percent of eligible inmates died before their requests were even decided by the BOP Director (A.96). Further, the OIG found that those achieving compassionate release did not pose a significant threat to public safety, since only a small percentage of compassionately released individuals were rearrested (A.96).

Not long after the OIG's critical report, the BOP somewhat revised its procedures for implementing the compassionate release/reduction in sentence provisions provided in both 18 U.S.C. § 3582(c)(1)(A), and the now repealed "old-law" provision in 18 U.S.C. § 4205(g) (allowing a sentencing court, "upon motion of the Bureau of Prisons, [to] reduce any minimum term to the time the defendant has served"). Program Statement 5050.49 (Aug. 12,

[7] A copy of the entire report is annexed as Exhibit 10 to petitioner's reply memorandum (indexed as Doc. No. 12-11).

2013) (A.97-111) now details the required procedures and criteria the BOP considers before making any motion that could result in a court reducing an inmate's sentence.

For requests based, as here, on the "death or incapacitation of the family member caregiver", the policy requires documentary proof that the family member passed away, that the inmate is the parent of the child or children who are under 18 years of age, and that the inmate has a release plan, housing and the financial means to care for the child or children upon his release (A.101-02). The policy then goes on to also require the BOP's assessment of matters beyond its ken, such as whether the deceased family member was "the only family member capable of caring for the inmate's minor child", whether "release of the inmate to care for the inmate's child is in the best interest of the child", and the familiar sentencing factors relating to the nature and circumstances of the offense, the history and characteristics of the offender, and whether release would pose a danger to the community (A.104, A.106).

These, of course, are some of the very same matters that are routinely considered, with far greater expertise, by family courts and sentencing courts. Further, a sentencing court is statutorily required to consider all § 3553(a) factors again once the BOP initiates the compassionate release process with a motion that confirms an inmate's general eligibility for a reduction in his sentence under § 3582(c)(1)(A) ("the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of

imprisonment . . . after considering the [applicable] factors set forth in § 3553(a) . . . if it finds that . . . extraordinary and compelling reasons warrant such a reduction"). Yet the BOP policy appears to be aimed at predetermining whether "particularly extraordinary and compelling circumstances" support an application for compassionate release as part of its initial screening for eligible candidates (A.106). Further, unlike any later judicial determination (assuming there ever is one), the BOP effort is entirely unguided, without so much as a definition of what might make circumstances "particularly" qualifying enough to bring a candidate to the court's attention.

As further highlighted in petitioner's § 2241 motion, this expansive interpretation of the BOP's supposed role in compassionate release matters next led to a public hearing on February 17, 2016 (A.112),[8] and ultimately to revisions in the Sentencing Commission's Policy Statement § 1B1.13, describing "what should be considered extraordinary and compelling reasons for sentencing reduction, including the criteria to be applied and a list of specific examples", as Congress directed the Sentencing Commission to provide in 28 U.S.C. § 994(t).

Witnesses at the 2016 hearing identified a number of problems with the BOP's criteria for filing an initiating compassionate

[8] Excerpts from the Sentencing Commission hearing testimony that petitioner submitted with his initial § 2241 motion are annexed (A.112-44). Petitioner also provided a complete copy of the relevant portion of the Sentencing Commission's hearing with his reply (indexed as Doc. No. 12-4, Exhibit 3), and filed copies of the written statements of some of the hearing witnesses as well (indexed as Doc. Nos. 12-8, 12-9, and 12-10, Exhibits 7-9).

release motion. For example, the BOP used a general recidivism rate (41%) to estimate whether the compassionate release of older inmates posed any danger to the public, whereas the OIG's office determined that a much lower recidivism rate (3.5%) actually applied to those granted compassionate release (A.119). Also, witnesses expressed concerns that, even though Congress intended compassionate release authority to serve as a "judicially-administered safety valve" that rests primarily on a sentencing court's evaluation of a particular prisoner's extraordinary and compelling reasons for compassionate release, as guided by the Sentencing Commission's defining criteria, the BOP has effectively "played all three decision-making roles" by considering, as part of its initial identification of qualifying individuals, not only an individual's threshold eligibility, but § 3553(a) factors (like the seriousness of the offense of conviction and whether a defendant is likely to reoffend) that the statute expressly intends a sentencing court to evaluate (A.120-23).

Witnesses therefore encouraged the Sentencing Commission to "restore the proper balance" to the compassionate release program by confining the BOP to its intended "gatekeeping role" of deciding whether the Commission's criteria apply and requiring the BOP to make an initiating motion whenever a defendant meets any of the eligibility criteria, since Congress intended § 3582(c)(1) to apply "whenever a defendant's changed circumstances make continued confinement inequitable" (A.123-30, A.136). As witnesses agreed, "the current process is broken", leaving individuals in prison

when the compassionate release program should have permitted their release to die at home, or to care for their children (A.127-28).

One witness in fact recounted petitioner Salvagno's own then-ongoing efforts to elicit a BOP initiating motion that would allow his sentencing court to consider his compassionate release so that he could return to his sick and parentless children after his wife's passing (A.135-41). At that time, petitioner's motion had been pending with the BOP for some nine months since the warden found petitioner eligible for a reduction in his sentence, even though he clearly satisfied the Commission's criteria for compassionate release (A.139-40). The witness therefore urged the Sentencing Commission to "send a clear message" to the BOP to "confine itself to the task of determining who in this population meets the criteria" the Sentencing Commission enunciates, move their cases into court, and leave the rest up to the court (A.141).

After this hearing, the Sentencing Commission promulgated amended guidance intended to "broaden[] certain eligibility criteria and encourage[] the Director of the Bureau of Prisons to file a motion for compassionate release when 'extraordinary and compelling reasons' exist". U.S.S.G. Policy Statement § 1B1.13, Amend. 799 (Nov. 1, 2016). As the Commission found, even though it is the "Director of the Bureau of Prisons [who] has the statutory authority to file a motion for compassionate release", it is the sentencing court that holds "a unique position to assess whether the [extraordinary and compelling] circumstances exist, and

whether a reduction is warranted" based on the defendant's medical condition, family circumstances, "whether the defendant is a danger to the safety of any other person or to the community", and other applicable factors in § 3553(a). *Id.* With this amendment, the Sentencing Commission therefore intended to remove "administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants", by urging the BOP to file an initiating motion whenever a defendant "meets any of the circumstances set forth in Application Note 1" to § 1B1.13 – one of which, again, is the "death or incapacitation of the caregiver of the defendant's minor child or minor children". Application Note 1(C)(i) to § 1B1.13.

The government's response (indexed as Doc. No. 5) to petitioner's well-supported application acknowledged that petitioner had sufficiently exhausted his challenge to the BOP's refusal to move for compassionate release, but nevertheless opposed the district court's consideration of the merits of his § 2241 motion.[9] As the government argued, the BOP has broad discretion to move or refuse to move for compassionate release, and various courts have deemed that discretion beyond a district court's power to review (*id.* at 15-19). Alternatively, if the court were to review it, the government posited that the BOP should be held to have made a reasonable and "well-informed"

[9] The government's response also argued that the proper respondent in this matter is not the Director of the Bureau of Prisons, but D.K. Williams, the Warden at FCI Danbury (*id.* at 2). Petitioner has agreed to this substitution in his reply (indexed as Doc. No. 12-1 at 1-2).

decision to withhold a compassionate release motion based on the nature and circumstances of petitioner's offenses of conviction – the factor that admittedly had "controlled" the BOP's refusal, given the opinion of the prosecution that petitioner's offense "led to the substantial likelihood of death for up to a hundred of his former employees" (*id.* at 21); or the inflated and oddly specific assertion that the offenses posed elevated risks of death or injury to 468 individuals, according to the BOP's "well-informed" but undisclosed sources that do not appear in any record (A.88); or that petitioner's offenses most recently put "hundreds, if not thousands of people in danger" according to the government's latest and equally unsupported estimate (Doc. No. 5 at 22) – and all of this even though there has been *no* reported individual who developed an asbestos-related ailment in the past 28 years as a result of petitioner's offense conduct that began in 1990, not even the one former employee who had to have contracted his condition years before he worked for petitioner. In any case, whether on the merits or because it lacked the ability to review the BOP's refusal to move on petitioner's behalf, the government urged the district court to dismiss petitioner's application (*id.* at 23).

In petitioner's reply (indexed as Doc. No. 12-1), petitioner disputed the government's claim that the district court lacked the power to review the BOP's refusal to move for compassionate release, citing many of the well-established principles that also appear in his opening appellate brief, including: the strong

presumption favoring judicial review of agency action unless a statute expressly prohibits it or provides no meaningful standards against which to evaluate an agency's discretionary act or omission; legislative history underlying § 3582(c)(1)(A) that entrusted decisions about sentencing reductions to the judiciary and only expected the BOP to identify eligible candidates for consideration; a court's long-recognized and necessary subject matter jurisdiction to review any agency's policies, rule making and statutory interpretations; and the fundamental power of habeas courts to review allegations of constitutional violations resulting from discretionary agency acts or omissions that either violated separation of powers principles or deprived a petitioner of due process. We revisit each of these issues in the argument below.

Unfortunately, the district court's decision below (A.145-56) did not consider these principles at all. After reciting the applicable statute (§ 3582(c)(1)(A)(i)) and regulations (28 C.F.R. §§ 542, 570.60-570.63) that govern the procedures for compassionate release applications (A.147-48), and the corresponding steps that the BOP followed in petitioner's case (A.148-49), the court summarily concluded that it had no authority to review or reverse a refusal by the BOP to move for compassionate release (A.153).

To reach this conclusion, the court uncritically embraced a string of summary orders and other decisions without relevant analysis, many of which either construed the distinct (and

repealed) predecessor statute to § 3582, 18 U.S.C. § 4205(g) – a statute that once afforded the BOP a broad and standardless discretion to move to reduce a defendant's custodial sentence in order to allow his immediate commencement of parole – or relied on earlier decisions that did the same (A.150-53). The court then surmised that § 3582(c)(1)(A)(i) imbued the BOP with "sole discretion" and "no limits" on its decision to move or refuse to move for a sentencing reduction, thereby preempting a court's authority to review that decision (A.152-53).

In passing, the court also dismissed the decisions on which petitioner had relied to show that § 2241 permitted judicial review of a BOP refusal to move for compassionate release, deeming the cases distinguishable because they related to other types of BOP discretionary decisions (A.153). Finally, the court considered and rejected petitioner's argument that 5 U.S.C. § 702 of the Administrative Procedures Act[10] applied to create a "presumption of judicial review" over the BOP's decisions to move or refuse to move for compassionate release, in part because the court somehow read § 3582(c)(1)(A)(i)'s unadorned language, "upon motion of the Director of the Bureau of Prisons", to preclude judicial review of the circumstances underlying the BOP decision, even though it says nothing of the sort; and also because the statute "arguably" is

[10] The government's response (Doc. No. 5) had suggested that petitioner did not "exhaust" his reliance on the APA and that, if his § 2241 motion raised "any other issue" than his concededly exhausted challenge to the BOP's denial of a motion for compassionate release, the claim should not be reviewed. The district court's decision did not find any failure to exhaust.

"drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" (A.154). In reaching this conclusion, however, the court's decision nowhere referred either to Congress' direction in 28 U.S.C. § 994(t) that the Sentencing Commission should define what "extraordinary and compelling reasons" warrant compassionate release, nor to the Sentencing Commission's fulfillment of that responsibility in U.S.S.G. Policy Statement § 1B1.13, nor to the only sensible inference that Congress intended the BOP's initiating motion to be controlled by consistent definitions of qualifying criteria.

Based on its superficial analysis, the district court ultimately concluded that "[a]bsent a motion from the BOP to seek compassionate release on the petitioner's behalf", it lacked the authority to review any of petitioner's claims, and accordingly dismissed his § 2241 motion for habeas relief (A.155-56). After petitioner filed his timely notice of appeal (A.158), this Court directed supplemental briefing that addressed, "among any other issues, whether the federal courts may review a refusal of the Bureau of Prisons to move for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i)" (A.159-60).

For the reasons that follow, and those in petitioner's opening *pro se* brief, we urge this Court's *de novo* review and agreement that judicial review of this agency decision and underlying policy – either under § 2241 or the Administrative Procedures Act – is both permitted and necessary to correct the intended course of compassionate release legislation and restore

the legislated balance of power that may presently start with the BOP's ministerial identification of eligible prisoners and initiating motion, but is ultimately meant to be guided by the expertise of the Sentencing Commission and the judiciary, the branch that "emphatically" retains "the province and duty . . . to say what the law is". Marbury v. Madison, 5 U.S. 137, 177 (1803). After this Court does so here, it should grant petitioner's application for habeas relief and, fulfilling what law and justice require, refer petitioner's application for compassionate release to the sentencing court for a decision on its merits, without further prejudicial delay.

ARGUMENT

I. UNDER EVERY APPLICABLE MEASURE, THE BUREAU OF PRISON'S REFUSAL TO FILE A MOTION TO INITIATE JUDICIAL ASSESSMENT OF PETITIONER'S ELIGIBILITY FOR COMPASSIONATE RELEASE IS AN ADMINISTRATIVE DECISION CALLING FOR JUDICIAL REVIEW

The district court's decision dismissing petitioner's § 2241 motion wrongly assumed that the court possessed no authority to review a procedurally and substantively flawed conclusion by the Bureau of Prisons that an inmate in its custody did not deserve compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). For a number of reasons, this Court should conclude otherwise and grant a habeas remedy that permits petitioner's sentencing court to fulfill the evaluation Congress intended when a defendant's family circumstances have worsened to a such an extraordinary degree that a court may grant his request for compassionate release.

A. Statutory Language and Context

Two statutes and one guideline policy statement provide the controlling authority and a clear set of criteria for a prisoner's consideration for compassionate release by his sentencing court. The first, contained in a portion of the Sentencing Reform Act that defines judicial responsibilities relating to the "[i]mposition of a sentence of imprisonment", is 18 U.S.C. § 3582(c)(1), which relevantly allows that, "in any case",

> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment ... after considering the factors set forth in section 3553(a) to the extent they are applicable, if it finds that–
>
> > (i) extraordinary and compelling reasons warrant such a reduction; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison ... and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;

The second statute, 28 U.S.C. § 994(t), in a provision governing the various "Duties of the [Sentencing Commission]", dovetails with § 3582(c)(1) by directing that:

> (t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation alone shall not be considered an extraordinary and compelling reason.

Based on this Congressional directive, the Sentencing Commission fulfilled its duty in Application Note 1 to U.S.S.G. Policy Statement § 1B1.13 (2016). As relevant here, it specified that one example when "extraordinary and compelling reasons exist" is upon:

> (C)(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

Further, in Application Note 4 to this same policy statement, when addressing § 3582(c)(1)(A)'s requirement of an initiating "Motion by the Director of the Bureau of Prisons", the Sentencing Commission expressly "encourage[d] the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1". Application Note 4 also confirmed that it is not the BOP, but the court that is expected to play the primary role in this process:

> The court is in a unique position to determine whether the circumstances warrant any reduction (and, if so, the amount of reduction), after considering the factors set forth [in] 18 U.S.C. § 3553(a) and the criteria in this policy statement, such as . . . the defendant's family circumstances. . . .

In addition, when explaining in its reasons for this most recent amendment (Amendment 799), the Sentencing Commission repeated that it "intended to encourage the Director of the Bureau of Prisons to exercise his or her authority to file a motion under section 3582(c)(1)(A) when the criteria in this policy statement are met" in order to place such applications before the court, and to discontinue the "inefficiencies that exist within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where

the applicant appears to meet the criteria for eligibility." Finally, though it did not insist that its policy statement had to be considered "legally binding" on the BOP, the Sentencing Commission again stressed that its "new commentary is intended to encourage" the BOP to file an initiating motion to allow judicial consideration of a defendant's entitlement to compassionate release when any criteria in the Sentencing Commission's policy statement were met.

The plain language of the statutes and the implementing policy statement thus convey nothing to suggest that Congress intended the BOP to play a more substantive or discretionary role in determining whether a prisoner's circumstances "deserved" a reduced sentence under any of the criteria identified by the Sentencing Commission as potential grounds for compassionate release, much less that it intended to insulate agency errors in connection with this initiating process from judicial review.[11] Nor do the statutes or the guideline policy statement required by § 994(t) imbue the BOP with any sort of discretionary wiggle room that would permit it to withhold an initiating motion on the basis of criteria beyond what the Sentencing Commission has specified.

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[11] When Congress wants to preclude judicial review, it does so expressly, as it did in 18 U.S.C. § 3625, a statute making the Administrative Procedure Act and its presumption of judicial review (discussed below) inapplicable to BOP decisions relating, among other things, to an prisoner's place of imprisonment, the temporary release of prisoners, prisoner transfers, and the release of prisoners under 18 U.S.C. §§ 3621-24, all matters over which the BOP would possess greater expertise than any reviewing court. Resentencing a defendant based on changed circumstances is not, however, an expertise within the BOP's wheelhouse.

In particular, § 3582(c)(1)(A) does *not* say that the Director of the Bureau of Prisons "may" file a motion on behalf of a defendant who qualifies for compassionate release consideration under one of the criteria identified by the Sentencing Commission – a word traditionally recognized to bestow discretion. *See, e.g.,* Weyerhauser v. U.S. Fish & Wildlife Service, No. 17-71, 202 L. Ed. 2d 269, 283 (Nov. 27, 2018); *see also* Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652 (2015) (even when Congress confers discretion on agency, that alone does not rebut presumption of judicial review if it has "not left *everything*" to the agency). Instead, Congress expected the BOP to initiate the compassionate release process with a motion that identified a candidate in its custody who qualified for judicial consideration, and the Sentencing Commission, at Congress' direction, urged the BOP to file a motion whenever an individual's changed circumstances were consistent with those contained in Policy Statement § 1B1.13.

Further, Congress expressly vested all discretion for the ultimate decision on compassionate release, not with the BOP, but with the sentencing court after it assessed a defendant's changed circumstances, as well as the sentencing factors in § 3553(a), after which the court "may reduce the term of imprisonment." When such matters of statutory interpretation affecting the execution of a defendant's sentence are before a court, § 2241 affords a recognized basis for judicial review. Barber v. Thomas, 560 U.S. 474, 477 (2010) (reviewing § 2241 claim that BOP regulations misinterpreted good time credits); Lopez v. Davis, 531 U.S. 230,

236 (2001) (reviewing § 2241 claim that BOP regulations conflicted with statute relating to early release after inmate's completion of drug treatment program). The district court should have reviewed the statutory issues here as well.

B. The BOP's Interpretive Program Statement[12]

Despite this clear delineation of responsibilities, framed against the Sentencing Reform Act's recognized backdrop of eliminating executive power over judicially imposed sentences in order to restore the "tradition of judicial sentencing" and achieve "greater honesty" and uniformity in sentencing, Setser v. United States, 566 U.S. 231, 242 & n.5, 248 (2012); *accord* Hughes v. United States, 138 S. Ct. 1765, 1776 (2018) (judicial

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[12] Agencies may adopt categorical rules after formal rule making proceedings, *see, e.g.*, Levine v. Apker, 455 F.3d 71, 73 (2d Cir. 2006), or less authoritative internal guidance to interpret statutes or agency rules without prior notice and public comment. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 253-54 (2006). Such lesser, interpretive rules are not entitled to judicial deference when they are "inconsistent with the design of the statute . . . in fundamental respects", and any deference an interpretive rule may deserve will be tempered by the rule's inability to persuade or the agency's lack of expertise. *Id.* at 268-69, citing Skidmore v. Swift, 323 U.S. 134, 140 (1944)); Christianson v. Harris County, 529 U.S. 576, 587 (2000); *see* De La Mota v. U.S. Dept. Of Education, 412 F.3d 71, 80 (2d Cir. 2004); Coke v. Long Island at Home, 376 F.3d 118, 131-32 (2d Cir. 2004).

Courts are empowered to review interpretive rules under Skidmore's power-to-persuade standard and invalidate the rule when it conflicts with statutory authority. Gonzales v. Oregon, 546 U.S. at 274-75. This Court may exercise that power here to invalidate the BOP's interpretive compassionate release Program Statement, as it did in Levine, 455 F.3d at 85 (agencies "may not promulgate categorical rules that do not take account of the categories that are made significant by Congress"), since the BOP has not afforded deference to Congress' expression, through the Sentencing Commission, of criteria that constitute "extraordinary and compelling reasons" to file an initiating motion for compassionate release, and otherwise clings to its unreasoned policy.

resentencing authority under § 3582(c)(2) broadly construed to contribute to Sentencing Reform Act's goal of uniformity in sentencing and assuring that sentences may be adjusted when too severe), the interpretive program statement adopted by the BOP added a number of additional qualifying factors to the criteria identified by the Sentencing Commission and, as it did in the present case, relied on those factors to foreclose any possibility of compassionate release based on a *judicial* assessment of extraordinary and compelling circumstances, the result that inevitably follows when the BOP refuses to file a motion initiating a court's consideration.

Program Statement 5050.49 (A.97-111) thus requires the BOP to base its initiating motion, not only on evidence that an inmate's circumstances have suffered an extraordinary and compelling change of the kind identified by the Sentencing Commission, nor on additional evidence about the inmate's correctional history and release plan to which the BOP would have ready access, but also to evaluate factors – including the nature and circumstances of the inmate's offense, his criminal history, any comments from victims, and the inmate's personal history – in order to decide whether an inmate's request for compassionate release presented what the BOP statement refers to as "particularly extraordinary and compelling circumstances" (A.106), a qualified term that the program statement does not define.

In this, the BOP has improperly undertaken an assessment of some of the same § 3553(a) factors that Congress expressly

reserved for a sentencing court's consideration in § 3582(c)(1)(A)(i). Setser v. United States, 566 U.S. at 239 (statute allowing judicial discretion over aspect of sentencing cannot "be read to give the Bureau of Prisons exclusive authority to make the [same] sort of decision committed to the district court"). The result, moreover, is not merely that the BOP will duplicate unnecessarily what the sentencing court will later consider and decide (and that the BOP's initiating motion will typically be seriously delayed in the process, as it was here), but that judicial consideration will be foreclosed altogether. That is what occurred in this petitioner's case when the BOP eventually denied any initiating motion almost two years after petitioner's warden recommended it, and did so based on materially inaccurate information, both about the exaggerated and incorrect potential effects of petitioner's offense conduct, and about the individuals who were looking after his three minor children (A.88).

Specifically, as discussed above, no evidence in the record suggested "a likelihood of death or serious bodily injury to at least 468 victims", an estimate far beyond the potential risk estimated in petitioner's presentence report and, as recent evidence has shown, a potential that was overstated when made and has never came to pass, even though the 15-20 year latency period identified by the government's expert has come and gone. Likewise, the BOP clearly erred in its statements about the circumstances of petitioner's children. At the time the BOP denied an initiating

motion in 2016, only one of petitioner's two younger children was still in the care of their uncle, and the children had been (and remain) separated: the youngest child had moved to the home of a family friend in another state, many hours away from his sister and older brother, both of whom are also separated by hundreds of miles, and only one of whom is presently living with a family member. Also, the family court did not order that petitioner's eldest child remain in foster care if his father's application for compassionate release is granted. Instead, the family court directed that the son be returned to his parent. Petitioner notified the BOP of these facts, moreover, prior to the BOP's eventual issuance of a factually flawed denial.

Surely, judicial review must be – and is – available when an agency not only overreaches the limited statutory purpose Congress intended it to play, but gets every fact wrong in the process. Guiterres de Martinez v. Lamagno, 515 U.S. 417, 424 (1995) (when agency official's "determination of a fact or circumstance" is dispositive of a controversy, "federal courts generally do not hold the determination unreviewable"); *see also* Townsend v. Burke, 334 U.S. 736, 741 (1948) (a sentence based on materially untrue assumptions, misinformation, or misreading of court records is inconsistent with due process and cannot stand). Even if the BOP program statement were not inconsistent with the statutory authority for compassionate release, therefore, the BOP's reliance on misstated facts is another matter unquestionably open for judicial review and a remedy.

C. The Strong Presumption of Judicial Review

Besides the clear division of responsibilities created by the controlling statutes and the Congressionally-directed Sentencing Guideline policy statement, plus the troubling deficiencies in the BOP's consideration of petitioner's well-supported application for compassionate release, there is also a strong judicial presumption that courts will review administrative decisions pursuant to the direction of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* As the Supreme Court has explained, because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," courts should always apply this "strong presumption" favoring judicial review of any administrative action. Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1651 (2015), quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

Like other presumptions, this one is also rebuttable, but only if a "statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." Block v. Community Nutrition Institute, 467 U.S. 340, 349, 351 (1984); *see* Guiterres de Martinez v. Lamagno, 515 U.S. at 424-25 ("judicial review of executive action 'will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress'", quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967)). Also, when an agency attempts to show that Congress "prohibit[ed] all judicial review", it bears a "heavy burden". Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

This presumption of judicial review serves important interests. For one thing, it "prevents agency overreaching" because, "[a]bsent such review, [an agency's] compliance with the law would rest in [the agency's] hands alone." Mach Mining v. EEOC, 135 S. Ct. at 1652-53 ("We need not doubt the [agency's] trustworthiness, or its fidelity to the law, to shy away from that result. We need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no legal consequences"). For another, any exercise of federal court authority over an agency's decision is "less ominous than the consequences of declaring" an agency's act or omission uncontestable. Gutierres de Martinez v. Lamagno, 515 U.S. at 436 (Congress should not be assumed to have wanted federal courts to dismiss cases "on an interested executive official's unchallengeable representation").

Here, the district court acknowledged the applicable presumption of judicial review contained in the Administrative Procedures Act, but considered it somehow rebutted by the statutory language, "upon motion of the Director of the Bureau of Prisons".[13] Yet that phrase does not suggest that Congress either

[13] The district court also suggested that a court would "arguably" have no meaningful standard to assess the BOP's exercise of discretion, thus excusing the presumption of judicial review. As Congress, through the Sentencing Commission, defined "extraordinary and compelling reasons" and urged the BOP to follow that definition, there are certainly sufficient standards for judicial review here. Moreover, if the BOP had the unbridled discretion the district court thought, the court could still review and set aside any agency action that amounted to an abuse of discretion or other misapplication of the law pursuant to § 706(2)(A). Hecker v. Chaney, 470 U.S. 821, 829 (1985).

wanted the BOP to "police its own conduct", or any other "persuasive reason" to curtail judicial review.[14] As noted above, Congress knows how to foreclose judicial review of certain agency activities, and expressly did so in § 3625, with respect to the BOP's statutory authority over a prisoner's place of imprisonment, temporary release, transfers, and final release. 18 U.S.C. §§ 3621-24. Congress made no similar pronouncement, however, with respect to the BOP's duty to file an initiating motion to allow a court's consideration of an inmate's compassionate release. Accordingly, it would be "particularly inappropriate" to "[d]raw[] meaning from silence" when Congress has shown that it knows how to be explicit elsewhere. Dean v. United States, 137 S. Ct. 1170, 1177 (2017); *see* Russello v. United States, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

The district court also relied on a collection of older decisions that expressly construed, or newer decisions that uncritically relied on those earlier cases that considered a

[14] The likely reason this initiating motion is entrusted to the BOP is simply that the agency is in the best position to confirm the qualifying facts about the individual in its custody. When there is no need to confirm such factual criteria, Congress allows a motion not only by the BOP, but the defendant and the sentencing court as well. *See* 18 U.S.C. § 3582(c)(2) (allowing motions for a possible reduction in sentence based on retroactive amendments to the Sentencing Guidelines, a matter the sentencing court can often consider without reference to any facts not already before the court).

statute that once afforded a defendant the possibility of an earlier release to parole supervision. *See* 18 U.S.C. § 4205(g)("[a]t any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served").[15] None of the decisions contained any significant analysis of the present statutory structure. Moreover, the BOP's decision in those early cases might even have properly called for more judicial deference simply because any motion made and granted would have resulted in a defendant's transition from one executive agency (BOP) to another (Parole). Since the "tradition of judicial sentencing" has long since replaced such executive power, however, any related policy or discretion that § 4205(g) may once have supported is no longer a persuasive basis to deem the presumption of judicial review overcome by the present statutory structure that has returned discretion for compassionate release decisions to the sentencing courts, where it belongs.

This Court should therefore agree that the district court's analysis does not reasonably support a conclusion that Congress intended to prevent courts from considering glaring flaws in the BOP's policies and procedures for initiating judicial consideration of a prisoner's changed circumstances. Nor do the statutory context and language, the relative areas of expertise of

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[15] Many of these decisions relied on Fernandez v. United States, 941 F.2d 1488, 1493 (11th Cir. 1991) (§ 4205(g) held to have provided BOP with "absolute discretion" to file a motion or not), or Turner v. United States Parole Commission, 810 F.2d 612, 618 (7th Cir. 1987) (§ 4205(g) provided no meaningful guidance for court to decide whether BOP exceeded agency discretion).

the BOP and the courts, the BOP's extremely poor track record of delays and "discretionary" disregard, or the BOP's reliance on internal policies that consider factors the statutes reserved for judicial review, justify continued and unreviewed adherence to administrative policies that themselves call for judicial review because they have undermined the reasons for compassionate release to the point that the process is rightly recognized to be "broken". For all of these reasons, the Court should agree that the BOP's refusal to file a motion initiating the district court's review of petitioner's tragically changed family circumstances was an agency decision to which the presumption of judicial review well applies.

D. Constitutional Issues Also Warrant Review

In addition to the statutory difficulties created by the BOP's refusal to move for compassionate release when a defendant's circumstances satisfy the criteria Congress specified through the Sentencing Commission's policy statement, the broken compassionate release process also offends constitutional principles, a matter always open for judicial review in a habeas proceeding. First, by incorporating § 3553(a) factors in its program statement, even though § 3582(c)(1)(A)(i) expressly vests consideration of those factors with the district court's neutral expertise, the BOP has offended separation of powers principles. Setser v. United States, 566 U.S. at 240 (BOP is "not charged with applying § 3553(a), and "much more natural" for a judge to apply those sentencing factors); Mistretta v. United States, 488 U.S. 361, 382

(1989)(Supreme Court does not "hestitate[] to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate branches, or that undermine the authority and independence of one or another coordinate Branches"). Judicial review should ensue to restore the intended balance of power and prevent future executive takeovers of a sentencing responsibility traditionally entrusted to, and best accomplished by our courts.

Second, as discussed above, due process was offended by the haphazard fact-finding undertaken by the BOP as its entirely unsupported and mistaken grounds for denying an initiating motion for compassionate release in this petitioner's case. Such "careless or designed pronouncement . . . on a foundation so extensively and materially false", Townsend v. Burke, 344 U.S. at 741, is as much a deprivation of due process in this context as it would be at the time of sentencing. Judicial review and a remedy are therefore warranted to permit a sentencing court's appraisal of this petitioner's eligibility for a somewhat reduced sentence that allows him to come home and care for his children after they were shattered and separated by events following their mother's untimely passing.

In sum, these significant constitutional concerns call for judicial intervention, both to assure that the BOP does not so often assume a terminal position that Congress never intended it to occupy, and that the BOP instead fulfills its more limited role: to identify individuals in its custody whose circumstances should be

brought to the attention of their sentencing courts because they satisfy threshold eligibility criteria for compassionate release. For these constitutional purposes as well, the Court should agree that judicial review is available to evaluate the BOP's refusal to file an initiating motion under § 3582(c)(1)(A)(i).

II. WHEN A RECORD CONFIRMS AN INMATE'S ELIGIBILITY FOR JUDICIAL CONSIDERATION FOR COMPASSIONATE RELEASE UNDER THE SENTENCING COMMISSION'S STANDARDS, REVIEWING COURTS SHOULD, AS JUSTICE REQUIRES, REMAND DELAYED APPLICATIONS DIRECTLY TO SENTENCING COURTS FOR IMMEDIATE CONSIDERATION

Any time that the BOP wrongly withholds an initiating motion for compassionate release, as it has here, defendants and their families are harmed in precisely the way this sentencing reconsideration authority was meant to prevent. For seriously ill defendants, too large a percentage die before their applications for compassionate release are processed by the BOP, even after their warden has recommended their eligibility (A.96). For defendants like petitioner Salvagno, whose children have had no parent to care for them for over four years, the delays, uncertainties, and denials of any relief have simply amplified the suffering that began with the loss of their mother.

As petitioner's warden has already agreed, his family circumstances satisfy the "exceptional and compelling" criteria that should allow him to appear before his sentencing court under § 3582(c)(1)(A). This Court should find the same. When it does, to avoid further pointless delay, the Court should exercise its powers under 28 U.S.C. § 2106 (courts of appellate jurisdiction "may remand the cause and direct . . . such further proceedings to

be had as may be just under the circumstances") and 28 U.S.C. § 2243 (habeas courts shall adjudicate matters "as law and justice require"), reverse the district court's decision dismissing petitioner's § 2241 motion, and remand directly to petitioner's sentencing court for prompt reconsideration of his remaining term of imprisonment under § 3582(c)(1)(A)(i) and § 3553(a).

CONCLUSION

The Court should reverse and remand with directions to grant petitioner Alexander Salvagno a Writ of Habeas Corpus and promptly commence resentencing proceedings pursuant to the statutory authority in 18 U.S.C. § 3582(c)(1)(A)(i) and § 3553(a).

Dated: New York, New York
December 14, 2018

/s/

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CERTIFICATE OF COMPLIANCE

Georgia J. Hinde, attorney for appellant Alexander Salvagno, hereby certifies that the foregoing brief conforms to the requirements of Rule 32(a)(7)(B)-(C) of the Federal Rules of Appellate Procedure in that, according to the word-processing system used to prepare this brief, the brief (excluding tables of contents and authorities) contains approximately 11,000 words.

Dated: New York, New York
December 14, 2018

/s/
Georgia J. Hinde