No. _____

In the Supreme Court of the United States

Rory Lee Zirkelbach,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2013, Rory Zirkelbach was sentenced to 235 months' imprisonment as a career offender under U.S. Sentencing Guideline § 4B1.2 when he did not, in fact, qualify for that designation. In 2021, he moved for reduced sentence under the compassionate-release statute, 18 U.S.C. § 3582(c)(1)(A)(i), arguing that the career-offender sentencing error and resulting sentencing disparity was an "extraordinary and compelling" reason for a lesser sentence under the statute's terms.

The question presented is:

Did the district court err when it imposed an extratextual limitation on its statutory authority to determine what amounts to an "extraordinary and compelling reason" for a sentence reduction by concluding that a sentencing error and disparity cannot be the basis for a motion under 18 U.S.C. § 3582(c)(1)(A)?

PARTIES TO THE PROCEEDING

Petitioner, Rory Zirkelbach, was the defendant-appellant below. Respondent, United States of America, was the plaintiff-appellant below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Rory Zirkelbach*, No. 21-2911, 8th Cir. (Aug. 27, 2021) (order summarily affirming without opinion the district court's denial of motion for compassionate release).

- *United States v. Rory Zirkelbach*, No. 13-cr-1001-CJW, N.D. Iowa, 2021 WL 3609299, (NDIA Aug. 11, 2021) (order denying motion for compassionate release).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rory Lee Zirkelbach respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported. (Pet. App. at 1). The opinion of the United States District Court for the Northern District of Iowa is also unreported and available at 2021 WL 3609299. (Pet. App. at 2-19).

JURISDICTION

The Court of Appeals denied Mr. Zirkelbach's appeal on August 27, 2021. (Pet. App. at 1). Mr. Zirkelbach petitioned for rehearing, which was denied on October 5, 2021. (Pet. App. at 20). This petition is being filed within 90 days of that denial, so it is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 603 of the First Step Act of 2018 states, in relevant part:

(b) Increasing The Use And Transparency Of Compassionate Release.—Section 3582 of title 18, United States Code, is amended—

> (1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "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."

Title 18 U.S. Code § 3582 states, in relevant part:

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

Title 18 U.S. Code § 3553(a) states, in relevant part:

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> > (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; . . .

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

This case is an ideal vehicle for resolving an acknowledged Circuit conflict over the extent of a district court's authority to determine what amounts to an "extraordinary and compelling" reason for a reduced sentence under 18 U.S.C. § 3582(c)(1)(A). In 2018, Congress took a rarely used statute and expanded a long-existing safety-valve for incarcerated persons who can establish "extraordinary and compelling" circumstances warrant a reduction in their sentences. 18 U.S.C § 3582(c)(1)(A). This statute is colloquially known as compassionate release.

Although the statute has existed for decades, in § 603 of the First Step Act of 2018, Congress amended 18 U.S.C. § 3582(c)(1)(A) to "Increase the Use and Transparency of Compassionate Release." *See* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications."). One way Congress did this was to remove the Director of the Bureau of Prisons ("BOP") as the sole arbiter of what constitutes "extraordinary and compelling" reasons for purposes of a sentencing reduction. *See* Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018). Before the First Step Act, an incarcerated person could only petition the BOP for compassionate release internally. *See* 18 U.S.C. § 3582(c)(1)(A) (1988). The BOP Director would then be authorized—if they saw fit—to file a motion with the original sentencing court on the person's behalf. But if the BOP Director refused to file the motion, then the person had no remedy and would remain incarcerated. *Id.*

Following the First Step Act, an incarcerated person can now move for compassionate release directly in the district court after exhausting their administrative remedies with the BOP. *See* Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018). Although the BOP arbiter function has changed dramatically, the additional statutory requirements for a reduced sentence remain largely the same under the amended statute: a district court may reduce a sentence if it finds the circumstances alleged by the movant rise to the level of "extraordinary and compelling," and the sentence reduction would be "consistent with *applicable* policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

"Extraordinary and compelling" is not fully defined in the statute. *Id.* Yet Congress has articulated one statutory limitation on a district court's authority: "[r]ehabilitation . . . alone shall not be considered an extraordinary and compelling reason" for compassionate release. 28 U.S.C. § 994(t). Moreover, the only "policy statement[] issued by the Sentencing Commission," 18 U.S.C. § 3582(c)(1)(A), relevant to compassionate release is U.S. Sentencing Guideline § 1B1.13. But that policy statement was promulgated well before the First Step Act's passage. And its plain language speaks exclusively to compassionate-release motions filed by the "Director of the Bureau of Prisons"—not those filed directly with the court by incarcerated persons. *See* U.S.S.G. § 1B1.13 app. n. 1–5.

It is in this lacuna of statutory and policy definitions that the controversy starts. Courts of appeals are sharply divided over the extent of a district court's discretion to determine what amounts to "extraordinary and compelling" and whether there is an "applicable" policy statement that governs the exercise of that discretion for motions for compassionate release filed by an incarcerated person. In this case, Mr. Zirkelbach argued before the district court that he had been erroneously sentenced as a career-offender and that the error and resulting disparate sentence amounted to "extraordinary and compelling" reasons for a sentence reduction. (Pet. App. at 15). The district court found it lacked the authority to consider this sentencing error and disparity as "extraordinary and compelling" under § 3582(c)(1)(A) because a sentencing error can be litigated only under 28 U.S.C. § 2255. (Pet. App. at 18). This was even though § 3582(c)(1)(A) provides no such limitation in its terms. Upon appeal, the Eighth Circuit summarily affirmed without allowing for briefing. (*Id.* at 1).

Although the only explicit limitation on a district court's discretion to determine what amounts to "extraordinary and compelling" contained within § 3582(c)(1)(A) relates to "rehabilitation," several Circuits across the country have injected similar extratextual limitations on a district court's authority. This conflict has left thousands of compassionate-release petitioners like Mr. Zirkelbach with different rights depending on the district in which they were originally sentenced.

Within the Fourth, Fifth, and Tenth Circuits, district courts are free to exercise their discretion to determine what amounts to "extraordinary and compelling" for purposes of a sentence reduction without limitation. Thus, within those Circuits, a district court would not have been barred from considering Mr. Zirkelbach's sentencing error and disparity as an "extraordinary and compelling" reason under 18 U.S.C. § 3582(c)(1)(A).

By contrast, the Third, Sixth, Seventh, Eleventh, and Eighth Circuits, have curtailed judicial discretion to determine what amounts to "extraordinary and compelling" by imposing extratextual limitations on the statute. In these Circuits, as happened below, Mr. Zirkelbach's sentencing error and disparity could not, as a matter of law, be considered "extraordinary and compelling," and he is left without a remedy.

Thus, the question here is one of statutory interpretation: whether any limitation, apart from "rehabilitation," 28 U.S.C. § 994(t), constrains a district court's discretion to determine what amounts to "extraordinary and compelling" when an incarcerated person files a motion under 18 U.S.C. § 3582(c)(1)(A).

The question presented calls for this Court's review. The split among the Circuit's is deep, and it was outcome determinative in Mr. Zirkelbach's case. Had the district court not been barred from considering the career-offender sentencing error and resulting disparity as "extraordinary and compelling," Mr. Zirkelbach would have been eligible for a reduced sentence. Instead, he remains incarcerated.

1. Statutory Background

The compassionate-release statute was first enacted as part of the Crime Control Act of 1984. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 3582(c), 98 Stat. 1976, 1998. The statute provides an exception to the general principle that a sentence already imposed is inalterable. Rather than adhere to finality, the statute allows a district court to reduce a previously imposed sentence if "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). The justification for compassionate release was the belief that there could be "unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," including "cases of severe illness [and] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence." S. Rep. No. 98-225, at 52, 55–56 (1983). Along with requiring an "extraordinary and compelling reason," however, the statute also requires that any reduction be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

Congress did not fully define "extraordinary and compelling" in the statute. It made clear that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," but apart from that, it directed the U.S. Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for a sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t).

It took the U.S. Sentencing Commission decades to fulfill its obligation. But, ultimately, in 2007, it promulgated a policy statement that set forth the criteria for and examples of "extraordinary and compelling reasons" in situations when a request is brought to the district court upon a "motion of the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13. The policy statement describes "extraordinary and compelling reasons for a reduced sentence" as including: (A) medical conditions, (B) advanced age, (C) familial circumstances and (D) "[o]ther [r]easons [as] determined by the Director" of the BOP. U.S.S.G. § 1B1.13 app. n.1.

Although the intent of compassionate release has always been a safety-valve, S. Rep. No. 98-225, 52, 53 n.196 (1983), the federal BOP was the sole arbiter for review. All requests had to be routed through the BOP, and it was only the BOP that had authority to move the district court for a reduction if the BOP saw it fit. And given this statutory structure, the U.S. Sentencing Commission's policy statement governing compassionate release aptly governed only "motion[s] of the Director of Bureau of Prisons." U.S.S.G. § 1B1.13.

Despite possessing this power, the BOP utterly failed to "properly manage the compassionate release program."[1] People sat in cages, rather than have their sentences reconsidered.[2] "The BOP inconsistently implemented and poorly managed

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[1] DEP'T JUST., OFF. INSPECTOR GEN., FED. BUREAU PRISON'S COMPASSIONATE RELEASE PROGRAM 11 (2013).
[2] *Id.*

the compassionate release program, resulting in overlooked eligible inmates and terminally ill inmates dying while their requests were pending."[3]

Because of the BOP's ineptitude, Congress stepped in and amended the statute as part of the First Step Act of 2018. *See* Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018). The amendments were geared toward two goals: providing access to the judicial system and having the decision-making vest directly within it, as Congress originally intended.[4] The changes allowed imprisoned people to petition the district court directly if the BOP failed to submit a motion on their behalf within thirty days. 18 U.S.C. § 3582(c)(1)(A).

Despite the passage of the First Step Act, however, the U.S. Sentencing Commission has not yet updated the 2007 policy statement that defines "extraordinary and compelling" to govern non-BOP initiated motions. Just a month after the Act went into effect, the Commission lost its quorum, rendering it unable to act. *See* 28 U.S.C. § 995(d); U.S. SENTENCING COMMISSION, 2019 Annual Report 3 (2019). And the Commission has yet to achieve a quorum, almost three years later.

With no statutory definition for "extraordinary and compelling," and no "applicable" policy statement for non-BOP initiated motions, the confusion in the

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[3] *Hearing on Compassionate Release and the Conditions of Supervision* Before the U.S. Sent'g Comm'n (2016) (statement of Michael E. Horowitz, Inspector Gen,, Dep't of Just.).
[4] S. Rep. No. 98-225, 52, 53 n.196 (1983).

Circuits has centered on just how much discretion the district court has when considering whether something amounts to "extraordinary and compelling."

2. Facts and procedural history

In 2013, Mr. Zirkelbach pleaded guilty to attempting to manufacture methamphetamine within 1,000 feet of a school and playground. (Pet. App. at 3). His U.S. Sentencing Guideline range was "188 to 235 months' imprisonment." (*Id.* at 4). His range was calculated under U.S.S.G. § 4B1.1, the career-offender provision, and it reflected three-prior drug-related convictions that the district court found qualified as "controlled substance offenses." (*Id.* at 4). On June 3, 2013, Mr. Zirkelbach was sentenced to 235 months, the "top of the guideline range." (*Id.*)

Mr. Zirkelbach "timely appealed his judgment," arguing against the application and constitutionality of the guidelines. (*Id.*) On August 12, 2013, however, Mr. Zirkelbach moved to dismiss the appeal under Federal Rule of Appellate Procedure 42(b). (*Id.*)

Several years later, the U.S. Sentencing Commission promulgated Amendment 782, which retroactively lowered the guideline range for certain drug offenses by 2-levels. In 2015, on its own motion, the district court denied Mr. Zirkelbach relief. (Pet. App. at 3). The district court determined that because Mr. Zirkelbach had been sentenced as a "career offender," he did not qualify under 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10. (*Id.* at 4–5).

On May 8, 2016, Mr. Zirkelbach attempted to collaterally attack his sentence by filing a pro se petition under 28 U.S.C. § 2255. (*Id.* at 5). In that petition (and amendment), he argued that the district court had "improperly sentenced him under the career offender" guideline at the time of his original sentence. (*Id.*). The district court denied his filings as "untimely," and his request for a "certificate of appealability" was denied. (*Id.*).

On March 18, 2021, Mr. Zirkelbach filed a pro se motion for compassionate release under § 3582(c)(1)(A). (*Id.*). The district court appointed counsel, and through counsel, Mr. Zirkelbach filed an amended motion. (*Id.*). In that motion, he set forth two "extraordinary and compelling" reasons justifying a reduced sentence. First, Mr. Zirkelbach argued that the rampant spread of COVID-19, the nation's worst pandemic in a hundred years, coupled with his "current medical conditions and corresponding vulnerability to COVID-19 compel[led] a sentence reduction." (*Id.* at 8–9). Second, he argued that because he was treated erroneously as a career offender at his original sentencing, if he were sentenced today, he would have faced a much lower guideline range and sentence. (*Id.* at 9). The sentencing error and disparity amounted to "extraordinary and compelling" reasons for a reduction. As required by the statute, Mr. Zirkelbach also argued the 18 U.S.C. § 3553(a) factors favored a reduced sentence. (*Id.* at 18).

The district court denied his motion. (*Id.* at 19). It found that Mr. Zirkelbach's health issues did not rise to the level of "extraordinary and compelling." (*Id.* at 13).

As for Mr. Zirkelbach's sentencing argument, the district court found that "[b]inding precedent" in the Eighth Circuit required the conclusion "that a sentencing error is not within the meaning of 'extraordinary and compelling reasons' under Title 1, United States Code, Section 3582(c)(1)(A)." (Pet. App. at 13) (citing *United States v. Fine*, 982 F.3d 1117, 1118–19 (8th Cir. 2020)). The district court reasoned that allowing a sentencing error to be an "extraordinary and compelling" reason would "impermissibly expand [the] Court's authority" and effectively change "compassionate release into an alternative habeas system." (Pet. App. at 18).

In short, the district court held that any proffered sentence-related "extraordinary and compelling" reason that could be theoretically cognizable in another post-conviction proceeding could not be considered under the compassionate-release statute. (*Id.*). Because the district court found no "extraordinary and compelling," reason it did not analyze the § 3553(a) factors. (Pet. App. at 18 n.13).

Mr. Zirkelbach filed a timely notice of appeal. Without allowing for briefing, the Eighth Circuit summarily affirmed the district court's order without an opinion. (Pet. App. at 1). On September 10, 2021, Mr. Zirkelbach petitioned for rehearing, and it was denied on October 5, 2021. (*Id.* at 20).

REASONS FOR GRANTING CERTIORARI

Mr. Zirkelbach's case raises a question of national importance that currently divides the Circuits: what limitation, if any, restricts a district court's authority to

identify an "extraordinary and compelling reason for a reduced sentence" under § 3582(c)(1)(A) when an incarcerated person files a compassionate-release motion?

At least three circuits follow the text of the statute and allow district courts full discretion to determine independently whether the circumstances alleged by an incarcerated person rise to the level of "extraordinary and compelling." Five circuits, by contrast, have explicitly limited judicial discretion by imposing extratextual limitations on the statutorily undefined "extraordinary and compelling."

This entrenched split prevents uniform application of an important law designed to provide incarcerated persons with "a mechanism for relief" from unfair sentences. *Setser v. United States*, 566 U.S 231, 243 (2012). Only this Court can resolve the division. And Mr. Zirkelbach's case, where the question presented is squarely raised and outcome determinative, is an ideal vehicle to do so.

1. The decision below deepens a Circuit split over the scope of a district court's discretion to consider what circumstances amount to an "extraordinary and compelling" reason for a sentence reduction.

If Mr. Zirkelbach had been sentenced in the Fourth, Fifth, or Tenth Circuits, the district court would have had the authority to conclude that his erroneous career-offender designation and the resulting sentencing disparity were "extraordinary and compelling" reasons for a sentence reduction. In these Circuits, unlike the Eighth, even when the alleged "extraordinary and compelling" reason is a sentencing error that could have theoretically been raised as an error in another post-conviction

proceeding there would be no limitation on the district court's authority to consider it independently under § 3582(c)(1)(A).

The Fourth Circuit, for example, has held that district courts may treat "as 'extraordinary and compelling reasons' for compassionate release the severity of the defendants' § 924(c) sentences and the extent of the disparity between the defendants' sentences and those provided for under the First Step Act." *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2021). In other words, a sentencing disparity—created by statute or error—may rise to the level of "extraordinary and compelling" in the district court's discretion. *Id.*

Likewise, absent further statutory limitation or guidance, the Tenth Circuit has held "district courts have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons.'" *United States v. Maumau*, 993 F.3d 821, 832 (10th Cir. 2021). And one such reason may be "the 'incredible' length of [] stacked mandatory sentences under §924(c) … and the fact that [the defendant], if sentenced today … would not be subject to such a long term of imprisonment." *Id.* at 837.

The Fifth Circuit recently remanded a case to the district court for further consideration on similar grounds. Having clarified that "the district court is not bound by [the definition of extraordinary and compelling in] § 1B1.13 when considering motions brought by prisoners," the Circuit left "for the district court to consider, in the first instance, whether the nonretroactive sentencing changes . . . either alone or in conjunction with any other applicable considerations, constitute

extraordinary and compelling reasons for a reduction in sentence." *United States v. Cooper*, 996 F.3d 283, 289 (5th Cir. 2021).

Moreover, although the Second and Ninth Circuits have not ruled explicitly on whether a district court has the discretion to consider sentencing disparities and errors as "extraordinary and compelling reasons," those Circuits have held that § 1B1.13 is not an "applicable" policy statement for motions brought by incarcerated people. *See United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020); *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021). And because § 1B1.13's definitions do not constrain the exercise of a district court's discretion, the Second and Ninth Circuits would appear to allow for a motion premised on a sentencing error or disparity like that raised in Mr. Zirkelbach's case.

By contrast, the Third, Sixth, Seventh, Eleventh, and Eighth Circuits have held that district courts cannot consider sentencing disparities or errors in determining whether "extraordinary and compelling" reasons warrant a reduction in sentence. In these Circuits, a district court's discretion is limited not by statute, but, instead, by an extratextual limitation read into the statute.

For example, the Third Circuit has held that "[t]he duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance," and "[t]he nonretroactive changes to the § 924(c) mandatory minimums also cannot be a basis for compassionate release." *United States v. Andrews*, 12 F.4th 225, 260–61 (3d Cir. 2021). The Sixth Circuit has agreed, reasoning that Congress was explicit in

crafting the First Step Act's various safety valves and nothing in the amended § 3582(c)(1)(A) "give[s] district courts a license to 'end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms.'" *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021) (citing *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021)).

The Seventh Circuit reached a similar conclusion, noting "there is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute." *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021). The Eleventh Circuit went even further to rule that U.S.S.G. § 1B1.13 remains binding on district courts even if a motion was brought directly by the incarcerated person, and that compassionate release motions based on sentencing-related issues simply cannot "fit within the circumstances established by Application Notes 1(A), (B), or (C)." *United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021).

The Eighth Circuit's approach aligns with the Third, Sixth, Seventh, and Eleventh Circuits. In *United States v. Fine*, 982 F.3d 1117 (8th Cir. 2020), the case on which the district court relied, the Eighth Circuit held that a sentencing error cannot be considered an "extraordinary and compelling" reason for a sentence reduction because "a post-judgment motion that fits the description of a motion to vacate, set aside, or correct a sentence should be treated as a § 2255 motion." *Id.* at 1118; *cf. United States v. Davis*, 2021 WL 5871721, at *1 n.4 (8th Cir. 2021) (disclaiming any

position on whether changes to § 924(c) can be considered an "extraordinary and compelling" reason for a reduced sentence); *United States v. Marcussen*, 15 F.4th 855 (8th Cir. 2021) (observing that U.S.S.G. § 1B1.13 is "relevant but not binding").

In conclusion, the Courts of Appeals are divided over the extent of a court's discretion in concluding what amounts to "extraordinary and compelling." One side of the split allows the district court discretion to determine what amounts to an "extraordinary and compelling" reason for a reduction, as the statute allows. And the other side cabins that discretion through extratextual limitations on the statute. The different sides of the split interpret the same statute in ways that result in vastly different outcomes for people living in federal prisons nationwide. Some can have their lengthy or erroneous sentences remedied while others like Mr. Zirkelbach are forced to remain in prison. Only this Court can bring uniformity.

2. This is an exceptionally important question given the number of people eligible to file motions for compassionate release.

The question here is also an important and recurring question. During eight months of 2020 alone, at least 12,138 incarcerated people filed motions for compassionate release. U.S. SENTENCING COMMISSION, COMPASSIONATE RELEASE DATA REPORT 4 TBL.1, (2020). And, ostensibly, every single one of the more than 155,000 people in federal prison could, at some point, be eligible to file. The difference in how courts across the nation have articulated the discretion that a district court possesses under § 3582(c)(1)(A)(i), means that hundreds of motions

with substantially similar facts in different Circuits are adjudicated differently. This leads to sentencing disparities based only on geography. The Eighth Circuit alone deals with almost 10% of all federally incarcerated persons across the nation. *See* U.S. SENTENCING COMMISSION, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 35–36 tbl.1 (2020), https://tinyurl.com/yms59zbx.

The scope of the district court's discretion is and will continue to be, a reoccurring question before this Court. There are two pending petitions for certiorari presenting similar questions: *Watford v. United States* and *Jarvis v. United States*. *United States v. Watford*, No. 21-1361, 2021 WL 3856295 (7th Cir. 2021), petition for cert. pending, No. 21-551(filed Oct. 12, 2021); *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021), petition for cert. pending, No. 21-568 (filed Oct. 15, 2021). Both ask what limits, if any, cabin a district court's discretion to define "extraordinary and compelling" reasons under the compassionate-release statute.

Further, this question cannot be settled by the U.S. Sentencing Commission. It is one of statutory interpretation—and that is within this Court's providence to decide. As a result, this case is not a question of interpretation under the U.S. Sentencing Guidelines, and *Braxton v. United States*, 500 U.S. 344 (1991), does not bar review. But there are additional reasons that this Court should not wait for the Sentencing Commission before acting.

First, there has not been a quorum on the Commission since early in 2019. It does not seem likely that one will be achieved soon. Under neither the Trump nor

the Biden Administration has the Senate Judiciary Committee even considered a nominee for Commissioner. *See* Douglas Berman, *Commentary: Reviving the U.S. Sentencing Commission*, CRIME & JUST. NEWS (Feb. 24, 2021, 8:00 AM).

Second, regardless of when a quorum is achieved there is still no certainty that a new policy statement defining "extraordinary and compelling" for non-BOP initiated motions would be promulgated quickly, or at all. Again, back in 1984, Congress required a policy statement, and it took the Commission almost twenty years. *See* Sentencing Reform Act of 1984 § 217(a), 98 Stat. at 2023 (enacting 28 U.S.C. § 994(s); *see also* U.S.S.G. § 1B1.12 (U.S. Sent'g Comm'n 2006).

A delay of twenty years would wreak havoc on one of goals for expanded compassionate release: to "unwind decades of mass incarceration" and increase its use as a mechanism for decarceration. *Hearing on Compassionate Release and the Conditions of Supervision* Before the U.S. Sent'g Comm'n (Feb. 17, 2016) (statement of Michael E. Horowitz, Inspector Gen., Dep't of Just.). These goals were partially served by removing the BOP as gatekeeper, enabling more incarcerated people to access the judiciary for a second look at their sentences. But the goal of Congress was also to put the "sentencing power in the judiciary, where it belongs." S. Rep. No. 98-225, 52, 53 n.196 (1983).

3. The decision below is incorrect because it imposes an extratextual statutory limitation and conflicts with the purposes behind 18 U.S.C. § 3582(c)(1)(A).

Finally, the decision below misreads the text of the compassionate-release statute and is incorrect. There is nothing within the plain text of either 18 U.S.C. § 3582(c)(1)(A)(i) or U.S. Sentencing Guideline § 1B1.13 that limits a district court's discretion to consider sentencing errors and disparities as "extraordinary and compelling" justifications for a reduced sentence.

In Mr. Zirkelbach's case, the district court found that "expanding compassionate release" to allow it to consider an obvious and consequential sentencing error as an "extraordinary and compelling" reason for a reduced sentence would "impermissibly expand" the court's authority and undermine the existing post-conviction adjudicatory system. (Pet. App. at 15, 18).

The district court relied on the Eighth Circuit's decision in *United States v. Fine*. (Pet. App. at 15–17). In *Fine*, the Eighth Circuit held that an erroneous career offender designation could not be an "extraordinary and compelling reason" under 18 U.S.C. § 3582(c)(1)(A) because post-conviction challenges to sentences must be brought pursuant to 28 U.S.C. § 2255.

Although *Fine* recognized that "[t]he law is unsettled in the circuit about what reasons a court may consider extraordinary and compelling" it concluded it did not have to "address the broader issue." *See United States v. Fine*, 982 F.3d 1117, 1118 (8th Cir. 2020). Yet it did just that, effectively holding that that challenges to sentences

that could, in theory, be brought under § 2255 could never be "extraordinary and compelling." *See id.* at 1118–19. At no point in reaching this conclusion, however, did the Eighth Circuit ever engage with the language of the statute at issue or the purpose behind compassionate release. *See generally id.* And the Eighth Circuit again refused to do so in Mr. Zirkelbach's case by declining to allow briefing and summarily affirming the district court without an opinion. (Pet. App. at 1).

The Eighth Circuit's prohibition on a district court considering a sentencing error as an "extraordinary and compelling" reason for a reduced sentence because a "federal inmate generally must challenge a sentence through a § 2255 motion," *Fine*, 982 F.3d at 1118, reads an extratextual limitation into § 3582(c)(1)(A) that only Congress has the authority to articulate. Until Congress amends the statute or directs the U.S. Sentencing Commission to craft a new policy statement that applies to non-BOP filed motions, the only limitation on a judge's discretion to define "extraordinary and compelling" is that the district court is prohibited from considering "rehabilitation" alone. *See* 28 U.S.C. 994(t). That Congress articulated one circumstance that affirmatively does *not* qualify as an "extraordinary and compelling" reason demonstrates that if it had intended to create the additional statutory limitations that the Eighth Circuit applied by judicial fiat, it could have done so. Yet, it did not.

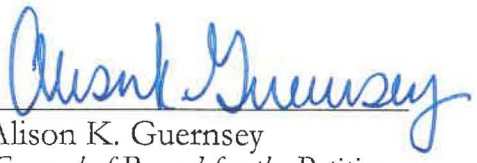
The decision of the Eighth Circuit is wrong. Under § 3582(c)(1)(A), the district court has the discretion to consider Mr. Zirkelbach's sentencing error and the

resulting sentencing disparity as an "extraordinary and compelling" reason for a reduced sentence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

By 

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